

## Enforcement Institutions-States Discussion Outline

*Note:* Indications of support for particular recommendations are based on AMC Staff’s consultation of deliberation meeting transcripts, notes regarding discussions during deliberation meetings, and views conveyed to Staff by Commissioners. No Commissioner is bound by the indications reflected in this document, and it is understood that Commissioners may change their positions from those tentatively indicated during previous deliberations.

### I. *Role of state attorneys general play in non-merger civil enforcement*

***Note:*** *A majority of Commissioners approved the following recommendations at previous deliberations meetings:*

- ✓ No change is appropriate to the current role of the states in non-merger civil antitrust enforcement.<sup>1</sup>
- ✓ State non-merger enforcement should continue to focus primarily on matters involving localized conduct or competitive effects.<sup>2</sup>

### II. *Role of state attorneys general play in merger enforcement*

***Note:*** *Deliberations on the following potential recommendations were not completed at previous deliberation meetings. Potential Recommendation #2, below, provides a specific articulation of the Commissioners’ discussion at the July 26 meeting of how to accomplish the potential recommendation tentatively favored by a majority of Commissioners that the federal government have a right of first refusal on merger enforcement.*

- [1] No change is appropriate to the current roles of states and federal enforcement agencies in merger enforcement.  
*[5 Commissioners tentatively favored: BB, SC, JJ, DV, JY]*
- [2] Recommend that Congress should amend the relevant statutes to provide the following:

For proposed mergers or acquisitions that require a filing under the Hart-Scott-Rodino Act, the federal antitrust enforcement agencies should have the “right of first refusal” to decide with respect to a proposed transaction whether to: (a) clear it; (b) investigate it, either independently or jointly with a state(s); or (c) refer it to a state(s) if the federal agency believes that the state(s) could evaluate the proposed transaction most effectively or efficiently, for example, due to familiarity and expertise with local markets.

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<sup>1</sup> Three Commissioners—Carlton, Shenefield, and Warden—voted to recommend the elimination of the authority of states to sue under federal antitrust law to address allegedly anticompetitive non-merger conduct.

<sup>2</sup> Five Commissioners—Burchfield, Cannon, Jacobson, Litvack, and Yarowsky—do not join this recommendation.

A state should not investigate or challenge under the federal antitrust laws a proposed transaction that requires pre-merger notification under federal law, unless a federal antitrust agency has asked the state for assistance in the federal investigation or has referred the matter to the state for its own investigation.

*[6 Commissioners tentatively favored: DC, DG, DK, SL, JS, JW. MD tentatively favored a limitation on state merger enforcement to matters with an impact in four or fewer states]*

**Note: A majority of Commissioners approved the following recommendations at previous deliberations meetings:**

- ✓ With respect to joint federal-state merger investigations, federal and state antitrust enforcers should achieve further coordination and cooperation, which would improve the consistency and predictability of outcomes in such investigations.
  - The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law. In particular, the states should revise the NAAG Horizontal Merger Guidelines to conform to the DOJ/FTC Horizontal Merger Guidelines.<sup>3</sup>
  - Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.<sup>4</sup>
  - Through NAAG, the state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

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<sup>3</sup> Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

<sup>4</sup> Commissioners Burchfield and Delrahim do not join this recommendation.



## MEMORANDUM

From: AMC Staff

To: Commissioners

Date: November 10, 2006

Re: State Antitrust Enforcement—Analysis of the NAAG data

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This memorandum summarizes data derived from the National Association of Attorneys General (NAAG) State Antitrust Litigation database. The database provides the following information for each state antitrust enforcement action reported to NAAG for inclusion in the database:

- 1) Name of the case;
- 2) Dates initiated and dates settled or brought to final judgment;
- 3) Whether there was federal participation (NAAG defines federal participation as “there was a federal case related to the state case”<sup>1</sup>; the database does not explain whether the federal participation was “joint, parallel, or independent”<sup>2</sup>);
- 4) Type of claims (*e.g.*, price-fixing, boycott, merger, monopolization<sup>3</sup>);
- 5) Lead state and other states participating in the case;
- 6) The industry involved;
- 7) Brief summaries (the depth of detail is not consistent); and,
- 8) How the case was resolved.

