Chapter II

Enforcement Institutions and Processes

In the United States, in addition to the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), fifty states and the District of Columbia are authorized to enforce federal antitrust laws as *parens patriae*, including in instances where the federal enforcers might have chosen not to challenge a transaction or conduct. Each state also has its own antitrust laws, which generally parallel federal law. In addition, numerous international competition authorities have begun to pursue enforcement much more aggressively, sometimes at odds with U.S. enforcement policies.

Principles of federalism and sovereignty support the authority of these many enforcers. Their existence is not without costs, however. Multiple enforcers may investigate the same conduct or transaction, increasing the burdens on companies and, ultimately, costs to consumers. In addition, different authorities may have divergent views as to how antitrust law should apply to certain types of conduct or mergers. These differences potentially subject companies to a range of different legal obligations, thus either imposing substantial compliance costs or compelling companies to follow the rules of the most restrictive jurisdiction. Multiple enforcers also may seek different remedies with respect to the same conduct or transaction, whether because they view the merits of the conduct or merger differently, or because the applicable law compels a different outcome. All of these differences across antitrust authorities have the potential to impose costs and inefficiencies on companies that may be passed on to consumers.

Of course, antitrust compliance and enforcement will always impose some costs on companies, regardless of the number of enforcers. It is important, however, to ensure that those costs do not overwhelm the benefits of antitrust enforcement or undermine consensus about the value of a strong antitrust enforcement regime. Enforcers should strive to avoid the imposition of unreasonable costs—for example, costs not reasonably justified by legitimate needs to gather further evidence or that could be avoided by coordination with, or deference to, other antitrust enforcers.

The Commission was urged to examine the need for multiple enforcers and the costs that multiple enforcers impose. In particular, it was suggested that the Commission consider whether it is necessary to maintain two federal enforcement agencies—the DOJ and the FTC—to enforce the antitrust laws and whether it is necessary, or even appropriate, for states to enforce federal antitrust law as *parens patriae*. In addition, many commenters expressed concern about international enforcement, including the potential that other jurisdictions might apply their competition laws to discriminate against U.S.-based companies, that international trade might be adversely affected by the policies of other jurisdictions that may be more restrictive than those of the United States, or that other regimes might be more hostile to intellectual property rights.

These important and interrelated questions focus attention directly on the procedural mechanisms used to enforce the antitrust laws. Accordingly, the Commission undertook to study a range of issues relevant to enforcement institutions and processes. The recommendations set forth in this Chapter address: (A) the consequences and costs of having two principal federal antitrust enforcers; (B) the costs of the merger review process used by the FTC and the DOJ pursuant to the Hart-Scott-Rodino Act; (C) the authority of the states independently to enforce federal antitrust laws; and (D) the implementation of mechanisms to enhance international cooperation in antitrust matters and appropriate convergence toward similar procedural and substantive approaches under each nation's antitrust laws.

Chapter II.A
Dual Federal Enforcement

1. INTRODUCTION

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have shared responsibility for government enforcement of the federal antitrust laws for decades. The position of Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within the Department of Justice thirty years later.[1] Congress separately created the FTC in 1914, in part specifically to supplement the DOJ's enforcement of the antitrust laws.[2] Congress also believed that an administrative agency—conducting administrative adjudication of antitrust cases, and vested with broad information-gathering powers—would be a better vehicle for developing more flexible standards of antitrust law than were the courts.[3]

The antitrust enforcement authority of the DOJ and the FTC are similar. The DOJ enforces the Sherman Act and the Clayton Act through civil actions, and may also criminally prosecute certain "hard core" offenses under the Sherman Act. The FTC enforces the antitrust laws through Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition," a term that is generally coextensive with the prohibitions of the Sherman and Clayton Acts.[4] In addition to actions in federal court, the FTC may enforce Section 5 through internal administrative litigation (known as Part III proceedings) before an administrative law judge, with review by the five FTC Commissioners and then a federal court of appeals.[5]

This system of "dual enforcement" has been the subject of periodic debate. Critics contend that having two agencies enforce the federal antitrust laws entails unnecessary duplication and can result in inconsistent antitrust policies, additional burdens on businesses, or other obstacles to efficient and fair federal antitrust enforcement. Some have suggested eliminating the FTC's antitrust authority; others propose reallocating nearly all antitrust enforcement authority to the FTC, with the DOJ prosecuting only criminal violations of the Sherman Act.

The Commission recommends no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws.[*] There appears to have been little, if any, duplication of effort between the two agencies, and they typically have worked together to develop similar, if not identical, approaches to substantive antitrust policy.[6] Although concentrating enforcement authority in a single agency generally would be a superior institutional structure,[7] the significant costs and disruption of moving to a single-agency system

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[*] Commissioners Kempf, Litvack, and Shenefield would recommend eliminating the FTC's antitrust enforcement authority and vesting responsibility for all antitrust enforcement with the DOJ.

at this point in time would likely exceed the benefits.[8] Furthermore, there is no consensus as to which agency would preferably retain antitrust enforcement authority.

Because the Commission concluded that consolidation or reallocation of authority is not worth the costs (and any such efforts would likely be politically very difficult), the Commission focused its study and recommendations on the areas in which dual enforcement appears to have the most significant negative consequences. In particular, concerns regarding efficiency and fairness remain in the area of merger enforcement, where both agencies are responsible for enforcing the Clayton Act through the Hart-Scott-Rodino Act (HSR Act) premerger notification system. The Commission studied two particular ways in which having two agencies creates inefficiencies or unfairness to merging parties in certain situations.

First, the Commission reviewed the process through which the DOJ and the FTC decide which agency will investigate a proposed merger (known as the "clearance process"). In some instances—most frequently high-profile mergers between large companies—the agencies take a lengthy time, sometimes exceeding thirty days, to decide which agency will conduct the investigation of the merger. These delays impose significant burdens on companies with time-sensitive transactions that potentially provide great value to consumers and shareholders alike. The agencies attempted to address these concerns in 2002 by entering into an agreement regarding the clearance process that sought to ensure a decision would be made within ten days. However, the agencies abandoned this agreement after congressional opposition to its provisions allocating mergers based on industry area. The delays the agreement appeared to alleviate remain.

Second, the FTC and the DOJ take different approaches when seeking an injunction from a court to block a merger, in part because of the different statutes governing their authority in such instances. The DOJ generally seeks a permanent injunction (along with a preliminary injunction) against mergers it believes are anticompetitive, resolving the question fully and completely in a single proceeding before a judge. If the DOJ fails to obtain the permanent injunction it seeks, the parties can consummate the merger without further antitrust litigation (assuming the DOJ does not appeal). In contrast, the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court when challenging mergers it believes are anticompetitive. The FTC's approach permits it to seek permanent relief in administrative Part III proceedings if it fails to obtain a preliminary injunction. Thus, although the parties can consummate the proposed transaction (absent a stay), antitrust litigation may continue for the merged parties while the FTC pursues permanent relief via Part III proceedings. Such administrative litigation can be lengthy, leaving a completed transaction in the limbo of litigation for over a year. In addition, the statutory standard governing when the FTC is entitled to preliminary relief is arguably more favorable to the government than is the general standard governing motions by the DOJ for preliminary relief.

Some believe that these differences in DOJ and FTC practices and standards result in mergers' being treated differently depending on which agency is involved. The FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ. Regardless of the degree of effect, these factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ. Any such differences—real or perceived—can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger.

Based on its study of these issues, the Commission makes the following recommendations.

22. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.**

23. **To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.**[*]

24. **The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.**[†]

25. **Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.**[**]

[*] Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

[†] Commissioners Cannon and Yarowsky do not join this recommendation.

[**] Commissioners Burchfield, Garza, Jacobson, and Kempf do not join this recommendation.

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.*

2. THE MERGER CLEARANCE PROCESS

A. Background

Merger enforcement at both the DOJ and the FTC consists primarily of the review of proposed mergers pursuant to the HSR Act.[9] Although the DOJ and the FTC have concurrent, overlapping authority to review nearly all HSR-reportable transactions,[10] in practice only one agency takes responsibility for investigation of a particular merger. To eliminate duplication in agency merger enforcement efforts, the agencies decide between themselves which agency will conduct a formal investigation of a particular transaction.[11] They accomplish this through the "clearance process"—one agency requests authority to investigate a transaction from the other agency, which "clears" the request. Neither agency will request non-public information from the merging parties (or third parties) until clearance has been received from the other agency.[12]

A large majority of mergers reported under the HSR Act do not raise competitive concerns and therefore do not result in clearance requests by either agency. Indeed, in over 80 percent of transactions over the past five years, neither agency sought clearance.[13] In most other cases, one agency requests clearance, which the other agency grants quickly. Usually, such matters involve industries in which one agency has a long record of expertise and experience, which is the traditional basis for assigning a merger to one agency or the other.[14]

In a limited number of cases, however, both agencies seek clearance to investigate a transaction, and the agencies must jointly determine which agency will conduct the investigation. In some matters in which clearance is "contested," the dispute is relatively quickly resolved because one agency concedes the other has greater relevant expertise in the products or industry at issue. In other matters, however, resolution of the dispute takes more

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

steps. First, the staff of each agency submits a "claims memo," explaining that agency's relevant experience regarding the product or industry involved in the merger.[15] Then the dispute is passed to increasingly senior staff until it is resolved, sometimes by the Chairman of the FTC and the Assistant Attorney General for Antitrust.[16] As detailed below, these disputes can cause significant delays in the review of a merger.

The FTC and the DOJ have long recognized concerns over clearance delays and have periodically implemented procedures that aim to reduce those delays.[17] Indeed, they have long-standing procedures regarding clearance for both merger and non-merger investigations.[18] Most recently, in August 2001, then-FTC Chairman Timothy Muris and then-Assistant Attorney General Charles James launched an effort to address increasingly serious delays in clearance. After an internal review, and after seeking recommendations from former antitrust officials, the FTC and the DOJ in early 2002 reached agreement on a new clearance framework.[19]

The 2002 Clearance Agreement explicitly identified which industries would be the primary responsibility of each agency.[20] These allocations of responsibility generally were consistent with the existing practices of assigning a merger to the agency with greater experience and expertise in the particular industry.[21] Under the agreement, each agency had a "right of first refusal" to review transactions in industries within its primary responsibility; both agencies retained authority to seek clearance for mergers in industries allocated to the other agency.[22] Thus, the agreement did not transfer or alter "jurisdiction" over mergers in particular industries. This allocation (and the 2002 Clearance Agreement itself) was subject to review every four years.[23] Finally, in the event a dispute arose regarding a particular transaction, the agreement created a dispute resolution mechanism, proceeding though increasing levels of seniority to the agency head, and then, if necessary, to binding arbitration, with a specified time—ten days—within which a clearance decision was to be made.[24]

The 2002 Clearance Agreement was in effect for only about two months, at which point the Antitrust Division withdrew from the agreement at the direction of the Attorney General. This withdrawal followed objections by Senator Ernest Hollings (at the time the Ranking Member on both the Senate Commerce Committee and the Senate Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary) relating to certain of the industry allocations.[25] The FTC and the DOJ have not subsequently sought to implement a revised version of the 2002 Clearance Agreement, and have therefore continued to follow previous agreements regarding clearance.

B. Recommendations and Findings

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

Clearance disputes impose substantial costs in a small but meaningful number of mergers. Although clearance disputes are relatively infrequent, when they occur they can cause significant delays in the review of a proposed transaction, since neither agency can investigate until the dispute is resolved.[26] Because these disputes reduce the time for initial review, they impose costs on merging parties either by extending the wait before they may consummate the transaction or by leading to the unnecessary issuance of a costly and burdensome second request, and sometimes both.[27] These effects can be especially significant because the transactions that spark clearance disputes are often among the largest mergers with the most substantial implications (whether positive or negative) for the U.S. economy.[28] These disputes, and the costs they impose, ultimately undermine the effectiveness and efficiency of agency review of proposed transactions under the HSR Act, and their elimination is of particular importance.[29] Moreover, the disputes create tension in the normally cooperative relationship between the two agencies and undermine public confidence in the U.S. antitrust enforcement regime.[30]

In the most serious instances, a clearance dispute may consume so much time that the agency cannot conduct an initial competitive assessment within the statutory thirty-day waiting period. In this situation, the agency may issue a second request, thereby preventing the parties from completing the transaction until they have complied with the second request, and imposing upon the parties the burden of responding to that request.[31] More commonly, the agencies provide the parties with an option to withdraw their pre-merger notification and re-file it, which restarts the thirty-day waiting period and allows the parties to forestall issuance of a second request.[32] This approach, in essence, transforms the statutory thirty-day waiting period into a sixty-day waiting period, so that the parties must wait an additional thirty days before either consummating their transaction or receiving and responding to a second request.[33]

The average number of clearance disputes each year (including merger and non-merger) increased more than seven-fold, from an average of ten during FY1982–89 to an average of eighty-three during FY1990–2001.[34] By comparison, reported transactions rose only 74 percent.[35] The number of clearance disputes since 2002 has remained stable when adjusted for the number of HSR filings.[36] The reasons for the increase are not clear. Some commentators suggest that the increase in clearance disputes is, in part, the result of changes in the economy, such as increased convergence between industries that were formerly distinct, which has made the existing arrangements that relied on industry experience less effective at providing clear determinations.[37] Whatever the cause, it is clear that clearance disputes continue to affect a small but meaningful number of mergers notified under the HSR Act.

The delays from clearance disputes are significant, however measured. Data compiled in developing the 2002 Clearance Agreement show that clearance disputes delayed review of a transaction an average of 17.8 business days during a twenty-one-month period.[38] Even where only one agency sought clearance, there were numerous instances in which the other agency delayed granting clearance for more than one week; clearance in these matters took an average of 12.8 days to resolve.[39] Recent data provided to the Commission by the agencies show that clearance-related delays remain. The FTC and the DOJ calculate that, over the past seven years, the average time for clearing HSR Act merger matters when both agencies sought clearance was 10.7 business days after the HSR filing.[40] This figure likely understates the magnitude of the problem for two reasons. First, this average is based on 297 matters in which both agencies made a claim for clearance; it is not limited to those in which the dispute was sufficiently significant to warrant an exchange of claims memos, which occurred 92 times.[41] It is the latter type of matter in which clearance delays can be most pronounced. Second, the agency data provide only averages, and do not give any indication of the incidence of lengthy delays. The agencies were unable to provide to the Commission such detailed data, which, if available, could shed additional light on the problems posed by clearance delays.

A clearance system containing the central elements of the 2002 Clearance Agreement is the most effective way to address the problems besetting the clearance process. The 2002 Clearance Agreement received uniform praise for being a fair and effective solution to the clearance dispute problem, and would be a marked improvement over the existing clearance process.[42] Moreover, the current agency heads recognize that approach as superior to the current arrangement.[43] Experience with the 2002 Clearance Agreement, although it was in place for only a short time, confirmed its effectiveness in expediting the clearance process and decreasing the number of clearance disputes.[44]

Ultimately, of course, the agencies should have final responsibility for developing the details of an improved clearance system, given their greater familiarity with the issues involved.[45] Nevertheless, because the 2002 Clearance Agreement provides the best starting point for the development of an improved clearance system, the Commission wishes to highlight two significant features of that agreement that should be part of any new agreement.

The most significant feature of the 2002 Clearance Agreement was its allocation of areas of primary responsibility by industry area.[46] This minimized room for clearance disputes in the first place, permitting quick determinations in the sizable majority of cases. It also provided transparency and predictability to the business community with respect to which agency would review a particular transaction.[47] Furthermore, by making an express allocation by industry in advance, the 2002 Clearance Agreement made further acquisition of expertise irrelevant to clearance decisions. In doing so, the agreement eliminated the agencies' incentives to conduct unnecessary, or more extensive, investigations in ongoing cases to enhance claims of expertise for use in future disputes.[48] Similarly, the allocation eliminated the agencies' incentives to fight for clearance to review a particular merger in order to preserve its claims of expertise in future mergers in the same or similar industries.[49]

The Commission does not take a position on how industries should be allocated between the two agencies or the specific allocations in the 2002 Clearance Agreement. However, those allocations may provide a useful starting point for discussion, because they were based largely on the agencies' historical experience and resulted from extensive negotiation between the agencies.[50] Far more important than the specific allocations is finding a procedure that permits the agencies to reach clearance decisions quickly.[51]

A second feature of the 2002 Clearance Agreement that should be part of any new clearance system is a "tie-breaker" to govern in the event the agencies cannot quickly agree to a clearance decision.[52] The agreement used an arbitrator to break deadlocks so that a final decision was ensured within ten days of the initial clearance request.[53] The Commission does not take a position on what tie-breaker the agencies should use. Although arbitration can result in clearance to the agency with greater relative experience, it takes additional time.[54] By comparison, a random mechanism—such as a coin flip, a "possession arrow" that alternates which agency gets clearance in disputed matters, or allocation of disputed matters depending on whether the transaction is assigned an odd or even file number—provides a nearly instantaneous decision, but sacrifices allocating a merger to the agency with greater relevant expertise and may be subject to "gaming."[55] Regardless of how the agencies balance these competing concerns and which tie-breaker they decide is best, however, any clearance agreement they adopt should include some tie-breaking mechanism that ensures final resolution within a short period (no longer than nine days) from the initial filing.

Finally, the Commission urges Congress and the agencies to work together in developing a new clearance system. Congressional opposition led to the demise of the 2002 Clearance Agreement, and concern over the potential for renewed congressional opposition has prevented the FTC and the DOJ from seeking to implement a new clearance agreement since 2002.[56] To facilitate congressional support and guidance, the agencies should consult with the appropriate congressional committees in developing a new clearance agreement. Congress should encourage the agencies in this process and provide guidance to allow the agencies to implement a clearance agreement that is satisfactory to Congress.[57]

23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.*

The Commission also recommends that Congress enact a statute that requires the agencies to resolve clearance promptly. A statute will impose additional discipline on the agencies to ensure that clearance is resolved expeditiously. Furthermore, it will enhance the ability of Congress to use its oversight authority to monitor the agencies' compliance with the clearance requirement. Indeed, whether or not Congress enacts legislation in this area, the Commission believes that the timeliness of clearance dispute resolutions should be a part of Congress' continuing oversight of the agencies.

The legislation should require the agencies to make clearance decisions within a short period (*e.g.*, nine days) after the merging parties submit their pre-merger notification under the HSR Act. A period of this length is appropriate; indeed, the agencies have previously committed to resolving clearance within nine days from the date of filing.[58] The statute should not include a penalty for the failure of the agencies to comply with its terms, however, and Congress should make clear that the statute does not create any implied penalties (or rights) that would prevent effective merger enforcement on the merits of the transaction. A penalty that, for example, allowed the parties to consummate the transaction if the agencies failed to provide timely notification could harm consumers and would not effectively penalize the agency.[59] Rather, congressional oversight, facilitated by agency recordkeeping regarding compliance, should provide sufficient opportunity to impose any needed corrective action against the agencies.

Possible legislation that would impose such a requirement appears in Annex A.

* Commissioners Burchfield and Cannon do not join this recommendation.

Commissioner Burchfield notes that precatory, or even mandatory, congressional deadlines on agencies have rarely been effective in other contexts, and sees no reason to believe one would be more so here.

Although Commissioner Carlton joins this recommendation, he would impose some financial penalty on the agencies for failing to resolve clearance within the appropriate period.

3. INJUNCTIONS AND ADMINISTRATIVE LITIGATION IN MERGER MATTERS

A. Background

Both the FTC and the DOJ have essentially identical authority to conduct investigations under the HSR Act.[60] Both agencies are also authorized to seek an injunction in federal court to prevent consummation of a merger they believe may substantially lessen competition.[61] If the court grants an injunction, the parties almost always abandon the transaction because of the cost and uncertainty of keeping the deal in place while seeking reversal on appeal.[62] When a court denies the injunction, the parties typically complete the transaction nearly immediately (absent a stay by a court of appeals). Once a merger is completed, the agency is unlikely to seek any further action.[63]

Although both agencies have similar authority, their practices with respect to seeking permanent injunctions differ. Generally, the DOJ agrees with the parties to combine (or consolidate) proceedings for both a preliminary injunction and a permanent injunction before a district court.[64] The FTC's practice, in contrast, is to seek only a preliminary injunction in court (despite statutory authorization to seek permanent relief in court as well).[65] This practice results from its statutory authority to secure permanent relief through administrative litigation, an avenue not available to the DOJ. The FTC has never consolidated proceedings for preliminary and permanent relief in federal court in a merger case,[66] and has in fact affirmatively sought to prevent such consolidation.[67] The FTC's practice thus prevents consolidation under the rules of civil procedure.[68]

This difference in approach has two consequences. First, the DOJ generally faces a higher burden of proof before the court. Obtaining a permanent injunction requires the DOJ to prove its case by a preponderance of the evidence.[69] By comparison, the FTC needs to meet only a lower burden applicable to preliminary injunctions in government merger enforcement litigation (and, as explained below, the FTC arguably faces a preliminary injunction burden that is lower than that the DOJ would face if it sought only preliminary relief).[70] Second, the FTC, by not seeking a permanent injunction, retains the option to seek permanent relief through its internal administrative litigation process. It thus may pursue administrative litigation even when the district court does not grant a preliminary injunction.[71] In 1995 the FTC adopted a policy setting forth the circumstances in which it will bring administrative litigation after the denial of a preliminary injunction in merger cases.[72]

B. Recommendations and Findings

Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger.[73] A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties' assent to a consent decree.[74] So long as both agencies retain authority to enforce the antitrust laws, such divergence should be minimized or eliminated. To accomplish this objective, the Commission makes three interrelated recommendations for administrative action and legislative change that, together, will ensure that parties before either agency face comparable procedural approaches and burdens when an injunction is sought, regardless of which agency reviews their merger.

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.*

The differences in the agencies' policies regarding consolidation of actions for preliminary and permanent relief impose significantly different burdens on the parties in two respects. The DOJ usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions; it therefore must establish that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence.[75] By comparison, the FTC must meet the burden required for obtaining a preliminary injunction, which is generally regarded as lower.[76] Because the grant of any injunction (whether preliminary or permanent) almost always kills the deal, this difference could materially affect the parties' prospects for completing their transaction.[77] Second, the decision of the district court in a consolidated DOJ proceeding is final (barring an appeal); if the DOJ loses, the parties can be certain that the challenge is finished.[78] In contrast, if the FTC fails to obtain a preliminary injunction, it may pursue relief in a potentially lengthy and costly internal administrative proceeding.

The FTC has rarely sought administrative remedies after losing a preliminary injunction. This change in practice would eliminate that possibility altogether. The mere availability of such proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a challenge to a merger. It thus can give the FTC greater leverage in seeking concessions in a consent decree. Although the FTC has not pursued a full administrative trial after denial of a preliminary injunction in at least fif-

* Commissioners Cannon and Yarowsky do not join this recommendation.

teen years,[79] its policy regarding the circumstances in which it would seek administrative litigation following the denial of a preliminary injunction does not rule out the possibility that it may pursue this course.[80] Indeed, in 2005 the FTC left an administrative complaint pending against Arch Coal for over eight months after it had failed to obtain a preliminary injunction, and has acted similarly in the recent past.[81]

This recommendation calls for the FTC to conform its practice to the DOJ's current practice regarding consolidation and thereby eliminate the difference in burden resulting from the agencies' divergent practices. There does not appear to be any obstacle to the FTC's adoption of the DOJ's approach: Section 13(b) of the FTC Act permits the FTC to seek permanent, as well as preliminary, injunctions in federal court.[82] This recommendation contemplates that the FTC may, as the DOJ does now, condition its consent to consolidation on the parties' agreement to a reasonable timetable for pre-hearing matters, in order to permit the FTC sufficient time to prepare its case on the merits.[83] The FTC should be able to agree to a reasonable schedule, just as the DOJ generally has been able to reach such agreements with merging parties.[84] In instances where the FTC cannot agree with the parties on timing and therefore seeks only a preliminary injunction, however, it should also seek any permanent relief in court, as the DOJ does, not in administrative litigation.

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.*

The FTC's ability to pursue administrative litigation even after losing a preliminary injunction proceeding can impose unreasonable costs and uncertainty on parties whose mergers are reviewed by the FTC, as compared to the DOJ.[85] If, as recommended above, the FTC seeks permanent relief in federal court it will not be able to bring administrative proceedings to challenge mergers. Statutory change, however, will ensure that even where the FTC does not seek permanent relief in court, it will not be able to resort to administrative liti-

* Commissioners Burchfield, Garza, Jacobson, and Kempf do not join this recommendation.

Commissioner Burchfield would preserve the option of subsequent administrative proceedings for situations in which, for whatever reason, the preliminary injunction and permanent injunction phases are not consolidated. He also notes that removing the authority of the FTC would be practically meaningless so long as the FTC retains the ability to reinstitute administrative proceedings against a consummated merger.

Commissioners Garza and Jacobson believe that follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts. Because the FTC has already acknowledged this point in its internal policy, Commissioners Garza and Jacobson believe that statutory change is both unnecessary and potentially harmful.

gation.[86] As a result, an amendment of the statute to bar administrative litigation in HSR cases will provide further reason for the FTC to seek permanent relief in district court, as recommended above.

Elimination of administrative litigation in HSR Act merger cases will not deprive the FTC of an important enforcement option. Although administrative litigation may provide a valuable avenue to develop antitrust law in general,[87] it appears unlikely to add significant value beyond that developed in federal court proceedings for injunctive relief in HSR Act merger cases.[88] Whatever the value, it is significantly outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs. Indeed, the FTC's own conduct confirms holding administrative trials after losing an injunction rarely, if ever, adds significant value, as the FTC has not held an administrative trial regarding an HSR Act merger after losing a preliminary injunction motion in recent years.

The proposed statutory bar would not preclude the FTC from pursuing an administrative complaint after the consummation of a merger, based on evidence that the merger has had actual, as opposed to predicted, anticompetitive effects. In such circumstances, the merger is no longer in the time-sensitive stage of HSR Act review and should be subject to the FTC's usual administrative process.[89]

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.*

There is at least a perception, if not a reality, that the FTC and the DOJ face different standards for obtaining a preliminary injunction.[90] Some antitrust practitioners contend that the

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

Commissioner Burchfield believes the case law has become clear that, unless Congress has articulated a different standard for injunctive relief, as it did for the Endangered Species Act, 16 U.S.C. §§ 1531-1544, *see* Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978), the traditional equitable test governs the grant or denial of injunctions, *see* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), and eBay, Inc. v. MercExchange, LLC, 126 S. Ct. 1837 (2006). This evolving authority suggests that the DOJ and the FTC confront the same preliminary injunction standards. Further legislation on this issue is as likely to confuse as clarify.

Commissioners Garza, Jacobson, and Kempf join this recommendation but believe that the standard today is the same and that such legislation is not truly necessary. Nevertheless, clarification can do no harm and may be beneficial by removing possible doubts.

standard applicable to FTC actions, as applied by the courts, is less burdensome, or is generally perceived to be less burdensome, than the standard applicable to DOJ actions.[91] This difference (or even a perception of difference) can lead to adverse consequences for parties whose transaction is reviewed by the FTC. In particular, the FTC may have greater leverage in negotiating a consent decree with the merging parties.[92] In addition, just the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of the dual merger enforcement regime.

The agencies face nominally different standards governing whether a federal district court will issue a preliminary injunction. The FTC must meet a public interest standard under Section 13(b) of the FTC Act, which calls for an injunction to be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[93] Courts have employed a number of formulations in describing the required burden, such as whether the FTC raises questions that are "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation."[94] By comparison, Section 15 of the Clayton Act, pursuant to which the DOJ seeks injunctions, does not specify a standard for obtaining preliminary relief. Accordingly, courts generally apply a version of the traditional equity test, which does not require the usual showing of irreparable injury.[95] Some courts describe the proper test as "whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor."[96]

While the magnitude of the difference between the two standards is not clear, the Commission believes Congress should remove all doubt by ensuring that courts apply the same standard in ruling on a motion for a preliminary injunction, whether the injunction is sought by the FTC or the DOJ.[97] The Commission recommends that the statute omit any specific standard for granting a preliminary injunction, which should lead courts to employ the version of the traditional equity test that they use in merger cases brought by the DOJ. This change should not hamper the FTC's ability to obtain injunctive relief in appropriate cases;[98] on the contrary, its ability should be identical to that of the DOJ.

This statutory change should not extend beyond HSR Act merger cases. Section 13(b) gives the FTC general authority with respect both to competition and consumer protection cases. The Commission did not undertake to study whether this standard was inappropriate in other areas, particularly consumer protection. The legislation therefore should make clear that the existing statutory language of Section 13(b) would continue to apply to injunctions sought by the FTC in consumer protection and other non-HSR merger cases.

ANNEX A

Amend 15 U.S.C. § 18a to add subsection (e)(1)(B) as follows, and redesignate existing subsection (e)(1)(B) as subsection (e)(1)(C).

> No later than the end of the ninth day after the beginning of the waiting period as defined in subsection (b)(1)(A) of this section, the Federal Trade Commission or the Assistant Attorney General shall inform both persons (or in the case of a tender offer, the acquiring person) whether the Federal Trade Commission or the Assistant Attorney General will have the authority to issue a request for additional information (if any) pursuant to this subsection.

Notes

[1] *See* Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 Antitrust Bull. 695, 717–18 (1990) [hereinafter Gellhorn, *Has Antitrust Outgrown Dual Enforcement?*].

[2] D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319–20 (2003). *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 4–5 (2003).

[3] *See* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Dual Federal Merger Enforcement, at 2 (Oct. 28, 2005) [hereinafter ABA Comments re Dual Federal Merger Enforcement]; David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 Antitrust L.J. 1113, 1113–14 (2005) [hereinafter Balto, *Reassessing the Approach to FTC Remedies*] (citing Philip Elman, Antitrust Enforcement: Retrospect and Prospect, Remarks Before First New England Antitrust Conference (Mar. 31, 1967)). The FTC has specific authority to gather information, which it may use to "enhance the development of antitrust law through studies and publication of reports." Balto, *Reassessing the Approach to FTC Remedies*, at 1114; William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 Antitrust L.J., 861, 865–66 (2005) (emphasizing the importance of "competition policy R&D"); *see also* Guide to the Federal Trade Commission, *available at* http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm#bc (stating that "Congress created the FTC as a source of expertise and information on the economy" and noting as an example the FTC's research and policy work public workshops on issues such as the development of electronic marketplaces).

[4] 15 U.S.C. § 45. Section 5 of the Federal Trade Commission Act generally covers conduct condemned by the Sherman, Clayton, and Robinson-Patman Acts, but in some circumstances it may cover unfair methods of competition that are not unlawful under those laws. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); *see also* American Bar Association, Section of Antitrust Law, Antitrust Law Developments 647–56 (6th ed. 2007) [hereinafter Antitrust Law Developments] (describing antitrust laws and other laws that the FTC is authorized to enforce and its authority under Section 5 of the FTC Act). The FTC does not have criminal enforcement authority.

[5] *See* 15 U.S.C. § 45(b)–(c); 16 C.F.R. § 3 (2006). In merger cases, the FTC may seek a preliminary or permanent injunction in federal court. 15 U.S.C. § 53(b).

[6] *See* Federal Enforcement Institutions Transcript at 102 (Sohn) (Nov. 3, 2005) (discounting the need for diversity in decision makers in merger regulation since "[t]he agencies have gone to considerable pains

to get together on the substance of Section 7"); Prof. Timothy J. Muris, Statement at AMC Federal Enforcement Institutions Hearing, at 15 (Nov. 3, 2005) [hereinafter Muris Statement re Federal Enforcement] (describing the agencies' efforts "to develop[] common substantive standards and to apply[] them consistently" in merger regulation). The agencies' joint development of the *Horizontal Merger Guidelines* and the *Commentary on the Horizontal Merger Guidelines* has facilitated this convergence.

7 *See, e.g.*, Joe Sims, Statement at AMC Federal Enforcement Institutions Hearing, at 2 (Nov. 3, 2005) [hereinafter Sims Statement] ("[n]o sensible person would design" a dual system); Federal Enforcement Institutions Trans. at 51 (Blumenthal) (in advising other jurisdictions "doing it from scratch, you probably would design it differently . . . [with] one independent agency"); Gellhorn, *Has Antitrust Outgrown Dual Enforcement?*, at 736 ("[D]ual enforcement is at best inefficient, and at worst inconsistent with sound economic policy."); William E. Kovacic, *Downsizing Antitrust: Is it Time to End Dual Enforcement?*, 41 Antitrust Bull. 505, 515, 521, 535 (1996). *But see* Federal Enforcement Institutions Trans. at 85 (Sohn) ("I think there are strong arguments for having both an FTC and a Justice Department at the federal level."); American Antitrust Institute, Public Comments Submitted to AMC Regarding Enforcement Institutions, at 2 (July 15, 2005) [hereinafter AAI Comments re Enforcement Institutions] (dual enforcement can promote a "diversity of viewpoints and policy competition over what merger enforcement policy and cases are best").

