Testimony of California Chief Assistant Attorney General Thomas Greene
Concerning State Merger Enforcement
Before the Antitrust Modernization Commission

July 15, 2005

I thank the Commission for providing me with the opportunity to submit this testimony. I direct my remarks specifically to the question of merger enforcement under the Clayton Act by state attorneys general.

Summary

State attorneys general acting singly or together play an instrumental role in merger enforcement. Our system of concurrent antitrust enforcement provides that both the federal agencies and the states have the authority to review and bring court challenges to anticompetitive mergers. The states, like any private party, may seek to enjoin a merger that violates section 7 of the Clayton Act. In addition, certain states may seek to enjoin mergers pursuant to state antitrust statutes that have analogues to relevant sections of the Sherman and Clayton Acts. States are vitally interested in the competitive effects of certain mergers which have the potential to raise costs to consumers and to the states themselves as purchasers. More particularly, states are keenly interested in mergers having local effects, regardless of whether the affected transactions are national, regional or local.

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in scope. Such mergers may impact areas of the states’ economies over which the attorneys general have traditional police power or regulatory responsibility. State merger enforcement over the last ten years represents a successful partnership with the federal agencies that increases the likelihood that anticompetitive mergers of all sizes will be scrutinized appropriately. Much would be lost by lessening the role undertaken by the states in reviewing mergers. Although state-federal cooperation can always be improved, our system of dual enforcement has served the U.S. economy well.

I. The State of State Merger Enforcement

The charts accompanying this comment confirm that state attorneys general devote significant resources to reviewing mergers of all sizes in various industries. This is true not only in large and mid-sized states such as Texas and Maryland but surprisingly in small jurisdictions such as Maine and the District of Columbia. Collectively, the states are likely to review ten to fifteen mergers per year. Texas and Maryland may be the only states that routinely keep track of merger investigations regardless of whether they result in a challenge, but their collected data are instructive. Texas, the second most populous state, opened on average over seven merger reviews in each of the last ten years. During that same period Maryland, a significantly smaller state, opened thirty-three merger investigations, including twenty that do not overlap the Texas list. California’s history under both Attorney General Bill Lockyer and former Attorney General Dan Lungren is similar: about five to eight merger investigations per year.

A closer look at the Texas data yields interesting insights into state merger enforcement. Approximately fifteen percent of the mergers reviewed by Texas over the ten-year time period were conducted without the federal enforcers. Of that number, five out of the eleven state-only reviews resulted in a resolution in the form of a lawsuit, consent decree, letter agreement, fix-it-first
divestiture, or voluntary withdrawal of the transaction. California's experience in the last five years also shows that approximately fifteen percent of its merger investigations annually involve no other antitrust enforcement agency. Thus, the states are looking at some mergers on their own and achieving results without significant federal involvement.

The vast majority of all mergers reviewed involve overlaps of products or services that are marketed locally to consumers or bought by governmental agencies. The mergers on the Texas list involve healthcare, petroleum, waste hauling and disposal, agricultural commodities, telecommunications, banking and general retail. Those that California has undertaken fall into the same categories, though often involving different merging parties.

Maryland, with fewer resources, was able to investigate the local impact of national mergers as well as purely local mergers, working both with federal agencies and on its own for transactions lacking Hart-Scott-Rodino filings. Interestingly, local merger investigations conducted by the Maryland Attorney General since 1995 culminated in every case with either a decision not to challenge the merger or an abandonment of the transaction by the parties.

As illustrated in the following sections, states are working cooperatively with DOJ and the FTC, extending scarce federal enforcement resources and increasing the intensity with which local markets are examined.

II. **Historical Role of State Attorneys General in Merger Enforcement**

On numerous occasions the Supreme Court has recognized that "[a]ntitrust laws ... are the Magna Carta of free enterprise."² During the explosive economic growth and industrialization of the late nineteenth century, free enterprise was in dire need of a tool to confront an unprecedented

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consolidation of market power by national trusts. Common law and state corporate law restrictions on consolidation through merger were ineffective against monopolistic combinations such as Standard Oil. It was the states, however, and not the federal government, who responded to the threat by enacting the country’s first antitrust statutes. By 1890, the year Congress approved the Sherman Act, twelve states had passed their own antitrust laws, and eight other states continued to adopt antitrust legislation into the next decade.

These antitrust laws were a natural extension of the states’ traditional police power to protect the welfare of their citizens. By enforcing antitrust legislation, the state attorneys general filled a void in our economic system that had allowed trusts to engage in coercive behavior to the detriment of consumers and free enterprise. Prior to 1890, six states instituted actions challenging the intrastate activities of certain trusts with all six cases resulting in either the revocation of the defendants’ business privileges or severance from the corporate trust relationship. Congress recognized the states’ role in antitrust enforcement and enacted the Sherman Act with the intent to supplement state law rather than supplant it.³ Between 1890 and 1902, twelve states brought twenty-eight antitrust actions compared to nineteen brought by the United States Department of Justice during the same period. After the turn of the century, federal enforcement activity would eventually eclipse that of the states. Nevertheless, state cases during these formative years were oftentimes the only barrier to the dominance of the trusts and in several instances resulted in important, lasting success. For example, the Standard Oil trust was prevented from controlling the extremely profitable Texas oil

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³ The Act’s sponsor, Sen. John Sherman stated that the proposed legislation was intended to “supplement the enforcement of the established rules of the common and statute law by the courts of the several states.” 21 Cong. Rec. 2457 (1890).
fields due to the active enforcement of state antitrust laws by the Texas Attorney General.\(^4\) Although the federal government eventually dissolved the Standard Oil trust under the Sherman Act\(^5\), state antitrust enforcement encouraged the growth of competition and shaped the structure of the modern oil industry.