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<sup>1</sup> NAAG State Antitrust Litigation Database, *available at* <http://www.naag.org/antitrust/search/>.

<sup>2</sup> *Id.*

<sup>3</sup> Many cases involved multiple claims.

Although NAAG's database is the most comprehensive database of antitrust actions filed by state antitrust enforcement agencies, it is not complete. NAAG sought data from all 50 states, but not all states have submitted data.<sup>4</sup> NAAG's database does include actions filed before 1990, but this part of the is are less comprehensive than the post-1990 data. Therefore, our analysis of the database focused on actions filed within the last 17 years, from 1990 through October 24, 2006. The database does not indicate whether the states and federal agencies sought or received different remedies in court or in settlement agreements. Finally, it appears that a few cases may have been misclassified; we have attempted to correct the data in those few instances, as specified in the footnotes.

### **Total State Enforcement Actions vs. State-Only Enforcement Actions**

- From 1990 through October 2006, reporting states filed a total of 343 antitrust actions, with a total of 470 claims.
- These actions fell into three main categories:
  - 1) Bid rigging, market allocation, and price fixing;
  - 2) Mergers; and
  - 3) Other (including claims of boycotting, monopolization, horizontal and vertical non-price restraints, joint ventures, resale price maintenance, refusals to deal, tying, monopsony, and/or violation of enforcement orders.)

Figure 1 reflects all 343 state enforcement cases. Bid rigging, market allocation, and price-fixing cases constitute the largest segment of cases, representing 161 of the 343 cases (47%). Merger challenges constitute the next largest segment, accounting for 119 of the 343 cases (34%).<sup>5</sup> Finally, 63 of the 343 cases fall under "other" claims (19%).

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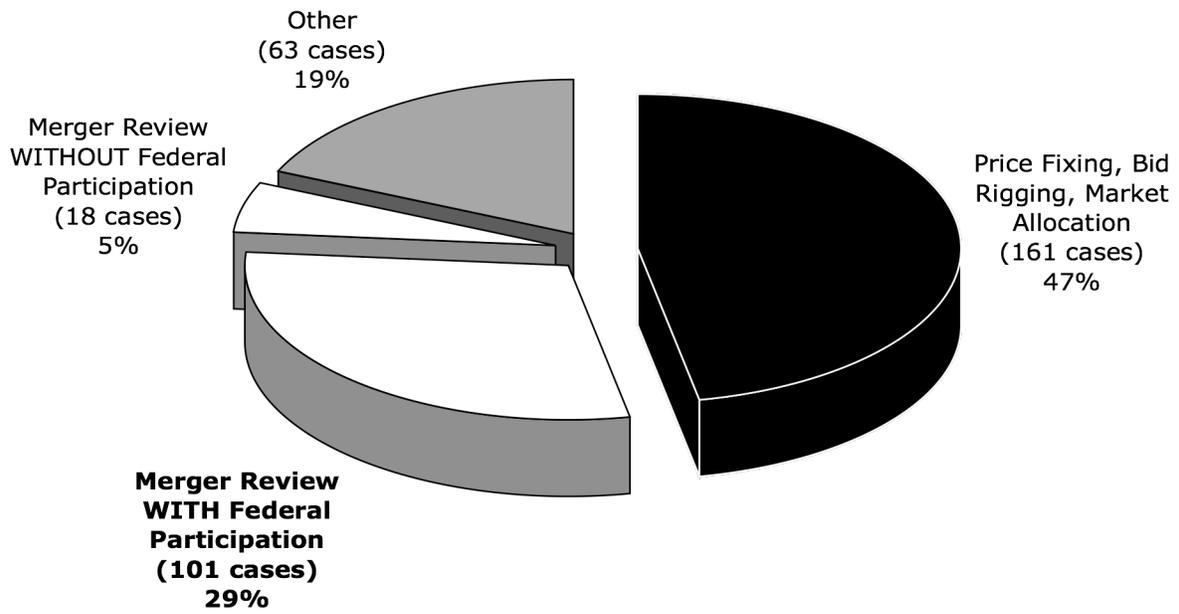
<sup>4</sup> In particular, the NAAG database does not include data from the following 14 states: Alabama, Colorado, Indiana, Kentucky, Louisiana, Montana, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, and Vermont.

