



MEMORANDUM

From: AMC Staff[†]
To: All Commissioners
Date: May 19, 2006
Re: Enforcement Institutions-States Discussion Memorandum

I.	Background.....	4
II.	Discussion of Issues.....	9
	A. Merger Enforcement.....	12
	1. Allocation of Merger Enforcement Authority.....	12
	a. Divide Merger Review Based on Locus of Harm.....	13
	b. Federal Right of First Refusal.....	15
	2. Improved Coordination Between Federal and State Enforcers.....	15
	a. Harmonization of Substantive Merger Law.....	16
	b. Coordinating Data Requests.....	17
	c. Model Confidentiality Statute.....	18
	d. Centralized NAAG Merger Experts.....	18
	B. Nonmerger Civil Enforcement.....	19
	1. Restrict State Enforcement to Local Matters.....	22
	2. Restrict State Enforcement to Certain Types of Matters.....	23
	3. Federal-State Clearance System.....	24

The Commission agreed to study the role of states in antitrust enforcement. In particular, it agreed to study (i) the “enforcement role that the states play with respect to federal antitrust laws,” and (ii) what role “private parties and state attorneys general play in merger

[†] This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

enforcement.”¹ The Commission received several suggestions to study this issue. House Judiciary Committee Chairman F. James Sensenbrenner suggested that the Commission study the issue saying that, while “the States have a vital antitrust enforcement role, interstate commerce may be adversely affected by the divergent and sometimes inconsistent antitrust standards.”² The attorneys general of forty-one states and the District of Columbia also recommended that the Commission study “the issue of antitrust federalism.”³ The Commission received additional suggestions to study the issue from then-Assistant Attorney General R. Hewitt Pate,⁴ the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights,⁵ and the Section of Antitrust Law of the American Bar Association.⁶

The Commission requested comment on May 19, 2005, regarding the following issues related to state enforcement of the antitrust laws:

- A. What role should state attorneys general play in merger enforcement? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved in multiple State and Federal merger reviews.
 1. Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal antitrust enforcement agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?

¹ Enforcement Institutions Study Plan, at 1 (May 5, 2005); *see* Jan. 13, 2005, Meeting Trans. at 56, 60-62, 76.

² July 15, 2004, Meeting Trans. at 8.

³ Amended Comments of the Attorneys General of forty-one States and the District of Columbia Regarding Commission Issues for Study, at 2.

⁴ Letter from R. Hewitt Pate, Assistant Attorney General, Department of Justice Antitrust Division, to Deborah A. Garza, Chair, Antitrust Modernization Commission, at 3 (Jan. 5, 2005).

⁵ Letter from Senators Mike DeWine & Herb Kohl, to Deborah A. Garza, Chair, Antitrust Modernization Commission, at 4 (Oct. 1, 2004).

⁶ Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission, at 3-4 (Sept. 30, 2004).

2. What role should private parties play in merger enforcement, and what authority should they have to seek to enjoin a merger? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved.
 3. What lessons, if any, can be learned from Europe's referral (or "one-stop shop") system of allocating merger enforcement between the EC and Member States? How does the more regulation-oriented European tradition (as opposed to a more enforcement-oriented U.S. tradition) affect any comparison of the two systems?
- B. What role should state attorneys general play in non-merger civil enforcement?
1. To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence, and analysis.
 2. Should state and federal enforcers divide responsibility for non-merger civil antitrust enforcement based on whether the primary locus of alleged harm (or primary markets affected) is intrastate, interstate, or global? If so, how should such an allocation be implemented?
- C. Has the ability of states and private plaintiffs to seek injunctive relief under 15 U.S.C. § 26 benefited consumers or caused harm to businesses or others? Please support your response with specific examples, evidence, and analyses supporting these assessment. What would be the consequences if the availability of injunctive relief to states and private plaintiffs under 15 U.S.C. 26 were changed?
1. Should standing to pursue injunctive relief under federal antitrust law be different for states than it is for private parties?
 2. Are there currently sufficient safeguards (*e.g.*, judicial discretion and the *Cargill* requirement that private plaintiffs establish antitrust injury) to limit injunctions to appropriate circumstances?⁷

The Commission held a hearing on October 26, 2005, regarding these issues. The witnesses who appeared at the hearing were the Honorable G. Steven Rowe, Maine Attorney General; Professor Michael E. DeBow, Cumberland Law School, Samford University; Professor Harry First, New York University School of Law; and Philip A. Proger, partner at Jones Day.⁸

The Commission also received comments from other institutions and individuals, including the

⁷ 70 Fed. Reg. 28,902, 28,903-04 (May 19, 2005). The issues under Section C (regarding injunctive relief) were set out for comment under the topic of Civil Remedies. Because the issues raised by these questions are more closely related to the role of states in the enforcement of federal antitrust laws, they are addressed herein.

⁸ Unless otherwise noted, all citations to "Trans." are to the transcript of the October 26, 2005, State Enforcement Institutions hearing.

American Bar Association, the American Antitrust Institute, California Chief Assistant Attorney General Thomas Greene, and the U.S. Chamber of Commerce.⁹

I. Background

The states and federal government have shared antitrust enforcement since passage of the Sherman Act in 1890. The Sherman Act was intended “to supplement the enforcement, not displace, state antitrust remedies.”¹⁰ Many state antitrust laws predate the Sherman Act: at least thirteen states had enacted antitrust legislation before the Sherman Act was passed in 1890; by 1900, twenty-seven states and territories had antitrust statutes; at least thirty-five states had

⁹ See Comments of the American Antitrust Institute Working Group on Enforcement Institutions to the Antitrust Modernization Commission, at 3-13 (July 15, 2005) (“AAI Comments”); Testimony of California Chief Assistant Attorney General Thomas Greene Concerning State Merger Enforcement Before the Antitrust Modernization Commission (July 15, 2005) (“Greene Comments”); Comments of the Maine Attorney General on the Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area (July 15, 2005) (“Rowe Comments”); Comments of Stephen D. Houck and Kevin J. O’Connor on the States’ Role in the Microsoft Case Re: Working Group on Enforcement Institutions (Sept. 22, 2005); Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission’s Request for Public Comment Regarding Government Enforcement Institutions: The Enforcement Role of the States With Respect to Federal Antitrust Laws in Merger Cases (Oct. 19, 2005) (“ABA State Merger Comments”); Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission’s Request for Public Comment Regarding Government Enforcement Institutions: The Enforcement Role of the States With Respect to Federal Antitrust Laws in Civil Nonmerger Cases (Oct. 19, 2005) (“ABA State Nonmerger Comments”); Comments of the Chamber of Commerce of the United States of America on Commission Issues Accepted for Study, at 1-6 (Nov. 8, 2005) (“Chamber of Commerce Comments”).

