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**English - Or. English**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

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## Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE DISCUSSION ON PRIVATE REMEDIES: CLASS ACTION/COLLECTIVE ACTION; INTERFACE BETWEEN PRIVATE AND PUBLIC ENFORCEMENT**

**-- United States of America --**

**7 June 2006**

*This note is submitted by the delegation of the United States of America to WP3 FOR DISCUSSION at its forthcoming meeting to be held 7 June 2006.*

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**English - Or. English**

**COLLECTIVE ACTION/CLASS ACTION (Contributed by the US Federal Trade Commission)**

1. Class actions can be an efficient and effective way to use litigation resources, remedy consumer injury, deter wrongdoing, and help maintain the integrity of the marketplace. They are a mechanism for the courts and the parties to adjudicate multiple claims efficiently. Combining individual injuries into a single legal action can also vindicate consumer rights that might otherwise go without remedy, thereby serving important redress and deterrence goals. For example, when a large number of consumers have each been injured a small amount, a suit by a single consumer is not rational because the costs associated with bringing the suit far outweigh any likely individual redress. The wrongdoer has reaped large rewards, however, and allowing such harm to go unredressed fails to deter such wrongdoing. This not only imposes costs on the injured consumers but also diminishes the trust all consumers are willing to place in the market system, ultimately harming all consumers and honest sellers. While enforcement actions by public agencies can also serve these goals of efficiency, redress, and deterrence, the class action device enables private actors to seek resolution for some problems for which government agencies may not have the statutory authority to obtain full redress[1] or the resources to pursue.

2. Sometimes, however, class actions do not serve the goals for which they were created. Where the interests of private class attorneys and defendants align to the detriment of the class members, injured plaintiffs may be offered insufficient redress while defendants obtain broad releases from liability and class counsel receive generous fees. In addition to the problem of insufficient redress, the class action mechanism can also create incentives to bring meritless class actions simply to pressure defendants to settle to avoid the nuisance of defending themselves. There have been attempts to ameliorate these problems through legislation and through the Federal Trade Commission's Class Action Fairness Project.

## 1. Rules that Establish a Right of Action for a Group of Consumers

3. The effort to accommodate multiparty litigation in a manageable way has a long and complex history in the United States. A variety of devices evolved for resolving claims of numerous parties that presented common legal issues.[2] This multiparty litigation was dramatically transformed by the 1966 amendments to Federal Rule of Civil Procedure 23, which provides the governing framework for class actions today.[3] This section provides an overview of the basic requirements of Rule 23.

4. Rule 23(a) sets out the four prerequisites for a class action. First, there must be numerosity of class members such that "joinder of all members is impracticable." Second, there must be commonality, meaning there are "questions of law or fact common to the class." Third, there must by typicality of "the claims or defenses of the representative parties" as compared to the rest of the class. And fourth, the

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1 In some cases, the statutes under which the government acts may provide primarily or exclusively for injunctive relief or criminal penalties rather than direct financial relief to consumers. In many states, however, attorneys general have the ability to initiate so-called *parens patriae* actions in the name of the state on behalf of residents of such state for, *e.g.*, violations of consumer protection and antitrust laws. Further, the Clayton Act authorizes a state attorney general to bring such an action in federal court on behalf of the natural persons residing in such state for a violation of the federal antitrust laws. In such a case, the attorney general acts as the representative of a "class" of harmed consumers and may seek treble damages for any such violations.

2 *See* Note, *Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874 (1957) (providing comprehensive treatment of multiparty litigation just before the beginning of the modern era).

3 There are also state class action statutes but, for reasons of brevity, this discussion will focus on federal class action issues.

representative parties must "fairly and adequately protect the interests of the class." Rule 23(b) further provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter.

5. Rule 23(c) lays out the class certification process. The court must hold a hearing to determine whether to certify the lawsuit as a class action, and an order certifying a class action must define "the class and the class claims, issues, or defenses, and must appoint class counsel . . . ." Rule 23(f) provides that a court of appeals, in its discretion, may permit the appeal of the decision granting or denying class certification. If a class is certified, the court typically must "direct to class members the best notice practicable under the circumstances," which must concisely and clearly state in plain, easily understood language the following information: the nature of the action; the definition of the class certified; the claims, issues, or defenses; the ability and method to opt out of the class; and the binding effect of a class judgment on members.