8 *See* Deborah Platt Majoras, Statement at AMC Barnett/Majoras Hearing, at 14 (Mar. 21, 2006) ("[C]hang[ing] the current system would come at a cost that would not be offset by countervailing benefits."); Federal Enforcement Institutions Trans. at 51 (Blumenthal) (arguing that the system generally works well and that the transition costs are substantial relative to any inefficiencies of the current system); *Nomination of Robert Pitofsky to be Chairman of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 104th Cong. 13 (1995) (statement of Robert Pitofsky) (explaining that, although one might not have to set up the antitrust agencies this way in the first place, "the fact of the matter is it works rather well"). *See generally Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 113–19 (1989) [hereinafter 1989 ABA Report] (discussing the advantages and disadvantages of dual enforcement). Previous ABA panels have declined to recommend termination of dual enforcement. 1989 ABA Report, at 119 ("[A] majority of the Committee believe that the case for ending the FTC's role has not been made."); Report of the ABA Commission to Study the Federal Trade Commission 2 (1969) (proposing that concurrent jurisdiction be retained while urging reexamination of the allocation of enforcement resources).

9 *See generally* Chapter II.B of this Report regarding the Hart-Scott-Rodino Act pre-merger review process.

10 There are a limited number of exceptions to the HSR Act. *See* 15 U.S.C. § 18a(c) (exempting various types of transactions from HSR's requirements); *see also* 15 U.S.C. § 21(a) (limiting FTC jurisdiction to enforce Section 7 by excluding certain common carriers and banks).

11 *See* American Bar Association, Section of Antitrust Law, The Merger Review Process: A Step-By-Step Guide to Federal Merger Review 134–36 (3d ed. 2006) [hereinafter ABA, Merger Review Process].

12 *See id.* at 135 ("As a consequence [of the understandings underlying the clearance process], neither agency may begin an antitrust-related investigation until clearance has been granted.").

13 *See* Letter from Marian Bruno and J. Robert Kramer II to Andrew Heimert, at chart D (Nov. 22, 2006, revised Feb. 8, 2007, & Mar. 7, 2007) [hereinafter FTC/DOJ Data Submission].

14 Federal Trade Comm'n & U.S. Dep't of Justice, FTC/DOJ Clearance Procedures for Investigations (Dec. 1993), *in* American Bar Association, Section of Antitrust Law, The Merger Review Process: A Step-By-Step Guide to Federal Merger Review 513 (2d ed. 2001) [hereinafter 1993 FTC/DOJ Clearance Procedures] ("[T]he principal ground for clearance is expertise in the product involved . . . gained through a substantial antitrust investigation of the product within the last five years."); Michael N. Sohn, Statement at AMC Federal Enforcement Institutions Hearing, at 2 (Nov. 3, 2005) [hereinafter Sohn Statement] ("Traditionally, clearance decisions have been made on the basis of prior experience in leading substantial investigations relating to the product or industry segment in question.") (citing U.S. Department of Justice, Antitrust Division Manual (3d ed. 1998)).

[15] Such disputes can happen if, for example, both agencies have significant relevant expertise with respect to the industry or products at issue; if each agency has substantial expertise in different industries or products at issue; or if neither agency has significant expertise in the products or industries at issues.

[16] 1993 FTC/DOJ Clearance Procedures; ABA Comments re Dual Federal Merger Enforcement, at 11.

[17] Muris Statement re Federal Enforcement, at 3–5.

[18] ABA, Merger Review Process, at 134–36. The agencies entered into a revised letter agreement setting forth clearance procedures in 1993. 1993 FTC/DOJ Clearance Procedures.

[19] Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002) [hereinafter 2002 Clearance Agreement].

[20] *Id.* ¶ 17.

[21] Federal Enforcement Institutions Trans. at 133 (Sims, Muris) (allocation was based on "historical experience"); Number of Enforcement Actions and Substantial Investigations by DOJ and FTC, by Industry, *available at* http://www.ftc.gov/opa/2002/02/clearance/clearchart.htm.

[22] 2002 Clearance Agreement, ¶ 17d.

[23] *Id.* ¶ 31.

[24] *Id.* ¶¶ 11–16, 25–29.

[25] *See* Matt Andrejczak, *Federal Trustbusters Abandon Pact: Justice, FTC Succumb to Budget Threats*, Market Watch, May 21, 2002, *available at* http://www.marketwatch.com/news/story/federal-trustbusters-abandon-merger-review/story.aspx?guid=%7BD7016EC7%2D6F14%2D4975%2D8F56%2D353D8FC05CC0%7D; *see also* Sohn Statement, at 5–6; Sims Statement, at 4.

[26] *See* Sims Statement, at 3 (process works "most of time" but can impose unacceptable delay when it breaks down); U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 15 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; ABA Comments re Dual Federal Merger Enforcement, at 10; William J. Baer, Statement at AMC Merger Enforcement Hearing, at 13 (Nov. 17, 2005) [hereinafter Baer Statement].

[27] *See, e.g.*, ABA Comments re Dual Federal Merger Enforcement, at 10 ("All too often clearance is substantially delayed during the initial HSR Act waiting period, resulting either in Second Requests being issued . . . , or in the merging parties being forced unnecessarily to withdraw and re-file . . . to trigger a new, post-clearance, initial waiting period."); Baer Statement, at 13 ("The existing clearance process unduly delays antitrust clearance."); Sohn Statement, at 3–4; Sims Statement, at 3; Business Roundtable, Public Comments Submitted to AMC, at 21 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]. *See generally* Chapter II.B of this Report regarding the HSR Act pre-merger review process, which describes the costs of complying with the second request process.

[28] For example, the agencies' clearance dispute over review of the AOL/Time Warner merger, one of the largest deals ever, took 45 days. *See* Letter from John J. Castellani, President, The Business Roundtable, to Timothy Muris, Chairman, FTC, at 4 (Feb. 25, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/brt.pdf; Business Roundtable Comments, at 20–21 (noting lengthy clearance delays in the AOL/Time Warner, AT&T/Media One, Whirlpool/Maytag, and Northrop/United Defense merger matters).

[29] *See, e.g.*, ABA Comments re Dual Federal Merger Enforcement, at 10 ("[T]here is a pressing need to fix the system by which merger matters are cleared between the agencies."); Business Roundtable Comments, at 21 (the "clearance process requires an immediate solution").

The Commission's recommendation is focused upon, but not limited to, clearance delays in HSR Act matters, where the problem "ar[ises] most acutely." Muris Statement re Federal Enforcement, at 6. Clearance disputes may also delay non-HSR Act investigations, although the problem for businesses is usually less acute because they are not precluded from engaging in the allegedly unlawful conduct pending agency review. Overall, the sizable majority of clearance disputes arise in HSR Act merger matters: Over 90 percent (92 of 104) of instances in which the agencies exchanged claims memos between FY2000 and FY2006 involved merger matters. *See* FTC/DOJ Data Submission, at chart C.

[30] *See* Federal Enforcement Institutions Trans. at 96 (Sims); John M. Nannes, Statement at AMC Federal Enforcement Institutions Hearing, at 2–3 (Nov. 3, 2005) [hereinafter Nannes Statement]; Muris Statement re Federal Enforcement, at 4–5 (citing one battle in which each side thought the other "was acting in bad faith") (emphasis omitted).

[31] *See* ABA Comments re Dual Federal Merger Enforcement, at 12; U.S. Chamber of Commerce Comments, at 15; ABA, Merger Review Process, at 141.

[32] *See* U.S. Chamber of Commerce Comments, at 15; ABA Comments re Dual Federal Merger Enforcement, at 10; Muris Statement re Federal Enforcement, at 6; Sohn Statement, at 4; Business Roundtable Comments, at 21.

[33] *See* Merger Enforcement Transcript at 282 (Kramer) (Nov. 17, 2005) (estimating, based on recent experience, that about 40 percent of those who "pull and re-file" receive a second request).

[34] Muris Statement re Federal Enforcement, at 6; Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Justice, State, and the Judiciary of the Committee on Appropriations, United States Senate (Mar. 19, 2002), *available at* http://www.ftc.gov/os/2002/03/budgetstmt.htm.

[35] Calculations are based on reports by the FTC and the DOJ of transactions in which a second request could be issued. *See* Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2005, at app. A (2006); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1997, at app. A (1998); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1988, at app. A (1989).

[36] FTC/DOJ Data Submission, at chart A (overlap clearance requests and HSR Act transactions increased by 56.7 percent and 52.9 percent, respectively, between 2002 and 2006).

[37] Sohn Statement, at 2 (citing "increasing convergence of industry sectors"); Nannes Statement, at 1–2 (evolution of the economy makes "application of traditional [clearance] allocations more difficult"); ABA Comments re Dual Federal Merger Enforcement, at 12.

[38] Clearance Delays, *available at* http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm. The data reflect the period from the initial request for clearance until clearance was granted.

[39] *Id.*

[40] FTC/DOJ Data Submission, at chart A.

[41] *Id.* at chart A, n.3 & chart C. The data also did not include information on delays in granting clearance when only one agency seeks clearance.

[42] Sohn Statement, at 6 (the Commission "should urge the enforcement agencies to re-endorse the 2002 agreement in consultation with the relevant congressional committees"); Federal Enforcement Institutions Trans. at 121 (Sohn); Sims Statement, at 4; Nannes Statement, at 4 (stating that "although their efforts were not successful, such an approach made sense then and would make sense now"); Merger Enforcement Trans. at 97–98 (Rill, Baer); Muris Statement re Federal Enforcement, at 11–13; Thomas B. Leary, Statement at AMC Government Civil Remedies Hearing, at 7 (Dec. 1, 2005) (describing the 2002 Clearance Agreement as "an act of enlightened statesmanship"); U.S. Chamber of Commerce Comments, at 15.

When the 2002 Clearance Agreement was announced, then-FTC Commissioner Mozelle W. Thompson argued that it had been reached without adequate consultation with other FTC Commissioners and that the problem of clearance delays was not as significant as claimed by proponents of the agreement. *See* Statement of Commissioner Mozelle W. Thompson, Concerning the Mar. 5, 2002, Clearance Agreement Between the Department of Justice and the Federal Trade Commission, *available at* http://www.ftc.gov/

opa/2002/03/clearancemwt.htm; Statement of Commissioner Mozelle W. Thompson, Concurring in Part in, and Dissenting in Part from, the Federal Trade Commission's Mar. 19, 2002, Testimony Before the Senate Commerce, Justice, State and the Judiciary Subcommittee of the Appropriations Committee, *available at* http://ftc.gov/os/2002/03/budgetmwt.htm.

[43] Barnett/Majoras Transcript at 43 (Majoras) (Mar. 21, 2006) (noting that the 2002 agreement is a "good idea"); *id.* at 43–44 (Barnett) (observing that an agreement would make the agencies "better off").

[44] Muris Statement, at 12; Sims Statement, at 4; Sohn Statement, at 6–7.

[45] Federal Enforcement Institutions Trans. at 94 (Nannes) (the resolution should be "accomplished by the antitrust agencies"); *id.* at 121 (Sohn) (the agencies should be "given deference" by Congress in allocating industries); *id.* at 110 (Sims) (agencies should receive "considerable deference" in making industry allocations).

[46] Federal Enforcement Institutions Trans. at 87 (Muris) (stating that having industry allocation was "the heart of the agreement"); *id.* at 88 (Sims); *id.* at 90, 93 (Sohn) (stating that the allocation agreement was "all the difference" and that any other approach would be a "distinct second best").

[47] *See* Federal Enforcement Institutions Trans. at 93 (Sohn); Business Roundtable Comments, at 22.

[48] *See* Business Roundtable Comments, at 22; Muris Statement, at 6 (stating that "agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future"); Nannes Statement, at 2–3.

[49] Anecdotal experience suggests that many recent clearance disputes were prolonged unnecessarily in debates over whether a particular clearance resolution would be a "precedent" in clearance disputes regarding future mergers in the same industry. *See* Deborah Platt Majoras, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Houston, We Have a Competitive Problem: How Can We Remedy It?, Remarks Before the Houston Bar Ass'n, Antitrust and Trade Regulation Sec. (Apr. 17, 2002) (clearance disputes sometimes arise due to one "agency's concern that granting clearance to the other agency would permit the other agency to gain expertise, and, perhaps, 'capture' that industry").

[50] *See id.* at 131 (Sims) (the agencies should adopt the 2002 Clearance Agreement allocation with minimal change rather than "open[ing] up" those arguments); *id.* at 133 (Muris) (while some changes in the allocation may be needed, "starting over again would be a heroic task"). *But see id.* at 121 (Sohn) (advising the Commission not to recommend that the agencies simply adopt the specific allocation in the 2002 Clearance Agreement).

[51] *Id.* at 102 (Sims) (arguing that "it doesn't make all that much difference which agency" reviews a particular merger); *id.* at 102 (Sohn) (same); *id.* at 103 (Muris).

[52] *See* Federal Enforcement Trans. at 113 (Muris) ("You need a way to break ties . . . ."); Federal Enforcement Trans. at 111–12 (Sims).

[53] 2002 Clearance Agreement, ¶¶ 25–29.

[54] *See id.* ¶ 27 (providing 48 hours for decision by arbitrator).

[55] *See* Federal Enforcement Trans. at 111 (Sims) (arguing that an arbitrator-based system is best, since others, such as the coin flip, "can be gamed in various ways"); ABA Comments re Dual Federal Merger Enforcement, at 14 (describing drawbacks with "random assignment" tiebreaker systems).

[56] *See* Barnett/Majoras Trans. at 54 (Majoras) (recounting expressions of concern from the Chairman of the Commerce Committee during her confirmation hearing and explaining the need for this Commission's help on clearance reform "as a practical and political matter").

[57] *See* Muris Statement, at 19 (due to congressional opposition to the 2002 Clearance Agreement, "the agencies likely will feel it necessary to consult Congress before any global resolution regarding clearance"); Barnett/Majoras Trans. at 54 (Majoras).

[58] Dep't of Justice & Federal Trade Comm'n, FTC/DOJ Announcement of Expedited Clearance Procedure, (Mar. 23, 1995), *in* ABA, MERGER REVIEW PROCESS, at Appendix 18.

[59] *See* ABA Comments re Dual Federal Merger Enforcement, at 14.

[60] *See* ABA, Merger Review Process, at 22–30 (describing the agencies' investigative authority and the processes they follow in conducting HSR Act pre-merger investigations).

[61] 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC); *see* ABA, Merger Review Process, at 30–31.

[62] *See* Sohn Statement, at 7, 11 (losing a preliminary injunction hearing is generally final for the parties, since "it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty" regarding the transaction); Sims Statement, at 7 (stating that "the entry of a preliminary injunction is fatal to the deal").

[63] *See* Sohn Statement, at 7 (losing a preliminary injunction hearing is generally final for the agencies, since they are generally unable to obtain effective relief post-consummation).

[64] *See* Federal Enforcement Institutions Trans. at 31–32 (Conrath); Craig Conrath, Statement at AMC Federal Enforcement Institutions Hearing, at 3 (Nov. 3, 2005) [hereinafter Conrath Statement] (the DOJ "agrees, pursuant to Rule 65(a)(2), to a consolidated proceeding combining the preliminary injunction hearing with the trial on the merits" when a reasonable schedule can be reached); Sohn Statement, at 13 (the DOJ "regularly agrees at the outset of a judicial proceeding to consolidate"). Fed. Rule Civ. Proc. 65(a)(2) provides, in part, that "before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

[65] Section 13(b) specifies that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

[66] The FTC has recently sought permanent injunctive relieve under Section 13(b) to enjoin anticompetitive, non-merger conduct violating Section 5 of the FTC Act. *See, e.g.*, Complaint for Injunctive and Other Equitable Relief, FTC v. Warner Chilcott Holdings Co., No. 1:05-CV-02179, 2005 WL 3439585, ¶ 68, (D.D.C. Nov. 7, 2005).

[67] *See* Pl. FTC's Mem. in Opp'n to Defs.' Mot. Seeking Consolidation of Prelim. & Permanent Injs., FTC v. Arch Coal, Inc., Case No. 1:04-CV-00534, at 3, 4 (Apr. 22, 2004) (arguing against consolidation).

[68] Sohn Statement, at 14 ("Because the preliminary injunction is aimed at preserving the status quo pending a trial before an FTC Administrative Law Judge, the opportunity provided by Rule 65 to consolidate a hearing on the application for preliminary relief with a trial on the merits is unavailable.").

[69] *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004).

[70] Sohn Statement, at 13–14. As discussed below, the FTC or the DOJ need not make the traditional showing of irreparable injury in order to obtain a preliminary injunction to enjoin a merger, but rather must make a sufficient showing of likelihood of success on the merits. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); 15 U.S.C. § 53(b). *See generally* Antitrust Law Developments, at 408–10.

[71] Although the FTC's approach also permits the agency to seek administrative litigation if it obtains a preliminary injunction in court, in nearly all cases the merging parties moot further action by abandoning the transaction.

[72] Federal Trade Comm'n, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995) [hereinafter FTC Administrative Litigation Policy Statement].

[73] American Bar Association, Public Comments Submitted to AMC Regarding Merger Enforcement Standards, at 1 (Oct. 28, 2005) [hereinafter ABA Comments re Merger Enforcement Standards]; Sohn Statement, at 8.

[74] *See* ABA Comments re Merger Enforcement Standards, at 4.

[75] Sohn Statement, at 13–14; *see also Oracle*, 331 F. Supp. 2d at 1109.

[76] *See Oracle*, 331 F. Supp. 2d at 1109 (in consolidated proceeding, "[p]laintiffs have the burden of proving a violation of Section 7 by a preponderance of the evidence"); Sohn Statement, at 13 (consolidation puts the "enforcer to its ultimate burden of proof" before their deal is lost).

[77] *See, e.g.*, Federal Enforcement Institutions Trans. at 28–29 (Sohn) (describing differences in applicable standards between DOJ consolidated proceedings and FTC preliminary injunction proceedings).

[78] The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) reported that it had "not found any example" in which the DOJ sought a permanent injunction after failing to obtain a preliminary injunction under Section 7. ABA Comments re Merger Enforcement Standards, at 5.

[79] The FTC identifies only one instance in "modern history" in which the FTC used this authority. Barnett/Majoras Trans. at 50–51 (Majoras) (identifying the *R.R. Donnelley* case); *see* FTC Press Release, Federal Trade Commission Dismisses Case Against R.R. Donnelley over Acquisition of Meredith/Burda (Aug. 4, 1995) (stating that the FTC failed to obtain a preliminary injunction, issued a Part III complaint, but ultimately overturned the ALJ's decision requiring divestitures), *available at*: http://www.ftc.gov/opa/1995/08/donnelly.htm.

[80] FTC, Administrative Litigation Policy Statement (explaining that "it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied" and that it will make decisions on a "case-by-case" basis); *cf.* William Blumenthal, Statement at AMC Federal Enforcement Institutions Hearing, at 4 (Nov. 3, 2005) [hereinafter Blumenthal Statement] (stating that the FTC has restrained itself appropriately through promulgating and implementing the 1995 policy statement).

[81] *Compare* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (order denying motion for preliminary injunction in August 2004), *appeal dismissed*, 2004 WL 2066879 (D.C. Cir. 2004) (ordering voluntary dismissal of FTC appeal in Sept. 2004) *with* Statement of the Commission, *In re* Arch Coal, Inc., FTC File No. 031-0191 (June 13, 2005) (reporting 4–1 vote in June 2005 not to pursue further administrative litigation in the *Arch Coal* matter); *see* Order Granting Motion to Dismiss, *In re* Butterworth Health Corp., FTC Docket No. 9283 (Sept. 25, 1997) (dismissing administrative complaint one year after preliminary injunction was denied and several months after denial was affirmed on appeal); *see also* ABA Comments re Merger Enforcement Standards, at 9 n.35.

[82] Section 13(b) specifies that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

[83] Federal Enforcement Institutions Trans. at 31–33 (Conrath) (pointing out that the government has a heavy burden and that key elements like expert reports require time).

[84] *See id.* at 31–32 (Conrath); Sohn Statement, at 13.

[85] *See* ABA Comments re Dual Federal Merger Enforcement, at 8–9.

[86] If the FTC does not consolidate the proceedings for preliminary and permanent relief, it would have to seek any necessary permanent relief in federal court.

[87] *See* AAI Comments re Enforcement Institutions, at 2 (stating that administrative litigation provides a forum in which facts can be more fully developed than in an injunction proceeding); Blumenthal Statement, at 3–4; Federal Enforcement Institutions Trans. at 8 (Blumenthal).

[88] Statement of Commission, *In re* Arch Coal, FTC File No. 031-0191, at 8 (June 13, 2005) ("The benefits of administrative litigation can be reduced greatly when the large majority of the relevant evidence already has been presented . . . at the preliminary injunction hearing.").

[89] *See* Initial Decision, *In re* Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, at 1–2 (Oct. 20, 2005) (appeal pending before FTC).

[90] ABA Comments re Merger Enforcement Standards, at 3 (stating that the Section 13(b) standard is "more lenient" than the DOJ standard); Sohn Statement, at 10 ("[M]any practitioners believe the FTC is accorded more deference than the Antitrust Division at the preliminary injunction stage."); Sims Statement, at 6. *But see* Federal Enforcement Institutions Trans. at 57–58 (Blumenthal) (stating that the perception

continually changes, and that it is not invariably the case that people would rather be before the DOJ).

[91] Sims Statement, at 6 ("most private practitioners today advise their clients that the FTC may have a greater legal ability to block a merger," and that FTC staff is "likely to be slightly more aggressive" since some FTC Commissioners believe the required showing is lower); Sohn Statement, at 10–11; ABA Comments re Merger Enforcement Standards, at 3 (stating that the Section 13(b) standard is "more lenient" than the DOJ standard). *But see* Barnett/Majoras Trans. at 49–50 (Majoras) (the courts are "treating the [preliminary injunction] hearing more like a trial on the merits" because granting the preliminary injunction "likely will block the deal"); Federal Enforcement Institutions Trans. at 33 (Conrath) (courts focus on merits considerations rather than the legal standard); Blumenthal Statement, at 4–6 (arguing that the standard applied to the FTC "is not meaningfully different from that applied by the courts to DOJ" and that both are subject to a "public interest" test).

[92] *See* ABA Comments re Merger Enforcement Standards, at 4.

[93] 15 U.S.C. § 53(b); *see* ANTITRUST LAW DEVELOPMENTS, at 409. Courts have recognized that, in adopting this standard, "Congress intended this standard to depart from what it regarded as the then-traditional equity standard." FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001). The FTC's role as the "ultimate decision maker" regarding permanent relief has been cited as justification for applying a lesser standard. *See* ABA Comments re Merger Enforcement Standards, at 4; ANTITRUST LAW DEVELOPMENTS, at 409–10.

[94] *Heinz*, 246 F.3d at 714–15; *see also* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 44 (D.D.C. 2002); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1051 (8th Cir. 1999); *Arch Coal*, 329 F. Supp. 2d at 116; FTC v. Staples, Inc., 970 F. Supp. 1066, 1071 (D.D.C. 1997). However, a showing of a "fair or tenable chance of success on the merits" will not suffice. *Tenet Health Care*, 186 F.3d at 1051. *See generally* ANTITRUST LAW DEVELOPMENTS, at 409 (describing standard).

[95] United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (holding that "once the Government demonstrates a reasonable probability that [Section] 7 has been violated, irreparable harm to the public should be presumed"); *see* Conrath Statement, at 5–6; Federal Enforcement Institutions Trans. at 9–10 (Conrath); Sohn Statement, at 9–10. *See generally* ANTITRUST LAW DEVELOPMENTS, at 408.

[96] *Siemens*, 621 F.2d at 505.

[97] *See* Sims Statement, at 6–7 (arguing that the applicable preliminary injunction standards should be the same, especially since the preliminary injunction is fatal to the deal).

[98] *See id.* at 7–8 (emphasizing that agency should be able to establish reasonable likelihood of success after second request and judicial discovery).

Chapter II.B
The Hart-Scott-Rodino Act Pre-Merger Review Process

1. INTRODUCTION

The passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) marked one of the most significant changes to federal merger enforcement since enactment of the Clayton Act in 1914.[1] Before enactment of the HSR Act, it was more difficult for the agencies to investigate and challenge mergers before they had been consummated. Even when these lawsuits were successful, it was difficult to fashion relief that was effective in eliminating the anticompetitive effects that resulted from the merger. Effective relief proved especially challenging in cases brought after the merger had been consummated, because in most instances it would require recreating a company, or significant parts of one, to replace the competitor that the merger had eliminated.

Under the HSR Act, parties to mergers subject to the Act must file a notification form with the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The parties may not complete their transaction until the expiration of a thirty-day waiting period, which permits the FTC or the DOJ to investigate whether the transaction may substantially lessen competition in violation of Section 7 of the Clayton Act.[2] The investigating agency may extend the waiting period in order to conduct a more detailed investigation by issuing a request for additional information, commonly called a "second request." The second request requires the parties to supply detailed information regarding the transaction and its possible competitive effects. The parties must also observe a second thirty-day waiting period after fulfilling this request, during which the agency must decide whether to challenge the transaction in court.[3]

Under this system, the agencies are able to challenge mergers before they are consummated, and seek injunctions blocking the merger, partial divestitures that would adequately address the competitive concerns, or other appropriate relief. Since Fiscal Year 2001 (FY2001), the FTC and the DOJ have blocked or obtained relief in nearly 165 mergers that they concluded would harm competition and consumers, or approximately 1.8 percent of all transactions notified pursuant to the HSR Act during that period.[4]

Although the HSR Act is widely recognized as having made merger enforcement far more effective, some concern has been expressed over costs it imposes. First, some believe that the second request process has become unduly expensive and burdensome, both in the cost of providing requested information and in the length of time for resolution. Second, some believe that the HSR reporting requirements cover a significant number of transactions that pose no competitive problems, imposing unnecessary costs, including preparing the filing, filing fees, and a thirty-day delay in completing the transaction.

Both the coverage and cost of complying with the HSR Act have grown beyond that originally expected by Congress. The reach of the Act was limited in recognition that, if its requirements "were imposed on every merger, the resulting added reporting burdens might more than offset" the enforcement benefits.[5] At the time the Act was passed, Congress expected that only about 150 very large transactions would be reported each year.[6] Instead, there have been nearly 1000 filings annually since the program began, reaching a high of 4749 in 2000.[7] Congress's recent changes to the filing thresholds, partially adjusting for inflation since 1976, reduced the number of notifications by approximately 50 percent.[8] Many of the transactions notified are quickly assessed as not likely to lessen competition substantially. For example, in FY2006, of the 1746 transactions notified, the government granted early terminations for 1098 (62.9 percent), extensively investigated only 45 (2.6 percent), and ultimately brought only 29 HSR Act enforcement actions (1.7 percent).[9] This broad coverage, however, ensures that the agencies are aware of nearly every transaction that has the potential to cause competitive harm.

Congress also assumed that the burden and cost of supplying documents and information in response to second requests would be modest and not time-consuming, as the responsive information would largely be contained in materials that the parties had already assembled.[10] Since 1976, however, merger analysis has become more complex, as the agencies have moved away from concentration thresholds in favor of a more flexible analysis that aims toward greater accuracy. As a result, today a second request can impose sizable burdens, including expenditures of several million dollars for attorneys' fees and production of tens of millions of pages of documents and tens of gigabytes of electronic data. One estimate places the current cost of responding to a second request investigation at between $5 million and $10 million.[11] The time needed for review of a transaction and receipt of approval from the agency now can be six months or longer.[12] The agencies maintain that they need this time and volume of information to accurately assess a merger's likely effects; others are skeptical.

Since 1990, acquiring parties must pay filing fees in connection with their notification. These fees, which range up to $280,000 for the largest transactions, supply a substantial part of the funding for the FTC and the Antitrust Division of the Department of Justice. Since 1996, at least 79 percent of the Antitrust Division's budget has been funded with filing fee revenue; for FY2000–FY2003, filing fee revenue fully funded the Antitrust Division's budget.[13] Between 32 and 59 percent of the FTC's appropriations, which also support its consumer protection mission, have come from filing fees each year since FY2001.[14]

The United States is one of approximately seventy jurisdictions, including the European Union and Canada, with a merger review system.[15] Most of these jurisdictions also require parties to notify transactions and observe waiting periods before closing to provide enforcers an opportunity to challenge the proposed merger before consummation.[16] Each jurisdiction that requires a filing imposes costs on a proposed transaction. Nonetheless, a recent broad survey concluded that the external costs to the merging parties subject to a second request investigation in the United States (including payments for attorneys, economists, and document production) were at least double that of any other jurisdiction.[17]

In light of the concerns about the burdens imposed by the HSR Act, the Commission studied the HSR Act pre-merger notification system as a whole, paying specific attention to pre-merger filing requirements, the second request process employed by the FTC and the DOJ, the costs the current system imposes, and the benefits of more effective merger enforcement that the HSR Act brings.

Based on its study of the issues, the Commission makes the following recommendations.

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.*

28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.†

29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

* Commissioners Garza, Kempf, and Warden do not join this recommendation.

† Commissioners Carlton and Jacobson do not join this recommendation.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

- **31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.***
- **31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.†**
- **31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.**
- **31d. The agencies should reduce the burden of translating foreign-language documents.**
- **31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.**

* Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

† Commissioners Burchfield, Cannon, Carlton, Litvack, and Yarowsky do not join this recommendation.

2. BACKGROUND

A. The Purpose and Mechanics of the Hart-Scott-Rodino Act

Prior to enactment of the HSR Act, the U.S. government had limited ability to stop an anti-competitive merger. To the extent the government had notice of a transaction, it had limited practical ability to obtain sufficient information to challenge it prior to its consummation.[18] Post-merger challenges, moreover, could take years—five to six on average.[19] As a result, even where the government ultimately prevailed, it was often unable to obtain effective relief.[20] It could neither fully compensate society for the interim loss of competition, nor fully restore a competitive market structure, particularly if the companies had already integrated their productive assets, or “scrambled the eggs.”[21]

Congress addressed these issues by enacting the HSR Act. The stated purpose of the Act was “to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they [were] consummated.”[22] Under the HSR Act, before consummating certain mergers and acquisitions, parties must file a notification with both the DOJ and the FTC.[23]

The HSR Act applies to transactions that exceed certain size-of-company and size-of-transaction thresholds and that have a significant nexus to U.S. commerce.[24] Currently, to be subject to the HSR Act, one of the acquired or acquiring persons must have at least $119.6 million in annual net sales or total assets, and the other must have at least $12 million in annual net sales or total assets.[25] The value of the transaction must be greater than $59.8 million.[26] The acquiring person must pay a filing fee, which depends on the value of the transaction and ranges from $45,000 to $280,000.[27] All filing thresholds are adjusted annually in accordance with changes in the Gross National Product (GNP).[28]

The HSR Act filing provides certain basic information about the transaction and the companies (for example, their affiliates, major shareholders, revenues, and the industries and geographic areas in which the operate, by North American Industry Classification System code (NAICS codes)), and includes documents prepared by or for directors or board-appointed officers of the companies in connection with the transaction that address competitive issues.[29] The parties are not required to provide any additional information about the extent to which they do or do not compete or the transaction’s potential impact on competition.

After filing, the parties must observe a thirty-day waiting period (fifteen days for cash tender offers) to allow the government time to make an initial determination as to whether to allow the transaction to proceed or to conduct a more extensive investigation.[30] The initial thirty-day waiting period may be terminated early if the parties so request and the government determines there are no material competitive issues, or may simply be allowed to expire.[31] In either case, the parties may then close their transaction. Alternatively, the government can extend the waiting period by issuing a request for additional information, which has come to be called a “second request.” [32] If a second request is issued, the parties may not close their transaction until thirty days (ten days for cash tender offers) after they both have "substantially complied" with the second request.[33] During that second thirty-day period the government must decide whether to allow the transaction to close, seek to block it in court, or negotiate to place conditions on it that resolve competitive concerns.

