

Enforcement Institutions-Federal Discussion Outline

Note: Italicized text is based on questions on which the Commission requested comment from the public.

1. *Should merger enforcement continue to be administered by two different federal agencies?*
2. *Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated?*

[1] No statutory change is appropriate; substantive merger enforcement under the HSR Act should continue to be conducted by the two antitrust agencies.

[2] All substantive merger enforcement authority under the HSR Act should be assigned exclusively to one agency or the other—*i.e.*, to the Federal Trade Commission (“FTC”) or the Department of Justice Antitrust Division (“DOJ”).

If so:

[a] The FTC should have exclusive substantive HSR Act enforcement authority.

[b] DOJ should have exclusive substantive HSR Act enforcement authority.

Assuming dual federal enforcement authority continues to exist:

3. *Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?*

[3] No statutory or practice change is appropriate.

[4] 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.

[5] 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.

[6] 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.

4. *To the extent there is a difference in legal standards that the agencies face in obtaining a preliminary injunction, should the different standards be harmonized? If so, how?*

[7] No statutory change is appropriate. There is insufficient evidence that preliminary injunction standards applicable to the two agencies have resulted in materially different outcomes.

[8] Recommend statutory change to ensure that the legal standard for obtaining a preliminary injunction in merger cases is the same for both the FTC and DOJ.

If so:

[a] The Clayton Act should be modified to adopt the standard specified in Section 13(b) of the FTC Act for preliminary injunctions in HSR merger cases.

[b] Section 13(b) of the FTC Act should be modified to specify the traditional equitable standard is applied when the FTC seeks a preliminary injunction in HSR merger cases.

5. *Should there continue to be a difference in the procedural aspects of federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how should that be done?*

[9] No change to the FTC's statutory authority for Part III administrative litigation is appropriate.

[10] Recommend that the FTC and DOJ consolidate proceedings for preliminary and permanent relief in HSR merger cases whenever possible.

[11] Recommend that the FTC adopt a policy that will limit its use of Part III procedures with respect to mergers subject to HSR Act notification to exceptional circumstances, but do not recommend any statutory change.

[12] Recommend statutory modification to Section 13(b) of the FTC Act that would restrict the circumstances in which the FTC can use its Part III procedures with respect to mergers subject to HSR Act notification to exceptional circumstances.

[13] Recommend statutory modification to Section 13(b) of the FTC Act that would prohibit the FTC from pursuing administrative litigation if it fails to obtain a preliminary injunction in an HSR merger case. However, the FTC would not be barred from pursuing administrative litigation, post-closing, based on evidence that a consummated merger has actually had anticompetitive effects.