6. Rule 23(g) states that, unless a statute provides otherwise, a court that certifies a class must appoint class counsel, who must fairly and adequately represent the interests of the entire class. In appointing class counsel, the court must consider the work that counsel has done in identifying the claims in the action; counsel's experience with class actions, other complex litigation, and the type of claims asserted in the action; counsel's knowledge of the applicable law; and the resources counsel will commit to representing the class. Further, Rule 23(h) permits the court to award reasonable attorneys' fees to class counsel in a lawsuit certified as a class action. A claim for such an award must be made by motion to the court. A class member may object to a motion for attorneys' fees, and the court may, in its discretion, hold a hearing to address such a motion.

7. Rule 23(e) provides that the court must approve any settlement or other disposition of the matter and direct notice in a reasonable manner to class members. The court, however, must hold a hearing to determine whether the disposition is fair, reasonable, and adequate. Class members may object to proposed dispositions that require court approval.

## 2. Issues Raised by Class Actions

8. Class actions have raised many different issues over the years since the 1966 amendments to Rule 23. In light of the questions posed by the request for written contributions and the antitrust enforcement agencies' experiences, this section focuses on those issues associated with class certification, the opt-out system, notice to the class, incentives for collusive settlements, coupon settlements, excessive attorneys' fees, and follow-on actions after government enforcement.

### *2.1 Class Certification*

9. Many courts and commentators have observed that the fate of a class action is largely determined by the court's decision whether to certify a class. A recent empirical analysis conducted by the Federal Judicial Center, the research and education agency of the federal judicial system, found that 89% of cases that were certified as class actions concluded with a court-approved, class-wide settlement.[4] In only 4% of such cases was a trial held. The authors of the study explained that "[t]he dichotomy between certified and noncertified cases could hardly be clearer. A certification decision appears to mark a turning point, separating cases and pointing them toward divergent outcomes."[5] These findings are consistent with the

[4] Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation* 50 & tbl. 19 (Fed. Judicial Ctr. 2005).

[5] *Id.* at 50.

view that class certification puts an immense pressure on defendants to settle class action litigation to avoid "the risk, however small, of potentially ruinous liability. . . ."[6]

### *2.2 Opt-out System*

10. The 1966 Amendment to Rule 23 changed the prior practice of opt-in classes to an opt-out system. Some commentators argue that there is a flaw in an opt-out system that permits "lawyers to speak for immense 'phantom' classes of people who have not selected them - - who may, in fact, be entirely unaware that they are parties to a lawsuit," which allows class counsel, rather than the class members, to drive the litigation and automatically gives counsel substantial bargaining power.[7] The very low settlement participation rates for some recent class action settlements seem to bear out this criticism. For example, in *Strong v. BellSouth Telecommunications, Inc*.,[8] the settlement provided class members with the option of either continuing under a service plan or canceling and receiving a credit. Although the settlement purportedly provided $64 million in compensation, the credit requests submitted by class members amounted to less than $1.8 million. Similarly, commentators report that the redemption rates for coupons sometimes used to settle class actions mirror the typical corporate-issued promotional coupon redemption rates of 1-3%.[9]

### *2.3 Insufficient Notice to the Class*

11. Presenting legally and factually complex information in an easily understood format is a challenge in drafting notices to members of a class action. Nonetheless, recently revised Rule 23 requires that class certification notices must be written in "plain, easily understood language." Such language is necessary to consumers' ability to make rational, well-informed decisions regarding the exercise of any legal rights affected by the class action. Commentators, however, have observed many shortcomings in notices to the class. For example, notices may ignore the plain language requirement by including legal terminology and chains of defined terms; may be too lengthy or redundant; may omit pertinent information, such as the nature of the claims in the lawsuit; may provide scant notice of the legal rights that may be at issue in the class action; may "sell" the settlement rather than present it in a neutral fashion; may attempt to dissuade class members from participating in or objecting to the proposed settlement; or may hinder the ability of potential class members to receive additional information regarding the settlement.[10]

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6 *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001). *See also* In re *Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) ("[The defendants] might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

7 Thomas B. Leary, *The FTC and Class Actions* 2 (2003), *available at* http://www.ftc.gov/speeches/leary/classactionsummit.htm.