B. Actual Practice

For the vast majority of transactions, the agencies grant early termination of the initial thirty-day waiting period or simply permit the waiting period to expire without conducting any formal investigation. For example, of the 1746 transactions notified in FY2006, 62.9 percent received early termination.[34] Only 2.6 percent of these transaction received second requests.[35] As Table A shows, these figures have been consistent from year to year.

Table A: HSR Act Enforcement Activity

	2001	2002	2003	2004	2005	2006
Transactions Reported	2237	1142	968	1377	1610	1746
Clearance not Sought or Investigation Closed During Initial Waiting Period	2167	1093	933	1342	1560	1702
Early Termination Granted	1603	793	606	943	997	1098
Second Request Issued	70	49	35	35	50	45
HSR Act Merger Enforcement Actions	42	28	33	17	16	29
Non-HSR Act Merger Enforcement Actions	13	5	3	5	2	3

Notes: HSR Act Merger Enforcement Actions: Enforcement actions are reported by the fiscal year in which the action was brought, regardless of when the investigation that led to the action was opened. FTC enforcement actions include Part II consents made public for comment, FTC authorization to file motions for preliminary or permanent injunction, FTC issuance of Part III complaints, and transactions that were abandoned or withdrawn for antitrust concerns that arose during the course of investigations. DOJ enforcement actions include complaints filed (whether litigated or settled), transactions that were abandoned or subject to a fix-it-first remedy, and certain bank divestitures pursuant to regulatory orders. Figures do not include merger enforcement actions in which the court found in favor of defendants (1 in 2002; 2 in 2004).

Non-HSR Merger Enforcement Actions: Both the DOJ and the FTC also bring enforcement actions challenging mergers that are not reportable under the HSR Act. For example, the DOJ has brought enforcement actions in banking mergers that are not reportable. Both agencies have brought actions in mergers that were below the reporting thresholds.

Source: FTC/DOJ Data Submission, at chart D.[40]

If one of the agencies decides that the transaction may raise material competitive concerns, it seeks clearance from the other agency to investigate.[36] In that event, the agency may request that the parties voluntarily provide additional information. The only way under the HSR Act that the government can prevent the parties from closing their transaction after thirty days is to issue a "second request."[37] However, in order to provide the government with additional time for investigation without the issuance of a second request, an informal practice has developed by which parties voluntarily withdraw their HSR filing and re-file it to start another thirty-day waiting period.[38] (Withdrawing does not guarantee that a second request will not issue.) Although the Commission understands from anecdotal evidence that increasing use has been made of this "pull and re-file" strategy to extend the initial thirty-day waiting period,[39] neither the FTC nor the DOJ has systematically tracked the number of transactions for which this has been done.

Issuing a second request enables the government to conduct a further examination of the competitive effects of a proposed transaction based on information and documents provided by the merging parties, their competitors, and customers. In addition to seeking the voluntary provision of information by competitors and customers, the agencies have the ability to compel information through the use of a subpoena or civil investigative demand. The agencies also have the ability to compel testimony from the merging parties and others through depositions (in the case of the DOJ) or investigational hearings (in the case of the FTC).[41] In this sense, the second request process resembles discovery in civil litigation, although it is not supervised by a court or governed by the Federal Rules of Civil Procedure.

The parties may not close their transaction until they both have substantially complied with the second request.[42] An officer of each company is required to certify substantial compliance.[43] If the government disputes substantial compliance, it has the option to go to court to enjoin the transaction until substantial compliance has been achieved.[44] In the history of the HSR Act, there have been only three occasions on which the FTC voted to authorize the filing of a complaint and motion seeking such an injunction.[45] Otherwise, the parties and government generally informally resolve their differences. The 2000 HSR Amendments, discussed below, required the FTC and the DOJ to establish formal internal processes for resolving such disputes, which they have adopted.[46]

If the agency determines that the effect of the transaction may be substantially to lessen competition, the agency can challenge the transaction in court.[47] Before seeking an injunction in court, however, the investigating agency may negotiate with the merging parties to reach a consent decree that obligates the merging parties to divest assets or agree to other relief that resolves the agency's concerns about the merger's competitive effects.

C. Recent Reforms by Congress and the Agencies

In 2000 Congress enacted the 21st Century Acquisition Reform and Improvement Act (2000 HSR Amendments) to address concerns about the growing scope and burden of the HSR Act.[48] These amendments had two principal components.

First, the 2000 HSR Amendments substantially increased the size-of-transaction filing threshold, from $15 million to $50 million. This amendment had the effect of reducing the number of transactions for which filings were required by about half.[49] The amendments also provided that all thresholds would be adjusted annually for changes in Gross National Product (GNP) beginning in 2005.[50]

Second, the 2000 HSR Amendments made several changes regarding the second-request process. One significant change required the agencies to designate a senior official to hear appeals from merging parties regarding the burden of second requests.[51] The amendments also directed both agencies to conduct one-time internal reviews of the HSR Act process, "implement reforms . . . in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay," and report back to Congress within 180 days.[52] Both the FTC and the DOJ reported to Congress in 2001, describing their reviews of the second request process and reforms they implemented.[53]

Both the FTC and the DOJ have continued to reform their pre-merger review processes. Each announced further reforms in 2006.[54]

3. RECOMMENDATIONS AND FINDINGS

Overall, the existing pre-merger review system under the HSR Act is achieving its intended objectives of providing a more effective means for challenging mergers raising competitive concerns before their consummation and protecting consumers from anticompetitive effects.[55] Although efforts must continue to reduce the cost and burden the system imposes on merging parties, there is no need for comprehensive reform.[56]

The costs the HSR Act imposes are not insignificant; while very small relative to the total value of the transactions reviewed, their magnitude remains of concern to many. First, the current notification system imposes costs—filing fees and a thirty-day waiting period—on a large number of merging parties whose transactions do not pose competitive problems. Second, the second-request process imposes very large, and in some cases unnecessary, burdens on parties to provide information to the agencies.

Effective prevention of anticompetitive mergers is an important policy objective. Nonetheless, mergers are often beneficial to consumers and businesses, offering procompetitive efficiencies that will benefit both.[57] Imposing unnecessary burdens on such transactions wastes resources and may, in the extreme case, inhibit beneficial conduct. The pre-merger review process should aim to strike a balance that enables effective merger enforcement while avoiding the imposition of excessive costs on the parties and the economy.

Based on its assessment of the operation of the HSR pre-merger review system, the Commission does not recommend systemic change or major modifications. Although the system is not perfect, alternative approaches do not appear to be more suitable and would impose their own sets of costs. For example, the Commission does not recommend adoption of a markedly different approach, such as that used in the European Union or Canada.[58] Indeed, there was minimal call for the Commission to recommend such alternatives.[59]

Rather, comments generally focused on reducing the burdens imposed by making modifications to the current process.

The Commission considered a variety of possible reforms to the current HSR system. First, the Commission considered changes to the initial filing process. As explained below, the Commission does not recommend any changes to the filing thresholds. The Commission does recommend that agency funding no longer be linked to filing fees. Second, the Commission considered numerous possible reforms to the second request process. Overall, it concludes that the second request process can impose sizable burdens on merging parties in terms of expense and delay that should be reduced wherever possible. It commends the agencies for the various reforms they have adopted to reduce second request burdens, and urges them to take steps to reduce those burdens further as well as implement mechanisms to measure burdens and track progress. The Commission recommends several specific reforms for the agencies to evaluate and, if appropriate, refine and implement.[60]

A. Pre-Merger Filing Requirements

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.*

Although the number of transactions reviewed has increased over time (largely due to the fact that the dollar thresholds remained constant while the dollar value of merger activity increased markedly),[61] the increase in the filing thresholds in 2000 significantly reduced the number of covered transactions.[62] If the $50 million size-of-transaction threshold had been in place for FY2000 (the last full year under the original thresholds), only 2502 transactions would have been reported in that year, rather than the 4749 actually notified, representing a decrease of 47 percent.[63] The 2000 HSR Amendments thus significantly addressed concerns that the HSR Act thresholds were "too low and capture[d] too many lawful transactions."[64]

Even with this significant reduction in coverage, and annual adjustments to accommodate GNP growth, it is clear that the vast majority of transactions reported raise no competitive issues.[65] This is particularly true for smaller transactions, which are less likely to be subject to challenge, or even extensive review, than transactions with large dollar values. Over the past five years, as Table B shows, the FTC or the DOJ issued a second request in 1.3

* Commissioners Garza, Kempf, and Warden do not join this recommendation. They believe that the filing thresholds should be increased in light of the significant number of transactions at the lower end of the thresholds that receive early termination and the few such transactions that either receive a second request or are subject to an enforcement action by the agencies.

percent of transactions valued between $50 million and $100 million, as compared with 11.1 percent of transactions over $1 billion. Similarly, they brought enforcement actions in less than 1 percent of mergers valued below $100 million, but 7.7 percent of mergers worth over $1 billion. Nevertheless, small transactions regularly account for a fair percentage of investigative activity. Between FY2002 and FY2006, 31 of the 214 second requests issued by the agencies (14.5 percent) were related to mergers valued between $50 million and $100 million.[66]

Table B: Second Requests and Enforcement Actions by Size of Transaction FY2002–2006

	Second Requests		Enforcement Actions	
Transaction Size	Number	Percent	Number	Percent
$50M–$100M	31	1.3%	14	0.4%
$100M–$150M	20	1.9%	12	1.1%
$150M–$200M	19	2.9%	9	1.4%
$200M–$300M	19	2.4%	10	1.3%
$300M–$500M	18	2.4%	14	1.9%
$500M–$1000M	37	6.4%	22	3.8%
Over $1000M	70	11.1%	49	7.7%
Total	214	3.1%	130	1.9%

Notes: "Enforcement actions" are defined in same manner as described in Table A, and do not include enforcement actions brought against mergers that were not reportable under the HSR Act.

"Percent" is the percentage of all transactions notified within each size range that resulted in a second request or an enforcement action.

Source: FTC/DOJ Data Submission, charts E1–E3.

The FTC's and the DOJ's enforcement efforts suggest that relatively small transactions can pose competitive problems, and that the pre-merger filing requirements facilitate review of these transactions. The recent adjustments to the thresholds adopted by Congress in 2000 reduced the number of filings considerably, and the evidence has not persuaded the Commission that further increases are currently warranted.[67] The Commission believes that the provisions for regular adjustments to the thresholds for increases in GNP should remain in place.

Although no change to the thresholds is currently recommended, Congress should continue to monitor the operation of the system, and periodically reevaluate whether it should adjust the size-of-transaction threshold to ensure that the number of smaller transactions actually reviewed and challenged by the agencies justifies the filing burdens imposed on those transactions.

28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.*

Revenues the antitrust agencies receive from HSR Act filing fees are evenly divided and credited to the appropriations for the Antitrust Division of the DOJ and the FTC.[68] As a result, filing fees significantly reduce the amounts that Congress appropriates from general revenues to fund the agencies' enforcement programs.[69] Indeed, in some recent years, the Antitrust Division has been funded entirely from filing-fee revenue.[70] Prior to FY 1990, there were no filing fees; Congress instituted a $20,000 filing fee in 1990 and began to fund both agencies' operations in part with the fee receipts. Congress increased the filing fees in the 2000 HSR Amendments, with fees ranging from $45,000 to $280,000, depending on the size of the transaction.[71] Congress enacted this increase largely to offset the reduction in fee receipts resulting from increasing the size-of-transaction threshold and thereby preserve agency funding.[72]

The agencies should be funded fully from general revenues, and should not have their funding linked to HSR filing fees.[73] The existing linkage has at least the potential to expose funding of other agency enforcement efforts—including criminal and civil non-merger efforts—to the risk that merger activity (and therefore filing fee revenues) will fall.[74] Furthermore, merging parties should not have to shoulder the burden of paying a large portion of the cost of antitrust enforcement generally.[75] Indeed, the fees Congress has imposed effectively tax mergers, the vast majority of which are procompetitive or competitively neutral.[76] Other countries may follow this example and use fees to finance various activities.[77] Moreover, because a large majority of filings impose negligible review costs on the agencies, filing fees do not accurately reflect the burden imposed on the government by a given filing.[78]

* Commissioners Carlton and Jacobson do not join this recommendation.

Commissioner Carlton believes that filing fees are equivalent to a user fee that is appropriately linked to agency funding.

Commissioner Jacobson believes that funding from HSR Act filing fees lessens the politics associated with funding the nation's antitrust function. Without the significant revenues from HSR filing fees, the agencies will be increasingly vulnerable to political pressures to appease various constituencies to ensure they get the funds they need.

This recommendation is not a call for reduced antitrust enforcement or reduced funding for the antitrust agencies. The Commission recognizes the importance of antitrust enforcement to promoting consumer welfare, efficiency, and innovation. It urges Congress to fund the antitrust agencies solely from general revenues.[79]

B. The Second Request Process

29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

A second request is the principal formal mechanism through which the agencies can obtain the information they need to perform a detailed assessment of a proposed merger's likely impact on competition. The second request process must provide the agencies with sufficient information in a timely fashion to enable them to determine whether to challenge an anticompetitive merger in court. The challenge facing the agencies is implementing an approach that strikes an appropriate balance between the likely benefit of requested information to their review and the cost it will impose on the merging parties. While additional information may potentially be helpful to an investigation, requests should be limited to avoid situations in which "the cost of supplying much of the information . . . is disproportionate to its probative value."[80]

The second request process can impose immense burdens on parties, both in terms of delaying transactions and forcing parties to expend significant resources to supply requested information. Indeed, commenters and witnesses uniformly expressed concern over the excessive cost and delay associated with the second request process.[81] The American Bar Association Section of Antitrust Law (ABA Antitrust Section) reported a "consensus in the private bar that second requests are unduly burdensome."[82] Furthermore, the 2000 Report of the International Competition Policy Advisory Committee (ICPAC) observed that "[m]any business groups and practitioners . . . perceive the second request process to be 'unduly burdensome.'"[83] Agency witnesses agreed as well that decreasing the burdens imposed by second requests is an important goal.[84] Indeed, reviewing a response to a second request imposes considerable burdens on the government;[85] FTC Chairman Deborah Platt Majoras has expressly stated that recent reforms at the FTC are intended to reduce the costs faced by parties *and* the agencies.[86]

The burdens of second requests are high and increasing.[87] The cost of responding to a typical second request includes outside counsel fees, payments for processing electronic documents and photocopying, and economists' fees.[88] Indirect costs, such as employee time and opportunity cost, are difficult to quantify but are nonetheless very significant.[89] The ABA Antitrust Section cited reports that compliance with a second request typically takes six months and costs $5 million, while the reviews in more complex investigations can take eighteen months and cost the merging parties up to $20 million.[90]

Most of the Commission's evidence on burden, however, is anecdotal. The primary empirical study available to the Commission at the outset of its work was performed by PricewaterhouseCoopers in June 2003 under the sponsorship of the American Bar Association and the International Bar Association.[91] PricewaterhouseCoopers collected information on sixty-two transactions requiring multijurisdictional filing and reviews.[92] The sample thus focused on large international transactions subject to review by multiple jurisdictions.[93] The study found a "relatively small, regressive tax on mergers" and "significant delays in the multi-jurisdictional merger review process."[94] The study also found that the U.S. second request process is by far the most costly in the world, imposing twice the external costs (including payments for attorneys, economists, and document productions) than do second-phase investigations in the European Union.[95]

To supplement this information, the Commission sought data on the burden imposed by second requests from the public. No individual firms or companies provided data on burdens they had experienced. Although companies did not provide information directly to the Commission about the burden imposed by second requests, the ABA Antitrust Section provided the Commission with the aggregated results of a survey it conducted on burdens.[96] The figures for the delays and burdens imposed by second requests obtained through the survey are generally consistent with other anecdotal evidence, as shown in Table C. For example, on average, second request investigations took seven months and resulted in median compliance costs of $3.3 million. In addition, the median values for these data illustrate some of the specific burdens involved in complying with second requests: electronic document production of 583,000 pages of email and 555,000 pages of other documents; 275 pages of interrogatory responses; 13 gigabytes of electronic data; $2.4 million in fees for attorneys; and $300,000 in fees for economists. However, the survey's value is limited by the fact that it is based on a non-scientific, self-selected sample of only twenty-three total responses, and only a subset of these included information on each specific question. Moreover, the median values of most measures of burden were much lower than the means, suggesting that the average (*i.e.*, mean) values may be influenced by a few very high observations.

Table C: Burdens Imposed by Second Requests

Measure of Burden *(number of responses providing numerical data)*	**Mean Value**	**Median Value**
Length of investigation, in months (from HSR Act filing to close or agency action) (22)	7	7
Number of custodians searched (23)	126	94
Pages of e-mail produced (7)	1,566,867	582,913
Pages of electronic documents produced (other than e-mail) (6)	5,411,437	554,870
Pages of documents produced in hard copy (20)	1,515,662	544,516
Pages of interrogatory responses produced (18)	872	275
Electronic data produced in response to the interrogatories (in gigabytes) (6)	20	13
Total costs of compliance with second request (18)	$5,194,196	$3,300,000
Cost of economists (fees) (9)	$1,116,349	$300,000
Cost of attorneys/paralegals (fees) (13)	$4,361,604	$2,424,803
Costs of duplication/reproduction of documents and information (13)	$714,047	$100,787

Source: Letter from Joseph Angland to the Antitrust Modernization Commission Re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007).

The Commission also sought data on second request burden from the agencies. The agencies do not systematically track the number of documents or the amount of data produced by parties in response to second requests.[97] However, they do track the length of second request investigations. For both agencies, the length of second request investigations averaged about six months from the opening of the investigation in FY2005.[98] The length of investigations resulting in no enforcement action decreased significantly between FY2000 and FY2005, dropping from 312 days to 168 days for the FTC, and from 184 days to 163 days for the DOJ.[99] Investigations resulting in enforcement actions generally took longer—208 days for the FTC and 260 days for the DOJ in FY2005—and the length of these investigations decreased for the FTC but not the DOJ over the same period.[100]

It appears clear from the evidence available to the Commission that the second request process imposes significant costs on the merging parties in a substantial number of cases. However, the Commission is concerned that the lack of reliable quantitative information on the extent and nature of the problem may inhibit the ability of the agencies and Congress to identify and implement improvements, and recommends efforts to improve data collection below.

There are a number of reasons for the sizable costs imposed by second requests in some merger investigations. Merger investigations pose considerable challenges for the agencies. The issues are complex, and decisions must be made on a tight time frame. The second request must be issued early in the investigation and is the agencies' only opportunity to obtain documents and data, other than by consent of the parties, prior to challenging the merger in court.[101] Moreover, merging parties have no incentive voluntarily to provide the agencies with information that would suggest the transaction might be anticompetitive. Accordingly, the agencies cannot simply rely on the parties to provide all significant information and instead must actively seek the information they need. As a result, cooperation by the parties in meeting the agencies' needs is likely to be important to reducing the burdens imposed by second requests.[102]

The agencies' need for information to assess the impact of a merger has expanded as antitrust analysis has evolved over the past thirty years from a reliance on structural presumptions that mergers that increased concentration above certain thresholds were unlawful, to a more complex and fact- and data-intensive analysis.[103] The agencies must consider a variety of complex issues, including entry barriers and efficiencies. Moreover, the agencies increasingly rely on econometric assessments in evaluating mergers, and direct analysis of likely competitive impacts.[104]

The problem of increasingly extensive production requirements has been compounded by an "explosion" in the number of documents retained by companies in electronic format in recent years.[105] Some commentators have reported a ten-fold increase in the volume of documents collected per employee due to electronic documents.[106] As a result, the "search and production of electronic files has become the most expensive and burdensome part of most second request productions."[107] The agencies' need for increased production of data has also increased costs, especially because firms retain more data due to technological advances.[108] Data production costs are further increased by the need to re-process data for an agency—for example, to produce the information in a particular common format.[109] The agencies' review efforts are also negatively affected by these developments, because the production of massive amounts of data and documents also make it more difficult for staff to find and review relevant data.[110]

Unfortunately, agencies may face internal pressures that discourage staff from limiting the scope of second requests and may restrict the systematic reforms they adopt.[111] The agencies are generally reluctant to forgo the possibility of obtaining relevant information, even where it may not improve their ability to assess the competitive impact of the merger. As one witness observed, from the agency staff perspective, "[i]t is easy to take the view that more is better when it comes to obtaining information," since limitations "pose risks . . . without, from the government's perspective, much apparent downside."[112] For example, a large percentage of email that is responsive to a second request typically comes from lower-level employees, and arguably is not likely to produce insights regarding competitive effects beyond information also stored centrally or available in management files.[113] Moreover, such evidence may provide relatively little useful information on the market and economic characteristics most relevant to merger assessment. The agencies' use of the second request process to obtain evidence to support seeking a preliminary injunction can exacerbate this tendency towards over-inclusiveness.[114] This, however, is counter to the intended purpose of the HSR Act process, which aims to provide the agency only with the information they need to determine whether to bring a court challenge.[115] The agencies may later obtain further discovery—governed by a district court and the rules of civil procedure—if the agency brings a challenge in court.

There are limited formal constraints on the agencies' tendencies to seek more information, due to the largely regulatory nature of the HSR Act process.[116] The parties' need to obtain the fastest possible resolution makes it extremely unlikely that they will request that a court review agency decisions regarding second request breadth or compliance.[117] The delay, uncertainty, and potential bar that a challenge would cause leads the parties to meet almost any agency demand in order to avoid going to court. Although the agencies have created formal internal checks, as required by the 2000 HSR Amendments, some commenters and witnesses questioned the efficacy of these internal review mechanisms.[118] The limited set of overall constraints has led some critics to assert that the agencies may use the second request "to essentially create the automatic stay of a transaction" and to "create a whole new discovery mechanism, unconstrained by the Federal Rules."[119]

Over the last several years, the agencies have engaged in various initiatives to reduce the burdens imposed by HSR Act review.[120] Both agencies adopted a number of specific reforms during 2006 (including limitations on the number of employees whose files must be searched for a second request, discussed more fully below).[121] Some of these reforms appear to have had modest success in reducing the length of second request investigations—in investigations in which no enforcement action was brought the length has decreased markedly over the past five years.[122] The 2006 reforms occurred too recently to have yet had a measurable effect.

The Commission commends the agencies for undertaking reforms, and for their continuing efforts, in collaboration with the antitrust bar, business community, and public, to reduce the burdens resulting from HSR Act review and second requests. The Commission encourages both agencies to fulfill their commitment to conduct an "ongoing assessment of the HSR Act program to increase accessibility, promote transparency, and reduce the burden on the filing parties without compromising the agencies' ability to investigate and interdict transactions that may substantially lessen competition."[123] Overall, the Commission shares FTC Chairman Majoras's view that the FTC's most recent reforms should be "the start rather than the end."[124]

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

There is little question that second requests have the potential to impose significant costs on the merging parties. The evidence of those costs is largely anecdotal, however, with little systematic quantitative information on the burdens second requests impose. The agencies are in the best position to collect such information. For example, the agencies could compile information about the volume of data and documents (or electronic "bytes") the parties produce in each investigation.[125] Information about the overall length of investigations, and the number of investigational hearings or depositions taken,[126] are valuable but do not provide a complete pictures of the burden involved in an investigation.

The absence of reliable data about investigational burdens makes it difficult to evaluate accurately the actual burdens imposed by HSR Act investigations. Such data could be used to confirm the anecdotal evidence that costs are high, or might show that the limited evidence overstates the typical burden. Equally important, comprehensive data provide a baseline by which to measure improvements through process reforms introduced by the agencies or to help identify "best practices" in merger review.[127] (In addition, data relevant to other aspects of the HSR Act process, such as information regarding delays from clearance decisions, would also help identify areas where delays and costs could be most effectively reduced.[128]) Finally, systematic data collection would assist congressional committees in exercising their oversight responsibilities regarding merger enforcement under the HSR Act by the FTC and the DOJ.

The agencies should improve and increase their systematic collection of data relating to the length, costs, and burdens of their investigations under the HSR Act. The agencies should collaborate on developing consistent measures and definitions to ensure that the data applicable to each agency are comparable, so that data can be aggregated or compared to see whether one agency has developed a more effective approach for reducing burdens. The Commission believes the development of improved data collection systems will not unduly burden the FTC and the DOJ. On the contrary, once institutionalized, the collection of such information is likely to become a routine part of each investigation that takes minimal additional time to compile. The benefits it can bring, however, to improved understanding of the costs and burdens of the HSR Act and areas for further reform are likely to be substantial.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

The Commission has identified several additional ways to streamline the second request process. The Commission recommends one specific reform to the second request process, and identifies four additional specific areas in which it recommends that the agencies evaluate current practices to determine whether further improvements can be made. These potential reforms recognize the need to maintain an appropriate balance between the burdens imposed by second requests and the need of the agencies to review a merger adequately. Overall, the reforms offered for the agencies' consideration could help reduce burdens on parties without materially impairing the ability of the agencies to determine whether a merger will cause anticompetitive effects. Other than with respect to the specific reform, the Commission has described the contours of these reforms in general terms, leaving it to the agencies to determine the best method of implementation in light of their substantial experience.[129] (To the extent these reforms require legislative change, the Commission recommends that Congress enact any legislation necessary for the agencies to implement these proposed reforms.)

The Commission's identification of these five possible reforms is not intended to be exhaustive. On the contrary, there are likely numerous other ways in which the agencies could reduce the costs and burdens of second requests. The Commission, however, leaves it to the agencies, and their collective expertise, to identify areas for further reducing costs and how best to implement appropriate reforms.

1. Recommended Specific Reform

31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.*

One of the principal sources of burden from a second request is the volume of electronic and paper documents that must be searched and produced. This burden is related to the number of custodians whose files must be searched for responsive information.[130] Several witnesses and commenters before the Commission suggested that custodian limits could

* Commissioners Burchfield, Carlton, and Garza to not join this recommendation.

Commissioner Carlton does not join this recommendation because he would not eliminate the provisions in the agencies' existing custodial limits that require the parties to enter into timing agreements or other scheduling conditions.

significantly reduce unnecessary burden in second requests without prejudice to the government's ability to obtain material information.[131] Indeed, limiting the number of persons subject to search in a second request is consistent with discovery limits imposed by procedural rules governing civil litigation.[132]

Recognizing these principles, the FTC and the DOJ recently adopted custodian search limits, capping the number of employees whose files must be searched for a second request to thirty to thirty-five for the DOJ and thirty-five for the FTC, subject to certain exceptions.[133] These limits do not vary depending on the size of the transaction,[134] and may be exceeded upon authorization by senior agency personnel.[135] Both agencies require that the parties provide documents and personnel to assist the agencies in determining which employees files should be searched, and do not extend the limits to company or "central" files.[136] Moreover, to obtain the benefit of these limits, the parties must agree to certain provisions extending the length of the investigation.[137] The FTC requires that the parties agree to delay certifying substantial compliance until thirty days after producing the required materials (or to a "rolling production"), and agree to a joint scheduling order containing at least a sixty-day discovery period in the event of a court challenge.[138] The DOJ requires that parties enter into a "Process and Timing Agreement" that, among other things, affords sufficient time for post-complaint discovery in the event of litigation, indicating that "four to six months is generally necessary."[139]

The Commission endorses the concept of custodian limits but recommends several modifications. Under the Commission's approach: (1) merging companies could opt into presumptive custodian-search limits at the time they file the HSR Act notification; (2) companies opting in would provide detailed organization charts with the HSR Act filing and commit to make company representatives immediately available to discuss them; (3) the limit on the number of custodians would vary based on the size of the transaction; and (4) the presumptive limit could be exceeded for cause with the agreement of the merging companies or with the approval of the Assistant Attorney General or FTC Chairman, as appropriate. (The complete description is set forth in Annex A.) The Commission's approach would not require the merging companies to commit to an extension of the statutory time periods of the HSR Act or any other timing agreements as a condition of limiting the number of custodians, as the current FTC and DOJ limits require.

Filing Option and Organizational Charts. The parties could choose to have the limits apply by checking a box on the HSR form, rather than when the second request issues, as under the existing agency approaches.[140] The parties would also be required to provide complete and accurate organizational charts at the time of the initial HSR filing, and to make a responsible officer available to explain the charts. This will allow the agency to begin its inquiry immediately. In addition, by making the election at the filing stage, the parties will provide the agencies with an indication that they believe the agencies may scrutinize the transaction.

Sliding Scale Limits. The agencies would establish limits on the number of custodians to be searched based on the size of the transaction, with the limits ranging between fifteen and thirty-five employees. A single limit has the potential to impose a proportionately larger burden on small transactions than on large transactions. Furthermore, the cost savings a sliding scale affords to smaller transactions should outweigh any increased complexity of such an approach.[141] Moreover, to the extent that lower limits would prevent thorough investigations, the agency could exceed the limits in appropriate cases.

Case-by-Case Increases in Limits. An agency may need to increase the number of custodians to search in some investigations to enable staff to conduct an adequate investigation (for example, when there are numerous product or geographic markets).[142] Accordingly, under the Commission's proposed approach, agency staff may seek to exceed the custodian limit where they deem it necessary to conduct an adequate investigation. They may do this either by obtaining the consent of the parties or by seeking certification from the Assistant Attorney General or Chairman of the FTC of his or her good-faith belief that the additional materials are needed. Because such exceptions should be granted sparingly, the Commission recommends that only the head of the investigating agency be permitted to make the formal certification of the need to expand the search.

No Agreement on Time Limits. The Commission's proposal does not include a provision requiring the parties to agree to a thirty-day extension of the second thirty-day waiting period after certifying substantial compliance, a stipulated period for post-complaint discovery, or other scheduling requirements, as both the current FTC and DOJ approaches do. Requiring the parties to agree to extensions of the waiting period is unnecessary and effectively amounts to an administrative amendment of the second thirty-day waiting period established by Congress. The thirty-day waiting period, in conjunction with the investigation period, should be adequate time for the agencies to decide whether to challenge a merger and to prepare a filing for a preliminary injunction; if it is not, the agencies should seek statutory change in Congress. Furthermore, parties should not be required to stipulate to a discovery schedule in order to avail themselves of the custodian limit. If the agencies challenge a transaction in court, the district court in its sound discretion can be relied upon to provide a sufficient period for any additional discovery the agencies need.

2. Additional Areas for Possible Reform

The Commission also identifies four specific areas in which further reform may be appropriate. The first two concern the transparency of the agencies' review process, particularly their economic and competitive analyses. The second two are areas in which the costs imposed by the second request may be particularly large relative to their benefits. The Commission recommends that the agencies examine how they could make further improvements in these areas, and take action as appropriate.

31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.*

The Commission understands that the agencies' staffs frequently discuss their competitive concerns and possible second request modifications with the parties shortly after the second request.[143] Based on comments submitted to the Commission, it appears that this may not occur in all cases or such discussions may not always fully reflect an agency's competitive concerns.[144] Such explanations can facilitate substantive discussions between the parties and agencies, as well as enable the parties to make better assessments of the information that would be most useful to the agencies. Furthermore, a systematic requirement to provide such an explanation may impose discipline on the second request itself, by clarifying the areas in which information is needed. The Commission therefore recommends that the agencies institutionalize this practice by specifically committing to provide information to merging parties regarding the agencies' competitive concerns shortly after issuing a second request.

31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.

The Commission understands that the agencies currently promote discussions between agency economists and the parties' economists as part of their efforts to ensure transparency and promote efficient merger review.[145] Several witnesses and commenters before the Commission advised that there should be greater transparency concerning the government's economic analysis. Merging companies are often limited in their ability to evaluate and critique the economic models being developed by agency economists, for example, because of concerns regarding the confidentiality of third-party information.[146] In addition, agency staff may be reluctant to reveal their preliminary analysis if the government may have to litigate with the parties.[147]

Current merger analysis relies heavily on econometric analysis and is highly sensitive to the assumptions, techniques, and data used. Specifying, testing, and refining econometric models to reflect actual industry circumstances are best served if the agencies' economists and the parties' economists can discuss alternative modeling approaches and economet-

* Commissioners Burchfield, Cannon, Carlton, Litvack, and Yarowsky do not join this recommendation.

ric testing.[148] Particularly given the reality that most merger challenges are not litigated, the search for the right resolution would be facilitated by open discussion. The Commission accordingly recommends that the agencies devise additional means through which the agency's economists can have frank and open discussions with the merging parties of the economic analysis being used.

31d. The agencies should reduce the burden of translating foreign-language documents.