<sup>5</sup> Figure 1 also splits the merger challenge segment into two pieces to illustrate the percentage of merger cases pursued with and without federal participation.

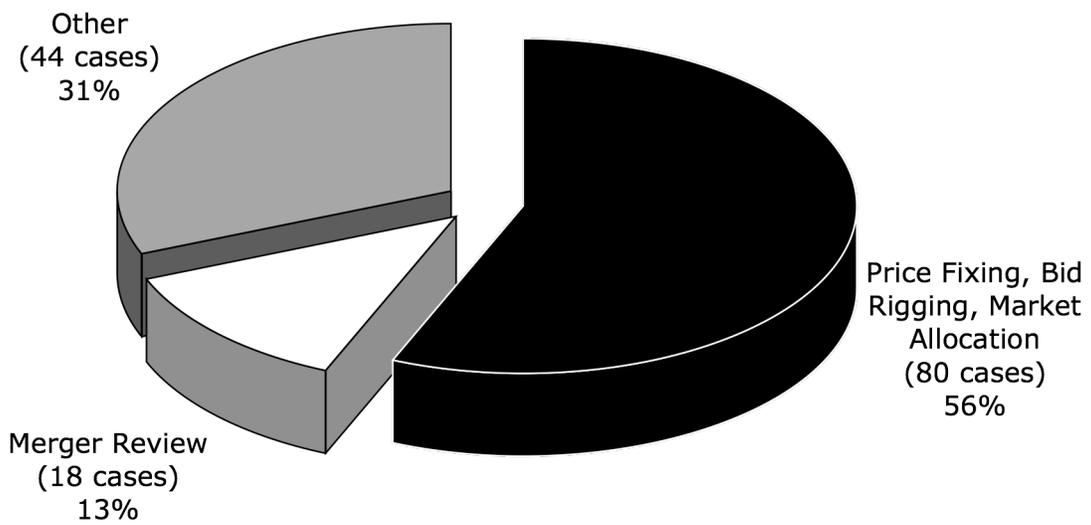
Figure 2 reflects state-only enforcement cases—that is, matters where there was no federal participation. States brought 41% (142 of 343) of the reported cases without participation by a federal enforcement agency. Price fixing, bid rigging, and market allocation cases constitute the majority of state-only enforcement cases, representing 80 of the 142 cases (55%). “Other” claims represent 44 of the 142 cases (30%), and merger challenges represent 18 of the 142 cases (15%).

The following sections provide more detail about each of the three main categories of cases for both total state enforcement actions and “state-only” matters.

**Total State Enforcement Cases (1990-Oct. 2006)(Fig. 1)**



**State-Only Enforcement Cases (WITHOUT Federal Participation)(1990-Oct. 2006)(Fig. 2)**



## **Bid Rigging, Price Fixing, and Market Allocation Agreements**

There were 161 bid rigging, price fixing, and market allocation cases in total.

- Federal agencies participated in 81 of these cases (50%).
- States filed actions without federal participation in 80 of these cases (50%).<sup>6</sup>
- Of the 80 state-only cases, 64 cases appeared to involve local or regional conduct or markets; 7 involved national markets; and 10 were unclear as to whether they involved local, regional, or national markets.

## **Merger Review**

There were 119 merger cases in total.

- Federal agencies participated in 101 of these cases (85%).
- In 18 cases, states filed actions without federal participation (15%).<sup>7</sup>
- Comments submitted by the State Attorneys General of Hawaii, Maine, and Oregon characterize 17 of the 18 state-only merger cases as involving commercial and industrial sectors with “localized market structure[s].”<sup>8</sup>

## **Other**

There were 63 “other” cases—that is, cases not involving mergers or claims of price-fixing, bid rigging, or market allocation.