In 1914, Congress enacted the Clayton Act and addressed a weakness in the Sherman Act that allowed anticompetitive mergers through the ordinary transfer of voting securities instead of trust certificates. Congress authorized the United States and individual states, as private parties, to enjoin anticompetitive mergers pursuant to section 7. Although the states are on the same footing as private parties under section 16, a state may bring suit for injunctive relief either in its proprietary capacity or exercising its quasi-sovereign interest as \textit{parens patriae}.\(^6\) A state’s quasi-sovereign interest in preventing an anticompetitive merger arises when the effects may “limit the opportunities of her people, shackle her industries, [and] retard her development.”\(^7\)

For most of the twentieth century, states focused their merger reviews on transactions with local effects. During the 1970s, state attorneys general entered a period of revival for both merger review and antitrust enforcement in general. In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”), providing states with \textit{parens} standing in damages cases under section 4 of the Clayton Act. At the same time, Congress established a two year program to


\(^5\) \textit{Standard Oil Co. v. United States}, 221 U.S. 1 (1911).

\(^6\) \textit{Georgia v. Pennsylvania R. Co.}, 324 U.S. 439 (1945) (recognizing authority of state attorney general to enjoin mergers which are harmful to the general welfare and economy of the state).

\(^7\) Id. at 451.

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fund state antitrust enforcement which many states used to establish bureaus and divisions exclusively dedicated to antitrust enforcement. In the early 1980s, just as the states were gradually increasing their activities in the national merger arena, federal merger enforcement underwent a temporary, but seismic shift which lasted until the first Bush Administration. When measured by the ratio of challenges, consent decrees and/or second requests to total HSR filings, the Department of Justice and Federal Trade Commission reduced their previous level of merger activities by seventy-five percent. As an example of the unprecedented transformation in merger policy, in 1987, then-Secretary of Commerce Malcolm Baldrige advocated for the repeal of section 7 of the Clayton Act. The reduction in federal oversight coincided with a significant increase in large mergers in concentrated industries.

The state attorneys general found themselves in largely the same position they occupied during the late 1800s. There was a void in antitrust enforcement that could potentially harm the states' consumers and economies. The most significant difference was that by filling the void, states would be preserving the consistency and predictability that is integral to successful antitrust enforcement. With their added responsibility, states proceeded to increase the number of merger actions, amicus curiae briefs, and administrative comments filed. The states also began to organize with each other to facilitate the review process. In 1983, NAAG created the Multistate Antitrust Task Force which is a permanent subcommittee comprising representatives from all fifty states, the District of Columbia, and five territories. The most important role of the Task Force is to provide a forum through which individual states may coordinate multistate investigations and litigation.

As the states started working together, cooperation between federal and state authorities began to falter. The FTC reversed its policy of assisting state attorneys general by sharing premerger
notification and market information obtained during a premerger investigation. In *Lieberman v. FTC* and *Mattox v. FTC*, the courts ruled that the HSR Act did not provide the states with a right to access premerger information. In response to these setbacks, the states entered into the NAAG Voluntary Pre-Merger Disclosure Compact in 1987. The NAAG Compact creates a contractual understanding among the signatory states and the parties to a transaction with regard to the sharing of information about the proposed merger. In exchange for parties voluntarily filing their HSR materials with a liaison state, the signatories conditionally agree not to exercise their right to serve additional requests for information or other investigatory demands. The NAAG Compact was designed to benefit the states by providing notification of contemplated mergers prior to their consummation while the parties were spared the burden of complying with multiple discovery requests.

In 1987, the states also promulgated their own substantive merger guidelines. The NAAG Merger Guidelines were the result of an effort to bring uniformity to the states’ enforcement procedures, provide the business community with the standards used by the attorneys general in reviewing mergers, and uphold the congressional intent underlying the Clayton Act. Although there were significant differences between the federal merger guidelines adopted in 1984 and the NAAG Merger Guidelines, both were revised and generally harmonized in 1992 and 1993, respectively.

As the 1980s drew to a close, federal and state cooperation began to improve. In 1989, the Executive Working Group on Antitrust was formed to articulate and enhance common enforcement

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8 See 16 C.F.R. § 4.11(c) (1985).
9 771 F.2d 32 (2d Cir. 1985).
10 752 F.2d 116 (5th Cir. 1985).
objectives and to allow states access to HSR filing information. The Executive Working Group is comprised of the leadership from the two federal agencies and the state attorneys general from five states. Some benefits resulting from the Executive Working Group are enhanced federal/state cooperation and substantial reductions in duplication. State and federal enforcers reduced their goals to writing with the *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* (the “Protocol”). The Protocol describes procedures for strategic planning of merger review such as the division of responsibility for requesting and reviewing documents.

The most recent development in the relationship between federal and state antitrust enforcers involves the creation of the State/Federal Cooperation Committee in 2003. This committee acts under the auspices of the Executive Working Group and is comprised of three staff representatives from each of the two federal agencies and three state attorney general representatives. The committee meets on a monthly basis to address and resolve issues that arise from ongoing cases, as well as to identify specific procedures to use in joint investigations generally, with particular emphasis in the merger arena.