The burden of translating into English foreign-language documents submitted in response to a second request can be particularly onerous in some transactions.[149] This burden should not be imposed on parties except where the documents are likely to be relevant to evaluating the competitive concerns, and even then only to the extent necessary to conduct an adequate investigation.[150] Although the agencies often limit translation requirements to certain key foreign-language documents, the standard second request contains no such limits and requires translation of all documents.[151] The Commission therefore recommends that the agencies consider institutionalizing reforms to limit the burden of translating documents. For example, it may be possible to require summaries of documents rather than full translations,[152] or to limit translation mandates to documents of "key corporate decision makers" and those relating to businesses or product lines most relevant to the competitive concern.[153]

31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.

Requests for data that are not kept in the ordinary course of business can be extraordinarily burdensome, since supplying such data may require the parties to incur great expense in engaging experts and information technology personnel.[154] The Commission recognizes the agencies have taken steps to reduce the burden of data requests, including efforts to understand the types of data the parties keep and the formats in which it is kept.[155] The Commission recommends that the agencies give further attention to taking steps, including formalizing policies, to reduce the burden imposed by requests for data that is not kept in the normal course of business by the parties (or which is kept in a form different from that requested).

ANNEX A

HSR ACT CUSTODIAN SEARCH LIMIT

1. The HSR Act Report Form will be modified to include a box labeled "Optional custodian limitation for potential additional request for information." If the notifying party checks this box, the procedures set forth below will apply. If, however, the box is not checked, any additional request for information may proceed without the limitations set forth below, consistent with current practice.

2. A party electing the custodian limitation option must (1) provide or create, and submit with the form, complete and accurate organization charts (or equivalent materials that allow staff to identify the party's employees and their positions), and (2) provide the name, and make available for interview, a responsible officer to explain the organization charts, the roles of the listed personnel, and the location of company records. The officer designated should be the senior person within the organization most familiar with these issues. If necessary, more than one such person should be made available.

3. If the notifying party has complied with paragraph 2 above, then, depending on the dollar size of the transaction, the reviewing agency will be limited to requiring a search of documents in the files of fifteen employees (at the low end) to thirty-five employees (at the high end).

4. If the agency staff believe that the files of custodians in excess of the numbers set forth in paragraph 3 are required to pursue their investigation, staff should first notify the affected party of the total number custodians whose files it seeks and request the party's consent. If consent is not provided within two business days, staff may seek materials from additional custodians only upon the personal approval and certification of a good faith belief that the additional materials are needed by, as the case may be, the Chair (or Acting Chair) of the Federal Trade Commission or the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Antitrust Division of the Department of Justice.

Notes

[1] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

[2] 15 U.S.C. § 18a(b).

[3] *Id.* § 18a(e).

[4] *See* Part 2.B of this Section, Table A. In addition, the agencies blocked or obtained relief in thirty-one mergers that were not reportable under the HSR Act. *See id.*

[5] H.R. Rep. No. 94-1373, at 11 (1976).

[6] Representative Rodino estimated that the HSR Act "will reach only about the largest 150 mergers a year." 122 Cong. Rec. 25,052 (1976) (remarks of Rep. Rodino); *see also* H.R. Rep. No. 94-1373, at 11.

[7] *See* Part 2.B of this Section, Table A; Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2005, at app. A (2006) [hereinafter DOJ/FTC FY2005 HSR Report]; Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1997, at app. A (1998); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1988, at app. A (1989).

[8] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2000, at tbl.II (2001) [hereinafter DOJ/FTC FY2000 HSR Report] (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

[9] *See* Part 2.B of this Section, Table A.

[10] 122 Cong. Rec. 30,876–77 (1976) (remarks of Rep. Rodino) (second requests would call for "the very data that is already available to the merging parties and has already been assembled and analyzed by" the parties).

[11] Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing, at 4 (Nov. 17, 2005) [hereinafter Sunshine & Wales Statement].

[12] *Id.* (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); Merger Streamlining Group, Public Comments Submitted to AMC, at 6 (Feb. 6, 2006) [hereinafter Merger Streamlining Group Comments] (reporting that the second request process often takes half a year); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Hart-Scott-Rodino Second Request Process, at 4 (Dec. 7, 2005) [hereinafter ABA Comments re HSR].

[13] Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[14] Data on FTC Appropriations (on file with AMC).

[15] James R. Atwood, Statement at AMC International Antitrust Hearing, at 3 (Feb. 15, 2006) (estimating that "approximately 70 [countries] provide for merger pre-notification and/or review"); International Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review, at 4 (Nov. 2004), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf (estimating that about 75 jurisdictions have merger review laws).

[16] Randolph W. Tritell, Ass't Dir. for Int'l Antitrust, Federal Trade Comm'n, Int'l Aspects of U.S. Merger Review Policy, ABA International Section Lunch Program, at 2 (Feb. 28, 2001), *available at* http://www.ftc.gov/bc/international/docs/tritell_intaspectsmergreview.pdf.

[17] PricewaterhouseCoopers, *A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews*, at 42 (July 2003) [hereinafter PwC Survey]; *id.* at 18 (defining costs covered in survey); Merger Streamlining Group Comments, at 6 (citing PwC Survey).

[18] *See* S. Rep. No. 94-803, at 61 (1976) ("Presently, the Government can stop few illegal mergers before they take place."); *see also* H. Rep. No. 94-1373, at 8 (the absence of pre-closing notification requirements "meant that many large and illegal mergers have been successfully consummated in recent years, before the government had any realistic chance to challenge them"); William J. Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 828–29 (1997) [hereinafter Baer, *Reflections on 20 Years of Merger Enforcement*].

[19] *See* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43, 52 (1969) [hereinafter Elzinga, *Antimerger Law*]; Baer, *Reflections on 20 Years of Merger Enforcement*, at 828–31.

[20] *See* Elzinga, *Antimerger Law*, at 47–54; S. Rep. No. 94-803, at 61. In one extreme case, a 1955 acquisition involving companies engaged in printing color comic supplements for newspapers was challenged by the DOJ in 1960. After the trial court dismissed the complaint in 1970, the Supreme Court held that the acquisition violated Section 7 and ordered the trial court to fashion relief in 1971. The trial court ordered divestiture in 1973, but by that time no interested buyer could be found. *See* United States v. Greater Buffalo Press, Inc., 327 F. Supp. 305 (W.D.N.Y. 1970) (dismissing complaint), *rev'd*, 402 U.S. 549 (1971), *on remand to* 1973 WL 833 (W.D.N.Y.) (ordering divestiture).

[21] *See* H.R. Rep. No. 94-1373, at 7–11.

[22] S. Rep. No. 94-803, at 61.

[23] A summary describing the main aspects of the program relevant to the Commission's study may be found in American Bar Association, Section of Antitrust Law, Antitrust Law Developments 388–96 (6th ed. 2007). For a more detailed discussion of the merger review process, see American Bar Association, Section of Antitrust Law, The Merger Review Process: A Step-by-Step Guide to Federal Merger Review 22–31 (3d ed. 2006) [hereinafter ABA, Merger Review Process].

[24] 15 U.S.C. § 18a(a).

[25] *Id.*; 72 Fed. Reg. 2693 (Jan. 22, 2007) (setting new filing thresholds based on change in GNP).

[26] 15 U.S.C. § 18a(a); 72 Fed. Reg. 2693 (Jan. 22, 2007).

[27] Act of Dec. 21, 2000, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111. These fee thresholds are also adjusted for changes in GNP. *See* 72 Fed. Reg. 2693 (Jan. 22, 2007) ($45,000 for transactions valued at less than $119.6 million; $125,000 for transactions valued between $119.6 million and $597.9 million; and $280,000 for transactions valued at $579.9 million or more).

[28] 15 U.S.C. § 18a(a)(2).

[29] 16 C.F.R. § 803, app. (2006), Notification and Report Form for Certain Mergers and Acquisitions.

[30] 15 U.S.C. § 18a(b)(1)(B).

[31] *Id.* § 18a(b)(2).

[32] *Id.* § 18a(e).

[33] *Id.* § 18a(e)(2). In the case of a cash tender offer, only the acquiring party is required to certify substantial compliance. *Id.*

[34] *See* Table A.

[35] *Id.*

[36] *See* Chapter II.A of this Report regarding the merger clearance process.

[37] 15 U.S.C. § 18a(e)(2); *see also* ABA, Merger Review Process, at 136–42.

[38] The FTC Premerger Notification Office has an informal policy under which the acquiring party can avoid paying a second filing fee and producing certain other additional information with the filing if re-filing is completed within two days. *See generally* ABA, Merger Review Process, at 141.

39 *See* Cecile Kohrs Lindell, *Companies are Trying to Beat the Antitrust Clock*, Daily Deal (Feb. 6, 2007) (reporting that companies are more frequently opting to pull and re-file their HSR notifications, and describing two recent examples).

40 Letter from Marion Bruno and J. Robert Kramer II to Andrew Heimert re AMC Data Request (Nov. 22, 2006, revised Feb. 8, 2007 & Mar. 7, 2007) [hereinafter FTC/DOJ Data Submission] chart D.

41 Federal Trade Comm'n's Rules of Practice, 16 C.F.R. § 2.8 (2006); Order No. 753–77, 42 Fed. Reg. 56,730 (Oct. 28, 1977).

42 15 U.S.C. § 18a(e)(2).

43 16 C.F.R. § 803.6 (2006).

44 15 U.S.C. § 18a(g)(2).

45 *See* FTC v. Blockbuster, Inc., Civ. No. 1:05CV00463 (D.D.C. 2005); FTC v. McCormick & Co., 1988 WL 43791, at *1 (D.D.C. Apr. 26, 1988); FTC v. Dana Corp., No. CA-3-81-0003-H (N.D. Tex. 1981).

46 15 U.S.C. § 18a(e)(B)(i).

47 *Id.* § 18.

48 Department of Commerce, Justice, State, and the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111 (2000) (codified as amended at 15 U.S.C. §§ 18a & 18a note).

49 *See* DOJ/FTC FY2000 HSR Report, at tbl.II (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

50 15 U.S.C. § 18a(a)(2). Adjustments were first made in FY2005 and are now made annually.

51 *Id.* § 18a(e)(1)(B)(i) ("The assistant attorney general and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person. . . ."). It also increased the second waiting period from twenty to thirty days. *Id.* § 18a(e)(2).

52 *Id.* § 18a(e)(1)(B)(iii)-(v).

53 Federal Trade Comm'n, Report to Congress Regarding Merger Review Procedures (June 19, 2001), *available at* http://www.ftc.gov/os/2001/06/hsrreport.htm [hereinafter FTC Report to Congress re Merger Review Procedures]; Dep't of Justice, Antitrust Div., Report to Congress Regarding Merger Review Procedures (June 19, 2001), *available at* http://www.usdoj.gov/atr/public/guidelines/8550.pdf.

54 Deborah Platt Majoras, Reforms to the Merger Review Process (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf [hereinafter FTC 2006 Merger Process Reforms]; Deborah Platt Majoras, Statement at AMC Barnett/Majoras Hearing, at 11 (Mar. 21, 2006) [hereinafter Majoras Statement] (summarizing reforms); Dep't. of Justice, Antitrust Div., Background Information on the 2006 Amendments to the Merger Review Process Initiative (Dec. 14, 2006) [hereinafter DOJ Background on 2006 Merger Process Initiative Amendments], *available at* www.usdoj.gov/atr/public/220241.htm; Dep't. of Justice, Antitrust Div., Merger Review Process Initiative (revised, Dec. 14, 2006) [hereinafter DOJ Revised Merger Process Initiative], *available at* www.usdoj.gov/atr/public/220237.htm.

55 *See* J. Robert Kramer II, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) [Kramer Statement] (before the HSR Act, the DOJ could not effectively detect and challenge anticompetitive mergers; pre-merger review effectively protects consumers from anticompetitive mergers); Baer, *Reflections on 20 Years of Merger Enforcement*, at 834.

56 *See, e.g.*, Merger Enforcement Transcript at 203 (Whitener) (Nov. 17, 2005) ("[I]n the main, it's a system that works well."); *id.* at 201 (Kramer) (HSR process is "successful from any global view"); Wayne D. Collins, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) (HSR Act provides "an adequate statutory framework for merger review," and the U.S. agencies "have done many things very well, [though] there is significant room for further improvement"); U.S. Chamber of Commerce, Public Comments Submitted to AMC (Nov. 8, 2005), at 14–15 [hereinafter U.S. Chamber of Commerce Comments] (prais-

ing agencies for reducing the number of second requests); *see also* International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust 139 n.127 (2000) [hereinafter ICPAC Report] (observing that "business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is 'fundamentally sound'").

57 *See, e.g.*, Thomas O. Barnett, Statement at AMC Barnett/Majoras Hearing, at 7 (Mar. 21, 2006) [hereinafter Barnett Statement] (mergers can "generate procompetitive benefits, such as lower costs and increased innovation"); Susan A. Creighton, Statement at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005) [hereinafter Creighton Statement] (merger review process may impose costs on transactions that are largely or wholly beneficial to consumers). *See generally* Chapter I.B of this Report regarding substantive merger law.

58 *See, e.g.*, Merger Enforcement Trans. at 234–35 (Whitener) (arguing against adopting the European approach to merger review in the United States); Merger Enforcement Trans at 235–36 (Wales) (arguing that U.S. system relies more on "objective facts"); ABA Comments re HSR, at 13 (declining to recommend adoption of a "Form CO-like submission").

59 *See, e.g.*, International Chamber of Commerce, Public Comments Submitted to AMC, at 2 (Sept. 5, 2005) [hereinafter ICC Comments] (commending the E.U. and Canadian approaches to structuring the second request review period); Merger Streamlining Group Comments, at 8–10 (noting that second phase investigations in Canada and the European Union imposes fewer burdens on parties and suggesting reforms analogous to features of those systems).

60 *See generally* Majoras Statement, at 10 ("[t]he agencies can implement such flexible revisions readily through changes to their internal procedures" while "crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges"); Barnett/Majoras Transcript at 24 (Barnett) (Mar. 21, 2006) (merger review process reform is "an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress."); Barnett Statement, at 7–9.

61 *See* ICPAC Report, at 127 (stating that, as of 2000, HSR filings had "increased significantly since the HSR Act was enacted" due to increased merger activity and the failure to adjust the thresholds).

62 *See* Table A; U.S. Chamber of Commerce Comments, at 13 (the "upward revision in the filing threshold has dramatically reduced the number of filings").

63 *See* DOJ/FTC FY2000 HSR Report, at tbl.II (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

64 ICPAC Report, at 126 (emphasis omitted).

65 U.S. Chamber of Commerce Comments, at 13.

66 *See* Table B.

67 *See* ICC Comments, at 2; ABA Comments re HSR, at 14. One commenter did suggest that action be taken to reduce the number of filings further. U.S. Chamber of Commerce Comments, at 13.

68 *See* Pub. L. No. 101-162, § 605, 103 Stat. 988, 1031 (1989) ("Fees collected for [HSR filings] shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division.'") (codified as amended by Pub. L. No. 101-302, Title II, 104 Stat. 213, 217 (1990) at 15 U.S.C. § 18a note).

69 Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm; Data on FTC Appropriations (on file with AMC).

70 Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[71] Act of Dec. 21, 2000, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111. Congress also raised the filing fee, in 1994, to $45,000 per transaction. Act of Aug. 26, 1994, Pub. L. No. 103-317, Title I, 108 Stat. 1724, 1739.

[72] 146 Cong. Rec. S10921 (daily ed. Oct. 10, 2000) (statement of Sen. Leahy) ("the appropriations to these agencies usually corresponds to the level of the fees collected," and the "bill authorizes the collection of sufficient fees to be revenue neutral"); 146 Cong. Rec. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl) ("In order to assure that this reform is revenue neutral [for the agencies], we have worked with the Appropriations Committee to ensure that this bill raises the filing fees for the largest transactions.").

[73] Sunshine & Wales Statement, at 10; Business Roundtable, Public Comments Submitted to AMC, at 15 (Nov. 5, 2005) [hereinafter Business Roundtable Comments]; U.S. Chamber of Commerce Comments, at 16; ICC Comments, at 2.

[74] ICPAC Report, at 129; *Antitrust Enforcement Agencies: The Bureau of Competition of the Federal Trade Commission and the Antitrust Division of the Department of Justice, Hearing Before the Committee on the Judiciary House of Representatives*, 106th Cong. 209 (2000) (prepared statement of Jim Rill, Co-Chair, International Competition Policy Advisory Committee) [hereinafter Rill/ICPAC Statement].

[75] *See* 146 Cong. Rec. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl) ("Of course, in a perfect world, we wouldn't finance the Antitrust Division and the FTC on the backs of these filing fees.").

[76] U.S. Chamber of Commerce Comments, at 16 ("As presently structured and applied, the fees represent nothing less than a tax imposed on parties that are forced to comply with the Hart-Scott-Rodino pre-merger scheme . . . ."); PwC Survey, at 4.

[77] *See* Business Roundtable Comments, at 15.

[78] U.S. Chamber of Commerce Comments, at 13 ("These [HSR] fees bear no relationship to the costs incurred in reviewing the average filing (since the vast majority of filings are cleared without any substantive review) and cannot be justified as a reasonable user charge."); Sunshine & Wales Statement, at 10.

[79] *See* ICPAC Report, at 129 ("[F]iling fees should be delinked from funding for the agencies, but . . . any efforts to do so must occur in an environment where sufficient funds are assured from other sources."); Rill/ICPAC Statement, at 209.

[80] William Blumenthal, *Overenforcement in the Hart-Scott-Rodino Second Request Process*, in Malcolm B. Coate & Andrew N. Kleit, The Economics of the Antitrust Process 26 (2003) [hereinafter Blumenthal, *Overenforcement in the HSR Second Request Process*]; *see also* Mark D. Whitener, Statement at AMC Merger Enforcement Hearing, at 3 (Nov. 17, 2005) [hereinafter Whitener Statement] ("The cost, delay and disruption to business operations associated with a typical second request are disproportionate to the benefits to the government's enforcement mission, and they are increasing.").

[81] *See, e.g.*, Business Roundtable Comments, at 11; ICC Comments, at 11 (many ICC members have reported that overly broad second requests are being issued); ABA Comments re HSR, at 3; Whitener Statement, at 6 ("Second request responses have transmogrified into even more massive efforts that typically entail several million dollars in direct costs, and result in the collection, review and production of not hundreds but thousands of boxes of documents (or their electronic equivalent) as well as complex and costly data responses."); U.S. Chamber of Commerce Comments, at 14 ("The incredible burden of responding to Second Requests is well-known to any firm that has survived the ordeal. It is not unusual for companies caught up in the process to produce millions of documents and spend similar amounts in order to comply with agency demands."); Sunshine & Wales Statement, at 2.

[82] ABA Comments re HSR, at 3.

[83] ICPAC Report, at 138 (footnote omitted).

[84] Majoras Statement, at 10–13; Barnett Statement, at 7–8; Kramer Statement, at 2; Creighton Statement, at 1–2.

[85] *See* Merger Enforcement Trans. at 285 (Kramer); id. (Creighton).

[86] *See* Majoras Statement, at 10 (reforms will reduce costs to parties and agencies).

[87] *See, e.g.*, Whitener Statement, at 5 ("From the merging parties' perspective, the costs of complying with a second request in terms of time, money and disruption are enormous. . . . The delays alone, to say nothing of the costs, usually are enough to make litigation infeasible."); ICC Comments, at 1, 4 ("the cost, burden . . . involved in HSR review appear to have increased dramatically" and the second request process is "unduly burdensome") (quoting ICPAC Report, at 137); ABA Comments re HSR, at 1–2 (despite prior reform efforts, "the expense and burden of second request compliance has steadily increased and is becoming untenable"); Business Roundtable Comments, at 11 ("The issuance of a Second Request dramatically increases the cost, delay, and burden for both the agencies and the parties. . . . Second Requests are overbroad and require parties to produce an extraordinary amount of documents and data, far beyond the scope of information that is 'readily available.'").

[88] *See, e.g.*, ABA Comments re HSR, at 9 (stating that parties that must comply with second requests "incur a variety of very substantial costs," including lawyers, economists, computer/data processing vendors, copy vendors, the opportunity costs of employee time, and the cost of delay in consummating the transaction.); Sunshine & Wales Statement, at 4.

[89] *See* ABA Merger Comments re HSR, at 9; PwC Survey, at 5.

[90] ABA Comments re HSR, at 4 (citing Cecile Kohrs Lindell, *Majoras Hopes to Streamline Reviews*, Daily Deal (May 11, 2005)); *see also* Sunshine & Wales Statement, at 4 (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); *cf.* Barnett Statement, at attachment 5 (citing average duration of approximately four months for matters that the DOJ does not challenge in court).

[91] PwC Survey, at 4.

[92] *Id.* at 12–13.

[93] *Id.* at 44.

[94] *Id.* at 42.

[95] *Id.*

[96] Letter from Joseph Angland to the Antitrust Modernization Commission Re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007) [hereinafter Angland Letter].

[97] FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 2).

[98] *Id.* at charts H1–H2.

[99] *Id.*

[100] *Id.*; *see also* Barnett Statement, at 8–9, attachments 4–5 (reporting reductions in the length of second request investigations and the percentage of initial investigations resulting in second requests).

[101] *See* American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2001*, at 29–30.

[102] *See* Deborah Platt Majoras, FTC Chairman, Reflections on My First Year, Remarks Before the 2005 ABA Annual Meeting, at 10 (Aug. 6, 2005) ("[I]f we do not have a reasonable level of assurance that parties are dealing in good faith, new rules and process reforms will be, I fear, dead-on-arrival."); *see also* Whitener Statement, at 11–12; Merger Enforcement Trans. at 224–25 (Creighton) ("[C]ooperation by the parties really is indispensable for us to be able to engage in any kind of meaningful reduction in the number of custodians searched.").

[103] FTC 2006 Merger Process Reforms, at 2, 6; Majoras Statement, at 10; Creighton Statement, at 2–3 (emphasizing the impact of "increasing sophistication of substantive merger analysis" and "increasing use of data-dependant economic analysis"); International Bar Association, Public Comments Submitted

to AMC Regarding Merger Enforcement, at 25 (Oct. 26, 2005) [hereinafter IBA Comments] ("U.S. merger review has come a long way and now involves detailed and sophisticated microeconomic analysis of a merger's likely impact on prices and markets.").

104 *See, e.g.*, Whitener Statement, at 6 (agencies and courts "rely more heavily on econometric analysis of business data").

105 *See, e.g.*, Creighton Statement, at 2 (due to increased use of electronic storage, "the number of documents that need to be searched and produced has grown exponentially"); FTC 2006 Merger Process Reforms, at 2 ("advances in technology—from the copy machine to e-mail—have resulted in companies' producing and retaining substantially more documents"); Kramer Statement, at 9 (the proliferation of electronic documents makes second request reform "more urgent").

106 Scott Sher & Daryl Teshima, *e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations*, ANTITRUST SOURCE, at 1 (Nov. 2005), *available at* www.wsgr.com/PDFSearch/sher1105.pdf [hereinafter Sher & Teshima, *e-Normous*] ("The volume of electronic documents . . . is overwhelming and increasing at a rate that puts Moore's Law to shame.").

107 American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 42 [hereinafter ABA, *The State of Federal Antitrust Enforcement—2004*].

108 *See* Whitener Statement, at 6 (agencies and courts "rely more heavily on econometric analysis of business data," and companies in turn collect more data that the agencies can request); IBA Comments re Merger Enforcement, at 25 (noting an increase in the need for data and the sources of data).

109 *See* ABA Comments re HSR, at 2 (The cost and length of time required to comply is primarily due to volume of (primarily electronic) documents and data being produced pursuant to second requests. Corporations store and retain more, and the agencies more regularly require the manipulation and production of such data.); Sher & Teshima, *e-Normous*, at 8.

110 Merger Enforcement Trans. at 285 (Kramer); *id.* (Creighton).

111 *See* Blumenthal, *Overenforcement in the HSR Second Request Process*, at 23–24.

112 *See* Whitener Statement, at 4–5; *see also* ABA, *State of Federal Antitrust Enforcement—2004*, at 41 (efforts to "discover[] every conceivable, potentially relevant fact" can "result[] in the type of massive, overbroad and unduly burdensome requests that are issued too often").

113 *See* Sher & Teshima, *e-Normous*, at 12.

114 IBA Comments re Merger Enforcement, at 30 (arguing that "[t]he Agencies' desire to collect all the evidence that may be required in litigation . . . increases the cost of the Second Request Process").

115 *See* Sunshine & Wales Statement, at 2 (HSR was intended to give the agencies "the time and the basic information needed to determine whether to institute a merger enforcement action in federal court").

116 *See generally* Sunshine & Wales Statement, at 1; William J. Kolasky & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 889–93 (1997) [hereinafter Kolasky & Lowe, *Merger Review Process*].

117 *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 868–69 (1997) [hereinafter Sims & Herman, *Effect of Twenty Years of Hart-Scott-Rodino*]; Sunshine & Wales Statement, at 1; Kolasky & Lowe, *Merger Review Process*, at 893 (time-sensitive nature of transactions generally leads parties to avoid litigation "wherever possible").

118 *See, e.g.*, Business Roundtable Comments, at 14 ("The internal appeals process at both agencies has proved to be useless."); ABA Comments re HSR, at 11 (in five years "the agencies have not, and, perhaps, cannot, create a credible internal second request appeals process"); Whitener Statement, at 13.

119 Sims & Herman, *Effect of Twenty Years of Hart-Scott-Rodino*, at 881. The authors contend that the agencies disregarded the clear intent of the HSR Act when they decreed that "[a]nything less than a complete response is not substantial compliance" and that the waiting period does not run until the agencies deter-

mine substantial compliance. *Id.* at 881 & n.58 (quoting Federal Trade Comm'n, Statement of Basis and Purpose, 43 Fed. Reg. 33,450, 33,508, 33,550 (July 31, 1978) (internal quotations omitted)).

[120] For descriptions of specific initiatives, see Kramer Statement, at 7–15 (describing various initiatives taken by DOJ over the past ten years); Barnett Statement, at 8–9 (focusing on the Division's 2001 Merger Review Process initiative); Majoras Statement, at 10; Barnett/Majoras Trans. at 11–12 (Majoras); ABA Comments re HSR, at 5.

[121] The agencies also adopted several other reforms that help reduce burdens, but that are not addressed by the Commission in this Report. FTC 2006 Merger Process Reforms, at 19–30; DOJ Background on 2006 Merger Process Initiative Amendments, at 13–15.

[122] FTC/DOJ Data Submission, at Charts H1–H2.

[123] DOJ/FTC FY2005 HSR Report, at 17–18; DOJ Background on 2006 Merger Process Initiative Amendments, at 1 (the "amendments are part of the Division's ongoing effort to reduce merger review burdens while preserving its ability to conduct thorough investigations and successfully challenge anticompetitive transactions.").

[124] Majoras Statement, at 12.

[125] FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 2).

[126] *Id.* at charts I1–I3.

[127] For example, the agencies do not currently track which types of employees are most likely to be the source of documents that prove most useful in investigations. FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 3).

[128] *See* Chapter II.A of this Report regarding dual federal enforcement, which describes the limited data on length of delays resulting from clearance disputes.

[129] *See* Majoras Statement, at 10 ("The agencies can implement such flexible revisions readily through changes to their internal procedures" while "crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges"); Barnett/Majoras Hearing Trans. at 24 (Barnett) (merger review process reform is "an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress."); Barnett Statement, at 7–9.

[130] ABA Comments re HSR, at 10 ("[L]imiting the number of custodians is probably one of the most effective ways to reduce the burden of compliance."); FTC 2006 Merger Process Reforms, at 12 (noting "the strong relationship between search group size and investigation cost"); Merger Enforcement Trans. at 224 (Creighton) ("[T]wo of the really key variables . . . are the time period and, even more importantly, the number of custodians that we review."); Whitener Statement, at 8 ("The number of people who are subject to the search is critical . . . ."); ABA, *State of Federal Antitrust Enforcement—2004*, at 42; *see also* Angland Letter, at chart 1 (comparing the total cost of compliance and the number of custodians searched).

[131] Whitener Statement, at 9–10; ABA Comments re HSR, at 10; FTC 2006 Merger Process Reforms, at 12.

[132] IBA Comments, at 28.

[133] *See, e.g.*, FTC 2006 Merger Process Reforms, at 9 (referring to a presumption of searching thirty-five custodians); DOJ Background on 2006 Merger Process Initiative Amendments, at 9 (referring to thirty-custodian cap on searches).

[134] FTC 2006 Merger Process Reforms, at 12–13.

[135] *Id.* at 13 (limit may be exceeded if authorized by the Director of the Bureau of Competition); DOJ Background on 2006 Merger Process Initiative Amendments, at 9 (limit may be exceeded if authorized by the Section Chief responsible for the investigation).

[136] FTC 2006 Merger Process Reforms, at 9–10, 13–14, 17–18; DOJ Background on 2006 Merger Process Initiative Amendments, at 10–12.

[137] FTC 2006 Merger Process Reforms, at 10, 15–19; DOJ Background on 2006 Merger Process Initiative Amendments, at 11.

[138] FTC 2006 Merger Process Reforms, at 10, 15–19.

[139] DOJ Background on 2006 Merger Process Initiative Amendments, at 11; DOJ Revised Merger Process Initiative, at 7.

[140] The agencies could retain their existing custodial limit programs for instances in which the parties do not elect this option using the HSR Act notification form.

[141] *But see* FTC 2006 Merger Process Reforms, at 12 (the FTC considered but rejected "establishing a range of presumptive custodial limits" tied to the size of the transaction, due to the "complexity of such an approach").

[142] *See* FTC 2006 Merger Process Reforms, at 13; DOJ Background on 2006 Merger Process Initiative Amendments, at 12.

[143] *See, e.g.*, DOJ Revised Merger Process Initiative, at 2–3 (stating that "[e]arly substantive consultations are strongly encouraged . . . . [for] both the Division and the parties to present their preliminary views on the transactions," including identification of all "critical or potentially dispositive issues"); FTC Report to Congress re Merger Review Procedures (generally within five days of issuing a second request, FTC staff will invite the parties "to discuss the second request and the competitive issues raised by the proposed transaction, to the extent then known").

[144] *See, e.g.*, ICC Comments, at 4 (at the beginning of a second stage review, the reviewing agency should give the parties, orally or in writing, "a short but clear statement of the competitive concerns that cause the agency to undertake further investigation"); Business Roundtable Comments, at 14; IBA Comments re Merger Enforcement, at 29.

[145] *See, e.g.*, DOJ Revised Merger Process Initiative, at 3–5; Federal Trade Comm'n, Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations, at 1–2, *available at* www.ftc.gov/be/ftcbebp.pdf.

[146] *See* Merger Enforcement Trans. at 278–79 (Creighton) (data sharing raises substantial difficulties); *see also id.* at 66, 74–75 (Willig) (discussing problems of data confidentiality in related context).

[147] *See* Merger Enforcement Trans. at 152–53 (Rule) (recounting instance in which the agency economists declined to reveal their models due to the possibility of litigation); *cf. id.* at 153 (Heyer) (noting that such events may occur but that cooperation is usually good).

[148] Two witnesses considered allowing staff to discuss the specifications of the models (and resulting estimates) with the parties' economists, but not the underlying data. Merger Enforcement Trans. at 277–79 (Kramer, Collins); *id.* at 151–52 (Heyer) (describing efforts to share data with parties).

[149] ICC Comments, at 6; Business Roundtable Comments, at 12; *see also* ICPAC Report, at 141–42; Letter from Roxanne C. Busey to Joseph Simons re Merger Review Process, at 17 (Aug. 6, 2002) (translation requirements can be "extremely expensive" and "potentially cripple a transaction in terms of time and expense").

[150] *See* Busey Letter, at 17–18 (suggesting an approach to balance the costs and benefits of requiring transaction of non-English documents).

[151] ABA, Merger Review Process, at 171; *id.* at app. 19, at 19-18 (Model Second Request); Casey R. Triggs, *Effectively Negotiating the Scope of Second Requests*, 13 Antitrust, Summer 1999, at 36, 39.

[152] *See* ICC Comments, at 6 (encouraging the Commission to explore how the practice of providing summaries of documents, and limiting production of full translations, can reduce the burden on the parties).

[153] *See* Business Roundtable Comments, at 13–14.