8 173 F.R.D. 167, 172 (W.D. La. 1997).

9 *See, e.g.*, James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005).

10 *See* Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 Geo. J. Legal Ethics 1359, 1367-68 (2005).

### *2.4 Incentives for Collusive Settlements*

12. As discussed above, the overwhelming majority of class actions, like the majority of other lawsuits, are settled before trial. When settlement and coupon redemption participation rates are expected to be low, however, there is the potential for a substantial pool of unclaimed funds that, in effect, can be split between class counsel and the defendants. That is, there are incentives for these parties to craft a settlement that allows class counsel and the defendants to maximize the pool of cash to themselves and subordinate the interests of the class. Once a proposed settlement is reached, class counsel and defendants have a common interest in touting the benefits of the proposed settlement and minimizing the difficulties associated with executing such settlement. Two types of settlements of particular concern are (1) settlements involving excessive attorney fees, and (2) so-called "coupon" settlements, in which class members receive discounts on future purchases from the defendants rather than cash.

13. Class action attorneys that represent their clients zealously and efficiently are entitled to reasonable compensation. Excessive class action attorney fee awards, however, represent a significant source of consumer harm. Such fee awards are not a costless windfall for lawyers, but rather diminish the total compensation available to injured consumers. To the extent that such fees do not accurately reflect the amount of work performed by the attorney, or the value of the settlement to the class, they may also create distorted incentives, thereby promoting excessive litigation that is not only contrary to the interests of the class, but unnecessarily raises the cost of goods and services to consumers generally.

14. Settlements involving coupon or other non-pecuniary compensation may be appropriate in certain circumstances, particularly where the size of each class members' individual recovery is likely to be *de minimis*. Under such circumstances, the cost of distributing each class members' cash award may exceed the total settlement amount, making coupons one of the few options available for providing relief of any kind. The use of coupon settlements, however, raises conflict-of-interest concerns. Defendants may be tempted to agree on coupon compensation because they are counting on a low redemption rate or because the coupons can actually generate additional sales. As a result, consumers may not get meaningful relief or the amount of the relief claimed. Further, coupon settlements are difficult to value, yet the aggregated face value of the coupons – regardless of the actual redemption rate of such coupons – has been used as a basis for setting class counsel's fees. Thus, class counsel may be tempted to settle for coupon compensation that is ultimately of little value, or even no value to the class, provided that the coupons facially appear valuable enough to justify the fees counsel seeks from the court.

### *2.5 Private "Follow-on" Actions to Government Enforcement*

15. Private class actions often can provide a beneficial complement to government enforcement actions. In some cases, for example, a private class action can provide a superior remedy to injured consumers than would be possible in a government action. This is the case where the statute(s) under which the government proceeds may provide primarily or exclusively for injunctive relief or criminal penalties rather than direct financial relief to consumers. "Follow-on" or "piggyback" class actions,[11] however, can also fail to significantly improve the recovery for injured consumers and can be duplicative.

16. Several issues have been raised concerning follow-on actions. Knowledge of the existence of a parallel or preceding government action can be important information to a court as it undertakes to understand the issues in dispute, assess the overall fairness of a proposed settlement, and determine the appropriate level of fees for class counsel. In light of the substantial work often undertaken by the government in prosecuting a case, the existence of a related government action likely reduces the amount

[11] "Follow on" actions refer not only to suits that take place after the government's enforcement action, but also those prior to and, even more likely, simultaneously with the government action.

of effort, prosecution risk, and expenses that class counsel otherwise would face without such government action. Maximizing class members' rightful recovery is the principal role that follow-on class actions are intended to play in a hybrid public/private enforcement structure, and class counsel's fees should be set at a level reflecting that objective.