III. Benefits and Effectiveness of Dual State/Federal Merger Enforcement

The states are an essential component in our national system of merger enforcement. They protect vital public interests and lessen the likelihood of under-enforcement without imposing unfair

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or inconsistent conditions. The states have significantly reduced duplication and burden in merger investigations and litigation through meaningful coordination and joint effort amongst themselves, the parties and relevant federal authorities. Recent examples of meaningful coordination may be found by examining the Oracle\textsuperscript{13} litigation and Echostar\textsuperscript{14} investigation.

In Oracle, the twenty-nine participating states each entered into a confidentiality agreement with Oracle, wherein, among other things, Oracle agreed to provide up to six repository states with all documents it provided to DOJ. In fact, only three states (Maryland, New York, and Texas) were so utilized, with these states, in turn, shipping documents to the other involved states. Efficiencies were further enhanced and burdens on the parties lessened by the states’ and DOJ’s participation in coordinated interviews and depositions. Although defendants ultimately prevailed at trial, federal and state enforcers presented the strongest possible case by proceeding in a closely coordinated manner during the investigation and litigation of this case.

Echostar provides another illustration of successful coordination. In 2002, the DOJ, twenty-three states, the District of Columbia, and the Commonwealth of Puerto Rico filed suit to block the acquisition of Hughes Electronics Corp. (the operator of DirecTV direct broadcasting satellite service) by Echostar (the operator of the Dish direct broadcast satellite service). The states arranged meetings with technical experts on satellite functionality and capability. The states also provided

\textsuperscript{12} While such coordination is on the increase, it is clearly not a new concept. Indeed as noted nearly two decades ago: “The states have achieved uniformity and near unanimity in enforcement ideology and methodology, as evidenced in documents such as our . . . Merger Guidelines . . . and our Merger Compact. More importantly, we now closely coordinate our investigations and litigation.” Lloyd Constantine, Remarks at the 22nd Annual New England Antitrust Conference, Harvard Law School, The Antitrust Enforcement Agenda for the New Administration: The State Perspective (October 28, 1988).

\textsuperscript{13} United States v. Oracle Corporation, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

\textsuperscript{14} United States v. EchoStar Communications, Inc., No. 1:02CV02138 (E.S.H.) (D.D.C. 2002).
economic expertise to be used by both the states and the DOJ to assist in preparing for litigation of the case. Throughout the investigation, most meetings with the parties concerning economic and technical issues were held jointly with the states, as provided under the Protocol. The states established a liaison so that document production was handled by a single state. After the filing of the complaint, all aspects of the litigation were coordinated with DOJ. Shortly before formal discovery began, the parties abandoned the deal.

Before they decide to coordinate with federal enforcers in a merger review, states generally take into account two critical factors. First, states evaluate local market effects even if they ultimately work with the federal enforcers to review national mergers.¹⁵ Determining local market effects assists states in assuming their traditional focus on protecting consumers as parens patriae. Second, states consider whether the merger involves products purchased by the state or by governmental entities in the state.¹⁶

In Oracle, for example, the relevant products were financial management and human resources management software utilized by large and complex organizations such as governmental entities and educational institutions. In Echostar, the states focused on providing assistance in analyzing local markets. To this end, the states arranged to collect information from rural Multichannel Video Programming retailers as well as smaller cable systems operating in or near rural markets. In particular, they helped determine where cable competitors served a community and the level of competition those systems provided.

¹⁵ See 2005 NAAG Resolution, supra note 11 (“in merger cases, the effects of consolidation in national mergers are more often felt locally than nationally and state Attorneys General are at least as knowledgeable about those effects as are the federal antitrust agencies....”).

¹⁶ These factors explain the handful of local merger reviews undertaken by states acting singly or in small regional groups.
In 1996, California antitrust staffers under former Attorney General Dan Lungren worked very closely with the DOJ, and to some extent with the Federal Reserve economists, in reviewing the Wells Fargo/First Interstate Bank merger resulting in a sixty-six branch divestiture package. All of the branches were in California—many of them in Central Valley communities. During the phase of examining real-world conditions in numerous isolated local markets where market concentrations were very high, the California enforcer’s knowledge of geography and demography was invaluable to DOJ. In addition, while the federal enforcer’s economists studied special impacts on small business, California’s economist studied impacts on agricultural lending, especially crop loans, in which commercial banks have played an increasingly important role.

The long-honored tradition of strong merger enforcement by the states in regional and local mergers continues, either in conjunction with or exclusive of, federal agency participation. Because states tend naturally to focus on local markets they may know the geographic terrain, demography, economic make up and regulatory structure better than their federal counterparts. They may also have frequent contacts with public and private sector entities in the state and be in a position to identify quickly local issues and to interview local witnesses about potential market effects.

As noted by Professor Calkins in his discussion of the advantages and benefits of merger enforcement by state attorneys general:

For all the talk about globalization of competition, antitrust enforcement is routinely concerned about competition in local markets…. Intimate knowledge about local competitive conditions are essential to effective antitrust enforcement.

State attorneys general have a clear comparative advantage in understanding local markets. (citations omitted). It would make little sense for Washington-based enforcers trying to craft divestitures to remedy a grocery store merger, or debating about the viability of stores on different sides of some small town, not to consult with or involve a state enforcer who is more likely to be familiar with the history and current market dynamics of that area.