[154] *See, e.g.*, ABA Comments re HSR, at 4 (providing data in a different format from that maintained by the company in the ordinary course of business can be especially burdensome, difficult, time consuming, and expensive); U.S. Chamber of Commerce Comments, at 15 (recommending a reduction in the "number and scope of interrogatory requests calling for the submission of financial/economic data not kept in the ordinary course of business"); Business Roundtable Comments, at 13 ("[r]equests for econometric data not kept in the ordinary course of business should not be standard" but rather determined by agency management).

[155] *See, e.g.*, FTC 2006 Merger Process Reforms, at 22–23 (providing for improved communication regarding data needs and negotiation of data requests, including an opportunity for parties to meet with senior management about a request).

Chapter II.C
State Enforcement of Antitrust Laws

1. INTRODUCTION

Today, each state, and the District of Columbia, has its own antitrust laws.[1] The language of most state antitrust laws is substantially identical to the language of the Sherman Act, and even where they are not identically worded, state antitrust statutes are generally "interpreted by the state court[s to be] consistent with federal law."[2] Courts generally have resolved constitutional challenges to state antitrust laws in favor of giving state antitrust laws full effect.[3] The Supreme Court has declined to find preemption of state antitrust laws on either Commerce Clause or Supremacy Clause grounds, holding that Congress intended there to be antitrust enforcement at both the state and federal levels.[4]

Each state, and the District of Columbia, also can sue under the federal antitrust laws. A state may sue on its own behalf (or on behalf of one of its political subdivisions) as an injured purchaser.[5] Alternatively, a state may sue as *parens patriae* seeking treble damages or restitution on behalf of state consumers—that is, "natural persons" (as opposed to corporations, partnerships, and other entities) residing in the state—who have suffered antitrust injuries under federal law.[6] Finally, a state may seek injunctive relief under Section 16 of the Clayton Act to forestall injury to the state's economy or its consumers.[7]

Much state antitrust enforcement has been consistent with federal enforcement. States nonetheless operate as independent decision-makers in enforcing federal antitrust laws.[8] As a result, state antitrust enforcers sometimes have challenged business conduct that federal enforcers declined to challenge, and have sought more stringent remedies than those sought by federal enforcers.[9]

Some have criticized such divergences as undermining a consistent, coherent federal antitrust policy and creating uncertainty and unjustified antitrust risks for businesses.[10] Among other things, opponents point to antitrust enforcement guidelines, adopted by the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG), which differ in some respects from the guidelines of the federal antitrust agencies.[11] Critics of states' enforcing federal antitrust laws further argue that, even when state antitrust enforcement is consistent with federal enforcement, state activities duplicate the efforts of federal agencies and unnecessarily burden businesses with additional costs.[12]

Proponents of states' enforcing federal antitrust laws, on the other hand, contend that antitrust enforcement by states can fill important gaps in federal antitrust enforcement. States can better identify and pursue local antitrust violations, they argue, and can bring their own enforcement actions if they believe federal agencies are enforcing the antitrust laws at a suboptimal level.[13] Proponents also value the states' authority to obtain treble damages for consumers injured by price-fixing or other antitrust violations that a federal agency has established in court—an authority the federal antitrust agencies do not have.[14]

To examine these issues, the Commission sought testimony and comments and reviewed data on state antitrust enforcement over the past fifteen years. The available evidence indicates that, in general, the types of antitrust cases brought by state antitrust enforcers have been consistent with those brought by federal antitrust enforcers. There also has been a substantial degree of cooperation and coordination among state and federal antitrust enforcers. On occasion, in significant, national cases, state antitrust enforcers have diverged from federal enforcers by, for example, seeking remedies beyond those sought by the federal government. Some see this as a problem requiring solution; others see it as a benefit of independent state antitrust authority. One definite cost of state merger enforcement is that it has sometimes overburdened businesses with duplicative document requests or the need to negotiate different document confidentiality agreements with different states.

In the Commission's view, such costs of state antitrust enforcement do not warrant eliminating the states' authority to enforce the federal antitrust laws. State antitrust enforcement can benefit consumers by obtaining treble damages for consumers and supplementing federal enforcement. The states have unique authority to recover antitrust damages for their consumers and local government purchasers. The vast majority of state enforcement activity over the past fifteen years has involved areas in which state enforcers may have a comparative advantage in terms of knowledge—that is, with respect to local markets, local competitive effects, and local government purchasers. During the same time period, the states' enforcement efforts have targeted most frequently those antitrust violations most likely to cause significant consumer harm, such as price-fixing, bid-rigging, and market allocation.

In addition, in recent years, state and federal antitrust enforcement have been largely consistent. State and federal authorities together have taken many steps to improve the coordination of their investigational and enforcement efforts. To the extent that differences occur, federalism suggests the states should continue to have the ability to make their own judgments on how best to seek to protect their consumers. Indeed, it would seem inappropriate to preclude the states from enforcing claims on behalf of themselves and their citizens while still allowing private parties to sue. Moreover, because the states, like the federal antitrust agencies, must go to court to pursue their cases, the courts can take steps to ensure the consistency of legal standards under federal law.

The Commission was not persuaded that the costs of state enforcement—such as companies' being required to deal with multiple enforcers—outweigh the benefits of state enforcement or could not be substantially mitigated by means short of eliminating the authority of the states to enforce the federal antitrust laws. Rather, to address the concerns that have been raised, state antitrust enforcers should continue to focus on their areas of comparative advantage, such as local markets, and should coordinate with the federal antitrust agencies and each other to find additional ways to reduce the costs to businesses of state merger review. Specifically, the Commission makes the following recommendations.

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.*

33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.†

34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.**

35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.

36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations:

- **36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.**
- **36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.**
- **36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.**

* Commissioners Carlton, Delrahim, and Shenefield do not join this recommendation.

† Commissioners Cannon, Jacobson, and Yarowsky do not join this recommendation.

** Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

2. BACKGROUND

A. The History of State Enforcement of Antitrust Laws

State antitrust enforcement has a long history. Twenty-one states had enacted their own antitrust laws before the passage of the first federal antitrust law, the Sherman Act, in 1890.[15] Senator Sherman stated the Sherman Act would supplement state antitrust enforcement: "Each State can deal with a combination within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world."[16] Because the definition of interstate commerce was then narrower than it is today,[17] the enactment of a federal antitrust law did not imply any overlap with state antitrust enforcement efforts. State antitrust laws applied only to intrastate conduct, while federal antitrust enforcement applied only to interstate conduct, narrowly defined.[18]

At the beginning of the twentieth century, the states' antitrust enforcement—proceeding under state antitrust laws—was more robust than that of the federal government.[19] Federal antitrust enforcement institutions developed slowly.[20] After World War I, however, the Supreme Court began to interpret the Commerce Clause much more broadly,[21] and state involvement in antitrust enforcement decreased as federal antitrust enforcement grew. Once the courts interpreted the Commerce Clause to allow federal enforcement agencies to challenge anticompetitive conduct virtually anywhere in the country, "state antitrust took a decided back seat to federal law and policy."[22]

In 1976, however, the passage of two federal statutes reinvigorated the states' role in antitrust enforcement.[23] Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) gave state attorneys general *parens patriae* authority to seek monetary relief (including treble damages) on behalf of state residents.[24] In addition, the Crime Control Act of 1976 led to the appropriation of new funds that enabled twenty-five states to establish antitrust enforcement units for the first time.[25]

For many decades, federal and state antitrust enforcers have had largely concurrent jurisdiction over interstate commerce.[26] This concurrent jurisdiction creates a potential for overlapping and inconsistent federal and state antitrust enforcement that did not exist when Congress passed the Sherman Act.[27] During the 1980s, for example, some state attorneys general, dissatisfied with what they perceived as insufficient levels of antitrust enforcement by the federal government, formed a Multistate Antitrust Task Force (Task Force) through NAAG.[28] The Task Force has coordinated a variety of state antitrust efforts, including the adoption of NAAG antitrust enforcement guidelines, which differ in some respects from those of the federal antitrust agencies.[29]

Important efforts to coordinate state and federal antitrust enforcement have taken place despite the differences.[30] These efforts include the 1989 formation of an Executive Working Group on Antitrust, which coordinates state and federal enforcement activities to avoid duplicative efforts.[31] Most states have joined the NAAG Voluntary Pre-Merger Disclosure

Compact, as revised in 1994 (NAAG Compact). That Compact encourages merging firms to submit pre-merger filings to the member states in return for an agreement by the states to forgo the issuance of individual state subpoenas and to obtain documents through the same process used by the relevant federal antitrust agency.[32] There also have been the joint state and federal adoption of two protocols—a Protocol for Increased State Prosecution of Criminal Antitrust Offenses in 1996[33] and a Protocol for Joint Federal/State Merger Investigations in 1998.[34]

In 2005 NAAG adopted certain Principles of State Antitrust Enforcement (NAAG Principles),[35] which articulate, among other things, NAAG's view of the relationship between state and federal antitrust enforcement.[36] The NAAG Principles state that Congress intended federal antitrust laws to "complement, rather than supplant state antitrust laws," and that the state attorneys general accordingly "oppose[] federal preemption of any state antitrust statutes . . . or other limitation of state antitrust authority."[37] The NAAG Principles note the states have merger enforcement jurisdiction and can obtain divestiture in merger cases.[38] They also claim that "in merger cases, the effects of consolidation in national mergers are more often felt locally than nationally," thus making state attorneys general at least as knowledgeable about those effects as the federal antitrust agencies.[39] The NAAG Principles assert that state attorneys general work closely with the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), and they have done so efficiently and productively. Congress has mandated and continues to support (as do the state attorneys general) increased cooperation (including sharing information) among the federal agencies and the states.[40]

B. State Authority and Recent State Antitrust Enforcement

State authority to obtain damages on behalf of consumers is broader than that of the federal antitrust agencies. This section briefly reviews that authority and then discusses state antitrust enforcement from the 1990s through 2006.

1. *States Are the Only Governmental Authorities that May Seek Treble Damages for Consumers to Remedy Violations of Federal Antitrust Law*

The only governmental authorities that may recover treble damages on behalf of consumers injured by violations of federal antitrust law are state attorneys general.[41] The federal antitrust enforcers have no such authority; at most, they may seek disgorgement or restitution as monetary remedies.[42] This state remedial authority is most relevant in non-merger matters, such as price-fixing cases, where states may recover overcharges that consumers paid.[43]

Of course, consumers may also sue individually, or as participants in class actions, to recover treble damages. Many individual consumers, however, are unlikely to undertake what can be lengthy and expensive litigation.[44] In addition, states have certain advantages as litigants. States using *parens patriae* authority do not need to meet all of the requirements that apply to private class actions,[45] and states—unlike private plaintiffs—can use tools such as subpoenas to investigate potential violations prior to litigation.[46]

2. Recent State Antitrust Enforcement

Data on state antitrust enforcement activities are not comprehensive. Each of the available data sets is missing some information, such as different states' activities or cases during different time periods. The data sets vary in the level of detail they provide about challenged activities and how the cases were resolved.

Nonetheless, various efforts to collect and describe data on state antitrust enforcement generally outline a consistent picture. One scholar who analyzed state antitrust enforcement activity between 1993 and 2002 concluded that state antitrust enforcement "is based overwhelmingly on the states' comparative advantages," characterized as "familiarity with local markets, familiarity with and representation of state and local institutions, and ability to send money to injured individuals."[47] Another scholar, using a different data set, concluded that a relatively large number of state price-fixing and bid-rigging cases, coupled with a relatively small number of vertical cases, reflected state enforcement priorities that were consistent with the enforcement priorities suggested by prevalent, well-regarded economic analysis.[48]

A similar picture emerges from analysis of the data provided in the NAAG State Antitrust Litigation database (NAAG Database), the most comprehensive source of information about state antitrust enforcement actions.[49] NAAG sought data from its members on their antitrust enforcement actions, requesting (among other things) case names, the dates cases were initiated and settled or brought to final judgment, the types of claims, the industry, and whether there was "federal participation" in the case. NAAG defined "federal participation" to mean "there was a federal case related to the state case."[50] The database does not explain whether federal participation was "joint, parallel, or independent,"[51] nor does it indicate whether the federal agency and the relevant state(s) sought or received different remedies in court or in settlement agreements.

Although the database is less than complete,[52] it provides significant insights into recent state antitrust enforcement activity. The analysis below focuses on actions filed within the last seventeen years, from 1990 through 2006. The reporting states filed a total of 343 antitrust actions in that period, including cases the states brought on their own as well as cases in which there was federal participation.

The greatest percentage of all of the NAAG-reported cases—47 percent—involved claims of price-fixing, bid-rigging, or market allocation, as shown in Figure 1. Merger challenges followed, making up 34 percent of the total cases.[53] Finally, 19 percent of the cases involved "other" allegations, including group boycotts, monopolization, horizontal and vertical non-price restraints, joint ventures, resale price maintenance, refusals to deal, tying, monopsony, or violation of enforcement orders.

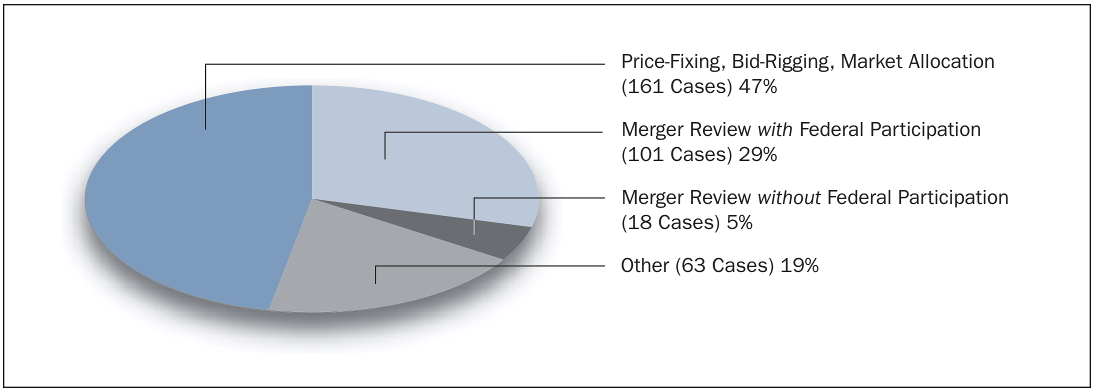

Figure 1: State Antitrust Enforcement by Type of Case

59 percent (201 of 343) of these actions represent joint enforcement with one of the federal agencies.[54] With respect to the remaining 142 cases, 56 percent involved allegations of price-fixing, bid-rigging, or market allocation, as shown in Figure 2. Only 13 percent involved merger challenges. Finally, 31 percent involved "other" allegations, as described above. 80 percent of the enforcement actions that states pursued on their own involved local or regional conduct.[55]

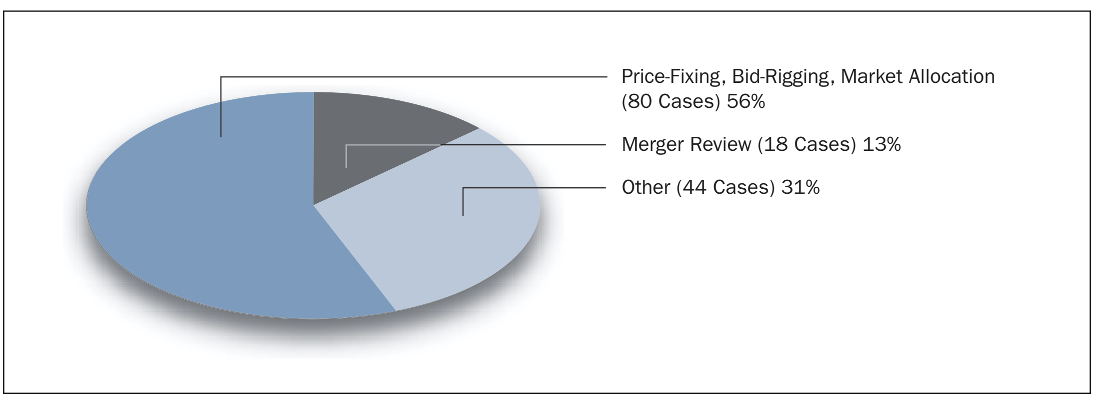

Figure 2: Types of State-Only Antitrust Enforcement

3. RECOMMENDATIONS AND FINDINGS

The available evidence does not suggest a need for Congress to change the states' authority to enforce the federal antitrust laws. The Commission does, however, make specific recommendations as to how the states and federal enforcement agencies can work together to respond to legitimate concerns that have been raised concerning multiple enforcement agencies. Because the issues differ somewhat for state non-merger and merger enforcement, recommendations for these areas are discussed separately below.

A. State Non-Merger Enforcement

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.*

33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.†

Multiple enforcers with different enforcement approaches can lead to inconsistent results.[56] To avoid this, state and federal antitrust enforcement should be broadly consistent. In the non-merger area, antitrust enforcement over the past fifteen years has been generally consistent between state and federal antitrust enforcers. During that time, the states' enforcement efforts most frequently have targeted the types of antitrust violations—such as price-fixing, bid-rigging, and market allocation—that antitrust practitioners generally agree are most likely to cause significant consumer harm. In addition, the states have exercised their unique authority to recover antitrust damages for state residents and local government purchasers. Finally, the available evidence shows the states have concentrated their non-merger enforcement efforts in areas where they have a comparative advantage in terms of knowledge—that is, with respect to local markets, local competitive effects, and local government purchasers. Thus, the available evidence does not justify a recommendation for statutory change to the states' authority to bring non-merger cases based on federal antitrust law.

* Commissioners Carlton, Delrahim, and Shenefield do not join this recommendation.

Although Commissioners Garza and Warden join this recommendation, they believe that the Supreme Court would reject the authority of the states to sue for equitable relief as *parens patriae* under the federal antitrust laws for other than state-specific injury, making statutory change unnecessary. Commissioner Warden elaborates on these views in his separate statement, in which Commissioner Garza joins.

† Commissioners Cannon, Jacobson, and Yarowsky do not join this recommendation.

1. *State Non-Merger Enforcement Has Been Broadly Consistent with Federal Non-Merger Enforcement*

a. *The States and the Federal Agencies Generally Appear to Have Brought the Same Types of Antitrust Cases*

Consistent state and federal antitrust enforcement standards and policies are generally desirable for a variety of reasons. Firms need clear guidance on what is or is not permissible under both federal and state antitrust laws. Consistency in legal standards increases a firm's ability accurately to assess risk with a reasonable degree of certainty, while inconsistency increases businesses' risks.[57] Conflicting state and federal antitrust standards can obfuscate and undermine the predictable application of antitrust law, thus hampering antitrust compliance efforts by businesses.[58]

Businesses have valid concerns that "complaints filed in state-initiated lawsuits could seek to impose multiple punishments or to generate inconsistent obligations on national or international firms."[59] For example, states may seek injunctive relief or conduct remedies that differ from those sought by federal agencies.[60] Moreover, because each state joining a federal antitrust prosecution becomes a party to any settlement negotiations, state participation may reduce the probability of reaching a final resolution.[61] Finally, some observers have expressed concern that state enforcers rarely issue statements explaining their reasons for challenging, or not challenging, particular conduct, so businesses may lack a clear understanding of state enforcement policies and may be unable to address perceived errors in state enforcement.[62]

The recent *Microsoft* litigation exemplified, among other things, the difficulties that can arise when federal and state governments disagree about settlement terms. The DOJ and a number of states brought this case. Following settlement talks, nine states and the District of Columbia (the "litigating states") rejected a settlement that the DOJ and nine other states had accepted.[63] The litigating states pursued a remedies trial, but were awarded less relief than they sought.[64] Two states took further action: West Virginia appealed, then settled;[65] Massachusetts litigated and lost.[66] Judge Richard A. Posner, who tried but was unable to mediate a settlement in *Microsoft*, complained that "[s]tates do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution; in addition, they are too subject to influence by interest groups that may represent a potential antitrust defendant's competitors."[67] Other commentators also have been critical that relatively few states were able to lengthen and complicate federal antitrust enforcement proceedings of such significance.[68]

The issues raised in the context of the *Microsoft* litigation and the possibility of conflicting or inconsistent legal standards, remedies, or settlement approaches, however, must be viewed in the context of the federal system in the United States. The states currently have the right and responsibility to make their own judgments about how best to seek to enforce the antitrust laws to serve the interests of their citizens. Even if Congress revoked the states' authority to bring suit under federal antitrust law, the states would still have authority to make those judgments under state antitrust law, absent a further step by Congress to preempt state antitrust laws.

Moreover, some view the states' ability to make such independent judgments, about both possible remedies and whether to bring an antitrust case in the first instance, as important to ensure challenges to anticompetitive behavior.[69] Even skeptics of state enforcement of federal antitrust law concede that "states might well serve as watch dogs, pressuring Washington to act when it is lax, but deferring to federal prosecutors even if they chose to enter after the fact."[70] In addition, the states can identify and pursue local antitrust violations. Others argue further that the states may produce useful diversification in antitrust policy.[71]

Of course, what some consider useful policy diversification, others view as unfounded theories of anticompetitive harm. Such disagreements are not surprising. Given the ongoing evolution of economics and antitrust law—especially in important and difficult cases with novel fact patterns—some disagreements among antitrust practitioners, including antitrust enforcers, are virtually inevitable. For our purposes, the question is whether such disagreements between and among state and federal antitrust enforcers are sufficiently frequent and disruptive that they significantly undermine coherent and judicious federal antitrust enforcement and unreasonably burden businesses with excessive costs and uncertainty.

The available evidence suggests that, to the contrary, state and federal non-merger antitrust enforcement over the past seventeen years has been broadly consistent and not in conflict. In the non-merger area, the states have brought claims of price-fixing, bid-rigging, and market allocation much more frequently than any other types of antitrust claims. Antitrust enforcers are in general agreement that consumers are likely to suffer significant harm from price-fixing, bid-rigging, and market allocation agreements, so state enforcement efforts in these areas fall very much in the mainstream of antitrust.

Other non-merger antitrust enforcement efforts have the potential to generate controversy. Nevertheless, the data suggest that, once again, state and federal antitrust enforcement have not been significantly inconsistent. The category of "other" cases in the NAAG Database includes allegations—such as resale price maintenance, vertical non-price restraints, and tying—that federal antitrust enforcers have become more cautious about bringing, particularly in light of developments in economic thinking in recent decades. It appears that state enforcers also have become more cautious in these areas. There has been a gradual reduction over time in the number of NAAG-reported cases in the "other" category that the reporting states brought without any federal participation. From 1989 to 1994, the reporting states brought nineteen state-only cases in the "other" category; from 1995 to 2000, they brought sixteen state-only cases in the "other" category; and from 2001 to 2006, they brought only nine state-only cases in the "other" category.

Table A: "Other" State-Only Cases (excluding Mergers, Price-Fixing, Bid-Rigging, and Market Allocation)

1989–1994 (19 Cases)	
# of Cases	**Claims**
2	Boycott
2	Boycott, Horizontal Non-Price Restraint
2	Boycott, Monopolization
1	Horizontal Non-Price Restraint
1	Horizontal Non-Price Restraint, Refusal to Deal
2	Vertical Non-Price Restraint
4	Resale Price Maintenance
2	Tying
3	Other
1995–2000 (16 Cases)	
# of Cases	**Claims**
2	Boycott
1	Boycott, Horizontal Non-Price Restraint
1	Joint Venture
5	Monopolization
1	Monopolization, Tying
1	Monopolization, Vertical Non-Price Restraint
1	Monopsony
1	Refusal to Deal
1	Resale Price Maintenance
1	Tying
2001–2006 (9 Cases)	
# of Cases	**Claims**
1	Boycott
1	Boycott, Resale Price Maintenance
5	Monopolization (Three are related cases)
1	Resale Price Maintenance, Vertical Non Price-Restraint
1	Tying

Source: NAAG Database.

These data reveal that conflicts between state and federal enforcers in the cases they bring or remedies they seek are more the exception than the rule.[72] With a few notable exceptions, state non-merger and federal non-merger antitrust enforcement over the past fifteen years appear broadly consistent.

b. The Available Evidence Does Not Support Elimination of the States' Authority to Collect Damages on Behalf of Consumers

In 1976 Congress passed the HSR Act, Title III of which gave state attorneys general *parens patriae* authority to seek monetary relief (including treble damages) on behalf of state residents.[73] (As explained earlier, federal antitrust enforcers do not have a comparable authority to seek such relief on behalf of consumers.)[74] The question of whether the states should continue to have this authority has been raised.[75] Some view state *parens patriae* actions as adding little value to overall deterrence and enforcement.[76]

Several witnesses testified, however, that *parens patriae* recovery has been a success,[77] noting examples such as a recent multistate litigation, in which states obtained $80 million from defendant pharmaceutical companies to compensate consumers, state agencies, and insurance companies for overcharges due to federal and state antitrust violations.[78] The states have also developed innovative methods of distributing settlement proceeds,[79] using Web-based submissions, for example, to streamline the process.[80] Acknowledging the states' greater experience in this area, the FTC had the states distribute the FTC's portion of the recovery in a case in which it obtained disgorgement of profits by a defendant.[81] Thus, it appears that state *parens patriae* damages actions have played, and can continue to play, a useful role in non-merger antitrust enforcement.

In the Commission's view, the states and the federal antitrust agencies should consider on a continuing basis how best to avoid seeking or imposing inconsistent remedies. Nevertheless, evidence that state and federal enforcers occasionally impose inconsistent remedies does not justify a recommendation to eliminate the states' authority to bring *parens patriae* actions to recover damages for their citizens. The data suggest that state antitrust enforcement efforts have usefully fulfilled their mandate to recover damages for consumers.

2. State Non-Merger Antitrust Enforcement Should Focus on Local Markets and Local Government Purchasers

Knowledge of local markets and conditions can be helpful to proper antitrust enforcement.[82] Proponents of state enforcement assert that the states can better ensure expert coverage of smaller, more local enforcement matters.[83] Some suggest that state antitrust enforcers have greater familiarity with local government institutions that purchase goods, and therefore can better identify and pursue antitrust violations, such as price-fixing, that affect those purchasers.[84]

State enforcement of the federal antitrust laws is not the only way to ensure coverage of local antitrust violations, of course. Both the DOJ and the FTC have brought a significant number of complaints involving purely local or regional markets and have demonstrated their expertise in investigating and pursuing such matters.[85] Nonetheless, the states' non-merger antitrust enforcement efforts in recent decades appear to have had a largely local and regional focus, which may improve the likelihood of uncovering and prosecuting local antitrust violations. Indeed, even a proposed transaction that is national or international in scope may also have competitive effects in local markets.[86] The data suggest that states have focused their enforcement efforts on such localized competitive effects.

A review of all (not just non-merger) state antitrust enforcement matters from 1993 to 2002 published in one case-law reporter showed more than 80 percent of the cases had a local aspect, typically because the complaints alleged local markets.[87] The author found state antitrust enforcement activity to be "overwhelmingly local," with challenged conspiracies involving "travel agents and tour bus operators, health care providers, school bus companies, road builders, roofers, auto body shops, dairies, group homes repairers, bakers of Italian bread, individuals who gave carriage rides, towers, and trash haulers."[88]

The NAAG-reported data on "other" cases—involving claims such as group boycotts, horizontal and vertical non-price restraints, and violations of enforcement orders—also reveal a primary focus on local markets. Of the 44 state-only "other" cases brought by the reporting states, 33 cases appeared to involve local or regional conduct or markets, 6 involved national markets, and 5 cases did not provide enough detail to assess the scope of markets they involved.[89]

A state focus on local or regional matters in the non-merger area is desirable. Among other things, state antitrust enforcers typically are better positioned to discover and prevent or prosecute locally based activities such as price-fixing or bid-rigging. Government purchasers are sometimes among the first to experience the effects of a local price-fixing conspiracy; states can use their ties with those agencies to develop a case challenging the anticompetitive conduct.[90] In addition, a state focus on local or regional matters can avoid unnecessary overlaps in state and federal antitrust enforcement, thereby using limited enforcement resources most efficiently. Finally, for matters of national or international scope that also have local competitive effects, it seems most appropriate for states to investigate competitive conditions in their own local markets.

B. State Merger Enforcement

34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.*

35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.

State merger enforcement takes place today in a world in which business operations are increasingly international. More than 100 countries have some form of antitrust enforcement,[91] and multinational firms proposing a merger or acquisition may need to obtain merger clearances from antitrust agencies in as many as seventy countries in addition to the United States.[92] The differing requirements of antitrust agencies all over the world can substantially increase a firm's costs of merger clearance.[93]

Adding the potential for fifty state merger enforcers also can significantly increase the time and money required to obtain clearance of a proposed transaction.[94] State merger reviews increase the likelihood that businesses will be subject to multiple and differing document production and data requests, differing competitive analyses, significant delays, and even inconsistent remedies. As discussed below, the Commission recommends specific areas of additional coordination and cooperation between state and federal enforcers to reduce such inefficiencies.

Some go further in their criticism of state merger enforcement, however. They view state merger enforcement as simply "free riding" on federal efforts.[95] Counsel for merging parties report that, in some instances, state antitrust enforcers have "contributed few resources, provided little expertise, and conducted little or no document review."[96] Commenters point out the tremendous disparity in resources between state and federal antitrust enforcers.[97] For example, in 2005 California, one of the most active states in antitrust enforcement, had an antitrust budget of $6 million; this was dwarfed, however, by the Antitrust Division's budget of $144 million that year.[98] Others note that states with limited resources and staff who may review only a few antitrust cases each year may find it difficult to match the degree of expertise at the federal antitrust agencies, where hundreds of lawyers and economists review many matters during any given year.[99] Commenters also express concern that merger investigations by state attorneys general may be influenced by non-antitrust-based concerns (such as job preservation).[100]

* Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

FFrom the record before the Commission, it appears there have been instances in which state antitrust enforcers essentially "piggy-backed" on the investigational and enforcement efforts of a federal antitrust agency. Whether such instances are rare or frequent, however, remains subject to debate. But the available evidence also suggests that states have played useful roles in merger enforcement. In the merger area, as in the non-merger area, the vast majority of cases in which states have been involved (with or without federal participation) address competitive problems in local markets, in which states may have particular expertise. In one survey, the author reported that state merger challenges from 1993 to 2002 "involve[d] hospitals, movie theaters, waste disposal operations, grocery stores, Jewish funeral homes, dairies, radio stations, gasoline stations, ski resorts, de-icing salt production facilities, and a sardine processing plant."[101]

Another analysis, undertaken by the state attorneys general of Hawaii, Maine, and Oregon, found that 77 percent of NAAG-reported state merger cases from 1991 to 2005 involved commercial and industrial sectors characterized by "their localized market structure."[102] These sectors included "health care, retail gasoline, solid waste, supermarkets, movie theaters, banking, retail pharmacy, funeral homes, department stores, and asphalt."[103] Federal participation occurred in 97 of 120 state merger cases,[104] suggesting that many involved national markets as well as local or regional markets. As one comment explained, the "effects of the merger in national markets can be reviewed by the federal government, while the local markets can be investigated by the state attorneys general."[105] States also have sometimes pursued very small, local transactions that may not have come to the attention of federal enforcers. For example, the state of Maine challenged certain health care consolidations that may have escaped notice at the federal level because they did not require pre-merger notification.[106]

In addition, as in non-merger enforcement, the states can act if federal antitrust enforcers fail to do so.[107] States may challenge a merger that a federal antitrust agency has purposefully declined to challenge, and states may seek broader relief than that sought by the federal agency.[108] Supporters of active state merger enforcement believe that such actions can be important to protect consumer welfare, where the level of federal enforcement is suboptimal.[109]

With respect to the substantive merger analyses of the states, however, the 1993 NAAG Horizontal Merger Guidelines themselves raise concern that state merger enforcement may sometimes be driven by motivations other than a sound antitrust analysis focused on consumer welfare. Those guidelines state that social and political objectives *other than* consumer welfare may be taken into account in making judgments about whether to challenge a proposed transaction.[110] This language, and state actions in a handful of cases, has raised concerns that states could attempt to block mergers for reasons other than to preserve competition.[111] Commenters argue that the "political nature of the state attorney general's office makes constituent influence more likely than at the federal level,"[112] and suggest that state attorneys general may be tempted to block mergers to prevent job losses in their states,[113] even though a proposed transaction could result in cost savings and lower prices for consumers in other states.[114]

The available evidence suggests only two or three instances in which state merger enforcement could be criticized as responsive to concerns other than preserving competition.[115] Even the scholar who found alleged instances of such "antitrust parochialism" states that, "[w]hile parochialism and externality concerns are theoretically well grounded, they do not find much empirical support in the states' actions to date."[116] Nonetheless, significant concerns remain among the antitrust bar that state merger enforcement, on occasion, may seek to accomplish goals other than consumer welfare.[117]

36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations.