## 3. How Have These Concerns Been Addressed?

### *3.1 FTC Class Action Fairness Project*

17. In response to concerns about the treatment of consumer interests in class actions, the FTC initiated the Class Action Fairness Project in 2002. The goal of the Project is to ensure that consumers with meritorious claims get meaningful, not illusory, relief. The FTC is interested in consumer class actions, and in particular, consumer class action settlements, because they raise issues that are at the core of the FTC's consumer protection mission. FTC efforts under the Class Action Fairness Project have taken the form of, among other things, several amicus briefs objecting to proposed settlements, an advocacy filing with the Federal Judicial Conference,[12] a class action workshop,[13] and a consumer education piece.[14]

18. The FTC has participated as an amicus in cases in which it believed the interests of consumers were being inadequately represented, or, in some instances, not represented at all. To date, the FTC's settlement objections have focused primarily on coupon compensation and excessive attorneys' fees. The Commission's briefs also have raised, to a lesser degree, such issues as insufficiently clear notices to the class, burdensome claims procedures, and follow-on class actions. In *In re First Databank*,[15] the Commission had challenged a merger as anticompetitive and, as part of the settlement, obtained $16 million in consumer redress. Subsequently, private class action counsel negotiated a settlement that added at most $8 million to the fund, for a total of $24 million. Class counsel sought 30% of the $24 million as a fee – a sum that would have captured 90% of the value added by their efforts and directly reduced the funds available to identifiable customers who had been overcharged. After the FTC objected, the court awarded counsel only 30% of the $8 million value added.

19. In *Erikson v. Ameritech*,[16] the FTC objected to a proposed coupon settlement that it believed was not only unlikely to be of value but actually likely to be affirmatively harmful to class members. To compensate consumers for its failure to disclose key terms of its voice mail service, Ameritech offered to provide coupons for one free month of speed dial service. There was no evidence that consumers would want this unrelated service, and, worse, the settlement notice did not adequately disclose that consumers

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12 Letter from FTC to the Judicial Conference of the United States (Feb. 15, 2002) (commenting on proposed amendments to Rule 23), *available at* www.ftc.gov/os/2002/02/rule23letter.pdf.

13 FTC Workshop, *Protecting Consumer Interests in Class Actions* (Sept. 2004). The workshop's home page, which includes links to many of the materials produced by the Class Action Fairness Project, is found at www.ftc.gov/bcp/workshops/classaction/index.htm.

14 FTC Bureau of Consumer Protection, *Need a Lawyer? Judge for Yourself* (advising consumers, among other things, to scrutinize opt-out notices and class action settlement terms carefully, particularly attorney fee awards that may reduce the total compensation available to class members), *available at* www.ftc.gov//bcp/conline/pubs/services/lawyer.pdf.

15 209 F. Supp. 2d 96 (D.D.C. 2002). The FTC's amicus brief in this matter is available at www.ftc.gov/os/2002/01/hearstbrief.pdf.

16 No. 99 CH 18873, slip op. (Ill. Cir. Ct. Sept. 18, 2002). The FTC's amicus brief in this matter is available at www.ftc.gov/os/2002/06/eriksonmemo.pdf.

who accepted the free service for a month would thereafter be billed for it unless they affirmatively canceled the service. The court rejected the proposed settlement, characterizing it as a "court-sponsored promotion gimmick."

20. Most recently, the FTC filed an amicus brief recommending that the court reject a proposed class action settlement in *Chavez v. Netflix*.[17] The proposed settlement offered current customers one month of upgraded service and former members one free month of service. Class members who accept the settlement, however, would be obligated to pay for the expanded or new service on a monthly basis after the conclusion of the free month, unless or until they cancelled the service. The FTC's objection focused on this "negative option" feature, arguing that it would be disclosed inadequately and would serve more as a marketing vehicle than as a redress mechanism. The parties subsequently restructured their settlement agreement, eliminating this negative option feature.

### *3.2 Class Action Fairness Act of 2005*

21. The Class Action Fairness Act of 2005 (CAFA)[18] was signed into law on February 18, 2005. In findings adopted as part of CAFA, Congress noted that recently there have been abuses of the class action device. In particular, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value. . . ." CAFA, therefore, was intended to "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." With these stated purposes in mind, CAFA provides two main areas of reform: expansion of federal jurisdiction over certain cases and new provisions for class action settlements and calculation of attorneys' fees.