¹⁰ *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989) (citing 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman)); see also Statement of Philip A. Proger, Before the Antitrust Modernization Commission: Allocation of Antitrust Enforcement Between the States and the Federal Government, at 4 (Oct. 26, 2005) (“Proger Statement”); Rowe Comments, at 1, 3 (“The Sherman Act supplemented rather than preempted preexisting state statutes, creating a system of concurrent authority grounded in federalism.”).

antitrust laws by 1915.¹¹ Currently, each state and the District of Columbia has its own antitrust laws.¹²

Most state antitrust laws are directly comparable to the Sherman Act. Where the terms of some state statutes differ from the federal antitrust laws, those statutes are generally “interpreted by the state court consistent with federal law.”¹³ Many states also have statutes dealing with particular industries, as well as laws relating to specific behavior, such as bid-rigging and below-cost sales, and some state consumer protection laws prohibit conduct that might also be challenged under federal antitrust law.¹⁴

The dual system of federal and state antitrust laws has given rise to a number of constitutional challenges to state antitrust laws, virtually all of which have been substantially resolved in favor of the states.¹⁵ The Supreme Court has declined to find preemption of state antitrust laws on both Commerce Clause and Supremacy Clause grounds, finding that Congress

¹¹ Statement of Harry First, Before the Antitrust Modernization Commission, Hearings on the Allocation of Antitrust Enforcement Between the States and the Federal Government, at 6-7 (Oct. 26, 2005) (“First Statement”); see also James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. Pa. L. Rev. 495, 499 (1987). Other commentators have different counts. See, e.g., Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. Antitrust Section 258, 262 (1962) (21 states had antitrust laws at the time Sherman Act was adopted); ABA Section of Antitrust Law, *Monograph No. 15, Antitrust Federalism: The Role of State Law* 3 (1988) (26 states had some form of antitrust laws at the time Sherman Act was adopted).

¹² See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 678 (2003) (“Calkins, *Perspectives*”).

¹³ Proger Statement, at 4. Statutes and case law in thirty-eight states direct judges hearing antitrust actions under state statutes to consult federal antitrust law for guidance. See ABA Section of Antitrust Law, *Antitrust Law Developments* 811 (5th ed. 2002) (“*Antitrust Law Developments V*”).

¹⁴ See ABA Section of Antitrust Law, *State Antitrust Practice and Statutes*, Introduction 1-22 (3d ed. 2004).

¹⁵ *Antitrust Law Developments V*, at 813.

intended there would be enforcement at both the state and federal levels.¹⁶ The Court also held that states can prohibit a broader range of conduct than federal antitrust law prohibits.¹⁷

States also enforce federal antitrust law. States rely on several sources of authority to enforce federal antitrust law.

- States may sue on their own behalf and on behalf of their political subdivisions, in their capacity as injured purchasers.¹⁸
- States may seek injunctive relief under Section 16 of the Clayton Act to forestall injury to the state's economy or consumers.¹⁹ When bringing such suits, states stand on the same footing as private plaintiffs.²⁰
- A state may seek damages or restitution for antitrust violations on behalf of consumers in the state through *parens patriae* actions.²¹ Such suits can be brought for treble damages sustained to the property of "natural persons" residing in the state.²²

According to data maintained by the National Association of Attorneys General ("NAAG"), the states collectively filed approximately 200 antitrust actions in the ten years between 1996 and 2005.²³ During those same years, the Department of Justice brought over 600

¹⁶ See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-29 (1978); *ARC Am. Corp.*, 490 U.S. at 100-02 (1989) (finding state antitrust laws to be within "an area traditionally regulated by the States" for which there is a "presumption against finding pre-emption").

¹⁷ See *Exxon*, 437 U.S. at 130-31.

¹⁸ 15 U.S.C. § 15(a); see *Antitrust Law Developments V*, at 804; see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972); *Georgia v. Penn. R.R. Co.*, 324 U.S. 439 (1945).

¹⁹ 15 U.S.C. § 26. Such suits are brought in states' common law *parens patriae* capacity. See, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972).

²⁰ See, e.g., *California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990).

²¹ 15 U.S.C. § 15c; see also Rowe Comments, at 3-4. The authority of states to seek damages on behalf of consumers was established in Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, §§ 301-05, 90 Stat. 1383, after a Ninth Circuit ruling that such actions were not permitted under the federal antitrust laws. *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

²² 15 U.S.C. § 15c(a).

²³ See <http://www.naag.org/antitrust>.

antitrust cases, and the FTC brought or investigated over 300 antitrust cases.²⁴ State cases have focused primarily on horizontal collusion and merger cases. Between 1996 and 2005, states brought five cases challenging vertical restraints and 28 monopoly cases.²⁵

The states act as independent decision-makers in enforcing the federal antitrust laws. They may pursue federal antitrust claims that federal enforcers have decided not to pursue and seek relief different from or in addition to relief obtained by DOJ or the FTC with respect the same transaction or course of conduct.²⁶ Indeed, invigoration of state antitrust enforcement in the early 1980s was a direct response to a disagreement by some state attorneys general with the antitrust enforcement policy of the Reagan Administration.²⁷ Thus, while much state enforcement is consistent (or at least not conflicting) with federal enforcement actions (and, in many cases, carried on cooperatively), there have been occasions in which state enforcement has been inconsistent with prevailing federal enforcement policies.²⁸ It is these occasions that have

²⁴ See Antitrust Division Workload Statistics, FY 1996-2005, *available at* <http://www.usdoj.gov/atr/public/workstats.htm>; FTC Annual Reports, FY 1996-2005, *available at* <http://www.ftc.gov/bc/anncompreports.htm> (including Part II Consent Agreements, Part III Consent Agreements, Preliminary/Permanent Injunctions Authorized, Civil Penalty Actions, and Merger Transactions Abandoned).