- There was no federal participation in 44 of these 63 cases (70%).

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<sup>6</sup> The NAAG database actually lists 90 state-only cases for this category, but we found that ten of those cases appeared to have “a federal case related to the state case” and thus would be covered by the NAAG website’s definition of federal participation. Appendix A contains a list of those ten cases, along with the corresponding federal case. Staff recently identified these apparent errors and/or inconsistencies to NAAG and they are in the process of reviewing them and making any appropriate corrections to the database.

<sup>7</sup> The NAAG database notes four additional cases without federal participation, but our further research indicates that federal agencies did file related cases in those matters. Appendix A contains a list of those four cases, along with the corresponding federal case.

<sup>8</sup> State Attorneys General of Hawaii, Maine, and Oregon, Supplemental Statement, at 6 (July 23, 2006) (“Supp. Statement of State Attorneys’ General”). One of the 17 cases, however—*Pennsylvania v. Russell Stover Candies, Inc.* (E.D. Pa. filed April 15, 1993)—appears not to have involved purely “localized market structures.”

- Of the 44 state-only “other” cases, 33 cases appeared to involve local or regional conduct or markets; 6 involved national markets; and 5 were unclear as to whether they involved local, regional, or national markets.

Figure 3 sets forth the combinations of claims in these 44 cases over three six-year periods.<sup>9</sup> These tables show that the number of these “other” cases pursued by the reporting states without federal participation has been decreasing over this time period.

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<sup>9</sup> The figures include one state-only “other” case from 1989, not otherwise included in the data in this memorandum, in order to present three tables covering largely equal time periods. The 2006 cases are updated through October.

**“Other” State-Only Cases**  
**(excluding Mergers, Price-Fixing, Bid Rigging, and Market Allocation)**  
**(Fig. 3)**

<b>1989-1994 (19 Cases)</b>	
<b># of Cases</b>	<b>Claims</b>
2	Boycott
2	Boycott, Horizontal Non-Price Restraint
2	Boycott, Monopolization
1	Horizontal Non-Price Restraint
1	Horizontal Non-Price Restraint, Refusal to deal
2	Vertical Non Price-Restraint
4	Resale Price Maintenance
2	Tying
3	Listed as “Other”

<b>1995-2000 (16 Cases)</b>	
<b># of Cases</b>	<b>Claims</b>
2	Boycott
1	Boycott, Horizontal Non-Price Restraint
1	Joint Venture
5	Monopolization
1	Monopolization, Tying
1	Monopolization, Vertical Non-Price Restraint
1	Monopsony
1	Refusal to deal
1	Resale Price Maintenance
1	Tying

<b>2001-2006 (9 Cases)</b>	
<b># of Cases</b>	<b>Claims</b>
1	Boycott
1	Boycott, Resale Price Maintenance
5	Monopolization (3 are related cases)
1	Resale Price Maintenance, Vertical Non Price-Restraint
1	Tying

**Appendix A**

Cases Identified in NAAG Database as “State-Only” For  
Which There Appears to be Federal Participation