Accordingly (and predictably) states move aggressively against mergers that hit close to home, be it in banking,\(^{18}\) healthcare,\(^{19}\) petroleum,\(^{20}\) supermarkets,\(^{21}\) or waste processing.\(^{22}\)

The states, as a group, have looked closely at consolidations in the oil and gas industry over the last several years. States are familiar with the pipelines, the gathering systems, the refineries and the storage facilities in our respective states from having studied them in multiple transactions. As a result, the states took lead responsibility in examining retail gasoline effects in the case of Shell/Texaco and natural gas gathering markets in the case of Conoco/Phillips. Similarly, the states have looked closely at the consolidation among waste hauling and disposal firms. Because the details of permitting vary among the states, federal-state cooperation is a virtual necessity in this industry. Likewise, the state’s knowledge of local markets is invaluable in reviewing the delivery of healthcare. In California, for example, consumer access to healthcare services can be profoundly affected by the realities of traffic circulation within a metropolitan area. Information and


recommendations based on this awareness by state enforcers has proven extremely valuable to their federal counterparts when reviewing mergers of clinic-based health service companies. In the case of California’s state-only challenge to Sutter Health’s acquisition of Summit Medical Center, our analysis of the effects of traffic patterns in the San Francisco Bay area, while not adopted by the court, has been borne out subsequently in fact.

Often, much of the value added by the states is of a more qualitative nature that will not be readily apparent when looking only at final results. An example was the role played by the states in the proposed acquisition of Office Max by Office Depot. Several states filed declarations with the Court authenticating local newspaper advertisements or pricing surveys that substantiated head-to-head competition between the merging parties. These declarations played an important role in the FTC’s successful challenge to the merger.

The important role of the states in effective merger law enforcement is also demonstrated when a state opts to undertake enforcement action in the absence of similar action by federal enforcers. For example, Connecticut brought an action against the merger of the major heating oil terminals in New Haven Harbor involving the only meaningful input point for the pipeline that serves the state.23 Significantly, the Connecticut Attorney General did not learn of the merger until after its consummation, following premerger notification to federal regulators who not only failed to challenge the transaction, but also granted an early termination of the waiting period. Successful action by the state resulted in a consent decree containing important relief including a significant

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divestiture of the merged assets.\textsuperscript{24}

Federal and state coordination generally continues at the conclusion of an investigation as enforcers work together to harmonize consent decrees. For example, many state decrees expressly provide that a defendant’s conduct will not violate the state’s consent decree if such conduct is specifically required by a parallel DOJ or FTC order.\textsuperscript{25}

\section*{IV. Criticism of State Merger Enforcement}

Despite the many benefits arising from state merger enforcement, some critics have asserted unsubstantiated claims challenging the states’ authority and effectiveness. Some have argued that state attorneys general, in making enforcement decisions, are unduly influenced by parochial considerations such as the impact of the merger on employment or headquarters location within the state, rather than consumer welfare.\textsuperscript{26} The empirical basis for this criticism is remarkably thin. Even some of the critics themselves recognize that their criticism rests on anomalous examples and theoretical concerns. Professor Michael DeBow, for example, observes that, “[w]hile parochialism and externality concerns are theoretically well grounded, they do not find much empirical support in the states’ actions to date.”\textsuperscript{27} Later in the same article, he concluded that “the vast majority of [state merger] cases … appear, at least on the surface, to be concerned with the effects of the

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{25}] See \textit{California v. Albertson’s Inc.}, No. SACV 99-825 (final judgment and consent decree at 22) (C.D. Cal. 1999).
\item[\textsuperscript{26}] See, \textit{e.g.}, Richard Posner, \textit{Antitrust and the New Economy}, 68 Antitrust L.J. 925, 940 (2001); see also Richard Posner, \textit{Antitrust Law}, 281-82 (2d. ed. 2001).
\item[\textsuperscript{27}] Michael DeBow, \textit{State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal}, in \textit{Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy} 267, 275 (eds. Richard A. Epstein and Michael S. Greve, American Enterprise Institute 2004); see also \textit{id.}, 271 (Table 1 presenting the author’s research on the volume of state actions in antitrust during the years 1993 - 2002).
\end{itemize}
\end{footnotesize}
challenged merger on consumer welfare, rather than on local effects on employment or competitors.”

The lack of substance to alleged parochial concerns was noted years ago in an ABA report to the Antitrust Section Council:

To date there is little evidence that the various problems potentially raised by concurrent state and federal jurisdiction to investigate and challenge mergers have actually occurred.

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... While hypothetical state challenges to mergers with nationwide impact could raise serious concerns of conflicting jurisdiction, politicized enforcement decisions, inconsistent legal standards, oppressive burdens on the parties, and the general deterrence of beneficial mergers, actual examples of such abuses to date have been rare. The states seem generally to [have] acted responsibly, and in most cases conservatively, in the exercise of their merger enforcement authority.

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... Both state and federal governments have legitimate, recognized interests in protecting their citizens from the diminution of competition, including that resulting from anticompetitive mergers. Neither state nor federal interest is inherently more legitimate or more important than the other.

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... Until enforcement trends are clear and abuses (if any) are more common, there is much to be said for a cautious approach to major legislative “solutions” that would fundamentally alter the current balance between state and federal interests.

Little, if anything, has changed since this report was issued in 1989. More importantly, the handful of examples cited by critics are simply overwhelmed in number and success by the examples

28 Id. at 277; see also Lloyd Constantine, Antitrust Federalism, 29 Washburn L.J. 163, 181 (1990) (“[t]he lone attorney general titling at a national merger for inappropriate or parochial reasons, which is the bete noir of this debate, is in fact, also its unicorn.”).