While the Commission does not recommend changing state authority to enforce federal antitrust law, further efforts at coordination and cooperation between the state and federal agencies could reduce inefficiencies and other possible problems. Accordingly, the Commission proposes a number of specific methods to improve coordination, as described below.

36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.*

The federal and state antitrust agencies use two different sets of guidelines for the analysis of a proposed merger or acquisition between or among competitors. The federal antitrust enforcement agencies use the Horizontal Merger Guidelines issued by the DOJ and the FTC (DOJ/FTC Merger Guidelines).[118] Many states apply the 1993 NAAG Horizontal Merger Guidelines, which offer a common standard for merger reviews among the states.[119]

There are important differences between these two sets of guidelines. The NAAG Horizontal Merger Guidelines provide a different methodology for defining relevant product and geographic markets, using the market definition methodology of the DOJ/FTC Merger

* Commissioners Carlton, Garza, and Valentine believe such harmonization ideally should take the form of the states' adoption of the DOJ/FTC Merger Guidelines.

Guidelines as only an "alternative."[120] The federal and state merger guidelines also use two different requirements for how soon certain types of entry must occur in the relevant market to eliminate or reduce competitive concerns.[121] Finally, the federal and state merger guidelines apply different standards for the circumstances in which evidence of efficiencies may eliminate or ameliorate competitive concerns.[122]

Beyond the differences between federal and state merger analysis, differences among various states are possible as well. Some states do not necessarily use the NAAG Horizontal Merger Guidelines in their merger analyses. Businesses and antitrust practitioners report there can be, and often are, divergent enforcement policies among the different states.[123]

All of these differences between and among federal and state merger enforcement standards can produce inconsistencies in enforcement that add time, costs, and uncertainty to merger review. The federal antitrust agencies and the states may seek to review different documents or seek different relief, depending on their theories of competitive harm. There may be delays in the negotiation of consent decrees "where state attorneys general and the federal government have different enforcement or remedy philosophies (and [there is an] accompanying potential for opportunistic behavior, as each government party to the consent negotiations may have an incentive to be the last to agree)."[124] Some maintain that "federal agency and attorney general consent orders often require different relief even when the states are suing under federal law only."[125] Such divergence can lead firms to question the fairness and validity of antitrust merger enforcement.

The costs of dual merger review at the state and federal levels, and among multiple states, could be significantly reduced by the application of well-established, generally agreed-upon antitrust principles for merger analysis.[126] Agreement by federal and state enforcers on general principles for antitrust merger analysis would also reduce the risk of inconsistent results. That inconsistency can undermine and impair the value of guidance to businesses that merger guidelines are intended to offer.[127]

The federal antitrust agencies and the states should work together toward the substantive harmonization of the NAAG Horizontal Merger Guidelines and the DOJ/FTC Merger Guidelines based on sound economic principles. Such analytical convergence might be fostered through a variety of means, including joint training sessions, participation by state attorneys general and the federal antitrust agencies in workshops, and additional application of economic theory and resources to merger review.[128] Federal and state enforcers may not agree on the precise application of analytical principles in every merger case. Nonetheless, federal and state enforcers should reach agreement on the proper antitrust principles to apply in merger analysis. The substantive convergence of federal and state antitrust merger analysis around an agreed-upon sound analytical framework would reduce the costs, delays, and uncertainty caused by differences in enforcement perspectives.[129]

36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.

The HSR Act does not give the states any right to participate in the HSR Act pre-merger review process.[130] Except when the merging companies consent, the DOJ and the FTC cannot share any information obtained from the companies. States must subpoena documents from the parties. Merging companies accordingly can be subject to multiple, inconsistent document requests from federal and several different state enforcers.

State and federal enforcers have made progress in coordinating document requests. The Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (adopted in 1998) provides a general framework for sharing confidential documents. The protocol provides examples of waivers through which merging companies can authorize the FTC or the DOJ to share with state attorneys general documents the companies submitted, whether in response to a second request, a civil investigative demand, or voluntarily.[131] In addition, most states have joined the NAAG Compact, which encourages merging companies to submit a copy of their HSR Act pre-merger filings to the states.[132] In return, the NAAG Compact binds the signatory states to obtain documents only through this mechanism and forgo the issuance of individual state subpoenas.[133] State antitrust enforcers also have worked together to reduce the number of matters in which parties are required to respond to multiple document requests from multiple states.[134]

There is still significant room for improvement, however. Counsel for merging parties report “there are instances in which state and federal authorities issued different requests for information even though they appeared to be pursuing the same theory [of possible competitive harm].”[135] In such instances, counsel for merging parties generally had to negotiate with both federal and state enforcers to narrow the requests and make them consistent.[136] State governments, unlike the federal government, may require paper (instead of electronic) copies of documents, and the “cost of preparing multiple responses [to various states] can be significant.”[137] Different states may request data in varying formats or for different time periods, depending on how individual states view their information needs in light of the interests they seek to protect.[138]

These types of problems are caused by both a lack of coordination between federal and state enforcers about document and data requests and the different analytical approaches that federal and state enforcers may apply to merger analysis. To avoid such circumstances, federal and state antitrust enforcers should work together before issuing document and data requests to achieve as much consistency in those requests as possible. In addition, the states should continue to work with each other to achieve consistency in data requests. Not all states have signed the NAAG Compact, and even the signatory states are not required to use it in every investigation.[139] Practitioners emphasize the need for even greater coordination.[140]

36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

Under the HSR Act, confidential business documents that firms submit to a federal antitrust agency as part of a merger review are treated as confidential.[141] The ability of the federal antitrust agencies to ensure that confidential business documents are not publicly or otherwise disclosed is critical to the success of the HSR Act's pre-merger review program.[142] Firms often submit documents to an antitrust agency that provide critical insights into current competitive conditions, the firm's own future competitive strategies, and the like, in a relevant market in which the firm participates. To reveal the content of those documents could potentially cause significant competitive harm to the firm.

Because the HSR Act does not allow for state participation in the pre-merger review process, states must negotiate confidentiality agreements with firms to ensure that confidential business documents are properly protected from disclosure. Inconsistencies among the provisions of confidentiality agreements offered by different states are another cost of state merger reviews, however. Confidentiality protections for firms' proprietary information typically must be negotiated on a state-by-state basis, because confidentiality statutes vary from state to state.[143] Those costs could be reduced by the adoption of a model confidentiality statute by as many states as possible.[144]

Notes

[1] *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 678 (2003) [hereinafter Calkins, *Perspectives on State and Federal Antitrust Enforcement*].

[2] Philip A. Proger, Statement at AMC State Enforcement Institutions Hearing, at 4 (Oct. 26, 2005) [hereinafter Proger Statement]. Statutes and case law in thirty-eight states direct judges to consult federal antitrust law for guidance. *See* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 623–24 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS].

[3] *See* ANTITRUST LAW DEVELOPMENTS, at 627.

[4] *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 130 (1978); California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (holding state antitrust laws to be within "an area traditionally regulated by the States" for which there is a "presumption against finding pre-emption").

[5] 15 U.S.C. § 15(a); *see* ANTITRUST LAW DEVELOPMENTS, at 725 & n.702 (collecting cases).

[6] 15 U.S.C. §§ 15c, 15f; *see also* Hon. G. Steven Rowe, Public Comments Submitted to AMC, at 3–4 (July 15, 2005) [hereinafter Rowe Comments]. Congress established the authority of states to seek damages on behalf of consumers in Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, after the Ninth Circuit's ruling that such actions were not permitted under the federal antitrust laws in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).

[7] 15 U.S.C. § 26. Such suits are brought under states' common law *parens patriae* capacity. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 257–60 (1972). When states bring suits for injunctive relief, they must prove "threatened loss or damage" to their own interests. *See* California v. American Stores Co., 495 U.S. 271, 280 (1990).

[8] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); *In re* Compact Disc Minimum Advertised Price Litig., 138 F. Supp. 2d 25 (D. Me. 2001).

[9] *See, e.g.*, *Microsoft*, 253 F.3d 34 (although several states joined with the DOJ in settlement, two states opposed that settlement); Prof. Harry First, Statement at AMC State Enforcement Institutions Hearing, at 14–15 (Oct. 26, 2005) [hereinafter First Statement] ("The threat of independent action from a state agency may cause the federal agency to examine a case more closely (*Microsoft* is a good example of this)."); *see also* Part 3.B of this Section.

[10] *See, e.g.*, Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) [hereinafter Posner, *Antitrust in the New Economy*]; Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT'L L. 501, 514, 521–22 (1994) [hereinafter, Flexner & Racanelli, *State and Federal Antitrust Enforcement*]; Michael E. DeBow, Statement at AMC State Enforcement Institutions Hearing, at 2–4 (Oct. 26, 2005) [hereinafter DeBow Statement].

[11] *See, e.g.*, National Association of Attorneys General, Horizontal Merger Guidelines (1993), *available at* http://www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf [hereinafter NAAG Horizontal Merger Guidelines]; National Association of Attorneys General, Vertical Restraints Guidelines (1985, revised 1995), *available at* http://www.naag.org/assets/files/pdf/at-vrest_guidelines.pdf [hereinafter NAAG Vertical Restraints Guidelines].

[12] Proger Statement, at 3, 7, 10 (noting that the system of state and federal antitrust enforcement "can lead to . . . inconsistent standards . . . cloud the clarity of the law, retard the process of continuing development of that law, . . . make the law less predictable . . . [and] introduce real additional costs"); *see also* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 252 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter Posner, *Federalism and the Enforcement of Antitrust*]; Robert B. Bell, *States Should Stay Out of National Mergers*, 3 ANTITRUST, Spring 1989, at 37, 39.

[13] Hon. G. Steven Rowe, Statement at AMC State Enforcement Institutions Hearing, at 6 (Oct. 26, 2005) [hereinafter Rowe Statement] ("State enforcers are present on the ground and are locally well-connected . . . in the context of local enforcement, we are the rapid responders, capable of greater efficiency with time and resources than our federal counterparts."); Proger Statement, at 12 (lauding states' "superior knowledge of local market conditions and local regulations that may affect competitive effects of merger or analysis of merger"); Rowe Comments, at 1 (describing Maine's state attorney general as having "contributed special knowledge of local conditions to cooperative enforcement endeavors with federal agencies and brought actions to address violations of which federal agencies were unaware and with which they might have been ill-equipped to deal"). *See generally* Part 3.B of this Section (describing specific instances of state enforcement).

[14] As explained in Chapter III.C of this Report, the Federal Trade Commission (FTC) has in very rare instances sought monetary remedies for consumers using its authority to seek equitable relief.

[15] *See ARC America*, 490 U.S. at 101 n.4. Other commenters have different counts. *See, e.g.*, First Statement, at 6 (thirteen states); Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. ANTITRUST SECTION 258, 263 (1962) (twenty-one states); AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MONOGRAPH NO. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 3 (1988) (twenty-six states).

[16] 21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman); *see also* Gregory J. Werden & Thomas A. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1, 50–51 (1982) (quoting 21 CONG. REC. at 2456, 2460 (1890) (remarks of Sen. Sherman)).

[17] *See* Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, *in* COMPETITION LAWS IN CONFLICT 269 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter DeBow, *State Antitrust Enforcement*]. For example, "[m]anufacturing was at that time held not to be interstate commerce. Only interstate buying, selling, and transportation incident thereto could be regulated under the commerce clause." Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71, 84 (1974) (citing Kidd v. Pearson, 128 U.S. 1 (1888)); 21 CONG. REC. 2598–600 (1890) (remarks by Sen. George); 21 CONG. REC. 2465 (1890) (remarks by Sen. Vest); 21 CONG. REC. 2467 (1890) (remarks by Sen. Hiscock); *see* Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 659 n.8 (1993) (citing United States v. E.C. Knight, 156 U.S. 1 (1895)).

[18] *See* DeBow, *State Antitrust Enforcement*, at 269.

[19] First Statement, at 6. For example, "[b]etween 1890 and 1902, twelve states had brought twenty-eight antitrust suits; the United States Department of Justice had brought nineteen." *Id.* at 7 (citing 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, 500–01 (1987)).

[20] First Statement, at 4–8. The position of the Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within the Department of Justice thirty years later. Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 717–18 (1990); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 16–17 (2003) (describing history of the DOJ); Chapter II.A of this Report regarding dual federal enforcement.

[21] In 1937 the Supreme Court agreed that the federal government had authority to regulate activities *affecting* interstate commerce. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see also* DeBow, *State Antitrust Enforcement*, at 269 (citing United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942)). In 1995 the Supreme Court revived limitations on federal power over interstate commerce, concluding that federal jurisdiction requires the regulated activity to fall within one or more of three broad categories: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce, that is, those activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[22] DeBow, *State Antitrust Enforcement*, at 269; DeBow Statement, at 1–2.

[23] Rowe Comments, at 3.

[24] *See* 15 U.S.C. § 15c(a)(1).

[25] *See* Rowe Comments, at 3–4 & nn.7, 9 (citing Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2407 (codified as amended at 42 U.S.C. § 3701-96c (2000))); Ralph E. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 Antitrust Bull. 941, 950 (1990).

[26] It seems settled that, for the most part, state antitrust laws apply to conduct affecting interstate commerce as well as intrastate commerce. American Bar Association, Section of Antitrust Law, State Antitrust Enforecement Handbook 19–21 (2003). In some states, such as Alabama, however, jurisdiction under the state antitrust law is limited specifically to intrastate matters. *See* Ala. Code 1975, 6-5-60; Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., 746 So. 2d 966 (Ala. 1999).

[27] *See* DeBow Statement, at 1–2.

[28] *See* Rowe Comments, at 3–4; DeBow, *State Antitrust Enforcement*, at 269; *see also* Flexner & Racanelli, *State and Federal Antitrust Enforcement*, at 501–02; *id.* at 508–09 ("In response to [increasing disagreement with the federal government in the 1980s], the states began to coordinate and formalize their enforcement role."); Lloyd Constantine, Statement at AMC Civil Remedies Hearing, at 3 (July 28, 2005); Daniel B. Moskowitz, *Why the States are Ganging up on Some Giant Companies*, Bus. Wk. 62 (Apr. 11, 1988) ("We have been witnessing the watchdog put to sleep. The States have had to fill the breach.") (quoting N.Y. State Att'y Gen. Robert Abrams).

[29] *See, e.g.*, NAAG Horizontal Merger Guidelines; NAAG Vertical Restraints Guidelines.

[30] *See, e.g.*, Thomas Greene, Public Comments Submitted to AMC, at 10-11 (July 15, 2005) [hereinafter Greene Comments].

[31] DeBow, *State Antitrust Enforcement*, at 270. The group is composed of the five Federal Trade Commissioners, the head of the Antitrust Division, and five representatives from NAAG. "The group promotes the sharing of information and the cross-deputization of attorneys to encourage the joint prosecution of cases." *Id.* at 270 & n.18.

[32] National Association of Attorneys General, Voluntary Pre-Merger Disclosure Compact (1987, revised 1994), *available at* http://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premerger-disclosure-compact.pdf [hereinafter NAAG Compact]. *But see* Proger Statement, at 10 & n.22 (listing states that have not signed).

[33] National Association of Attorneys General, Protocol for Increased State Prosecution of Criminal Antitrust Offenses, *available at* http://www.naag.org/assets/files/pdf/ProtocolforIncreasedStateProsecutionofCriminalAntitrustCases.pdf. State criminal antitrust enforcement takes place under state law.

[34] National Association of Attorneys General, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, *available at* http://www.naag.org/assets/files/pdf/at-state_fed-protocol.pdf [hereinafter NAAG Protocol for Coordination in Merger Investigations] (setting forth ways in which the states and the federal agencies can maximize cooperation and minimize the burden imposed on the parties. Provides general framework for, and sets forth examples of, party waivers that enable federal agencies to share party-submitted documents (provided in response to HSR requests, civil investigative demands, or voluntarily) with state attorneys general); DeBow, *State Antitrust Enforcement*, at 270 & nn.20, 21 (citing Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 Fordham Int'l L.J. 18, 37–39 (1996) (collecting Clinton-era cases)); Laurel L. Price, *Roundtable Discussion with Enforcement Officials*, 63 Antitrust L.J. 951, 965–66 (1996).

[35] National Association of Attorneys General, Resolution, Principles of State Antitrust Enforcement (Mar. 14–16, 2005), *available at* http://www.naag.org/assets/files/pdf/2005.Spring.Antitrust.Resolution.Final.pdf.

[36] *Id.* at 1–3.

[37] *Id.* at 2 (citing *ARC America*, 490 U.S. at 101).

[38] *Id.* at 2.

[39] *Id.*

[40] *Id.* at 1, 3.

[41] *See* 15 U.S.C. § 15c.

[42] Disgorgement and restitution are equitable remedies. Disgorgement "'deprive[s] a wrongdoer of his unjust enrichment and . . . deter[s] others' from future violations," whereas "restitution . . . 'restore[s] the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation.'" Federal Trade Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,821 (Aug. 4, 2003). *See generally* Chapter III.C of this Report regarding the authority of the FTC and the DOJ to obtain equitable monetary remedies.

[43] Proger Statement, at 13 ("[S]tates have advantages in investigating [non-merger] conduct-related offenses, the most important of which is the states' ability to directly compensate individual consumers.").

[44] Private lawsuits to recover damages are generally lengthy and expensive propositions that most individual consumers are unlikely to undertake. Proger Statement, at 13.

[45] *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1039 (2001); Rowe Comments, at 20; American Antitrust Institute, Public Comments Submitted to AMC Regarding Enforcement Institutions, at 9 (July 15, 2005) [hereinafter AAI Comments re Enforcement Institutions].

[46] *See* Rowe Comments, at 20.

[47] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 679–80, 694.

[48] *See* Michael DeBow, *State Antitrust Enforcement*, at 272–73 (the "relatively large number of bid-rigging and horizontal price-fixing cases [in state enforcement] is consistent with enforcement priorities suggested by Chicago School economic analysis, as is the small number of vertical cases").

[49] National Association of Attorneys General, State Antitrust Litigation Database, *available at* http://www.naag.org/antitrust/search/ [hereinafter NAAG Database]. This appears to be the first, and only, successful effort to compile a comprehensive database. *See* Posner, *Federalism and the Enforcement of Antitrust*, at 263 (states "do not report such data"); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding State Antitrust Enforcement, at 5 (Oct. 19, 2005) [hereinafter ABA Comments re State Antitrust Enforcement] ("We have been unable to create or identify a satisfactory database."); DeBow, *State Antitrust Enforcement*, at 271 ("There does not appear to be a central registry of information about state antitrust activity. (NAAG is reportedly working on such a database.)").

[50] NAAG Database.

[51] *Id.*

[52] The NAAG database does not include data from fourteen states: Alabama, Colorado, Indiana, Kentucky, Louisiana, Montana, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, and Vermont. The level of detail about each case that is reported varies among the states.

[53] Figure 1 splits the merger-challenge segment into two pieces to illustrate the percentage of merger cases pursued with and without federal participation.

[54] AMC Staff, State Antitrust Enforcement Memo—Analysis of the NAAG Data, fig.2 (Nov. 10, 2006, updated Mar. 1, 2007) [hereinafter AMC Memo—Analysis of NAAG Data].

[55] *Id.* at 5–6 (113 of 142 cases (80 percent) of enforcement actions pursued by states without federal participation involved local or regional conduct or markets—64 of 80 price-fixing, bid-rigging, and market allocation cases; 16 of 18 merger review cases; and 33 of 44 "other" cases).

[56] *See* Posner, *Antitrust in the New Economy*, at 940; U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 2–4 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 889, 890–91 (2003).

[57] *See* Proger Statement, at 3, 7.

[58] *See* U.S. Chamber of Commerce Comments, at 3; DeBow Statement, at 4–6; Proger Statement, at 3; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding State Civil Nonmerger Enforcement, at 8–9 (Oct. 19, 2005) [hereinafter ABA Comments re State Civil Nonmerger Enforcement].

[59] U.S. Chamber of Commerce Comments, at 3.

[60] *See* First Statement, at 18 (states may seek injunctive relief under state antitrust laws); AAI Comments re State Enforcement Institutions, at 9–12 (without state enforcement, certain injunctive relief might not be attained); *see also* Rowe Supp. Statement, at 3 n.6 (citing *In re* Disposable Contact Lens Antitrust Litigation as the only example of states seeking injunctive relief after a federal antitrust agency decided not to seek injunctive relief).

[61] *See* Posner, *Antitrust in the New Economy*, at 940; *see, e.g.*, U.S. Chamber of Commerce Comments, at 3; DeBow Statement, at 4–6; Proger Statement, at 3.

[62] *See* Proger Statement, at 9.

[63] Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. 37, 37 (2002); *States split on MSFT settlement: Nine states reject DOJ-Microsoft settlement; to pursue litigation*, CNN MONEY, Nov. 6, 2001, http://money.cnn.com/2001/11/06/technology/msft_ruling/index.htm; Joe Wilcox, *Breakaway States Nix Microsoft Pact*, CNET NEWS.COM, Nov. 6, 2001, http://news.com.com/Breakaway+states+nix+Microsoft+pact/2100-1001_3-275440.html?tag=nl.

[64] *Compare* Joe Wilcox, *States Get Tough in* Microsoft *Case*, CNET NEWS.COM, Dec. 7, 2001, http://news.com.com/2100-1001-276744.html (detailing states' requests for additional relief), *with* New York v. Microsoft Corp., Civ. No. 98-1233, Final Judgment (Nov. 1, 2002) (setting forth more limited relief in final judgment); *see also* David S. Evans et al., United States v. Microsoft*: Did Consumers Win?*, 1 J. COMP. L. & ECON. 497, 516–20 (2005).

[65] Andrew Chin, *Decoding* Microsoft*: A First Principle Approach*, 40 WAKE FOREST L. REV. 1, 75–76 (2005).

[66] Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004); Rowe Statement, at 23 & nn.71–72.

[67] Posner, *Antitrust in the New Economy*, at 940.

[68] *See, e.g.*, DeBow Statement, at 4–6; Robert W. Hahn & Anne Layne-Farrar, *The Case for Federal Preemption in Antitrust Enforcement*, 18 ANTITRUST, Spring 2004, at 79, 80 [hereinafter Hahn & Layne-Farrar, *The Case for Federal Preemption*].

[69] *See* AAI Comments re Enforcement Institutions, at 10 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), as a case in which states won significant relief and established important precedents, although the DOJ had declined to investigate the matter); Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 321–22 (2004).

[70] Hahn & Layne-Farrar, *Case for Federal Preemption*, at 81.

[71] *See, e.g.*, William E. Kovacic, *Toward a Domestic Competition Network*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 321–22 (Richard A. Epstein & Michael S. Greve eds., 2004).

[72] *See* AAI Comments re Enforcement Institutions, at 12 ("The *Hartford* and *Microsoft* cases are the exception, not the rule.").

[73] *See* 15 U.S.C. § 15c(a)(1).

[74] *See* Chapter III.C of this Report regarding government civil monetary remedies.

[75] *See, e.g.*, ABA Comments re State Civil Nonmerger Enforcement, at 3–4.

[76] *See* State Enforcement Institutions Transcript at 27 (DeBow) (Oct. 26, 2005); Posner, *Antitrust in the New Economy*, at 940; U.S. Chamber of Commerce Comments, at 4; ABA Comments re State Civil Nonmerger Enforcement, at 11 (*parens patriae* actions do not create any greater or lesser *in terrorem* effects than class actions). With respect to injunctive relief, others have objected to *parens patriae* actions for injunctive relief on the ground they allow states to seek relief that unnecessarily adds to, or potentially even conflicts with, the relief sought by federal enforcement agencies. ABA Comments re State Civil Nonmerger Enforcement, at 6–10.

[77] *See* First Statement, at 16–24; Proger Statement, at 13; Rowe Statement, at 5; AAI Comments re Enforcement Institutions, at 8–11.

[78] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 692 & n.104.

[79] *See* Proger Statement, at 14.

[80] *See* Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 691–92.

[81] Connecticut v. Mylan Labs, 2001-1 Trade Cas. (CCH) ¶ 73,273, at 90,403–03 (D.D.C. 2001). The FTC's recovery was combined with that of the states. *See* Proger Statement, at 14.

[82] *See* Proger Statement, at 2; Rowe Statement, at 5; State Enforcement Institutions Trans. at 10 (Rowe); ABA Comments re State Civil Nonmerger Enforcement, at 6–7.

[83] *See* Rowe Comments, at 25; AAI Comments re Enforcement Institutions, at 9; ABA Comments re State Antitrust Enforcement, at 6.

Some also argue that the states can devote resources to matters that federal enforcers cannot investigate due to the necessary prioritization of limited federal resources. *See* ABA Comments re State Civil Nonmerger Enforcement, at 6–7; AAI Comments re Enforcement Institutions, at 10; ABA Comments re State Antitrust Enforcement, at 7. States have very limited resources available for antitrust enforcement, however. *See* Hahn & Layne-Farrar, *The Case for Federal Preemption*, at 80 (in fiscal year 2002, California spent $5.6 million on antitrust enforcement, while the combined antitrust budgets of the federal antitrust agencies in 2002 totaled about $204 million); Rowe Comments, at 17 ("State attorneys general are increasingly restricted by budget constraints, with the result that meritorious enforcement actions are often passed up for lack of resources.").

[84] ABA Comments re State Civil Nonmerger Enforcement, at 6–7.

[85] One of the Antitrust Division's most sustained criminal enforcement efforts involved bid-rigging in the provision of milk to schools. *See, e.g.*, United States v. Md. & Va. Milk Producers Coop. Ass'n, Inc., 974 F.2d 1333 (4th Cir. 1992). The FTC has challenged many grocery mergers, which also have effects primarily in local markets. *See, e.g.*, *In re* Albertson's, Inc. & Am. Stores Co., FTC Docket No. C-3986 (2000); *In re* Winn-Dixie Stores, Inc., FTC Docket No. C-4001 (2001).

[86] *See* AAI Comments re Enforcement Institutions, at 12.

[87] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 688. *But see* Rowe Comments, at 8–9 (from 1984 to 2005, only one-quarter of Maine's antitrust enforcement matters were purely intrastate, and that percentage may be shrinking).

[88] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 688–89.

[89] AMC Memo—Analysis of NAAG Data, at 6.

[90] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 690–91 (discussing cases).

[91] *Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the H. Comm. on the Judiciary*, 108th Cong. 18 (July 24, 2003) (statement of R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice).

[92] Bertelsmann AG et al., Public Comments Submitted to AMC, at 2–3 (Aug. 12, 2005).

[93] International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust, at 91 (2000) [hereinafter ICPAC Report] ("Although no comprehensive data are available that quantify the overall public and private costs imposed by compliance with multijurisdictional merger notification and review requirements, the responses of firms and their advisors . . . suggest that these costs are sizeable.") (citing J. William Rowley, QC, & A. Neil Campbell, *Multi-jurisdictional Merger Review—Is It Time for a Common Form Filing Treaty?*, *in* Policy Directions for Global Merger Review: A Special Report by the Global Forum for Competition and Trade Policy 9 (1999)).

[94] U.S. Chamber of Commerce Comments, at 3; Proger Statement, at 3, 5, 10; ICPAC Report, at 143.

[95] *See, e.g.*, U.S. Chamber of Commerce Comments, at 4; Posner, *Federalism and the Enforcement of Antitrust*, at 258 ("[A]s shown by the *Microsoft* case, if the [DOJ] brings an antitrust suit, the state attorneys general may be able, by bringing parallel suits, to take a free ride on the department's investment in the litigation."); *see also* Business Roundtable, Public Comments Submitted to AMC, at 20 (Nov. 4, 2005) ("State antitrust enforcement often 'free rides' on federal government investigations, thus subjecting a company to double scrutiny without adding any value for consumers.").

[96] ABA Comments re State Antitrust Enforcement, at 7.

[97] U.S. Chamber of Commerce Comments, at 2.

[98] *Id.* at 6; Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[99] Hahn & Layne-Farrar, *Federal Preemption of Antitrust*, at 80; U.S. Chamber of Commerce Comments, at 2–3.

[100] *See, e.g.*, ABA Comments re State Antitrust Enforcement, at 1–2.

[101] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 688.

[102] State Attorneys General of Hawaii, Maine, and Oregon, Public Comments Submitted to AMC, at 6 (July 23, 2006). Consent decrees, judgments, or settlements were reached in 111 of these cases. *Id.*

[103] *Id.*

[104] *Id.*

[105] ABA Comments re State Antitrust Enforcement, at 6; *see also* AAI Comments re Enforcement Institutions, at 5.

[106] Rowe Comments, at 11–12.

[107] ABA Comments re State Antitrust Enforcement, at 6.

[108] *See, e.g.*, Massachusetts v. Campeau Corp., 1988-1 Trade Cas. (CCH) ¶ 68,093 (1988) (the FTC had approved the transaction, but Massachusetts filed suit); *American Stores*, 495 U.S. 271 (the FTC conditionally approved the transaction, requiring a divestiture to which American Stores agreed, but California filed suit post-consummation, requesting an injunction and additional divestitures); New York v. Primestar Partners, CV 93-38683907 (S.D.N.Y. 1993) (the DOJ and the states reached different settlements, based on the states' and the DOJ's different concerns with Primestar's joint venture).

[109] For example, some view the *Kraft Foods* case, the department store cases in upstate New York, and broader divestitures in grocery store mergers as positive state actions to undertake broader anti-merger activity than the federal antitrust agencies. *See* New York v. Kraft Gen. Foods, 862 F. Supp. 1030, 1993-1, Trade Cas. ¶ 70,284 (1993); Flexner & Racanelli, *State and Federal Antitrust Enforcement*, at 524 n.121 (the New York attorney general and Macy's signed an agreement in 1988 in which "the department store chain obligated to divest itself . . . of certain stores in the New York metropolitan area" if it acquired its biggest rival, Federated Department Stores; the acquisition would otherwise have threatened to "'eliminate all meaningful competition, with resulting harm to consumers with regard to price, choice, and quality of merchandise'") (citing 54 Antitrust & Trade Reg. Rep. (BNA) 502, 503 (1988)); *see also*

Greene Comments, at 8–9, 17; Rowe Statement, at 5; Proger Statement, at 6 ("There have been, for instance, cases involving the merger of local firms where enforcement was pursued by the states, even after the federal government chose not to challenge the transaction.") (citing, for example, California v. Sutter Health Sys., 84 F. Supp. 2d 1057 (N.D. Cal.) (hospital merger that the FTC did not challenge), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000) (opinion not for publication, at 2000-1 Trade Cas. (CCH) ¶ 72,896)); Proger Statement, at 15 (acknowledging that states "fill[] in for federal enforcement not only where the federal agencies decline to investigate but also providing a mechanism for direct redress for consumers or to benefit the public good") (citing *In re* Compact Disc Minimum Advertised Price Litig., No. 2:01-CV-125-P-H (D. Me. Sept. 26, 2002); Florida v. Nine West Group, No. 00 Civ. 1707 (S.D.N.Y. Mar. 6, 2000)). *See generally* Posner, *Federalism and the Enforcement of Antitrust*, at 259 ("The state attorneys general can offer only harsher antitrust enforcement than the Justice Department.").

110 *See* NAAG Horizontal Merger Guidelines, § 2. 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, say the Guidelines, "may affect the Attorney General's ultimate exercise of prosecutorial discretion." *Id.*

111 *See, e.g.*, Proger Statement, at 7–8; DeBow Statement, at 4; ABA Comments re State Antitrust Enforcement, at 8–9.

112 Proger Statement, at 7.

113 *See* DeBow, *State Antitrust Enforcement*, at 276 (discussing certain state merger enforcement matters); Proger Statement, at 7–8. *But see* Rowe Comments, at 12–13 (responding that Maine brought its enforcement action to protect competition, not jobs).

114 DeBow, *State Antitrust Enforcement*, at 275.

115 *See* ABA Comments re State Antitrust Enforcement, at 8–9 (citing Pennsylvania v. Russell Stover Candies, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,224 (E.D. Pa. 1993) (Pennsylvania State Attorney General instituted a merger challenge to protect jobs within the state); Maine v. Conners Bros. Ltd., 2000–1 Trade Cas. (CCH) ¶ 72,937 (Me. Sup. Ct. Mar. 29, 2000); Wal-Mart Stores Inc. v. Rodriguez, 373 F.3d 747 (1st Cir. 2003)).