22. The Class Action Fairness Act expands federal court jurisdiction to include class action lawsuits brought under state law where any class member is a citizen of a state different from any defendant, the total amount in controversy (including all claims of the individual class members) exceeds $5 million, and the putative class has at least 100 members. CAFA was intended to and likely will result in most class actions, including indirect purchaser actions, being litigated in federal court. Nonetheless, certain exceptions to this expanded jurisdiction – applicable where more than one-third of the proposed class members are citizens of the state in which the lawsuit was originally filed – permit truly localized disputes to be heard by local state courts.

23. Other CAFA provisions concern class action settlements and the calculation of attorneys' fees. While CAFA does not prohibit the use of coupons in such settlements, it does restrict the fees paid to class attorneys who obtain coupon settlements for the class. CAFA provides that, "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed," as opposed to the value of all coupons issued to the class. CAFA also provides that a settlement involving coupons may be approved only if the court conducts a hearing and makes written findings that the settlement is fair, reasonable, and adequate for class members. Such hearing may, in the court's discretion, include expert testimony on the actual value to the class members of the coupons that are redeemed. CAFA further provides that the court may require that a

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17 No. CGC-04-434884 (Cal. Sup. Ct.). The FTC's amicus brief in this matter is available at www.ftc.gov/os/2006/01/netflixamicusbrief.pdf.

18 Pub. L. No. 109-2, 119 Stat. 4 (2005).

proposed settlement agreement include the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations, as agreed to by the parties.[19] The value of any such distribution, however, may not be used to calculate the fees for class counsel.

24. CAFA also provides for two types of protection in approving proposed settlements. First, a court may not approve a settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member unless the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss. Second, a court may not approve a settlement that discriminates in the benefits provided to class members based on geographic proximity to the court.

25. In response to issues raised by follow-on class actions, CAFA requires that, within ten days of filing a proposed class action settlement for court approval, each defendant must send to the "appropriate" state and federal officials, among other things, a copy of the settlement agreement, complaint, settlement hearing information, proposed settlement notice, and information about class members residing in each state. In most cases, the appropriate state and federal officials will be the Attorney General of the United States and of each state in which a class member resides. (A different federal official is appropriate in cases involving certain financial institution defendants, and a different state official is appropriate where some state official other than the attorney general has primary regulatory or licensing authority over the defendants or the subject matter of the lawsuit.) No proposed class action settlement may be approved until 90 days after the appropriate federal and state officials have been notified of the proposed settlement.

### 4. Conclusion

26. A class action can be an efficient mechanism for using judicial resources, providing consumer redress, deterring wrongdoing, and safeguarding the integrity of the marketplace. As consumer class actions have evolved over time, however, concerns have been raised about whether some of these actions – and in particular some of the settlements reached in these actions – truly serve consumers' interests and deter unlawful behavior by defendants. These concerns focus on, among other things, the disproportionate influence of the class certification decision, insufficient notice to the class, consumer redress that does not really provide anything of value, and excessive attorneys' fees that may either reduce consumer redress in meritorious cases or provide incentives for prosecution of meritless cases that can harm consumers indirectly.

27. As discussed above, the FTC's Class Action Fairness Project has addressed some of these concerns, particularly those involving coupon settlements and excessive attorneys' fees that negatively impact consumers. Further, the enactment of the Class Action Fairness Act of 2005 – the most significant amendment of U.S. class action law since the 1966 amendments to Rule 23 – was prompted by many of the concerns outlined in this submission. The impact of CAFA on class action litigation and settlements will be closely watched and analyzed by the FTC, courts, commentators, and the bar.