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of state enforcement actions (many of them multi-state and many of them cooperative efforts with federal enforcers) which are in the mainstream of antitrust law and economics.\(^\text{30}\)

Another criticism of state enforcement has been that attorneys general bring meager resources to merger enforcement, often free-riding on federal efforts. According to these critics, merger enforcement would not suffer if it were the exclusive province of the federal enforcers.\(^\text{31}\) This criticism is belied by the states’ enforcement record, as detailed in these comments. There is no dispute that state merger enforcers bring substantially fewer resources to the table than do federal enforcers. Nonetheless, there are many examples of effective and appropriate independent state merger enforcement, as well as cooperative state-federal enforcement. The states cannot and do not investigate every merger investigated by the federal enforcers. Their decision to use their limited resources to investigate a particular merger reflects a judgment (often a collective judgment of several states) that the merger is particularly important to consumers within their state or states, and

\(^\text{30}\) Moreover, as noted in the ABA Report on Dual Enforcement,

> There is nothing in the legislative history or structure of the Clayton or HSR Acts that supports the notion that the states should defer to federal decisions not to challenge mergers. … [P]rivate litigation raises many of the same concerns and imposes many of the same costs and uncertainties. Yet, at least where the plaintiff has standing . . . there are few suggestions that private enforcement is inappropriate, merely because it exists concurrently with federal authority.

ABA Report on Dual Enforcement, \textit{supra} note 29, at 59-60. To the limited extent there is some divergence, it is instructive to note (as we also have done in our comments to this Commission regarding the indirect purchaser issue):

> Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market. It reminds legislators, courts and scholars that, on many key issues, reasonable minds may differ and that, because society has conflicting and overlapping desires, there may not be one single answer.


\(^\text{31}\) Posner, \textit{Antitrust Law, supra} note 26, at 241.
that the matter represents a high priority allocation of resources. These necessarily prioritized enforcement efforts should not be a source of concern to anyone who believes in the value of merger enforcement to the economy and to consumers. To the contrary, the record demonstrates that state enforcers not only supplement and extend federal resources, but also independently bring important and groundbreaking cases.33

V. Conclusion

The states believe the multi-level enforcement system created by our federal and state antitrust laws is a positive and powerful process by which anticompetitive conduct can be identified and minimized.

As detailed above, a review of merger work done by states in the last decade confirm that states mainly (1) are involved in reviews of mergers that may have a specific effect on consumers of their states, (2) follow mainstream antitrust jurisprudence in both joint and individual reviews and (3) coordinate efforts in joint investigations, regularly deferring leadership to the federal agency involved in joint reviews. Complaints of questionable unilateral investigations or burdensome joint reviews are generally unsubstantiated and exaggerated. Uncertainties as to when or how an attorney general will commence and proceed with a merger review are minimal.

Acknowledging that multiple enforcers involved in a single merger review may present some inefficiencies and possible conflicting results, state attorneys general and the federal agencies have established formal and informal procedures to maximize benefits and minimize negatives of joint


33 In the latter category are such matters as New York's successful challenge of a "virtual merger" between hospitals in the Poughkeepsie area. New York v. St. Francis Hospital, 2000-2 Trade Cases (CCH) ¶ 72,649, 2000 WL 1804194 (S.D.N.Y 2000).
enforcement. The process of joint investigations makes it imperative to have continuing discussions between and among enforcers, and this is being addressed by the Executive Working Group and its State/Federal Cooperation Committee. Logistical concerns such as how to maintain privileges and confidentiality as well as how to standardize and improve joint document review can best be identified and resolved by the staff members of the Committee within the policies established by the Executive Working Group members. This ongoing work, on both levels, further addresses expressed concerns.

The multi-level enforcement system may theoretically present some inefficiencies and possible conflicting results. However, such perceived shortcomings of this system are far outweighed by its benefits, and do not justify the implementation of radical measures that would reduce or eliminate the jurisdiction or standing of the state attorneys general in merger reviews. I respectfully submit that the present state merger enforcement scheme is beneficial and should remain in place unabrogated.