²⁵ See <http://www.naag.org/antitrust>; see also Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in *Competition Laws in Conflict* 272 (Richard Epstein et al., eds. 2004).

²⁶ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (pursuing additional claims); *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (pursuing additional or different relief); *In re Compact Disc Minimum Advertised Price Litig.*, 138 F. Supp. 2d 25 (D. Me. 2001) (pursuing additional or different relief); see also DeBow Statement, at 4 (regarding *Microsoft*); AAI Comments, at 10 (regarding *Hartford Fire*).

²⁷ See Testimony of Lloyd Constantine, Antitrust Modernization Commission, Civil Remedies: Joint & Several Liability, Contribution and Claim Reduction, at 1-2 (July 28, 2005) (“Constantine Statement”).

²⁸ See *Microsoft*, 373 F.3d 1199 (while several states joined with DOJ in settlement, two states opposed that settlement); see also See Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940-42 (2001) (“Posner, *Antitrust*”).

given rise to controversy in the past and that in part prompted calls to the Commission to study issues relating to state enforcement of federal antitrust law.

Increased state enforcement of federal antitrust law led to a number of efforts designed to coordinate efforts among states and as between the states and federal enforcers. For example, NAAG has assumed an important role in coordinating the efforts of states in investigating and litigating cases. In addition, the states have entered into a number of agreements for the coordination of the states' efforts in investigation and litigation.²⁹ There are a number of agreements in place for the coordination of multistate merger enforcement, state and federal merger enforcement, and state and federal criminal investigations.³⁰ For example, the states and federal government have entered into a pre-merger disclosure compact (the "compact"), which encourages merging companies to submit a copy of their Hart-Scott-Rodino (HSR) Act pre-merger filings to the states.³¹ In return, the compact binds states to obtain documents through the second request process and forgo the issuance of individual state subpoenas.³²

²⁹ Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1014 n.73 (2001) ("First, *Delivering Remedies*") (citing Robert Abrams & Lloyd Constantine, *Dual Antitrust Enforcement in the 1990s, in Revitalizing Antitrust in Its Second Century, in Essays on Legal, Economic, and Political Policy* 484, 507 n.42 (Harry First et al. eds., 1991)). NAAG also helps train state enforcement officials.

³⁰ First, *Delivering Remedies*, at 1014 & n.74 (citing Nat'l Ass'n of Attorneys Gen., *Voluntary Pre-Merger Disclosure Compact*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,410 (Mar. 21, 1994); Antitrust Div., U.S. Dep't of Justice, *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*, reprinted in John J. Flynn et al., *Antitrust: Statutes, Treaties, Regulations, Guidelines, Policies* 305-12 (2001) (governing confidentiality of information, sharing of information, and guidelines for joint investigations and settlements); U.S. Dep't of Justice, *Protocol for Increased State Prosecution of Criminal Antitrust Offenses*, reprinted in 70 Antitrust & Trade Reg. Rep. (BNA) 362 (Mar. 28, 1996)).

³¹ See 4 Trade Reg. Rep. (CCH) ¶ 13,410.

³² See *id.*

II. Discussion of Issues

In addition to addressing the Commission’s specific questions, commenters and witnesses offered the following general observations favoring and disfavoring a policy of dual federal and state enforcement of federal antitrust law.

Benefits

- State enforcement is rooted in a strong tradition of federalism and the constitutional principle that each state is a sovereign.³³
- State antitrust enforcers benefit from greater familiarity with local geography, economics, and politics.³⁴
- State enforcement better ensures coverage of smaller, more local enforcement matters, and decreases the risk that violations may go unremedied.³⁵
- States have statutory authority to recover compensation for individuals, while federal enforcers have very limited ability to do so.³⁶
- States may balance enforcement and reduce the possibility of “Type II” errors (which could result in under-enforcement) by pursuing cases that federal enforcers decline to pursue.³⁷

³³ See ABA State Merger Comments, at 4; AAI Comments, at 3 (states have been bringing merger challenges for decades); Greene Comments, at 2 (states average ten to fifteen merger reviews per year).

³⁴ Written Testimony of Maine Attorney General G. Steven Rowe, on the Allocation of Antitrust Enforcement Between the States & the Federal Government, at 5 (Oct. 14, 2005) (“Rowe Statement”); Rowe Comments, at 1, 5-6, 25; First Statement, at 9; Proger Statement, at 2; Calkins, *Perspectives*, at 680-82 (knowledge of local competitive conditions is helpful); Trans. at 10 (Rowe) (“State attorneys general . . . have superior knowledge of local market dynamics as well as local laws. We’re on the spot, and we are capable of rapid and efficient response.”); ABA State Nonmerger Comments, at 6-7 (states have familiarity with local government institutions who purchase goods).

³⁵ Rowe Comments, at 25; AAI Comments, at 9 (stating that “concurrent enforcement authority of state attorneys general . . . can effectively compensate for ‘false negative’ enforcement decisions by the federal enforcement agencies”); ABA State Merger Comments, at 6. Similarly, state enforcement acts as a safeguard against “lax” federal enforcement. ABA State Nonmerger Comments, at 7.

³⁶ Proger Statement, at 13; Rowe Comments, at 19-20; AAI Comments, at 8; ABA State Nonmerger Comments, at 7.

³⁷ ABA State Nonmerger Comments, at 7; AAI Comments, at 9-10.