Case Identified in NAAG Database	Federal Participation
<u>Bid-Rigging, Price Fixing, and Market Allocation Agreements</u>	
<i>New York v. American International Group (AIG)</i> , No. 401720/05 (NY Supreme Court 2005)	NAAG Database description notes DOJ’s involvement in settlement. <i>See also</i> DOJ press release about AIG case: <a href="http://www.usdoj.gov/opa/pr/2006/February/06_crm_057.html">http://www.usdoj.gov/opa/pr/2006/February/06_crm_057.html</a> <sup>10</sup>
<i>Ohio v. Daicel Chemical Industries, Ltd.</i> , No. 02CVH10-12064 (Franklin Co., Oh. Ct. C. P. 2002)  <i>Illinois ex rel. Madigan v. Daicel Chemical Industries, Ltd.</i> , No. 02CH19575 (Cir. Ct. Cook Cty IL) (2002)  <i>Washington v. Daicel Chemical Industries, Ltd.</i> , No. 05-2-05779-3 SESA (2002)	<i>United States v. Daicel Chemical Industries, Ltd.</i> , CR 00-0392 SI (N.D. Cal. 2000)
<i>Florida v. Abbott Laboratories</i> , No. 91-40002; <i>In re Infant Formula Antitrust Litigation</i> , MDL 878 (N.D. Fla, 1991), 1993-1 Trade Cas. (CCH) ¶ 70,241 (N.D. Fla. 1993)  <i>Texas v. Abbott Laboratories</i> , No. 91-13079 (D. Travis City Texas 1995)	<i>FTC v. Mead Johnson &amp; Co.</i> , 92-1266 (D.D.C. June 11, 1992); <i>FTC v. American Home Prods.</i> , 92-1367 (D.D.C. June 11, 1992); <i>see also FTC v. Abbott Labs.</i> , Civ. A. No. 92-1364, 1992 WL 335442, *2 (D.D.C. Oct. 13, 1992), <i>dismissed on other grounds</i> , 853 F. Supp. 526 (D.D.C. 1994).
<i>Colorado v. Airline Tariff Pub. Co.</i> , No. 1:90-CV-2485-MHS and MDL No. 861 (N.D. Ga. Oct. 1994)	<i>United States v. Airline Tariff Publishing Co.</i> , 1994-2 Trade Cas. (CCH) ¶ 70,687 (D.D.C. Aug. 10, 1994) (final consent decree); 1993-2 Trade Cas. (CCH) ¶ 70,410 (D.D.C. Nov. 1, 1993) (consent decree).

<sup>10</sup> Federal indictments related to alleged fraudulent conduct. New York case focused on fraudulent conduct, but also included claims of bid rigging.

<i>New York v. Keds Corporation</i> , 1994 WL 97201, 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. 1994)	<i>In the Matter of Keds Corporation</i> , 117 F.T.C. 389 (1994) (consent order).
<i>Missouri v. American Cyanamid Co.</i> , 1997 U.S. Dist. LEXIS 4722, 1997-1 Trade Cas. (CCH) 71,712 (W.D. Mo. 1997)	<i>In the Matter of American Cyanamid Company</i> , FTC File No. 951-0106 (Jan. 31, 1997) (consent agreement)
<i>Florida v. Nine West Group, Inc. and John Doe, I-500</i> , 80 F. Supp. 2d 181 (S.D.N.Y. 2000)	<i>In the Matter of Nine West Group Inc.</i> , FTC File No. 981-0386 (Mar. 6, 2000) (consent agreement)
<u>Merger Matters</u>	
<i>Nixon v. Cargill, Inc.</i> , No. 4:97-cv-0687 (E.D. Mo., April 1997)	<i>United States v. Cargill Inc.</i> , No. 6:97-CV-6161 (W.D.N.Y. July 22, 1997)
<i>Ohio v. British Petroleum</i> (1999)	<i>In the Matter of the British Petroleum Company and Amoco Corp.</i> , FTC File No. 981-0345, 1998 WL 910216
<i>Vermont v. Suiza Foods Corp.</i> , No. 2:01-CV-194 (D. Vt. 2002)	Two parallel cases in the NAAG database describe DOJ participation. <i>See Massachusetts v. Suiza Foods Corp.</i> , No. 01 CV 11097 DPW (D. Mass. July 6, 2001), and <i>Connecticut v. Suiza Foods Corp.</i> , 301-CF-1178 AWT (D. Conn. 6/25/2001)
<i>Washington v. Texaco, Inc.</i> , No. C97-1980 (W.D. Wash. 1997)	<i>In the Matter of Shell Oil Company and Texaco Inc.</i> , FTC File No. 971-0026, Docket No. C-3803 <sup>11</sup>

<sup>11</sup> Proposed joint venture between Shell Oil and Texaco.