

Enforcement Institutions-States Discussion Outline

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

1. *What role should state attorneys general play in merger enforcement?*
2. *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] No change is appropriate to the current roles of states and federal enforcement agencies in merger enforcement.
- [2] Recommend statutory change that allocates merger enforcement activity between the federal and state enforcement agencies.
 - [a] Recommend that merger enforcement be exclusively conducted by federal enforcers.
 - [b] Recommend division of merger review depending on the locus of harm. When the effects of a merger are national (or not limited to a single state or small group of states), states would not have the authority to investigate the merger.
 - [c] Recommend a federal right of first refusal on merger enforcement. No state would be permitted to investigate a merger if a federal enforcer is already doing so.
- [3] Recommend improved coordination among enforcers, which would help achieve consistency and predictability of outcomes, irrespective of any limits on state merger enforcement.
 - [a] Recommend harmonization of the substantive antitrust law between states and the federal government.
 - [i] Recommend the NAAG merger guidelines be revised to reflect the current state of antitrust law and theory.
 - [ii] Recommend the states adopt the federal merger guidelines.
 - [b] Recommend that data requests are consistent across enforcers.
 - [c] Recommend adoption of a model confidentiality statute to eliminate inconsistencies between state and federal confidentiality agreements.
 - [d] Recommend NAAG establish a permanent staff of lawyers and economists with the responsibility of assisting and overseeing the states' merger review process.

3. *What role should state attorneys general play in non-merger civil enforcement? To what extent is state parens patriae standing useful or needed?*
4. *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?*
5. *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? Should standing to pursue injunctive relief under federal antitrust law be different for states than it is for private parties?*

- [4] No change is appropriate to the current role of the states in non-merger civil antitrust enforcement.
- [5] Recommend that state civil non-merger enforcement be restricted to those matters involving localized conduct or effects.
 - [a] The restriction should apply equally to matters seeking damages and injunctive relief.
 - [b] The restriction should apply differently depending on whether damages or injunctive relief is being sought.
- [6] Recommend that state civil non-merger enforcement be restricted to certain types of antitrust matters.
 - [a] Recommend restriction to local horizontal price-fixing cases.
 - [b] Recommend restriction to matters with direct consumer impact.
 - [c] Recommend restriction to matters involving injunctive relief.
 - [d] Recommend restriction to matters seeking damages.
- [7] Recommend statutory revision of Section 4(c) of the Clayton Act to create a formal review process by which a state attorney general who wished to bring a *parens patriae* case would submit the matter for review by the federal enforcement agencies. If the federal agencies cleared the matter, the state could proceed.
 - [a] The revision should apply equally to matters seeking damages and injunctive relief.
 - [b] The revision should apply differently depending on whether damages or injunctive relief is being sought.