

# United States Senate

WASHINGTON, DC 20510-2309

November 22, 2010

The Honorable Christine A. Varney  
Assistant Attorney General for Antitrust  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Assistant Attorney General Varney:

I am writing to urge you to investigate Comcast Corporation's compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino"), 15 U.S.C § 18a, and the Sherman Act, 15 U.S.C § 1, in light of the company's recent announcement of its intended management leadership for NBC Universal, Inc.

On September 26, Comcast announced that, aside from naming Comcast's Chief Operating Officer, Steve Burke, as the prospective Chief Executive Officer of NBC Universal, "there will be no additional structural or personnel announcements until the deal closing process and timing is certain." Indeed, the companies' proposed merger has yet to be approved by federal authorities, including the Department of Justice.

Nevertheless, last Wednesday, Mr. Burke announced the "members of the new NBC Universal senior management team," to be effective upon closing of the merger. Mr. Burke named Mr. Robert Greenblatt to be Chairman of NBC Entertainment, Ms. Bonnie Hammer to be Chairman of NBC Universal Cable Entertainment and Cable Studios, and Ms. Lauren Zalaznick to be Chairman of NBC Universal Entertainment & Digital Networks and Integrated Media. Mr. Burke announced that some executives would remain in their positions, including Mr. Ron Meyer (President and Chief Operating Officer, Universal Studios), Mr. Steve Capus (President, NBC News/MSNBC), and Mr. Mark Hoffman (President, CNBC). He announced that others, including Mr. Jeff Gaspin, Mr. Mike Pilot, and Ms. Allison Goust, "will be leaving NBC Universal at the close of the transaction." This was a comprehensive restructuring of NBC Universal: in total, Mr. Burke named 43 individuals to various positions at the company.

By announcing the future leadership of NBC Universal well in advance of federal approval, Comcast may be seeking to indirectly exert managerial and operational control of that company. Moreover, in doing so, Comcast may purposefully or inadvertently trigger the exchange of competitively sensitive information between the companies, beyond what is customarily permissible in premerger settings. As a result, Comcast's actions may constitute "gun-jumping" in violation of the letter and spirit of federal antitrust law.

It is widely acknowledged that merging firms may—and should—conduct due diligence and integration planning prior to closing a transaction. As William Blumenthal, then-General Counsel of the Federal Trade Commission, has noted, “[b]oth [activities] are necessary; and *within appropriate limits*, both are unobjectionable from an antitrust enforcement perspective.” William Blumenthal, Gen. Counsel, Fed. Trade Comm’n, Remarks before the Association of Corporate Counsel: The Rhetoric of Gun-Jumping, at 7 (November 10, 2005) (“The Rhetoric of Gun-Jumping”) (emphasis added).

Hart-Scott-Rodino is one of those limits. This law prohibits certain merging companies from acquiring “beneficial ownership, whether direct, *or indirect*” of one another before the end of a federally-mandated waiting period. See 15 U.S.C. § 18a; 16 C.F.R. § 801.2(a); 16 C.F.R. § 801.1(c) (emphasis added). Federal authorities have found that “the transfer of operational or management control is a significant attribute of beneficial ownership.” *United States v. Computer Assocs. Int’l, Inc.*, Civ. No. 01-2062(GK), 2002 WL 31961456, at \*10 n.3 (D.D.C. Nov. 20, 2002) (“*Computer Associates*”); see also Complaint at 2, *United States v. Smithfield Foods, Inc. et al.*, No. 1:10-cv-00120 (D.D.C. Jan 21, 2010). Mr. Blumenthal agrees, adding that beneficial ownership includes “the right to ... designate management.” *The Rhetoric of Gun-Jumping* at 8.

The Department of Justice and Federal Communications Commission have yet to complete their review of the proposed Comcast and NBC Universal merger. And yet, by publicly announcing their intended managers of each component of NBC Universal, Comcast has effectively told employees at NBC Universal who their “real bosses” are.

Unfortunately, these actions may also facilitate and encourage NBC Universal personnel to provide their prospective superiors with competitively sensitive information. Federal authorities have successfully charged merging entities with violations of various antitrust laws when such exchanges (1) exceed what is reasonably necessary for legitimate due diligence and integration planning; (2) have the effect of reducing competition; or (3) effectively cede operational or managerial control from one company to another. See *In re Insilco Corp.*, 125 F.T.C. 293, 297 (1998) (violation of Section 5 of FTC Act); *Computer Associates*, 2002 WL 31961456, at \*5-6, \*9-11 (violation of Hart-Scott-Rodino Act and Section 1 of the Sherman Act); *U.S. v. Container Corp. of America*, 393 U.S. 333, 337 (1969) (violation of Section 1 of the Sherman Act).

As Mr. Blumenthal has noted, the federal government’s “gun-jumping” charges and prosecutions have typically stemmed from “easy cases that involved egregious conduct.” *The Rhetoric of Gun-Jumping* at 3. Comcast’s premerger announcement may not, standing on its own, establish an “easy case” of gun-jumping. But I believe that this conduct—combined with Comcast’s disingenuous commitment to avoid further personnel announcements until the merger’s certainty—*does* merit a serious inquiry into the nature of Comcast’s premerger control over NBC Universal and the impact that control may have on competition in the marketplace.

Comcast has every right to promote its business and this merger. It does not have the right to effect that merger absent explicit federal approval, or indirectly control or influence NBC Universal until that approval is granted. I urge you to investigate this conduct.

Thank you for your time and prompt attention, and please do not hesitate to contact me at (202) 224-5641 should you have any questions or concerns on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Al Franken". The signature is fluid and cursive, with a long horizontal stroke at the end.

Al Franken  
U.S. Senator