

Supplemental Enforcement Institutions-Federal Discussion Outline

Note: Italicized text is based on the Commission’s questions for public comment. Possible recommendations have been narrowed to those that appeared to receive substantial support from four or more Commissioners during the deliberation meeting on May 23, 2006. Indications of support for particular recommendations are based on AMC Staff’s recording of discussions during and the transcripts of the deliberation meeting on May 23. 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 in initial deliberations.

I. <i>Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?</i>
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Note: Eleven Commissioners tentatively favored two closely related recommendations addressing this question (Commissioner Delrahim was not present).

- Recommend that the FTC and DOJ implement a new merger clearance process based on the principles contained in the 2002 clearance agreement or such other principles as the agencies deem appropriate, with the goal of clearing all mergers to one agency or the other within a short period of time.
- Recommend that the relevant committees in Congress encourage the FTC and DOJ to implement a new merger clearance process based on the principles contained in the 2002 clearance agreement or such other principles as the agencies deem appropriate, with the goal of clearing all mergers to one agency or the other within a short period of time.

Issues for further deliberation

Further discussion of the following possible recommendations was deferred pending additional staff research on particular issues. See AMC Staff Memorandum re Federal Enforcement Institutions—Interagency Clearance Agreement (July 20, 2006).

[1] Recommend legislation requiring the FTC and DOJ to clear all mergers under the HSR Act to one agency or the other within a specified period of time (*e.g.*, seven calendar days), and to adopt processes to meet that requirement.

[7 Commissioners tentatively favored: DC, DG, JJ, DK, JS, DV, JW. Not present: MD]

[2] Recommend the adoption of a particular “tie-breaker” mechanism to resolve clearance matters.

[a] Recommend that a neutral arbitrator make a binding decision on clearance when both agencies refuse to clear a transaction to the other.

[b] Recommend that the agencies flip a coin to decide who will review transactions when they both refuse to clear a transaction to the other.

[c] Recommend that the agencies alternate in reviewing transactions when they both refuse to clear a transaction to the other (“possession arrow”).

[d] Recommend that transactions with even file numbers be allocated to one agency and those with odd file numbers to the other agency when both agencies refuse to clear a transaction to the other.

[e] Recommend that the parties (or one of the parties) designate which agency may review the transaction when both agencies refuse to clear a transaction to the other.