- States can use their scarce resources efficiently by prioritizing enforcement efforts that supplement (rather than duplicate) federal enforcement and uniquely benefit their local citizens.³⁸
- Claims of state parochialism or favoritism to in-state interests are overstated. There is no evidence this is a systematic problem; indeed, critics point to at most two or three instances in which such interests may have overridden standard antitrust concerns.³⁹
- State enforcement stimulates competition in antitrust enforcement, leading to policy diversification, which produces better antitrust enforcement than a system in which enforcement is controlled by a single agency.⁴⁰ Competition in antitrust enforcement fosters a determination of whether particular forms of regulation are improving public welfare.⁴¹
- The number of state merger reviews is relatively small, so any problems are narrowly confined.⁴²

Criticisms

- Even though state and federal laws are in many areas comparable, interpretations of those laws may differ across enforcers.⁴³ For example, the 1993 NAAG Horizontal Merger Guidelines, unlike the federal guidelines, allow states to take “non-economic” goals into account.⁴⁴ State enforcement thus threatens uniform antitrust policies, and leads to interstate conflict in enforcement of the laws, making the law potentially unclear and less predictable.⁴⁵

³⁸ See Greene Comments, at 17.

³⁹ See Greene Comments, at 14-16.

⁴⁰ See William E. Kovacic, *Toward a Domestic Competition Network*, in *Competition Laws in Conflict*, at 321-22. Different agencies reflect different constituencies and interests, and develop different competencies and specializations. First Statement, at 8-9.

⁴¹ See First Statement, at 10-15.

⁴² See Greene Comments, at 2 (states average ten to fifteen merger reviews per year).

⁴³ See Robert W. Hahn & Anne Layne-Farrar, *The Case for Federal Preemption in Antitrust Enforcement*, 18-SPG Antitrust 79, 80 (2004) (“Hahn & Layne-Farrar, *The Case for Federal Preemption*”); see also Testimony of Michael E. DeBow, Before the Antitrust Modernization Commission, at 4-6 (Oct. 26, 2005) (“DeBow Statement”); Chamber of Commerce Comments, at 3.

⁴⁴ See p. 16, below.

⁴⁵ See DeBow Statement, at 4-6 (“[b]usiness people need reasonably clear statements about what’s appropriate and what is inappropriate, and when antitrust enforcement agencies get creative, there’s a risk to the economy and to consumer welfare as a result of that”); Chamber of Commerce Comments, at 3 (“state lawsuits can affirmatively frustrate uniform enforcement of federal law”); Proger Statement, at 3 (can lead to the creation of inconsistent standards); ABA

- State enforcement actions offer marginal incremental enforcement value, particularly to the extent they primarily follow-on to or accompany federal enforcement efforts.⁴⁶ It is unclear whether any incremental value of state enforcement outweighs the added burden on defendants of dealing with multiple state enforcers.
- State actions have complicated certain federal merger and conduct investigations by enabling state enforcers to hold up settlements through insistence on divestitures and other remedies that they might not be able to obtain if they litigated the case.⁴⁷
- State enforcement officials may have an incentive to promote or protect local interests (for example, by preventing the takeover of a local company or closure of a plant), rather than more generalized consumer welfare.⁴⁸
- State enforcement had greater potential value when the Commerce Clause was interpreted narrowly, and the definition of intrastate commerce subject only to state regulation was much broader than it is today.⁴⁹

State Nonmerger Comments, at 8-10 (state enforcement can lead to conflicting remedies and enforcement approaches); *see also* DeBow Statement, at 2-4 (only a federal enforcer can fully internalize the costs and benefits of policy decisions, whereas state enforcement decisions may cause spillover costs on other states that are not internalized by the decision-making state).

⁴⁶ *See* Posner, *Antitrust*, at 940-42; DeBow Statement, at 7 (“limited resources committed by state governments to antitrust enforcement”); Chamber of Commerce Comments, at 2 (“States lack the resources necessary to make a material contribution to the enforcement of federal law. . . . Most states do not have dedicated antitrust divisions, let alone a staff of experts. . . .”); Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 Harv. J.L. & Pub. Pol’y 877, 889-90 (2003) (“Hahn & Layne-Farrar, *Federalism in Antitrust*”) (“State antitrust expenditures pale in comparison to federal expenditures. Among those states reporting a separate line item, antitrust budgets are usually only one to two percent of the overall AG budget. . . . [S]tate efforts in national antitrust enforcement at best amount to little more than free riding on federal actions.”). Some also argue that state attorneys general are not sufficiently skilled to engage in meaningful antitrust enforcement. *See* Posner, *Antitrust*, at 941 (“struck by the poor quality of the briefs and arguments of the lawyers in the offices of the state attorneys’ general”). *But see* First Statement, at 26 (proposing to improve funding of state enforcement by allowing some portion of the monetary recovery made by states in *parens patriae* actions to be distributed to the state enforcement programs).

⁴⁷ DeBow Statement, at 4.

⁴⁸ *See* Hahn & Layne-Farrar, *The Case for Federal Preemption*, at 79 (“State officials choose in-state interests over national ones not because they are corrupt, but because their incentives are skewed.”); Chamber of Commerce Comments, at 3 (“There is a considerable risk that state actions could be motivated by parochial considerations”); Posner, *Antitrust*, at 940-41.

⁴⁹ *See* DeBow Statement, at 1-2.

- Dual state and federal enforcement can lead to increased compliance costs or duplicative efforts.⁵⁰ Although states have voluntarily coordinated enforcement actions, they are not currently legally required to do so.

A. What role should state attorneys general play in merger enforcement?

Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal antitrust enforcement agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?

Several proposals to address concerns regarding state merger enforcement have been advanced. Some proposals focus on placing limits on state merger enforcement. Others suggest a variety of harmonization and coordination proposals to reduce the posited costs of dual state and federal merger review.⁵¹

1. *Allocation of merger enforcement authority*

The Commission received proposals that mergers should be allocated between the federal and state enforcement agencies, removing at least some authority from the states.⁵² Such proposals are commonly premised on the argument that where a merger involves businesses operating on a national or international basis, it is more efficient to have a single, national enforcer reviewing the transaction, in order to avoid expense, burden and delay that can impede

⁵⁰ See Proger Statement, at 10; ABA State Merger Comments, at 7, 11.