116 DeBow, *State Antitrust Enforcement*, at 275.

117 *See, e.g.*, U.S. Chamber of Commerce Comments, at 3; ABA Comments re State Antitrust Enforcement, at 8–9 (identifying cases that exemplify this concern and finding the lack of additional examples insufficient to refute the concern).

118 Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997) [hereinafter DOJ/FTC Merger Guidelines].

119 NAAG Horizontal Merger Guidelines.

120 *See id.* § 3A.

121 For example, the NAAG Horizontal Merger Guidelines will consider entry from unused excess capacity only if it is likely to occur within *one* year of any attempted exercise of market power. *Id.* §§ 3.3, 3.31, 3.32 (emphasis added). By contrast, the DOJ/FTC Merger Guidelines take into account entry "that can be achieved within *two* years from initial planning to significant market impact." DOJ/FTC Merger Guidelines, § 3.2 (emphasis added).

122 The NAAG Merger Guidelines allow the consideration of efficiencies only if merger proponents show by clear and convincing evidence that the cost savings will be passed on to consumers and will persist over the long run. NAAG Merger Guidelines, § 5.3. By contrast, the DOJ/FTC Merger Guidelines allow consideration of merger-specific efficiencies that merger proponents substantiate in such a way that "the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." DOJ/FTC Merger Guidelines, § 4.

[123] *See* U.S. Chamber of Commerce Comments, at 3; Proger Statement, at 9.

[124] ABA Comments re State Antitrust Enforcement, at 8.

[125] *Id.* at 9.

[126] *See id.* at 2.

[127] Proger Statement, at 3, 10; ABA Comments re State Antitrust Enforcement, at 7, 11.

[128] *See* ABA Comments re State Antitrust Enforcement, at 11.

[129] *Id.*

[130] Ilene Knable Gotts, *What Role Should State Attorneys General Have in Clayton Act Pre-merger Enforcement?* (1999), *available at* http://library.findlaw.com/1999/Jan/1/130734.html#Ref7.

[131] NAAG Protocol for Coordination in Merger Investigations.

[132] NAAG Compact.

[133] *See id.*

[134] ABA Comments re State Antitrust Enforcement, at 7 n.23.

[135] *Id.* at 7.

[136] *Id.*

[137] Proger Statement, at 10.

[138] *Id.*

[139] *Id.* at 10–11.

[140] *Id.* at 3, 8–9, 15; Rowe Comments, at 26; ABA Comments re State Antitrust Enforcement, at 11.

[141] 15 U.S.C. § 18a(h).

[142] *Id.*

[143] Proger Statement, at 11.

[144] *See id.*

Chapter II.D
International Antitrust Enforcement

1. INTRODUCTION

The United States adopted the Sherman Act over 100 years ago.[1] Although few countries adopted similar laws for many years,[2] today there are over 100 nations with competition laws.[3] An increasing number of countries implemented comprehensive competition laws and enforcement regimes as they recognized the "value of competition as a tool for spurring innovation, economic growth, and . . . economic well-being," and the advantages of moving away from government-managed economies.[4] Over this same period, global trade has increased markedly, and there has been a significant increase of economic integration and interdependence across national borders.[5] Advances in communication technology have "shrunk the time and distance that separate markets around the world."[6]

A. Convergence, Cooperation, and Comity

Notwithstanding the large number of antitrust regimes worldwide, multinational antitrust enforcement generally has not generated significant inconsistencies or conflict among nations.[7] Indeed, significant convergence based on sound principles of competition law has occurred and is continuing to occur on both procedures relating to multinational enforcement and the core substance (if not the details) of antitrust and competition law.[8] Consensus is being reached through a variety of means, including through multinational organizations such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).[9] The U.S. antitrust agencies in particular have played an important role in encouraging convergence and cooperation, through participation in the OECD and the ICN, as well as through the provision of technical assistance to nascent competition law regimes. And a U.S. advisory committee, the International Competition Policy Advisory Committee (ICPAC), issued an extensive report in 2000 that identified steps for cooperation and convergence and stimulated further efforts in this regard.[10]

Cooperation between and among different nations' antitrust enforcers has also limited conflict. Instead of resisting "extraterritorial" enforcement of the U.S. antitrust laws through blocking statutes and the like (as often occurred in the 1970s), many foreign jurisdictions now actively assist the United States in antitrust enforcement efforts, and vice versa.[11] For instance, a British magistrate court and a U.K. secretary of state recently authorized the extradition of a British citizen to the United States to face criminal antitrust charges[12]—rulings that likely would not have occurred as recently as five years ago.[13]

The United States and the European Union routinely coordinate their reviews of cross-border transactions.[14] Such cooperation has been advanced by formal bilateral and multilateral agreements between the United States and other countries. For example, the United States has entered into bilateral agreements with the European Union that both encourage cooperation on investigations and establish principles of comity to govern when each jurisdiction should defer to the other.[15] In 1994 Congress enacted the International Antitrust Enforcement Assistance Act (IAEAA),[16] authorizing the United States to enter into agreements enabling the exchange of confidential business information to facilitate the coordination of cross-border investigations.[17]

Although the United States and other countries have reached a substantial degree of convergence, improved by cooperation and coordination,[18] further steps are appropriate. Divergence can create problems of at least three types. First, companies may be subject to conflicting and inconsistent laws, creating uncertainty as to the legal standards applicable to their business arrangements.[19] Second, companies must comply with the procedural requirements of multiple jurisdictions, potentially increasing their costs significantly, particularly with respect to notification requirements for mergers.[20] Third, different countries may ultimately impose different, and inconsistent, remedies with respect to the same conduct or transaction.[21] U.S. companies that have been subject to differing remedies from different enforcers, which resulted from the lack of greater convergence, include some of the largest U.S. companies, such as Boeing, General Electric, and Microsoft.[22]

Based on its study, the Commission makes several recommendations intended to further convergence on appropriate standards, encourage cooperation, and minimize conflict in the future, as follows.

37. The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.

38. As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.*

* Commissioners Shenefield and Valentine do not join this recommendation.

40. **Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international antitrust technical assistance.**

41. **The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.**

- **41a.** **Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.**

- **41b.** **Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and "benchmarking reviews."**

B. The Foreign Trade Antitrust Improvements Act

Applying the U.S. antitrust laws to conduct occurring overseas has the potential to conflict with competition law and other policies in other nations. The Supreme Court first addressed U.S. antitrust jurisdiction over conduct occurring outside the United States in 1909.[23] After years of divergent court decisions, Congress attempted to resolve the issue by passing the Foreign Trade Antitrust Improvements Act (FTAIA) in 1982.[24]

The FTAIA, however, proved to be less than a model of clarity and resulted in continued split court decisions. In 2004 the Supreme Court addressed some of these issues regarding the law's extraterritorial scope in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,[25] but the opportunity for continued divergence exists. The Commission's general principle on the antitrust laws' reach is intended to offer clear guidance in these unresolved areas.

Based on its study of the FTAIA, the Commission makes the following recommendation.

42. **As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.***

* Commissioner Delrahim does not join this recommendation.

2. RECOMMENDATIONS AND FINDINGS

A. Cooperation and Convergence

37. The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have made extensive efforts to improve cooperation between the United States and other nations' antitrust enforcers.[26] Both U.S. antitrust agencies "enjoy [a] strong cooperative relationship[] with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination on international antitrust policy, and provision of technical assistance to new agencies around the world."[27] Whereas U.S. requests for cooperation previously took up to a year to be processed,[28] today antitrust agencies worldwide have a "pick up the phone" approach toward sharing information and assisting each other in their antitrust enforcement efforts.[29] This high degree of cooperation has facilitated convergence of both procedural and substantive aspects of antitrust law.

The efforts of the U.S. antitrust agencies have been advanced in part through their participation in two organizations, the OECD and the ICN.[30] The OECD was created in 1961 to expand free trade and improve development in member countries.[31] As part of these efforts, it created a Competition Law and Policy Committee that provides a variety of means for countries to share their best practices regarding antitrust and competition policy.[32] The ICN, in comparison, is relatively new, but has a more broad-based membership. It was created after ICPAC called for the creation of a "Global Competition Initiative" to address antitrust enforcement in a growing globalized economy.[33] Membership in the ICN has increased from fourteen jurisdictions when it began in 2001[34] to ninety-seven members from eighty-five jurisdictions in 2007.[35]

The ICN and OECD have promulgated "best practices" on merger reviews and cartel investigations and continue to work on convergence of substantive and procedural law.[36] For example, the ICN is currently undertaking a study of unilateral conduct standards with the goal of developing a consensus on the objectives and legal and economic bases of enforcement regarding unilateral conduct.[37] The ICN in the past has developed principles of best practices regarding merger notification regimes, with the objective of highlighting the importance of transparency and clarity in each jurisdiction's rules regarding filing requirements and review.[38] Overall, through their efforts, these institutions have had a meaningful influence in "promoting convergence in antitrust enforcement"[39] and have contributed to the "significant recent progress in reducing conflicts by increasing cooperation, information sharing, and networking."[40] Indeed, their successes are reflected at least in part by the fact that the vast majority of international investigations are conducted without incident.[41]

The DOJ and the FTC should continue to participate and take a leadership role in the ICN and OECD competition activities. Congress should be supportive of these efforts. The ICN and OECD mechanisms have proven extremely useful for encouraging the development of competition laws in other countries based on sound antitrust principles that are not in conflict with U.S. antitrust laws. Avoiding such conflict is of great benefit to U.S. consumers and businesses, because it allows companies to operate efficiently on a global scale, providing the benefits that global commerce can bring.

38. As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

Approximately seventy jurisdictions now require notification of a merger.[42] The filing requirements and procedures can vary significantly from one country to the next. As a result, companies involved in cross-border mergers must comply with numerous different rules and processes.[43] The costs can be significant, including costs for determining where filings are required, preparing filings, and paying filing fees.[44] The 2003 PricewaterhouseCoopers survey on the time and costs involved in multijurisdictional merger reviews found that such reviews typically required "eight completed or considered filings" at a cost of $3.8 million for uncomplicated mergers, and $11.5 million for "more complex ones."[45]

The FTC and the DOJ should evaluate, in consultation with other jurisdictions, how to implement some kind of common premerger notification system across countries that would reduce the burden associated with multiple filings—for example, by providing an opportunity for companies to provide a single, simple initial submission for use by all affected jurisdictions.[46] Recent efforts to harmonize filing requirements have been a useful first step, but further progress is needed. For example, one Commission witness noted that Germany, France, and Britain attempted to implement a joint filing form, but that it is not frequently used because "it really didn't serve anybody's interest."[47] The Commission believes that further steps toward a common system would be valuable and should be feasible. The antitrust agencies should report to Congress promptly as to whether a more uniform and less burdensome notification system is feasible.

39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.*

In 1994 Congress enacted the International Antitrust Enforcement Assistance Act (IAEEA) to authorize the United States to enter into agreements with other countries that allow the exchange of confidential business information.[48] Such agreements are known as Antitrust Mutual Assistance Agreements (AMAAs). In the absence of an AMAA, the United States (as well as other nations) is generally barred from sharing confidential information obtained from businesses in the course of antitrust investigations.[49] The IAEAA requires AMAAs to include safeguards to ensure that confidential, competitively sensitive information that is exchanged between enforcement agencies does not become public.[50] By allowing countries to share confidential information, an AMAA has the potential to permit countries to conduct joint investigations more efficiently and to reduce burdens on parties that might otherwise have to supply that information to both countries separately. Moreover, they can assist countries in conducting coordinated cartel prosecutions by allowing cooperation in the investigation of international cartels.[51]

Since passage of the IAEAA, the United States has entered into only one AMAA—with Australia.[52] Notably, the United States currently has no formal mechanism for exchanging cartel evidence with the European Union.[53] Two provisions in the IAEAA may discourage other jurisdictions from entering into AMAAs with the United States. First, the IAEAA provides that the United States may enter into an AMAA only on a "reciprocal basis"—that is, the agreements must provide both signatories with similar rights and obligations.[54] Second, the IAEAA requires that an AMAA must permit the foreign signatory to request from U.S. officials the authority to use confidential information obtained through the AMAA in non-antitrust matters.[55] Because of the reciprocity requirement, this second provision could mean that other jurisdictions must similarly provide a mechanism that would allow the United States to seek approval for the use of exchanged confidential information in non-antitrust matters.

The combination of these two provisions appears to have impeded other countries from entering into AMAAs because they are not willing to provide for the possibility of non-antitrust uses of information.[56] For instance, Canada's Competition Act expressly prevents the Competition Bureau from entering into an agreement where the information provided would be used for purposes other than "the purpose for which it was requested."[57] To be

* Commissioners Shenefield and Valentine do not join this recommendation. They believe that the current statute adequately accommodates authorities' potentially divergent interests in use of shared information.

sure, there may be other reasons as to why countries have not been more willing to enter into AMAAs with the United States,[58] and there may be other mechanisms through which confidential information can be shared.[59] The fact that there may be other reasons creating obstacles to the adoption of AMAAs, as well as possible work-arounds, does not mean that statutory change is not appropriate.

Congress should amend the IAEAA to make it clear that it does not require AMAAs to include a provision for non-antitrust uses of confidential information. Such an amendment would ensure that other countries are not prevented or dissuaded from entering into such agreements out of concern over non-antitrust use of information.[60]

40. Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international technical assistance.

The DOJ and the FTC provide extensive technical assistance to nascent competition law regimes.[61] The agencies use a variety of means—such as supplying on-site, long-term advisors and conducting workshops involving personnel from agencies in several countries—to provide assistance and training.[62] Such training assists other countries in the development of their enforcement institutions as well as in their understanding of the appropriate economic and legal underpinnings of sound competition policy.[63] It provides assistance in "the development of framework laws," and in the "training of personnel in the substantive legal principles, analytical framework, and investigative techniques . . . ."[64] Taken together, these services will foster greater cooperation and convergence on sound antitrust law principles.[65]

Neither the FTC nor the DOJ, however, has authority to fund such training itself. Funding is instead provided through the U.S. Agency for International Development (USAID),[66] whose mission is to foster democracy, economic growth, and human health in developing nations through a variety of means, including food aid, infrastructure construction, training, and technical assistance.[67] FTC and DOJ requests for limited USAID funding to support antitrust training efforts accordingly compete with others' demands for basic needs such as food and healthcare support. The Commission believes that providing funding for antitrust technical assistance directly to the antitrust agencies will help to ensure that the objectives and priorities of antitrust technical assistance are properly weighed by those with the relevant expertise, and that the monies are allocated as efficiently as possible.

B. Formal Agreements Incorporating Comity Principles

Convergence and cooperation are a significant, but not the sole, method of reducing conflicting approaches and outcomes that may result from having more than one country seek to apply its antitrust or competition laws to conduct. Regular application of principles of comity is a second critical component that calls for one enforcer to defer to another's decisions, and not take parallel, potentially inconsistent decisions. Comity has been described as "a concept of reciprocal deference . . . [that] holds that one nation should defer to the law and rules . . . of another because . . . the other has a greater interest."[68] Principles of comity in the antitrust arena encourage "competition agencies to presumptively defer their own enforcement authority to that of jurisdictions with the greatest interest or center of gravity."[69]

Comity principles can be applied in different ways. For example, courts may use comity principles in deciding whether U.S. law applies to conduct that takes place outside the United States. Indeed, comity has long been recognized as "a well-established part of U.S. case law in antitrust cases."[70] Similarly, comity principles may inform the adoption of agreements between countries regarding their respective responsibility and role in enforcing laws. The United States has entered into numerous bilateral and multilateral agreements that help to foster cooperation and coordination with other antitrust regimes, many of which include provisions calling for use of comity principles.

Most significantly, the United States entered into a bilateral agreement with the European Union in 1991 regarding antitrust enforcement, and a revised agreement in 1998.[71] These agreements set out certain principles of comity, both negative and positive.[72] Traditional or "negative" comity, contained in the 1991 agreement, is where one country restrains itself so as not to allow its laws and law enforcement actions to harm or impede another country's important interests.[73] The 1991 agreement calls for the United States or European Union to consider certain factors such as the significance of the anticompetitive activities involved "within the enforcing Party's territory as compared to conduct within the other Party's territory;" "the degree of conflict or consistency between the enforcement activities and the other Party's laws;" and "the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities."[74] Accordingly, when "it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider [the factors enumerated above] . . . in seeking an appropriate accommodation of the competing interests."[75] This type of comity is an exercise of prosecutorial or investigatorial restraint.

"Positive" comity, by comparison, is where one country asks another to "take appropriate actions regarding anticompetitive behavior occurring in its territory that affects the important interests of the requesting party, where that behavior violates the competition laws and regulations of the host [country]."[76] For example, under the 1998 Agreement the U.S. competition authorities may request the E.U. competition authorities to investigate and, if warranted, to remedy anticompetitive activities occurring largely in the European Union in accordance with its competition laws.[77] Under the agreement, the United States would also defer or suspend pending or contemplated enforcement activities while the European Union investigated.[78] Positive comity thus aims to place primary responsibility for enforcement "in the hands of the jurisdiction most closely associated with the alleged anticompetitive conduct."[79]

41. The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.

41a. Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.

Agreements incorporating principles of comity provide a useful mechanism to avoid duplicative enforcement and to reduce instances of potentially conflicting decisions, thereby making antitrust enforcement more efficient and lessening costs on businesses and consumers. The 1991 and 1998 U.S.-E.U. agreements have, in general, been used successfully,[80] and have served as a template for subsequent bilateral agreements with Brazil, Canada, Israel, Japan, and Mexico.[81] However, the potential of the agreements may not been fully realized because the parties have not regularly invoked their comity principles.[82] As one commenter stated, while U.S. bilateral agreements "have largely been a success[,] . . . the comity provisions . . . have been less successful."[83]

For example, some believe that the "limited impact of comity in the antitrust field" resulted in the inconsistent conclusions reached by the United States and the European Union in the investigations of the *GE/Honeywell* merger and of conduct by Microsoft.[84] They believe that when jurisdictions with longstanding and respected antitrust regimes such as the United States and the European Union fail to apply principles of comity when appropriate, it gives jurisdictions with less mature regimes a license similarly to disregard comity principles.[85] The United States therefore must lead by example in this critical area.[86] The FTC and the DOJ should actively seek opportunities to invoke the comity provisions in existing agreements and encourage other countries to do likewise. They should consider developing more informal and efficient uses for comity and extend comity principles to interactions with other nations with which agreements do not exist.

This is particularly important because global trade, investment, and welfare depend, in part, on the efficient and consistent resolution of antitrust investigations. Inconsistent remedies and resulting conduct obligations can impose high costs on businesses and the consumers of their products.[87] For example, commenters identified numerous costs, including: (1) "increased political tension that may reduce support for global trade and cooperative bilateral relations[;]"[88] (2) "uncertainty over the legal consequences of cross-border transactions or investments which hinders business planning and skews investment decisions by diminishing the anticipated competitive rewards of innovation[;]"[89] and (3) "conflicting or inconsistent remedies, which result[s] in uncertainty, impedes business planning, skews investment decisions, and promotes inefficiency."[90] Ultimately, such costs can deter investment and trade that generally benefits consumers and increases their welfare.[91]

Multinational agreements that incorporate comity principles, whether existing or new, should be more explicit in recognizing the importance to global trade, investment, and consumer welfare of avoiding conflicting or inconsistent antitrust enforcement.[92] At present, the United States' bilateral agreements do acknowledge that "effective enforcement of antitrust laws is important to the efficient operation of markets and to economic welfare."[93] However, such statements fail to convey fully the importance of cooperation agreements including comity principles to achieving robust trade and investment on a global scale and should, where possible, be strengthened to confirm these important points.

41b. Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and coordination, and "benchmarking reviews."

The United States, as it pursues increasing numbers of agreements containing comity principles with other countries, should seek to enter into agreements that contain the following five principles. These principles, as explained below, aim to assign principal enforcement authority to the country with the greatest connection to the transaction or conduct at issue, but seek to ensure that other countries that have an interest in the merger or conduct also are assured that their interests will be taken into account.

- *Complete Deferral.* Any country as to which a cross-border transaction or conduct does not have a direct, substantial, and reasonably foreseeable anticompetitive effect should defer to the enforcement judgment of the country or countries where there is such an effect.

- *Presumptive Deferral.* When a competition authority in one country with a substantial nexus to a transaction or conduct has taken enforcement action, other countries with a lesser nexus should presumptively defer to that action. The first country should consult with other jurisdictions before taking action that will affect their significant interests.*
- *Harmonization of Remedies.* When more than one country pursues an enforcement action against the same transaction or conduct, those countries should seek to avoid imposing inconsistent or conflicting remedies through, for example, consultation or by fashioning remedies on a joint basis.
- *Coordination Mechanism.* A mechanism should be established whereby any private entity that is potentially subject to inconsistent or conflicting rules or remedies with respect to the same transaction or conduct can request consultation and/or coordination between or among jurisdictions to avoid inconsistency or conflict.
- *"Benchmarking" Reviews.* In any case where the United States and another jurisdiction nevertheless impose inconsistent or conflicting remedies, they should agree to conduct ongoing "benchmarking" reviews of the impact of the divergent remedies on the parties and competitive processes.

Complete Deferral. This first principle would ensure that where a transaction or conduct does not have a significant effect on a country's consumers, that country will not seek to take an enforcement action or seek to impose remedies on the conduct.[94] Incorporating this principle into bilateral agreements would help prevent countries with only minimal connection with a particular transaction or conduct from exercising jurisdiction where they have relatively minor interests and others are better positioned to do so.

This principle would take as its guiding standard the "direct, substantial, and reasonably foreseeable" test used in the Foreign Trade Antitrust Improvements Act (and comparable principles in other countries).[95] Thus, unless anticompetitive conduct has a direct, substantial, and reasonably foreseeable effect on a country that is party to such an agreement, it would defer to the enforcement efforts of other countries in which there was such an effect. When only a negligible effect exists, a country's consumers are unlikely to be meaningfully affected, and there is little reason for that country's antitrust enforcer to seek relief against the conduct or transaction.

Presumptive Deferral. The second principle seeks to ensure that even where conduct or a merger may affect consumers in a country, that country's antitrust enforcers will defer to the enforcers in other countries in which the effects are likely to be more significant. Thus, the country with a lesser "nexus" to the conduct or transaction should defer to the other

* Commissioner Carlton does not join in recommending the inclusion of this principle.

country with a greater nexus. The relative nexus to the transaction can be determined on the basis of generally accepted choice-of-law principles.[96] This presumptive deferral has two limitations. First, it is only a presumption, so that if there are other compelling reasons for taking action, a country may do so even where it otherwise might not. Second, although a country with a lesser nexus should defer on enforcement decisions, the country with the greater nexus should consult with it to ensure that the interests of the other country are taken into account.

The consultation obligation is of particular importance because it helps allay concerns that smaller jurisdictions will usually have a lesser nexus and thus would be obligated to defer in most instances to another jurisdiction's decisions.[97] Although global transactions and conduct have the potential to cause anticompetitive effects acutely in some nations, more typically any effects will be broadly spread throughout the world. As a result, in many instances, larger jurisdictions, such as the European Union and the United States, are likely to have the most substantial nexus to the conduct or transaction. However, "every harmed nation has a legitimate interest in applying its law to protect its citizen."[98] The consultation requirement will help to accommodate the interests of countries with less substantial connections, which would refrain from seeking remedies themselves under this principle.[99] It provides smaller nations with a "voice" and an opportunity to have their particular interests considered, while still allowing the jurisdiction with the greater nexus to the conduct to lead the investigation.[100]

Harmonization Mechanism. This principle calls for countries to seek to make remedies consistent wherever possible.[101] It helps to ensure that where comity principles do not result in one country's deferring to the enforcement responsibility of another cooperation will instead be used to avoid the costly effects of inconsistent remedies. To be sure, in the vast majority of multinational cases antitrust regimes have managed to avoid imposing inconsistent or conflicting remedies on multinational businesses.[102] Nonetheless, in a few cases the United States and other antitrust enforcement agencies have taken divergent paths in both their analysis and in the remedies imposed.[103]

The Commission does not recommend a principle by which the remedies imposed by the first jurisdiction to investigate should limit the authority of other jurisdictions to impose different (whether lesser or greater) remedies.[104] Such deference requires the countries involved in the agreement to have confidence that the jurisdiction that is the first to act will both be competent and free from political influence.[105] With time and further cooperation between the United States and other countries, the confidence such decisions will be competent and free from parochial bias are likely to increase. At that point, a different approach regarding remedies may become appropriate.

Coordination Mechanism. This principle helps to reinforce the previous principle by ensuring that where countries fail to cooperate in fashioning remedies, the entities subject to the conflicting remedies will have a mechanism through which to request that such cooperation and consultation take place.[106] While in the typical instance cooperation should occur as a result of the agreement, there may be circumstances in which it does not. The Commission does not propose any particular mechanism, but expects that any company that makes a credible showing that an investigation by more than one country could potentially subject it to inconsistent or conflicting remedies should be permitted to request a joint consultation between the antitrust agencies conducting the investigation.[107]

"Benchmarking" Reviews. This principle also helps to reinforce the previous two principles. In the few instances in which multinational cooperation and coordination cannot reach a harmonious result, the countries involved should undertake a retrospective evaluation as to why the usual cooperation mechanisms failed.[108] A benchmarking review after completion can identify why potentially avoidable conflict occurred and how to prevent it in the future. Even where the different remedies may be a result of different assessments of the relevant evidence, the investigating agencies are likely to benefit from a fuller understanding as to why each agency reached a different conclusion. Such consultations may foster further convergence that will avoid such outcomes in the future.

C. The Foreign Trade Antitrust Improvements Act

Almost since the Sherman Act's passage, courts have struggled to define the territorial limits of the Act in two interrelated respects. First, when does conduct overseas affect U.S. commerce? Second, if it does, who may sue for the harm suffered as a result of that conduct? Ultimately, the case law that developed did not provide clear answers to these questions. As U.S. businesses expanded their operations worldwide, they became concerned that their conduct overseas might be subject to the Sherman Act.[109] To provide greater clarity, Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA). The complex wording of this statute, however, has also resulted in ambiguities. The territorial scope of the Sherman Act and who may bring a claim under it thus remain unclear.

The importance of clarity in this area has grown in recent years. Improved methods of detection, as well as increased global awareness of the harms of anticompetitive conduct, have led enforcers to prosecute vigorously global price-fixing conspiracies that affect worldwide commerce. Consumers harmed by alleged anticompetitive conduct caused by such global conspiracies sometimes seek to recover under the Sherman Act. When those consumers sue for purchases they made in the United States, their right to seek recovery is not controversial. However, consumers who made purchases outside the United States from companies outside the United States also sometimes seek to take advantage of the Sherman Act's robust private remedies, including treble damages, which generally are not available under the laws of other nations.

Such lawsuits can affect both international comity and business certainty. First, interpreting the Sherman Act to extend to conduct that occurs wholly outside the United States has the potential to interfere with other countries' decisions regarding how best to regulate their own commercial affairs. Countries with less robust private remedies than those in the United States have chosen to balance the costs and benefits of such a remedial scheme differently. If remedies under the Sherman Act were extended to every purchaser world wide, that would undermine other countries' choices about the appropriate remedial scheme. Second, the lack of clarity regarding the application of the Sherman Act to conduct wholly outside the United States leaves U.S. businesses uncertain regarding the consequences of their conduct outside the United States and has the potential to increase their liability despite no additional harm to U.S. consumers.

The Supreme Court's decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* in 2004,[110] and a subsequent appellate court decision in that case,[111] have cleared up some of the uncertainty about the territorial limits of the Sherman Act, as articulated in the FTAIA. These judicial decisions, however, have not ended the issue. The FTAIA itself remains a source of confusion, and courts may still diverge on their approaches, given the limited guidance from the Supreme Court.

1. Background

The Sherman Act makes illegal anticompetitive restraints in, or monopolization of, any part of "trade or commerce among the several States, or with foreign nations."[112] By its terms, the Sherman Act thus protects U.S. consumers and U.S. markets against anticompetitive conduct, whether that conduct takes place within the United States or outside of it. It was always clear that when domestic conduct produces anticompetitive effects, consumers injured by these anticompetitive effects can sue for treble damages.[113] But, prior to passage of the FTAIA, courts had varied in their interpretations of when the Sherman Act applied to conduct outside the United States.[114] Some had held that the Sherman Act applied only when conduct had a direct or substantial effect on U.S. commerce.[115] Other courts had extended the Sherman Act to cover conduct that did not have a substantial effect on U.S. commerce.[116]

This lack of uniformity among courts led U.S. businesses to seek statutory clarification of the territorial reach of the Sherman Act. In 1982 Congress enacted the FTAIA to clarify the case law and establish well-defined limits on the reach of U.S. antitrust laws. The FTAIA provides that:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of [the Sherman Act], other than this section.

If sections 1 to 7 of [the Sherman Act] apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.[117]

In short, the FTAIA places a limit on the geographic reach of the Sherman Act so that entirely foreign conduct is outside the reach of the Sherman Act. However, such conduct can be brought back within the Sherman Act's reach (and thus the FTAIA limit does not apply) if the foreign conduct causes a direct, substantial, and reasonably foreseeable effect on U.S. commerce.

Congress intended the statute to make plain that, unless foreign conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, such conduct would be outside the reach of U.S. antitrust laws. Congress believed that this test would serve as a "simple and straightforward clarification of existing American law" that would create "[a] clear benchmark . . . for businessmen, attorneys and judges."[118]

Despite Congress's efforts, the FTAIA had the unintended consequence of eliciting additional inconsistency in the case law. In particular, the FTAIA's proviso that the Sherman Act applies when the anticompetitive effect of foreign conduct "gives rise to a claim" under the Sherman Act produced inconsistent results in the courts. Some courts held this term to mean that the FTAIA does not limit application of the Sherman Act so long as the foreign conduct causing injury gave rise to "a" claim under the Sherman Act. Under this interpretation, a person harmed by anticompetitive conduct anywhere in the world could pursue a claim under the Sherman Act so long as at least one person was injured by that conduct's U.S. effect and thus had "a claim."[119] Other courts resolved the question differently, requiring that the plaintiff seeking relief under the Sherman Act show that it had a claim itself for relief.[120] Under this alternative interpretation, for a person to assert a Sherman Act claim, he must himself have been injured by the conduct's effect on U.S. commerce.

The Supreme Court granted certiorari in *F. Hoffmann-La Roche Ltd. v. Empagran* to resolve this split among circuit courts. *Empagran* involved a global vitamin price-fixing conspiracy that affected consumers in numerous countries, including the United States.[121] The plaintiffs were located outside the United States and conceded that they had suffered injury through purchases made outside the United States. They nevertheless sought recovery in U.S. courts on the ground that the global conspiracy produced anticompetitive effects in the United States that gave rise to "a" valid Sherman Act claim. It did not matter, they argued, that the Sherman Act claim was not their own.[122]

The Supreme Court held that a person may not assert a claim merely because another person has a claim arising from the same conduct's effect on U.S. commerce.[123] The Court further held that it could find no basis for extending the reach of U.S. antitrust laws to circumstances where the foreign injury was independent of any U.S. effects[124]—especially when the very purpose of the FTAIA was to "exclude[] from the Sherman Act's reach . . . anti-competitive conduct that causes only foreign injury."[125]

On remand, the Supreme Court directed the D.C. Circuit to consider the circumstances in which an overseas plaintiff could successfully show that it had been harmed because of the effects on U.S. commerce. The plaintiffs argued that the cartel could be successful only if it raised prices globally; had it not raised prices in the United States, resellers could have taken advantage of the lower prices in the United States to arbitrage the difference and undermine the cartel by reselling in the rest of the world.[126] Accordingly, "but for" the harm to U.S. commerce, plaintiffs argued, they would not have suffered harm, and this was sufficient to avoid the FTAIA's limitation on the Sherman Act.

The D.C. Circuit rejected the plaintiffs' "but for" causation theory, and held that the plaintiffs' harm must have a "direct causal relationship, that is, proximate causation" with the effect on U.S. commerce.[127] Subsequent courts confronting the same argument have also rejected the "but for" approach based on an arbitrage theory.[128] Nonetheless, only two of twelve circuit courts have addressed the issue. Moreover, no court of appeals has entirely foreclosed all alternative theories on which a foreign purchaser that purchases from a foreign seller might prove its harm was caused by effects within the United States.

2. Recommendation and Findings

42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.*

The Commission agreed that this general principle fairly represents the intent of Congress in enacting the FTAIA, is consistent with the Supreme Court's holding in Empagran, and describes how court decisions should apply the FTAIA.† The Commission recommends this principle for the following reasons.