## Interface between Public Enforcement and Private Enforcement (Contributed by the United States Department of Justice)

28. In June 2004 the U.S. Congress passed the Antitrust Criminal Penalty and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004), to provide more incentive for leniency applications

[19] Such distributions – typically referred to as *cy pres* awards – are utilized when it is impossible to distribute all of the settlement fund directly to the class. (The term *cy pres* is derived from a French phrase meaning "as near as," and reflects the belief that such awards are the next-best use of settlement funds that cannot be distributed directly to class members.)

by de-trebling private damages for leniency applicants which cooperate with civil plaintiffs in their suits against the other cartel members. This provision was specifically designed to enhance the Antitrust Division's Corporate Leniency Policy, which has been very effective in exposing harmful cartel activity in recent years. The de-trebling legislation gives cartel members an even greater incentive to turn themselves in by limiting their potential damages in private lawsuits to single damages based on their own role in the cartel, provided that they also cooperate with plaintiffs in the private lawsuit. Other cartel participants remain fully liable for treble damages based on harm caused by the entire conspiracy. The result should be more cartels exposed and brought to justice, both in criminal prosecutions and in private legal actions.

29. This provision reduces civil damages from corporate amnesty applicants to single damages in a private lawsuit *only* if an applicant cooperates with the plaintiffs in that lawsuit. The court in which the civil action is brought determines whether cooperation is satisfactory, but the de-trebling statute provides that cooperation shall include: (i) providing a full account of all facts known to the applicant that are potentially relevant to the civil action and (ii) furnishing all documents potentially relevant to the civil action that are in the possession, custody, or control of the applicant, wherever those documents are located. An antitrust leniency applicant must also use its best efforts to secure the cooperation of its employees.

30. The Antitrust Division's policy is to treat as confidential the identity of leniency applicants as well as any information they provide. The Division will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, except by court order.

31. Federal Rule of Criminal Procedure 6(e) prohibits disclosure by government attorneys of any matters occurring before criminal grand juries. When a private party in private litigation seeks to obtain from another party information that the latter has provided to the government (such as a discovery request to an amnesty applicant or subpoena recipient asking for all information provided to the government during the course of a criminal investigation), the government can seek to intervene to obtain a stay of discovery. Frequently, in a private damages case the court will stay testimonial discovery and certain interrogatories of key witnesses in order for the government to complete its criminal investigation and proceedings.

32. In one private case the plaintiffs tried to subpoena "leniency materials" from an unsuccessful leniency applicant. Even though the discovery request was not directed to the Division, the Division participated as amicus in the district court proceedings over the subpoena. When the district court permitted the discovery, the Division also filed a brief on appeal, but the leniency applicant at that point settled the entire case, thus mooting the appeal on the discovery issue, and the district court decision was vacated.

33. On the civil enforcement side, the Division has on occasion dealt with attempts by private parties to obtain non-public civil investigation materials from the Division by subpoena or by making a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In general, documents, information, and testimony obtained from merging parties under the Hart-Scott-Rodino Act (HSR Act), or produced by any party in response to an administrative subpoena, are shielded by law from disclosure to outside parties. HSR materials are expressly exempt from disclosure under FOIA, 15 U.S.C. § 18a(h), and otherwise protected from public disclosure except in the course of FTC and DOJ administrative and judicial proceedings. Likewise, materials submitted in response to administrative subpoena are exempt from disclosure under FOIA, 15 U.S.C. § 1314(g), and may not be disclosed to outside parties without the consent of the producing party, except where the disclosure is (1) to Congress, (2) between DOJ and the FTC, (3) to third parties during the course of investigatory depositions, or (4) for official use in connection with federal administrative or regulatory proceedings. As a result, private parties are generally unsuccessful in obtaining these investigative materials from the Division.

34. With respect to other investigative material, such as information provided voluntarily by investigative sources, the Division strictly protects the confidentiality of sensitive business information, and takes all appropriate steps to prevent competitively sensitive information from being shared among competitors. Therefore, the Division's policy is not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In response to any request by a private party for disclosure of confidential business information, the Division generally will (1) assert all applicable legal exemptions from disclosure, (2) for requests under FOIA, provide notice to the company and give the company an opportunity to object to disclosure as provided in Departmental regulations, and (3) for requests outside of FOIA, use its best efforts to provide the company such notice as it practicable prior to disclosure of confidential business information.