[Note: Charts of enforcement activity by the states of Maryland and Texas are attached.]
<table>
<thead>
<tr>
<th>YEAR</th>
<th>PARTIES</th>
<th>INDUSTRY</th>
<th>ACTION TAKEN/COMMENT</th>
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<tr>
<td>1985</td>
<td>Conrail/Norfolk Southern</td>
<td>Rail transportation</td>
<td>Investigated local impact; merger not opposed.</td>
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<tr>
<td>1989</td>
<td>Pars/Data II</td>
<td>Airline reservations systems</td>
<td>Settlement Agreement w/State AG's.</td>
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<tr>
<td>1989</td>
<td>Coors/Strohs</td>
<td>Beer</td>
<td>Merger not consumated.</td>
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<tr>
<td>1990</td>
<td>Blockbuster/Errols</td>
<td>Video rental market</td>
<td>Investigation of local impact, with FTC; analysis of evidence determined that insufficient evidence of potential monopoly rents existed, merger not opposed.</td>
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<tr>
<td>1991</td>
<td>Rite Aid/Revco</td>
<td>Drug Stores</td>
<td>Investigation of local impact, 3rd party purchaser intervened to acquire Revco.</td>
</tr>
<tr>
<td>1991</td>
<td>Systems Control/Hamilton Industries</td>
<td>Motor Vehicle Emission Testing Systems</td>
<td>Investigated with FTC; merging companies were active bidders on State contracts; merger not opposed.</td>
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<tr>
<td>1992</td>
<td>MNC/Nations Bank</td>
<td>Banking</td>
<td>Investigation of local impact; w/DOJ; consent decree w/divestitures.</td>
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<tr>
<td>1994</td>
<td>Winner/Beltway</td>
<td>Beer Distribution</td>
<td>MD investigation, acquisition not opposed.</td>
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<tr>
<td>1994</td>
<td>BFI/Attwoods</td>
<td>Waste Hauling</td>
<td>MD &amp; FL investigation w/DOJ, Consent Decree filed.</td>
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<tr>
<td>1995</td>
<td>BFI/DRJ</td>
<td>Waste Hauling</td>
<td>MD investigation; MD intervened in Bankruptcy Court to oppose acquisition. DRJ sold to 3rd party.</td>
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<tr>
<td>1995</td>
<td>Greenspring Dairy/Cloverland Dairy</td>
<td>Dairy products</td>
<td>MD investigation, w/DOJ; acquisition not opposed.</td>
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<tr>
<td>1996</td>
<td>Cargill/AKSO</td>
<td>Rock Salt</td>
<td>Investigation of local impact w/DOJ and multistate group.</td>
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<tr>
<td>1997</td>
<td>Baltimore Sun/Patuxent papers</td>
<td>Newspaper advertising</td>
<td>MD investigation, w/DOJ, acquisition not opposed.</td>
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<tr>
<td>1997</td>
<td>Staples/Office Depot</td>
<td>Office products</td>
<td>Investigation of local impact/w/FTC; supported FTC Motion for Preliminary Injunction w/Amicus Brief</td>
</tr>
<tr>
<td>1998</td>
<td>Exxon/Mobil</td>
<td>Gasoline</td>
<td>Investigation of impact on local retail gasoline market; w/FTC and multistate group. Consent Decree filed w/divestitures.</td>
</tr>
<tr>
<td>Year</td>
<td>Case Name</td>
<td>Industry</td>
<td>Description</td>
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<tr>
<td>1998</td>
<td>Royal Ahold/Giant Food</td>
<td>Grocery stores</td>
<td>Investigation of local impact, w/FTC. Consent Decree filed w/divisitutes of Maryland stores. MD not on Consent Decree.</td>
</tr>
<tr>
<td>1998</td>
<td>Transactive/City Corp.</td>
<td>Electronic Benefit Transfer Services</td>
<td>Investigation w/DOJ; DOJ filed Complaint. MD State official served as government witness.</td>
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<tr>
<td>1998</td>
<td>Bell Atlantic/GE</td>
<td>Phone Service</td>
<td>MD investigated local market w/DOJ.</td>
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<tr>
<td>1998</td>
<td>MCI/World Com</td>
<td>Long distance phone service</td>
<td>MD investigation w/DOJ and multistate group, Consent decree filed, MD not one of filing States.</td>
</tr>
<tr>
<td>1999</td>
<td>MARTA/Envirotest</td>
<td>Emission Testing Services</td>
<td>MD investigation on narrowing of bidders market on State contract; acquisition not opposed.</td>
</tr>
<tr>
<td>1999</td>
<td>H&amp;S Bakery/Schmidt Baking Co.</td>
<td>Governmental bread purchases</td>
<td>MD investigation, acquisition not opposed.</td>
</tr>
<tr>
<td>1999</td>
<td>Aetna/Prudential Health Care</td>
<td>HMO's</td>
<td>MD investigated local market, w/DOJ and multistate group. No Maryland impact.</td>
</tr>
<tr>
<td>1999</td>
<td>Allright/Central Parking</td>
<td>Parking garages</td>
<td>MD investigation, w/DOJ and multistate group. Consent Decree filed, MD did not join.</td>
</tr>
<tr>
<td>2000</td>
<td>Fidelity National Financial/Chicago Title</td>
<td>Title insurance</td>
<td>Advice and assistance on antitrust markets to MD Insurance Administration.</td>
</tr>
<tr>
<td>2000</td>
<td>Long &amp; Foster/Grempler Realty</td>
<td>Residential real estate</td>
<td>Merger not opposed.</td>
</tr>
<tr>
<td>2000</td>
<td>United/US Air</td>
<td>Airline</td>
<td>Investigation of local and national markets w/DOJ and multistate group. Merger abandoned.</td>
</tr>
<tr>
<td>2001</td>
<td>Reliant/Orion</td>
<td>Electric Power</td>
<td>MD investigation, acquisition not opposed.</td>
</tr>
<tr>
<td>2001</td>
<td>Churchill</td>
<td>Wine spirits distributors</td>
<td>MD investigation, acquisition not opposed.</td>
</tr>
<tr>
<td>2001</td>
<td>EchoStar/Hughes</td>
<td>Satellite TV Subscription services</td>
<td>MD investigation of local market; w/DOJ &amp; multistate group; merger abandoned.</td>
</tr>
<tr>
<td>2002</td>
<td>Comcast/AT&amp;T</td>
<td>Cable TV</td>
<td>Investigation of impact in MD; w/DOJ and multistate group.</td>
</tr>
<tr>
<td>2002</td>
<td>Waste Management/Republic</td>
<td>Waste Collection</td>
<td>MD merger investigation of sale of Republic's Central Maryland assets to Waste Management; acquisition not opposed.</td>