⁵¹ Changes to the relief available to states in merger review would presumably also impact private injunctive remedies, because states stand on the same footing as private parties in seeking injunctive relief, as discussed in the Background section. The general availability of injunctive relief is further discussed in Section II.B of this memorandum.

⁵² See, e.g., Proger Statement, at 5.

the efficient operation of capital markets, and also to avoid the risk of inconsistent results.⁵³

Another argument for such proposals is that the federal government has greater resources, expertise, and remoteness from bias, and is therefore better suited to investigate mergers with nationwide consequences.⁵⁴

a. Divide Merger Review Depending on Locus of Harm

One proposed approach is to allocate responsibility between the state and federal enforcers depending upon the locus of the effects of the merger.⁵⁵ Under this approach, states would not have the authority to investigate the merger when the effects of a merger are national (or not limited to single state or small group of states).⁵⁶ State enforcers would have enforcement authority only when a merger has predominantly intrastate effects, although they could certainly play a supporting role appropriate to their interest in national mergers.⁵⁷

Pros

- A division based on the locus of harm obtains the benefit of state expertise in local matters, while avoiding the potential for inconsistent enforcement, extraterritorial effect, and bias.⁵⁸
- The decreased predictability and inefficiencies that result from multiple investigations outweighs the states' interest in ensuring that "national" mergers do not adversely affect competition within their borders.⁵⁹

⁵³ See Hahn & Layne-Farrar, *The Case for Federal Preemption*, at 80; DeBow Statement, at 4-6; Chamber of Commerce Comments, at 3; Proger Statement, at 3, 10; ABA State Nonmerger Comments, at 8-10; DeBow Statement, at 2-3; ABA State Merger Comments, at 7, 11.

⁵⁴ See Proger Statement, at 6-8; Posner, *Antitrust*, at 941 ("The federal government, having a larger and more diverse constituency, is, as James Madison recognized in arguing for the benefits of a large republic, less subject to takeover by a faction.").

⁵⁵ See ABA State Merger Comments, at 11.

⁵⁶ See *id.*

⁵⁷ See Proger Statement, at 6-8; ABA State Merger Comments, at 11 (suggesting use of international comity principles to allocate responsibility). The question of how to define "predominantly intrastate effects" remains open.

⁵⁸ See Proger Statement, at 6-8, 12-13.

- States would still have a role in merger enforcement. When a state has an interest in a merger, the federal enforcers would be encouraged to work with the state enforcers in investigating the matter.⁶⁰

Cons

- Drawing implementable distinctions between intrastate, interstate, and global mergers will be very difficult. Moreover, many national or global mergers have particularly localized effects.⁶¹
- Local expertise will be lost in any system that limits states' roles in merger enforcement.⁶²
- States do not always have the resources to pursue even local matters. To the extent that such mergers are exclusively allocated to states, then federal enforcers will not have a place to pursue primarily local issues on behalf of a particular state's consumers.⁶³
- Allocation of merger responsibility is already done informally, so there is no need for a formal mechanism.⁶⁴
- The European approach is not a helpful analog. That approach reflects a desire on the part of the European Union to pull numerous independent nations towards a cohesive whole. The U.S. approach, in contrast, reflects a long history of federalism and a desire to avoid the centralization of power in the federal government.⁶⁵
- The E.U. merger system imposes high costs on parties. Furthermore, for the U.S. to implement such a system would require substantial revision to the Hart-Scott-Rodino rules to allow referrals from the federal government to the appropriate states.⁶⁶

b. Federal Right of First Refusal

An alternative mechanism would provide, in effect, a federal right of first refusal on merger enforcement. No state would be permitted to investigate a merger if a federal enforcer is

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ AAI Comments, at 12.

⁶² *See Rowe Statement*, at 6.

⁶³ AAI Comments, at 12.

⁶⁴ *See id.* at 5.

⁶⁵ *See ABA State Merger Comments*, at 13.

⁶⁶ *See id.*

doing so.⁶⁷ States could investigate mergers only when the federal government has declined to investigate.⁶⁸

2. *Improved coordination between federal and state enforcers*

The Commission received suggestions that improved coordination among enforcers would help achieve consistency and predictability of outcomes, irrespective of any limits on state merger enforcement.⁶⁹ Some have suggested that further coordination efforts and harmonization could address many of the problems identified with state merger enforcement.⁷⁰ Others argued that existing coordination is already very good.⁷¹

Proposals for improved coordination fall into both substantive and procedural categories. Substantively, they suggest the states conform practices to federal law. Procedurally they suggest several reforms.

⁶⁷ See Proger Statement, at 12-13; Chamber of Commerce Comments, at 4; *see also* Posner, *Antitrust*, at 941-42.

⁶⁸ See Proger Statement, at 12-13; Chamber of Commerce Comments, at 4. States have investigated mergers after the federal government did not investigate in several instances. *See id.* (citing *Maine v. Rite Aid Corp.*, No. CV04-273 (Maine Sup. Ct. Dec. 6, 2004) (consent decree under Maine antitrust law); *Maine v. Dead River Co.*, No. CV03-32 (Maine Sup. Ct. Feb. 18, 2003) (requiring throughput agreement and divestiture as condition of merger); *Massachusetts v. Sainsbury PLC* (Mass. Sup. Ct. July 30, 1999) (state consent decree requiring divestiture in grocery store acquisition); *Massachusetts v. Suiza Foods Corp.* (D. Mass. June 22, 2001) (consent order pursued by Massachusetts and Maine to rectify alleged anticompetitive effects of milk processing and distribution merger); *In the Matter of Stericycle, Inc.* (Mass. Sup. Ct. Jan. 2, 2003) (consent order involving Massachusetts and Connecticut, requiring divestiture in medical waste disposal merger)).

⁶⁹ See, e.g., Proger Statement, at 4-5, 8-13.