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* Commissioner Delrahim does not join this recommendation.

† Commissioners Burchfield, Carlton, Jacobson, Kempf, Valentine, and Warden would support a statutory change to the FTAIA consistent with this principle.

a. U.S. Antitrust Laws Should Not Interfere with Other Nations' Decisions on How Best to Regulate Their Economies

Plaintiffs that have purchased goods or services in foreign markets from foreign sellers should have no right to seek redress under U.S. laws for injuries sustained in those foreign markets.[129] Such plaintiffs should seek redress in the jurisdiction in which they were a market participant.[130] Limiting who may seek redress under U.S. antitrust laws in this way prevents those laws from interfering with other nations' decisions as to how their antitrust laws should regulate conduct in their territory.[131]

As global awareness of the importance of competition and the need for laws to protect it grows, other countries will continue to implement mechanisms to ensure competition flourishes. These nations may adopt laws that permit consumers injured in those markets to seek redress.[132] Even if a foreign jurisdiction has not adopted such remedies, however, U.S. antitrust policy should not fill the gap.[133] Other countries may reasonably determine that a remedial scheme like that in the United States would interfere with their own competition policies or other values they have decided to advance. Similarly, other countries may have concluded that treble damages are "too much" or government civil fines are sufficient for deterrence.[134] Therefore, the Commission's principle confirms that the FTAIA does not "provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement."[135]

b. Allowing Foreign Purchasers to Sue in the United States for Foreign Injuries Could Undermine Global Deterrence of Anticompetitive Conduct

In *Empagran* the antitrust enforcement agencies of several nations, including the DOJ, filed *amicus* briefs cautioning that allowing foreign purchasers to sue in U.S. courts could potentially undermine deterrence by hindering the agencies' criminal enforcement programs.[136] Allowing such private suits could deter participation in antitrust leniency programs in the United States and in other countries because companies would be subjected to increased liability in the United States once they had acknowledged involvement in a cartel.[137] Reduced efficacy of such leniency programs, which help identify cartels in the first place, has the potential to reduce the ability of all nations to combat and prosecute cartel conduct effectively, and hamper deterrence as a result.

Proponents of a broader interpretation of the FTAIA believe that allowing persons who purchased and suffered injury abroad to sue more freely under U.S. antitrust laws would increase overall deterrence by subjecting companies to broader liability.[138] All else being equal, increasing the liability of companies will likely increase deterrence. But a broader interpretation of the FTAIA may well undermine deterrence, for the reasons discussed above. In addition, deterrence can be increased, if appropriate, through alternative mechanisms.[139]

c. The Proposed General Principle Does Not Limit the Availability of the Sherman Act Based on the Nationality of the Plaintiff

The Commission's recommended principle does not limit the availability of the Sherman Act on the basis of the nationality of the plaintiff. In enacting the FTAIA, Congress explained that:

> [F]oreign purchasers should enjoy the protection of [U.S.] antitrust laws in the domestic marketplace, just as our citizens do . . . . [The FTAIA] preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality . . . .[140]

Courts likewise have explained that the plaintiff's nationality is irrelevant, and that it is the location of the transaction's effects that matters.[141] There is no need to inquire into the nationality of the plaintiff—especially when such an inquiry could fail to answer the critical question of whether the plaintiff purchased abroad from a seller abroad and thus could not have suffered the requisite injury as a result of any U.S. effects.[142] Moreover, using a claimant's nationality to decide whether he or she can gain access to U.S. courts could violate certain international treaties to which the United States is a party.[143] Thus, the "critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated" and whether that market was affected.[144]

Notes

1 Congress passed the Sherman Act in 1890. *See* Act of July 2, 1890, 51 Cong. Ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1 et seq.).

2 R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Securing the Benefits of Global Competition, Address at the Tokyo American Center, at 2 (Sept. 10, 2004) [hereinafter Pate, Securing the Benefits of Global Competition].

3 Bertelsmann AG et al., Public Comments Submitted to AMC, at 3 (Aug. 12, 2005) [hereinafter Bertelsmann Comments]; Association for Competitive Technology, Public Comments Submitted to AMC, at 3 (Feb. 7, 2006) [hereinafter ACT Comments]; *see also* International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust 33 (2000) [hereinafter ICPAC Report] (noting sizable majority of countries adopted their antitrust laws since 1990).

4 ICPAC Report, at 33; *see* Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before the National Italian American Foundation, at 4 (Oct. 12, 2005) ("[M]any, if not most, governments in recent decades have been relying more and more on the forces of the marketplace and reducing their intervention in market outcomes."); Pate, Securing the Benefits of Global Competition, at 3; *see also* Prof. Eleanor M. Fox, Statement at AMC International Antitrust Hearing, at 2 (Feb. 15. 2006) [hereinafter Fox Statement] (referring to the fall of the Berlin Wall as the impetus behind the growth in global antitrust enforcement); ICPAC Report, at 33 ("The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.").

[5] ICPAC Report, at 33 ("Economic liberalization and technological development . . . [are] driving economic integration."); Ben S. Bernanke, Chairman, Fed. Reserve, Global Economic Integration: What's New and What's Not?, Remarks at the Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium, at 1 (Aug. 25, 2006).

[6] Alan Greenspan, Chairman, Fed. Reserve, Current Account, Remarks at Advancing Enterprise 2005 Conference, at 1 (Feb. 4, 2005).

[7] International Antitrust Transcript at 11–12, 15 (Tritell) (Feb. 15, 2006).

[8] Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 19 Antitrust 25, Summer 2005, at 26 (identifying the following antitrust principles as being most common to modern antitrust regimes: "promoting consumer welfare; the importance of economics in competition analysis; the need to deter and punish hard-core cartels; the value of separating social and employment policy from competition policy; and non-discrimination on the basis of nationality").

[9] American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding International Cooperation, at 2 (Feb. 8, 2006) [hereinafter ABA Comments re International Cooperation] (describing the U.S. agencies as "leaders in promoting convergence and coordination through multilateral fora such as the OECD and the ICN"); Fox Statement, at 3 (stating that the OECD and the ICN play an important role in today's era of cooperation).

[10] *See generally* ICPAC Report.

[11] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Speech Before 20th Annual Nat'l Inst. on White Collar Crime, ABA Criminal Justice Section, at 6 (Mar. 2, 2006) [hereinafter Hammond, International Cartel Prosecutions]; Scott D. Hammond, Acting Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Speech Before ABA Mid-winter Leadership Meeting, at 3–4 (Jan. 10, 2005) (referring to foreign government's "increased willingness to assist the United States in prosecuting cartel activity" and acknowledges that "[c]ooperation among competition law enforcement authorities has undergone a sea change").

[12] *See* Dep't of Justice, Antitrust Div., Update, at 7 (Spring 2006) (stating that both the Bow Street Magistrate's Court and the U.K. Secretary of State for the Home Department in *The Government of the United States of America v. Ian P. Norris* authorized the extradition, under the U.K. Extradition Act of 2003, of Ian Norris to the United States to face criminal antitrust charges), *available at* http://www.usdoj.gov/atr/public/216254.htm. An appellate court in the United Kingdom has stayed the extradition ruling, pending an appeal to the House of Lords. *See* Business Times Online, *Norris Cleared to Take Extradition Fight to Lords*, (Mar. 13, 2007), *at* http://business.timesonline.co.uk/tol/business/law/corporate/article1508737.ece.

[13] Her Majesty's Government of the United Kingdom and Northern Ireland, Public Comments Submitted to AMC, at 2 (Feb. 3, 2006) [hereinafter U.K. Comments] (referring to a recent trend in the United Kingdom of moving British antitrust laws toward U.S. standards); *see, e.g.*, Hammond, International Cartel Prosecutions, at 10 (noting that the United Kingdom introduced criminal sanctions for hard-core cartel participants in 2002 through its U.K. Enterprise Act).

[14] William Blumenthal, FTC General Counsel, The Status of Convergence on Transatlantic Merger Policy, Remarks Before the ABA Section of International Law 2005 Fall Meeting, at 3–4 (Oct. 27, 2005) (referring to the successful coordination and collaboration between the U.S. federal agencies and their E.U. counterparts in transatlantic mergers such as GE/Amersham, P&G/Gillette, Sony/BMG, Sanofi/Aventis, and GE/Instrumentarium); *see also* Randolph W. Tritell, Statement at AMC International Antitrust Hearing, at 3–4 (Feb. 15, 2006) [hereinafter Tritell Statement] (describing the close cooperation U.S. agencies enjoy with their foreign counterparts in antitrust matters involving "notification [and the] exchange of non-confidential information").

[15] American Bar Association, Sections of Antitrust Law and International Law, Public Comments Submitted to AMC Regarding Comity, at 7–8 (Apr. 10, 2006) [hereinafter ABA Comments re Comity].

[16] 15 U.S.C. §§ 6201–12.

[17] ABA Comments re International Cooperation, at 2.

[18] *See, e.g.*, U.K. Comments, at 2 (stating that there has been a "steady trend in recent years towards convergence" and that the UK's "new prohibitions on anti-competitive agreements . . . are similar to those in U.S. law").

[19] *See* Bertelsmann Comments, at 3; Michael L. Blechman, Statement at AMC International Antitrust Hearing, at 2 (Feb. 15, 2006) [hereinafter Blechman Statement]; James R. Atwood, Statement at AMC International Antitrust Hearing, at 4 (Feb. 15, 2006) [hereinafter Atwood Statement]; ABA Comments re Comity, at 4. Such uncertainty can reduce efficiency because companies will either forgo procompetitive conduct about which they have legal uncertainty or will be forced to operate different marketing, distribution, and manufacturing schemes to comply with different requirements in competing jurisdictions. *See* Bertelsmann Comments, at 3; *see also* ACT Comments, at 9–10 (noting problem is particularly acute for computer software companies, whose assets are primarily intellectual not physical, and that thus easily do business globally); Blechman Statement, at 2; International Chamber of Commerce, Public Comments Submitted to AMC, at 11 (Sept. 1, 2005); Atwood Statement, at 4; Tritell Statement, at 7 (referring to potential for duplicative or incompatible antitrust rules due to the existence of over 100 antitrust regimes); ABA Comments re Comity, at 2.

[20] *See* Bertelsmann Comments, at 3; Blechman Statement, at 2; Atwood Statement, at 4; ABA Comments re Comity, at 4; *see also* ACT Comments, at 10.

[21] In many "new economy" industries, in which a company may sell a product or service worldwide, a remedy imposed by a single country can have worldwide consequences. *See* Bertelsmann Comments, at 3; *see also* ACT Comments, at 7–9 (citing *Microsoft* remedies in European Union and South Korea, as well as European Union's order of compulsory licensing of intellectual property holding in *IMS Health*); Business Roundtable, Public Comments Submitted to AMC, at 26 (Nov. 4, 2005) [hereinafter Business Roundtable Comments] (stating that Roundtable members are concerned they will face conflicting antitrust remedies). The problem has been exacerbated by "forum shopping" by complainants that seek out a country that is likely to impose the most stringent remedy. *See* Bertelsmann Comments, at 3; Blechman Statement, at 2; ABA Comments re Comity, at 4.

[22] *See* Tritell Statement, at 8 n.17 (noting investigations of Boeing/McDonnell-Douglas and G.E./Honeywell mergers, as well as Microsoft's conduct).

[23] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (declining to extend U.S. antitrust laws in regions where the conduct at issue was not unlawful).

[24] 15 U.S.C. § 6a.

[25] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 173 (2004) (answering the question whether the FTAIA "gives rise to 'a' claim" should be interpreted as "gives rise to 'the' plaintiff's claim").

[26] ABA Comments re International Cooperation, at 2 (describing the U.S. agencies as "leaders in promoting convergence and coordination through multilateral fora such as the OECD and the ICN"); Atwood Statement, at 5 (noting that U.S. authorities encouraged the development of antitrust law around the world); Bertelsmann Comments, at 5 (stating that the United States played a "pioneering role" in developing bilateral agreements with other countries).

[27] Tritell Statement, at 3; *see also* International Antitrust Trans. at 39–42 (Tritell and Masoudi).

[28] Hammond, International Cartel Prosecutions, at 6.

[29] *Id.*; Blechman Statement, at 5 ("Antitrust enforcement authorities now routinely notify each other of investigations, share information during investigative phases, and either confer regarding or jointly negotiate remedies.").

[30] Fox Statement, at 3 (stating that the OECD and the ICN play an important role in today's era of cooperation).

[31] History of Organisation for Economic Co-operation and Development, *available at* http://www.oecd.org/document/63/0,2340,en_2649_201185_1876671_1_1_1_1,00.html.

[32] Organisation for Economic Co-operation and Development, Competition Law and Policy, *available at* http://www.oecd.org/department/0,2688,en_2649_34685_1_1_1_1_1,00.html.

[33] ICPAC Report, at 281 (proposing a "Global Competition Initiative" as a forum for addressing global competition issues); International Competition Network, History, *available at* http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/history [hereinafter ICN, History] (stating that "[t]he concept for the ICN came directly out of the recommendations of the International Competition Policy Advisory Committee (ICPAC)").

[34] ICN, History.

[35] *See* International Competition Network, A Statement of Mission and Achievements up until May 2006, at 2 (May 2006), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMission&AchievementsStatement.pdf.

[36] Gerald F. Masoudi, Statement at AMC International Antitrust Hearing, at 3–6 (Feb. 15, 2006) [hereinafter Masoudi Statement].

[37] International Competition Network Unilateral Conduct Working Group 2006-2007 Work Plan, *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/UCWGworkplan.pdf; Press Release, Dep't of Justice, International Competition Network Conference Finalizes Merger Guidelines Workbook to Improve Merger Review Analyses, Establishes Unilateral Conduct Working Group (May 5, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215982.htm.

[38] *See, e.g.*, ICN Working Groups, Mergers, *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/notification.html.

[39] Masoudi Statement, at 3.

[40] Bertelsmann Comments, at 4.

[41] International Antitrust Trans. at 11–12, 15 (Tritell).

[42] Bertelsmann Comments, at 2.

[43] Blechman Statement, at 2.

[44] ACT Comments, at 10; Blechman Statement, at 2; ABA Comments re Comity, at 4; ICPAC Report, at 91–93.

[45] PricewaterhouseCoopers, A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, at 4, 42 (July 2003) (figures reported were €3.3 million and €10 million, converted here at then-prevailing rate of approximately €1 to $1.15); *see also* ICPAC Report, at 93 n.17 (stating that the Halliburton/Dresser merger reportedly cost the parties $3.5 million "to comply with notification and investigation requirements in the six jurisdictions where notification was required (Australia, Brazil, Canada, the EU, Mexico, and the United States)").

[46] *See* Fox Statement, at 16 & n.34 (recommending the establishment of a central clearinghouse for international mergers).

[47] International Antitrust Trans. at 74 (Tritell).

[48] 15 U.S.C. §§ 6201–12.

[49] ABA Comments re International Cooperation, at 2–3; Tritell Statement, at 5.

[50] *See* International Bar Association, Public Comments Regarding International Antitrust, at 19–20 (Jan. 27, 2006) [hereinafter IBA Comments re International Antitrust]; Tritell Statement, at 5 (stating that Congress enacted the IAEAA to overcome the limitations in prior cooperative agreements that prevented parties from exchanging confidential information); ABA Comments re International Cooperation, at 3.

[51] *See* Business Roundtable Comments, at 25–26 (stating that "international cooperation is necessary in order to assure effective and efficient antitrust enforcement").

[52] ABA Comments re International Cooperation, at 3; Tritell Statement, at 5.

[53] ABA Comments re International Cooperation, at 5.

[54] 15 U.S.C. § 6211(2); *see also* American Bar Association, Section of International Law, Public Comments Submitted to AMC (Sept. 1, 2005) [hereinafter ABA Int'l Section Comments] ("IAEAA provides that the United States may enter into AMAAs with foreign jurisdictions . . . on a reciprocal basis.") (internal quotations omitted).

[55] 15 U.S.C. § 6211(2)(E)(ii).

[56] ABA Int'l Section Comments, at 8.

[57] *Id.* at 9 (citing R.S.C. 1985, c. C-34, § 30.01(d)(ii), which provides that "[b]efore Canada enters into an agreement, the Minister of Justice must be satisfied that . . . the agreement contains the following undertakings by the foreign state, namely, . . . that any record or thing provided by Canada will be used only for the purpose for which it was requested").

[58] Some foreign jurisdictions have laws that prevent them from entering into information-sharing agreements such as those contemplated by the IAEAA (irrespective of the issue raised by Section 6211(2)(E)(ii) of the IAEAA). ABA Comments re International Cooperation, at 6. In addition, foreign jurisdictions that have not criminalized antitrust violations might be concerned about the possible use of AMAA-obtained information in a U.S. criminal proceeding. IBA Comments re International Antitrust, at 22; ABA Comments re International Cooperation, at 6 (stating that jurisdictions might be reluctant or unable "to provide information that could be used in U.S. criminal prosecutions").

[59] For example, in many investigations, particularly with respect to mergers, the parties are willing to waive the restrictions on the exchange of confidential information. *See* Tritell Statement, at 5; ABA Comments re International Cooperation, at 3. Some countries may find existing Mutual Legal Assistance Treaties (MLATs) sufficient for the exchange of information. IBA Comments re International Antitrust, at 22 (identifying Canada as one jurisdiction that prefers the use of MLATs over AMAAs). By comparison, Australia, which does not have criminal antitrust enforcement, likely entered into an AMAA because an MLAT (used only for criminal investigations) would provide it with no benefits. *Id.* at 20.

[60] This amendment would specifically call for Congress to modify Section 6211(2)(E)(ii) to clarify that a provision for non-antitrust uses is not a mandatory component of an AMAA. *See* ABA Int'l Section Comments, at 2; IBA Comments re International Antitrust, at 4 (stating that it would be "advisable that Congress amend this provision to clarify that this provision to disclose antitrust evidence for non-antitrust purposes is not mandatory"); *see also id.* at 22 (Congress could amend Section 6211(2)(E)(ii) to limit information-sharing to antitrust matters only).

[61] Tritell Statement, at 5–6.

[62] ABA Comments re International Cooperation, at 4.

[63] *Id.* (stating that the technical assistance provided by the U.S. agencies helps to "develop [the] investigational and analytical skills" of nascent foreign antitrust regimes).

[64] Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective, Report to the OECD, at 2 (Feb. 6, 2002), *available at* http://www.oecd.org/dataoecd/37/61/1833990.pdf.

[65] *See* ABA Comments re International Cooperation, at 7 ("Sustained technical assistance from the U.S. and other countries and multilateral organizations is crucial if the scores of fledgling antitrust agencies that have formed in the past fifteen years are to contribute to economic efficiency rather than stifle it through ineffective or misguided regulatory approached.").

[66] ABA Int'l Section Comments, at 10.

[67] USAID Primer: What We Do and How We Do It, *available at* http://www.usaid.gov/about_usaid/primer.html.

[68] Fox Statement, at 6.

[69] International Antitrust Trans. at 15 (Tritell).

[70] *Id.* at 14 (Tritell).

[71] Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (June 4, 1998), *available at* http://www.ftc.gov/bc/us-ec-pc.htm [hereinafter 1998 U.S.-E.U. Agreement]; Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding The Application of Their Competition Laws (Sept. 1991), *available at* http://www.usdoj.gov/atr/public/international/docs/0525.pdf [hereinafter 1991 U.S.-E.U. Agreement].

[72] *See* ABA Comments re Comity, at 8.

[73] Blechman Statement, at 2 & n.3.

[74] 1991 U.S.-E.U. Agreement, art. VI.

[75] *Id.*

[76] Atwood Statement, at 8; *see* Blechman Statement, at 3.

[77] 1991 U.S.-E.U. Agreement, art. III; *see also id.* art. II, §§ 2–3 (defining "Requested Party" and "Requesting Party").

[78] *Id.* at art. IV, § 1.

[79] Blechman Statement, at 3. The positive comity provisions have been very infrequently invoked by the United States or European Union. *See id.* at 8.

[80] Blechman Statement, at 5 (The U.S.-E.U. agreements have "facilitated substantial strides in cooperation among enforcement authorities."); ABA Comments re Comity, at 8.

[81] Eleanor M. Fox, *Extraterritoriality in the Age of Globalization: Conflict and Comity in the Age of* Empagran, 1 ANTITRUST REP. 3 (2005) [hereinafter Fox, *Extraterritoriality in the Age of Globalization*] (referring to the "numerous bilateral agreements following the [U.S.-E.U.] model"); ABA Comments re Comity, at 7–8 (discussing other bilateral agreements with Canada, Germany, Australia, Brazil, Israel, Japan, and Mexico).

[82] ABA Comments re Comity, at 8; Bertelsmann Comments, at 5 (comity provisions incorporated in the U.S.-E.U. agreements have been less successful than the coordination and cooperation provisions).

[83] Bertelsmann Comments, at 5.

[84] *Id.*; *see* ACT Comments, at 5–7; Atwood Statement, at 3.

[85] Bertelsmann Comments, at 5–6 (stating that the United States and the European Union, as long-established antitrust regimes, must set an example for countries "with less mature antitrust regimes" by avoiding inconsistent or conflicting outcomes).

[86] *Id.*

[87] *Id.* at 1 (stating that inefficiencies and uncertainty could impose significant costs on businesses and society); Atwood Statement, at 4.

[88] Bertelsmann Comments, at 3.

[89] *Id.*

[90] ABA Comments re Comity, at 4.

[91] *Id.* (stating that the consequences of business uncertainty include the discouragement of procompetitive conduct that could improve consumer welfare).

[92] Bertelsmann Comments, at 7 (proposing that agreements highlight fact that "trade, investment, and welfare can be impeded by divergent government competition policies and inconsistent antitrust remedies").

[93] *Id.*

[94] Joint Export Trade Alliance, Public Comments Submitted to AMC Regarding International Issues, at 1–2 (Jan. 13, 2006) (similarly advocating that jurisdictions adopt the FTAIA's direct, substantial, and reasonably foreseeable test when dealing with international transactions); *see also* Blechman Statement, at 8 (advocating deference for jurisdictions with no direct, substantial, and reasonably foreseeable impact resulting from the transaction).

[95] 15 U.S.C. § 6a.

[96] Fox Statement, at 16–17 & n.36 (stating that globalization has placed pressure on existing premerger notification systems and that jurisdictional disputes could be resolved through choice-of-law principles).

[97] *See* International Antitrust Trans. at 14–16 (Tritell).

[98] Fox, *Extraterritoriality in the Age of Globalization*, at 19.

[99] *See* International Antitrust Trans. at 18–21 (Fox).

[100] *Id.* at 21 (Fox).

[101] Fox Statement, at 15 (citing ICPAC Report, at 78–81).

[102] International Antitrust Trans. at 11–12 (Tritell).

[103] *See* Blechman Statement, at 6–7 (referring to the *Microsoft* case); Atwood Statement, at 9 (referring to the G.E./Honeywell and Boeing/McDonnell-Douglas transactions); Tritell Statement, at 8 n.17 (calling these the "best known, and perhaps only, examples" of where international antitrust regimes took divergent paths in a particular matter); *see also* Press Release, Dep't of Justice, Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in its Microsoft Case (Dec. 7, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/December/05_at_648.html (objecting to Korea's implementation of remedy against Microsoft regarding Windows Media Player).

[104] *See* ABA Comments re Comity, at 7; R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Current Issues in International Antitrust Enforcement, Address Before Fordham Corporate Law Institute, 31st Annual Conference on International Antitrust Law & Policy, at 11 (Oct. 7, 2004) ("[I]t surely must count for something under basic principles of comity that a competent system with a clear nexus to a matter has already made a full effort to address it and has already come to a result.").

[105] Fox, *Extraterritoriality in the Age of Globalization*, at 17 (stating that the second jurisdiction can relax its guard when it has faith in the technical and non-political motivations of the first jurisdictions).

[106] Atwood Statement, at 14.

[107] *See id.*; ABA Comments re Comity, at 14.

[108] Bertelsmann Comments, at 8.

[109] H.R. Rep. No. 97-686, at 4–5 (1982).

[110] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[111] Empagran S.A. v. F. Hoffmann-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005).

[112] 15 U.S.C. § 1.

[113] 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained[.]").

[114] *See* H.R. Rep. No. 97-686, at 5 (1982) (congressional discussion of courts applying varying tests to determine U.S. jurisdiction over foreign conduct).

[115] *See, e.g.*, Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974) (finding that the restraints imposed by defendants' distributors abroad "directly affected the flow of commerce out of this country" and thus "are subject to . . . Section 1 of the Sherman Act"); H.R. Rep. No. 97-686, at 5 (citing Dep't of Justice, Antitrust Guide to International Operations, 6–7 (1977) (stating U.S. jurisdiction should exist over international transactions when there is a substantial and foreseeable effect on U.S. commerce)).

[116] *See, e.g.*, Industria Siciliana Asfalti v. Exxon Rsrch. & Eng'g Co., 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977) (referring only to the "required impact upon United States commerce" having been established); Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (referring to *Alcoa*'s "effects test" but then stating that "[i]ndeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not [d]e minimus" [*sic*]).

[117] 15 U.S.C. § 6a.

[118] H.R. Rep. No. 97-686, at 2–3.

[119] *See, e.g.*, Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002) ("[A]dopting the defendants' interpretation would mean rewriting the statute to replace the word 'a' . . . with the words 'the plaintiff's,' resulting in a new subsection 2 that requires that the 'effect give[ ] rise to *the plaintiff's* claim.'"); Sniado v. Bank Austria AG, 352 F.3d 73, 78 (2d Cir. 2004) (vacating the district court's decision that required the plaintiff to advance his own claim); Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338, 341 (D.C. Cir. 2003) (stating the FTAIA requires that "the anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court"), *vacated and remanded*, 542 U.S. 155 (2004).

[120] *See, e.g.*, Den Norske Stats Oljeselskap AS v. HeereMac VOF, 241 F.3d 420, 425 n.15 (5th Cir. 2001) (citing Congress for the proposition that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws"); *id.* at 426 & n.19 (rejecting argument that plaintiffs can advance a claim other than their own); *see also* Sniado v. Bank Austria AG, 174 F. Supp. 2d 159, 166 (S.D.N.Y. 2001); Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 2001 WL 761360, *3–4 (S.D.N.Y. June 7, 2001).

[121] *Empagran*, 542 U.S. at 158.

[122] *Id.* at 173–74 ("Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically speaking, they say, that is beside the point.").

[123] *Id.* (holding that, notwithstanding the FTAIA's reference to "a" claim, it should be read as "the plaintiff's claim or the claim at issue") (internal quotations omitted).

[124] *Id.* at 165; *id.* at 173 (holding that "Congress would not have intended the FTAIA's exception to bring *independently* caused foreign injury within the Sherman Act's reach") (emphasis added).

[125] *Id.* at 158.

[126] *Id.* at 175.

[127] Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005).

[128] *See In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535 (8th Cir. 2007); *In re* Graphite Electrodes Antitrust Litig., 2007 WL 137684 (E.D. Pa. Jan. 16, 2007); *see also* Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V., 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005) (finding plaintiffs' facts almost indistinguishable from the facts of *Empagran* and dismissing plaintiffs' case); *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 WL 515629 (N.D. Cal. Mar. 1, 2006) (same).

[129] *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715 (D. Md. 2001) ("[F]oreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim.").

[130] H.R. Rep. No. 97-686, at 9–10 (stating that "foreign buyers injured by [export-only] . . . conduct would have to seek recourse in their home courts."); de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 518 (S.D.N.Y. 1985) ("Congress did not contemplate recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce."); *In re Microsoft*, 127 F. Supp. 2d at 715 (noting that in legislative history of the FTAIA "[n]othing is said about protecting foreign purchasers in foreign markets").

[131] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). *But see Empagran*, 542 U.S. at 165 (stating that although it is generally inappropriate for the United States to impose its policies

on foreign jurisdictions that have opted for a different remedial scheme, it may do so where there is a need "to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused").

132 For example, the European Union is evaluating whether to enhance private remedies. *See* Commission of the European Communities, Green Paper, Damages Actions for Breach of the E.C. Antitrust Rules, (Dec. 19, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf [hereinafter EU Damages Green Paper]; Neelie Kroes, The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights, Opening Speech at the European Parliament Workshop on Damages Actions for Breach of the EC Antitrust Rules, at 6 (June 6, 2006), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/speech_06062006.pdf, (stating that there was "clear consensus" that the EU needs to "complement public enforcement with stronger private actions").

133 *Empagran*, 542 U.S. at 169 (stating that "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress . . . would not have tried to impose them, in an act of legal imperialism, through legislative fiat.").

134 For example, the European Union is considering whether to provide double (as opposed to treble) private damages. *See* EU Damages Green Paper, at 7.

135 *Empagran*, 542 U.S. at 166 (internal quotations omitted); *see also Statoil*, 241 F.3d at 427–28 ("[U]nder . . . an expansive interpretation [of the FTAIA], any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.").

136 Brief for the United States as Amicus Curiae Supporting Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 2004 WL 234125, at *19–20 (Feb. 3, 2004) [hereinafter U.S. Amicus Brief]; *see also* Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 2004 WL 226388, at *5 (Feb. 3. 2004) [hereinafter Germany/Belgium Amicus Brief] ("The [lower] court's interpretation of the FTAIA . . . threatens to undermine international antitrust cooperation and enforcement . . . [by] creat[ing] strong disincentives for companies to participate in [leniency] programs[.]"); Brief for the Government of Canada as Amicus Curiae Supporting Reversal, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 2004 WL 226389, at *13 [hereinafter Canada Amicus Brief] ("[U]pholding U.S. jurisdiction in this case would conflict with and impede effective administration of Canada's immunity program.").

137 U.S. Amicus Brief, at *19–20; Germany/Belgium Amicus Brief, at *5; Canada Amicus Brief, at *13; *Empagran*, 542 U.S. at 167–68 (noting that the U.S., Canada, and Germany stated that a broad interpretation of the FTAIA would interfere with their antitrust enforcement efforts); *see also* Canadian Bar Association, Public Comments Submitted to the AMC, at 3 (Jan. 16, 2006); IBA Comments re International Antitrust, at 16–18; Masoudi Statement, at 7.

138 Fox Statement, at 9; *see also* American Antitrust Institute, Public Comments Submitted to AMC Regarding International Antitrust, at 4 (July 15, 2005) (stating that *Empagran* created the potential for "a substantial weakening of deterrence"); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 403 (2d Cir. 2002) (stating that when the anticompetitive conduct affects both domestic and foreign markets, deterrence increases when persons injured in foreign markets are permitted to sue in the United States).

139 For example, Commissioners Carlton and Garza would increase the damages multiplier where the FTAIA limits claims. *See* Chapter III.A of this Report regarding treble damages.

140 H.R. Rep. No. 97-686, at 9.

141 *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 716 (D. Md. 2001); *see also* Pfizer, Inc. v. Government of India, 434 U.S. 308, 318–20 (1978); H.R. Rep. No. 97-686, at 10.

142 For example, in *Sniado v. Bank Austria AG* the plaintiff was a U.S. resident who purchased allegedly price-fixed currency exchange services from European banks in Europe. Sniado sued the foreign banks under the Sherman Act for injuries he sustained in Europe. The court dismissed Sniado's claim, notwithstanding

his U.S. citizenship, on the basis that his foreign injury lacked the requisite nexus to any U.S. effects. *See Sniado*, 378 F.3d at 212–13; Sniado v. Bank Austria AG, 352 F.3d 73, 75 (2d Cir. 2003) (noting that Mr. Sniado was a resident of New York). By contrast, in *Pfizer, Inc. v. Government of India* the governments of India, Iran, and the Philippines entered into and suffered injury in U.S. commerce when they purchased allegedly price-fixed antibiotics from U.S. pharmaceutical companies. The Court stated that:

> When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State . . . . Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages . . . .

Pfizer, 434 U.S. at 318–20. This principle remains true even if the foreign plaintiff transacted in a U.S. market but took title abroad. *See* H.R. Rep. No. 97-686, at 9 (noting that the Sherman Act can apply "[e]ven if some purchasers take title abroad or suffer economic injury abroad").

[143] H.R. Rep. No. 97-686, at 9 (referring to Friendship, Commerce and Navigation treaties between the United States and various countries that provide reciprocal access for each other's citizens into their courts); International Antitrust Trans. at 57–58 (Fox) (stating that discriminating on the basis of nationality would be a violation of GATT).

[144] *In re Microsoft*, 127 F. Supp. 2d at 716.