</tr>
<tr>
<td>2002</td>
<td>TransCorp/Mark IV Merger</td>
<td>Transponder (EZPASS) market</td>
<td>Multistate group/ merger abandoned.</td>
</tr>
<tr>
<td>2002</td>
<td>Allied/Republic</td>
<td>Waste Collection</td>
<td>MD merger investigation of sale of Republic's Eastern Shore assets to Waste Management; acquisition not opposed.</td>
</tr>
<tr>
<td>2003</td>
<td>First Data/Concord</td>
<td>Electronic Payment System networks</td>
<td>Investigation of impact in MD; w/DOJ and multistate group; Consent Decree filed, MD did not join.</td>
</tr>
<tr>
<td>Year</td>
<td>Merger</td>
<td>Industry</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>------------------------------</td>
<td>-------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>2003</td>
<td>Oracle/People Soft</td>
<td>Enterprise Software</td>
<td>Multistate and DOJ/ MD joined DOJ &amp; States lawsuit.</td>
</tr>
<tr>
<td>2004</td>
<td>Waste Management/ Allied</td>
<td>Waste Collection</td>
<td>Investigation w/DOJ of acquisition by WMI of Allied's Western Maryland assets; merger abandoned.</td>
</tr>
<tr>
<td>2005</td>
<td>Davita/Gambro</td>
<td>Kidney dialysis centers</td>
<td>Open</td>
</tr>
<tr>
<td>2005</td>
<td>Federated/May</td>
<td>Department Store chains</td>
<td>Open</td>
</tr>
<tr>
<td>2005</td>
<td>AMC/Loews</td>
<td>Movie Theatre chains</td>
<td>Open</td>
</tr>
<tr>
<td>Merging Parties</td>
<td>Industry</td>
<td>Date</td>
<td>Participants</td>
</tr>
<tr>
<td>-----------------------------------------------------</td>
<td>---------------------------------------------------</td>
<td>-------</td>
<td>-----------------------------</td>
</tr>
<tr>
<td>American General/Unitrin Corporation</td>
<td>Home Service (Burial Insurance)</td>
<td>1995</td>
<td>4-5 states</td>
</tr>
<tr>
<td>Columbia HCA/Healthtrust Hospital</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1995</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Kimberly Clark/Scott Paper</td>
<td>Paper products</td>
<td>1995</td>
<td>DOJ and Texas as state rep</td>
</tr>
<tr>
<td>St. Anthony's/High Plains Baptist (Amarillo)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1995</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Archer Daniels Midland/Gruma</td>
<td>Corn tortilla flour</td>
<td>1996</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Columbia HCA, Inc./St. David's Hospital JV (Austin)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1996</td>
<td>Texas only</td>
</tr>
<tr>
<td>IBP Inc./Vernon Calhoun Meat Packing</td>
<td>Meatpacking</td>
<td>1996</td>
<td>Texas only</td>
</tr>
<tr>
<td>Lubbock Methodist/St. Mary of the Plains (Lubbock)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1996</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Spohn/Christus Health/Memorial Hospitals (Corpus Christi TX)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1996</td>
<td>Texas only</td>
</tr>
<tr>
<td>Ultramar Diamond Shamrock/Phillips 66</td>
<td>Oil and gas</td>
<td>1996</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Union Pacific/Southern Pacific RR</td>
<td>Rail transportation</td>
<td>1996</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>USA Waste Services, Inc./Sanfill, Inc.</td>
<td>Waste Hauling/Disposal</td>
<td>1996</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Allied/USA Waste (FL Worth)</td>
<td>Waste Hauling/Disposal</td>
<td>1997</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>BRC/AIS</td>
<td>Election equipment</td>
<td>1997</td>
<td>DOJ and 8 states</td>
</tr>
<tr>
<td>Compaq Computer/Tandem</td>
<td>Computer Manufacturing</td>
<td>1997</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Hanson PLC/Concrete Pipe and Products</td>
<td>Concrete pipe products</td>
<td>1997</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Loewen/Services Corp International (Hostile takeover bid)</td>
<td>Death care</td>
<td>1997</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Mid-America, Southern Foods, Milk Products</td>
<td>Fluid milk processing</td>
<td>1997</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>PCA/Humana</td>
<td>HMOs</td>
<td>1997</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Wichita General Hospital/Bethania Hospital (Wichita Falls)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1997</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>American Home Products/Monsanto</td>
<td>Agricultural Technology</td>
<td>1998</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>ADI/CompuServe</td>
<td>Internet Access</td>
<td>1998</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Central and Southwest Corporation /American Electric Power</td>
<td>Electric power</td>
<td>1998</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Cinemex/Odeon Theaters/Sony-Loews</td>
<td>Movie Theaters</td>
<td>1998</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Humana/United HealthCare Corp</td>
<td>HMOs</td>
<td>1998</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>MCI/WorldCom</td>
<td>Internet backbone</td>
<td>1998</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Merging Parties</td>
<td>Industry</td>
<td>Date</td>
<td>Participants</td>
</tr>
<tr>
<td>-----------------</td>
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</tr>
<tr>
<td>Monsanto/DeKalb</td>
<td>Corn seed technology</td>
<td>1998</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Nations Bank/Bank of America</td>
<td>Banking</td>
<td>1998</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Nations Bank/Boatman's</td>
<td>Banking</td>
<td>1998</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Service Corp International/Equity Corp International</td>
<td>Funeral Services</td>
<td>1998</td>
<td>FTC and 8 states</td>
</tr>
<tr>
<td>Sisters of Charity/Columbia HCA, Inc. S.E. Texas Hospitals (Beaumont TX) USA Waste Services, Inc. / Waste Management</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1998</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Astha U.S. Healthcare/Prudential Healthcare</td>
<td>HMOs</td>