⁷⁰ *See id.*

⁷¹ See Greene Comments, at 8-11.

a. Harmonization of substantive merger law

The NAAG Merger Guidelines are in some ways inconsistent with the federal Merger Guidelines. Accordingly, some witnesses and commenters proposed that NAAG revise its merger guidelines to reflect the current state of antitrust law and theory, or in the alternative adopt the federal merger guidelines.⁷²

Pros

- The NAAG Merger Guidelines are inconsistent with the federal guidelines, as creating conflicting standards and thus preventing harmonization.⁷³ In particular, the NAAG Merger Guidelines differ significantly from the federal merger guidelines in several important respects:⁷⁴ first, their methodology for defining the relevant product and geographic markets;⁷⁵ second, their treatment of entry;⁷⁶ third, their acceptance of efficiencies.⁷⁷ The NAAG guidelines also invite state attorneys general to take social and political objectives other than consumer welfare into account in making merger enforcement decisions.⁷⁸

⁷² Trans. at 18-19 (Proger); *see also* ABA State Merger Comments, at 11 (suggesting “soft convergence”).

⁷³ *See* Trans. at 18 (Proger) (“If the law has so many different views or is so complicated that it’s hard to determine what is correct, that, in my mind, is not helpful.”).

⁷⁴ *See* Proger Statement, at 6-10.

⁷⁵ The NAAG Merger Guidelines do adopt the DOJ-FTC market definition methodology as an alternative methodology, but caution that in the event of a conflict, the investigating state will rely on the methodology that is based upon the most reliable empirical evidence and “most accurately reflects the markets.” National Association of Attorneys General Horizontal Merger Guidelines, § 3A (“NAAG Merger Guidelines”), *available at* <http://www.abanet.org/antitrust/committees/state-antitrust/mergerguides.pdf>.

⁷⁶ For example, the NAAG Merger Guidelines will only consider entry from unused excess capacity if empirical evidence proves that the entry is likely to occur within one year of any attempted exercise of market power. NAAG Merger Guidelines, §§ 3.3, 3.31, 3.32.

⁷⁷ The NAAG Merger Guidelines only consider efficiencies if they can be shown by clear and convincing evidence. In addition, the proponent of the efficiencies must show that they will be passed on to consumers, that comparable savings cannot be obtained through means other than the merger, and that the cost savings will persist over the long run. NAAG Merger Guidelines, § 5.3.

⁷⁸ *See* NAAG Merger Guidelines, at 3-4. Section 2 states that, in addition to effects on consumer welfare through price increases, “[m]ergers may also have other consequences that are relevant to the social and political goals of section 7. For example, mergers may affect the opportunities for small and regional business to survive and compete.” *Id.* Such considerations,

- Although NAAG issued a common standard for state merger reviews, states are not bound to that standard.⁷⁹
- Revising the NAAG Merger Guidelines to conform to federal law would help improve the predictability of existing merger law.⁸⁰

Cons

- Opponents of increased coordination say that the current system is working well as-is, and any efforts to formalize it will create rules that will require interpretation and create uncertainty.⁸¹ This may add to enforcement costs and inconsistencies. Different enforcers may interpret the rules differently, leading to uncertainty.
- Most states tend to follow the federal guidelines already, so this change would not make a significant difference.⁸² They are, furthermore, already harmonized in essence.⁸³

b. Coordinating data requests

Some identified inconsistencies in data requests among enforcers as an area for improvement and reducing the costs of a dual system.⁸⁴ They proposed enhanced coordination in this area. The cost of preparing multiple responses can be significant.⁸⁵ For example, data may be requested in varying formats or for different time periods by different enforcers.⁸⁶ The federal government often works with merging parties to produce documents electronically, but

say the guidelines, “may affect the Attorney General’s ultimate exercise of prosecutorial discretion.” *Id.*

⁷⁹ NAAG Merger Guidelines, Executive Summary, at 2.

⁸⁰ *See* Trans. at 17 (Proger) (“[I]t is an important criterion as we look into the system of enforcement that our laws be predictable.”).

⁸¹ *See* Trans. at 84 (Proger).

⁸² Trans. at 18, 84 (Proger); Trans. at 39 (Rowe) (“everybody knows we use the federal Merger Guidelines”), at 86 (Rowe).

⁸³ Greene Comments, at 7.

⁸⁴ Proger Statement, at 10; ABA State Merger Comments, at 11.

⁸⁵ Proger Statement, at 10.

⁸⁶ *Id.*

states generally require paper copies of document productions.⁸⁷ Coordinating data requests between state and federal enforcers would, accordingly, reduce costs and burdens associated with federal and state investigations.⁸⁸

c. Model confidentiality statute

One witness identified inconsistencies between state and federal confidentiality agreements as another cost of dual state and federal merger reviews, and suggested the adoption of a model confidentiality statute.⁸⁹ Confidentiality statutes vary from state to state, with differing levels of protection. As a result, confidentiality protection for parties' information must be negotiated separately with each state, a process that is costly both in terms of the time it takes and the lack of uniformity that often results.⁹⁰ States should develop a uniform or model confidentiality agreement that would be authorized by state law.⁹¹ With such agreements authorized and in place, a single state could take the lead in negotiating and drafting specific confidentiality terms for a merger, with all other participating states signing the agreement.⁹²

d. Centralized NAAG merger experts

States have been criticized for having insufficient resources to conduct meaningful merger reviews. One possible response proposed to the Commission is for the states, through NAAG, to establish a permanent staff of lawyers and economists at NAAG, with the

⁸⁷ *Id.*

⁸⁸ ABA State Merger Comments, at 7.

⁸⁹ Proger Statement, at 11.

⁹⁰ *Id.*

⁹¹ *Id.* The model agreement could be modeled on the confidentiality provisions that govern federal antitrust investigations.

⁹² Proger Statement, at 11; Trans. at 18-19 (Proger).

responsibility of assisting and overseeing the states' merger review process.⁹³ These NAAG lawyers would provide consistency and institutional memory.⁹⁴ Others suggest they could take a role in policy planning and evaluation.⁹⁵

B. What role should state attorneys general play in non-merger civil enforcement?

To what extent is state *parens patriae* standing useful or needed?

Has the ability of states and private plaintiffs to seek injunctive relief under 15 U.S.C. § 26 benefited consumers or caused harm to businesses or others?

The Commission received substantial criticism of the states' authority to recover damages and to obtain injunctive relief under the federal antitrust laws, as well as numerous arguments supporting the importance of its role.

Several witnesses testified that *parens patriae* enforcement is a success.⁹⁶ In addition to the general benefits of state enforcement, *parens patriae* actions have resulted in successful damages actions, for instance, an \$80 million settlement from pharmaceutical companies to compensate consumers and third-party payers for injuries sustained as a result of an allegedly unlawful agreement to delay generic drug entry.⁹⁷

Benefits

- There is generally no federal agency authority to obtain damages on behalf of citizens.⁹⁸ State *parens patriae* actions fill this role.

⁹³ Proger Statement, at 12; Trans. at 18, 90-91 (Proger).

⁹⁴ Proger Statement, at 12.

⁹⁵ Trans. at 93-94 (First).

⁹⁶ See Proger Statement, at 13-14; Rowe Statement, at 5; Rowe Comments, at 1, 18-20; AAI Comments, at 8-11.

⁹⁷ Proger Statement, at 13-14; see also *In re Cardizem Antitrust Litig.* (E.D. Mich. May 31, 2005), available at <http://www.cardizemsettlement.com/pdf/CardizemNoticeR3.pdf>; AAI Comments, at 9 (“attorneys general have recovered hundreds of millions of dollars for their citizens”).

⁹⁸ AAI Comments, at 9.

- States have developed innovative methods of distributing settlement proceeds, which have benefited antitrust enforcement generally.⁹⁹
- If *parens patriae* authority under federal law were limited or eliminated, states would bring the cases in state courts under state law. This would result in less consistency and less predictability than there is now.¹⁰⁰
- *Parens patriae* actions offer advantages over private class actions, which otherwise might sufficiently obtain relief for consumers.¹⁰¹ States need not meet the requirements for Rule 23 class certification, such as commonality or adequacy of representation.¹⁰² States also have the ability to investigate potential violations prior to litigation.¹⁰³ In all, they argue, “[g]iven the limitations of private class actions and the Federal Trade Commission’s rarely used disgorgement remedy, . . . *parens* cases are hardly duplicative.”¹⁰⁴
- State enforcers should retain the authority to seek injunctive relief, because private parties have less incentive to bring actions for injunctive relief.¹⁰⁵ Further, state-obtained injunctive relief is not any more problematic than privately obtained injunctive relief.

⁹⁹ See Proger Statement, at 14. For example, states have used web-based submission to streamline the process. See Calkins, *Perspectives*, at 691-92. Acknowledging the state’s greater experience in this area, the FTC, in a case in which it disgorged profits from a defendant, allowed the states to distribute the recovery. *Connecticut v. Mylan Labs.*, 2000-1 Trade Cas. (CCH) ¶ 73,273 at 90,403-04 (D.D.C. 2001). The FTC’s recovery was combined with that of the states, with the states distributing the FTC’s portion of the recovery.

¹⁰⁰ See Trans. at 40 (Rowe) (“you would see these cases . . . being brought only in state courts with state causes of action”); see also ABA State Nonmerger Comments, at 5 (non-trivial number of cases brought under state law).

¹⁰¹ Rowe Comments, at 20; First, *Delivering Remedies*, at 1039; AAI Comments, at 9.

¹⁰² Rowe Comments, at 20; First, *Delivering Remedies*, at 1039. State *parens patriae* recoveries contain additional statutory limitations: Duplicative recovery “for the same injury” is excluded; notice of suit is required, with the right to opt out; settlements require court approval; and recoveries are distributed in the court’s discretion, or deemed a civil penalty going to the state’s general revenues. 15 U.S.C. §§ 15c(a)(1), (b)(2), (c), 15e.

¹⁰³ Rowe Comments, at 20. Additionally, class counsel are often criticized as the primary beneficiaries of monetary awards, not consumers.

¹⁰⁴ Trans. at 10 (Rowe). One commentator suggests providing the Department of Justice with authority to obtain damages and to distribute the proceeds to victims. See Posner, *Antitrust*, at 941. If DOJ were to bring a case, all private suits regarding the conduct would be preempted. See *id.* See generally Civil Remedies-Government Discussion Memorandum (May 4, 2006).

¹⁰⁵ AAI Comments, at 9.

- State enforcers should retain the authority to seek injunctive relief, as it has direct consumer impact.¹⁰⁶

Criticisms

- Allowing state *parens* actions adds little value to overall deterrence and enforcement.¹⁰⁷
- State enforcers should not retain the authority to seek injunctive relief, because they may seek relief that is either unnecessarily additional to, or in fact conflicting with, that sought by federal agencies, thereby imposing costs.¹⁰⁸ “Another problem associated with common law *parens patriae* actions for injunctive relief is the specter of unnecessary or conflicting injunctive relief being ordered by the court. . . . The demands for additional relief . . . can place defendants in a position of needing to accede to such additional demands ‘just to end the matter,’ or to litigate further because the additional demands are unacceptable.”¹⁰⁹

The Commission received several proposals to limit, but not eliminate, state civil non-merger authority. Each of these proposals aims to allow states to continue to bring cases where they are not likely to present the problems identified with state enforcement. The proposals are:

- Restrict state enforcement to local matters;
- Restrict state enforcement to certain types of substantive matters;
- Require states to obtain federal clearance before proceeding.

These proposals and their critiques are set out below.¹¹⁰

¹⁰⁶ See Proger Statement, at 14-15.

¹⁰⁷ See Trans. at 27 (DeBow); Posner, *Antitrust*, at 940-41; Chamber of Commerce Comments, at 4; ABA State Nonmerger Comments, at 11 (*parens patriae* actions do not create any greater or lesser *in terrorem* effect than class actions).