<td>1999</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>APAC, Inc./Buster Paving</td>
<td>Paving/Concrete</td>
<td>1999</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Apple Computer/Power Computing</td>
<td>Computer Manufacturing</td>
<td>1999</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Baylor Healthcare System/Texas Health Resources (DFW)</td>
<td>Parking</td>
<td>1999</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Central Parking/Allright Parking</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1999</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Columbia HCA Healthcare Corp./Memorial Hermann Healthcare System (Pasadena) Exxon/Mobil</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>1999</td>
<td>Texas only</td>
</tr>
<tr>
<td></td>
<td>Oil and Gas</td>
<td>1999</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Monsanto/Delta &amp; Pineland SBC/Ameritech</td>
<td>Cotton seed technology</td>
<td>1999</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td></td>
<td>Telecommunications</td>
<td>1999</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Sprint/MCI World Com</td>
<td>Telecommunications</td>
<td>1999</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>El Paso Natural Gas/PG&amp;E</td>
<td>Oil and Gas</td>
<td>2000</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Harris Methodist Health Plan/PacifiCare (DFW) Kroger/Winn-Dixie (Texas and Okla)</td>
<td>HMOs</td>
<td>2000</td>
<td>Texas only</td>
</tr>
<tr>
<td></td>
<td>Grocery stores</td>
<td>2000</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Phillips/Chevron (Jt venture of chemical ops)</td>
<td>Chemical</td>
<td>2000</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Texas Health Resources (St. Paul Medical Center/Zale Lipshy University Hospitals (Dallas) United Airlines/USAir</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>2000</td>
<td>Texas only</td>
</tr>
<tr>
<td></td>
<td>Airline transportation</td>
<td>2000</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Varian Medical Systems/Ampac</td>
<td>Radiation treatment (oncology)</td>
<td>2000</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>American Electric Power/EnronCorporation (Houston Pipeline)</td>
<td>Natural gas pipeline</td>
<td>2001</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Baylor Health System/All Saints Hospital (Ft. Worth)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>2001</td>
<td>Texas only</td>
</tr>
<tr>
<td>Merging Parties</td>
<td>Industry</td>
<td>Date</td>
<td>Participants</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>------------------------------</td>
<td>-------</td>
<td>--------------------------------</td>
</tr>
<tr>
<td>Chevron/Texaco</td>
<td>Oil and gas</td>
<td>2001</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Hewlett Packard/Compaq Phillips/Tosco</td>
<td>Computer Manufacturing</td>
<td>2001</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Seton Healthcare/St David's Health Partnership (Austin)</td>
<td>Oil and Gas</td>
<td>2001</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Texas Health Resources, Inc (McCusision)/Christus Health Systems (Hospital acquisition, Paris TX)</td>
<td>In-patient psych services</td>
<td>2001</td>
<td>Texas only</td>
</tr>
<tr>
<td>Ultramar Diamond Shamrock/Valero Energy Corp.</td>
<td>Oil and Gas</td>
<td>2001</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Wells Fargo/Marquette (First State Bank of Texas &amp; First National Bank of Texas)</td>
<td>Banking</td>
<td>2001</td>
<td>DOJ and Texas</td>
</tr>
<tr>
<td>Baylor Healthcare System/All Saints Hospital (DFW Metroplex)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>2002</td>
<td>Texas only</td>
</tr>
<tr>
<td>Conoco/Phillips 66</td>
<td>Oil and Gas</td>
<td>2002</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Dean Foods and Suiza Foods</td>
<td>Fluid milk processing</td>
<td>2002</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>EchoStar/Hughes Corporation(DirecTV)</td>
<td>Satellite TV</td>
<td>2002</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Winn Dixie/Brookshire (DFW)</td>
<td>grocery stores</td>
<td>2002</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Archer Daniels Midland/Chickasha Oil Mill (TX Panhandle)</td>
<td>Agricultural processing</td>
<td>2003</td>
<td>Texas only</td>
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<tr>
<td>Caremark/Advance PCS</td>
<td>Prescription Benefit</td>
<td>2003</td>
<td>FTC and 26 states</td>
</tr>
<tr>
<td>UniVision/Hispanic Broadcasting Co (HBC)</td>
<td>Management Spanish Language TV</td>
<td>2003</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Arch Coal/Triton</td>
<td>Low-sulphur coal</td>
<td>2004</td>
<td>FTC and multiple states</td>
</tr>
<tr>
<td>Bank One/JP Morgan Chase</td>
<td>Banking</td>
<td>2004</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Christus Healthcare (Spohn)/Triad Hospitals, Inc. (Alice TX)</td>
<td>In-patient hospital</td>
<td>2004</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>First Data Corporation/Concord EFS</td>
<td>ATM Services</td>
<td>2004</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Oracle Corporation/PeopleSoft</td>
<td>Software</td>
<td>2004</td>
<td>DOJ and multiple states</td>
</tr>
<tr>
<td>Plains Energy/Link Resources</td>
<td>Crude oil pipelines</td>
<td>2004</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Tenet Healthcare Corporation/Valley Baptist (Brownsville TX)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>2004</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Triad Hospitals, Inc./Texas Health Resources (Denton TX)</td>
<td>In-Patient Acute Care Hospital Services</td>
<td>2004</td>
<td>FTC and Texas</td>
</tr>
<tr>
<td>Merging Parties</td>
<td>Industry</td>
<td>Date</td>
<td>Participants</td>
</tr>
<tr>
<td>-------------------</td>
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<td>-------------------</td>
</tr>
<tr>
<td>Cingular/AT&amp;T Wireless</td>
<td>Cellular Telephone</td>
<td>2005</td>
<td>DOJ and multiple states</td>
</tr>
</tbody>
</table>