¹⁰⁸ ABA State Nonmerger Comments, at 10.

¹⁰⁹ *Id.*

¹¹⁰ Another proposal is to coordinate investigations and litigation at a case-specific level. States would then have access to the decisions and investigative materials of the federal antitrust enforcers. Ultimate decisions would be made by the federal enforcers, but the states could have some input. ABA State Nonmerger Comments, at 14.

1. *Restrict state enforcement to local matters*

Pros

- Limiting state civil non-merger enforcement to matters involving localized conduct or localized effects would reduce or eliminate the concern about threats to a coherent national antitrust policy.¹¹¹
- At a minimum, some argue, placing such limits on state enforcement would avoid imposing the costs of “misguided” antitrust enforcement on other states, particularly if a state has brought a case out of parochial interests.¹¹²
- This proposal would allow states to continue to enforce the antitrust laws for local matters, thereby taking advantage of their familiarity with local markets and issues and obligation to protect state residents’ interests.¹¹³
- The pros cited in support of limiting merger enforcement to local matters generally apply as well.¹¹⁴

Cons

- The approach potentially limits state sovereignty.¹¹⁵ In particular, one aspect of sovereignty is determining whether a state’s consumers are better served through the investigation of an interstate violation or by investigation of an intrastate matter.¹¹⁶
- Limiting states to matters concerning intrastate commerce would limit their role greatly, if not altogether.¹¹⁷

¹¹¹ See Trans. at 45 (Proger); see also Chamber of Commerce Comments, at 5.

¹¹² See Hahn & Layne-Farrar, *The Case for Federal Preemption*, at 79; Chamber of Commerce Comments, at 3 (“There is a considerable risk that state actions could be motivated by parochial considerations.”); Posner, *Antitrust*, at 940-42.

¹¹³ See Background, above. States have a history of challenging local conspiracies in industries such as health care, travel agents, roofers, auto body shops, dairies, and bakers. See, e.g., *Maine v. The Maine Health Alliance*, No. CV03-135 (Maine Sup. Ct. June 18, 2003); see also Calkins, *Perspectives*, at 688-90; Proger Statement, at 14-15.

¹¹⁴ See p. 13-14, above.

¹¹⁵ Supplemental Testimony of Maine Attorney General G. Steven Rowe, on the Allocation of Antitrust Enforcement between the States & the Federal Government, at 2 (Dec. 8, 2005) (“Rowe Suppl. Statement”).

¹¹⁶ See ABA State Nonmerger Comments, at 11-13.

¹¹⁷ ABA State Nonmerger Comments, at 12 (under the Commerce Clause, nearly all activity falls within interstate commerce).

- As a practical matter, state non-merger enforcement is frequently local, and therefore does not usually raise serious issues about interstate conflict.¹¹⁸ Indeed, instances of disharmony between state and federal enforcement have been rare.¹¹⁹
- Without corresponding limits on federal agencies to cases with broad geographic effects, there will remain overlap between federal and state enforcement, leading to potential inconsistency.¹²⁰
- It would be difficult to draw a line between local and interstate matters so in practical terms, this solution is not workable.¹²¹
- The cons cited against limiting merger enforcement to only local matters generally apply as well.

2. *Restrict state enforcement to certain types of antitrust matters*

Some commentators suggest limiting state enforcement of federal antitrust laws to certain types of antitrust matters.¹²²

- For example, some would allow states to prosecute local horizontal price-fixing cases.¹²³ Such cases may be more obvious to local enforcement personnel than to federal officials. Furthermore, because price-fixing cases do not involve elaborate doctrinal tests, state prosecutors would be unlikely to upset national antitrust policy.¹²⁴
- Others would allow states to take on matters with direct consumer impact.¹²⁵
- In addition to the general benefits of state enforcement (discussed above), flexibility in assigning responsibility for particular matters provides both state and

¹¹⁸ Calkins, *Perspectives*, at 688 (counting 82% of cases having local aspects); Rowe Statement, at 5 (“Many single-state nonmerger cases involve local or regional matters unlikely to attract federal interest or attention.”); Rowe Suppl. Statement, at 3 (Maine has had “exclusive focus on in-state markets.”)

¹¹⁹ Rowe Suppl. Statement, at 3.

¹²⁰ See ABA State Nonmerger Comments, at 11-13.

¹²¹ AAI Comments, at 12; ABA State Nonmerger Comments, at 11-13.

¹²² See, e.g., Trans. at 25, 46 (DeBow, Proger).

¹²³ Chamber of Commerce Comments, at 5.

¹²⁴ See Trans. at 29-30 (DeBow).

¹²⁵ See Proger Statement, at 15.

federal enforcers with a greater range of strategic options, permitting more complete coverage of possible cases.¹²⁶

- Any restrictions or limits on state jurisdiction would therefore result in under-enforcement.¹²⁷

3. *Federal-state clearance system*

A third proposal is to revise Section 4C of the Clayton Act to create a formal review process wherein a state attorney general who wished to bring a civil non-merger case would submit the matter for review by the federal enforcement agencies.¹²⁸ If the agencies approved the request, the state could proceed.¹²⁹ By requiring federal clearance, this would allow states to satisfy their mandate to protect state residents' interests, while mitigating concerns about inconsistent federal and state enforcement policies, reach beyond state borders, and bias. However, critics of a federal-state clearance system argue that any limitation on state authority raises federalism questions, and a clearance system of any sort could lead to underenforcement.¹³⁰ No witness or commenter addressed the issue of whether there would be a need for clearance of civil litigation following on to criminal prosecutions.

¹²⁶ See Rowe Statement, at 6.

¹²⁷ See *id.*

¹²⁸ See DeBow Statement, at 8; Chamber of Commerce Comments, at 4; *see also* ABA State Nonmerger Comments, at 14 (proposal is worthy of further consideration and development of details).

¹²⁹ See DeBow Statement, at 8.

¹³⁰ See Trans. at 11 (Rowe).