Optimizing Multistate Merger Reviews: Cooperation, Communication, and Coordination

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While nothing is certain in life but death and taxes, a proposed merger involving competing parties of a certain size, scope, and market concentration is likely to result in investigations by multiple state attorneys general and the Department of Justice or Federal Trade Commission. From the merging parties’ perspective, a multistate antitrust review comprised of 10 or 20 (or more) state attorneys general may seem like a hydra-headed beast. From the viewpoint of state attorneys general, it is an opportunity to determine if a proposed transaction adversely affects a state’s consumers, its economy, or the state itself. For all involved, a multistate merger review is an opportunity to reach a resolution, whether globally or with individual states, through a more efficient process than if each state worked independently of one another. The parties can optimize the process if they understand the nature of a multistate merger review, and cooperate, communicate, and coordinate with the participating states, the reviewing federal agency, and each other.

The Nature of a Multistate Merger Review

Although states may choose to go it alone with respect to reviewing and investigating a proposed transaction, for states that decide to participate, the multistate merger review process offers certain economies of scale. A multistate review is coordinated through the multistate Antitrust Task Force (ATF) of the National Association of Attorneys General (NAAG) Antitrust Committee, but the ATF itself does not run or direct a multistate review or related litigation. The ATF may receive complaints about alleged anticompetitive conduct or proposed mergers from a variety of sources, however, each state determines whether to review or challenge a proposed transaction. NAAG’s Voluntary Pre-Merger Disclosure Compact (NAAG Compact) is the framework for state attorneys general to share information and coordinate the activities of a multistate merger review, assuming their particular state is a signatory to the NAAG Compact.

After multiple states decide to proceed with a merger review, the participating states follow a multifaceted approach that generally involves: (1) forming a working group of state assistant


2. In California v. American Stores Co., 495 U.S. 271 (1990), the FTC reached a settlement with the parties involving divestiture of certain grocery store locations. Despite this, the California Attorney General proceeded to challenge the transaction and the Supreme Court held that California had the authority to obtain greater relief than the FTC. The Supreme Court held that state attorneys general were “persons” within the meaning of federal antitrust law and could seek injunctive relief, including divestiture, under Section 16 of the Clayton Act. Id. at 296. This decision confirmed the rights of state attorneys general to challenge mergers and seek remedies in federal court.

3. See ABA STATE ANTITRUST ENFORCEMENT HANDBOOK, supra note 1, at 53–54.

4. NAT’L ASS’N OF ATTORNEYS GEN., VOLUNTARY PRE-MERGER DISCLOSURE COMPACT (1994) [hereinafter NAAG Compact], https://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premerger-disclosure-compact.pdf; see also ABA STATE ANTITRUST ENFORCEMENT HANDBOOK, supra note 1, App. A. All states and most territories, except California, have signed the NAAG Compact. As a result, California may be required to issue a separate demand for access to documents.
attorneys general; (2) closely coordinating discovery, experts, and motion practice among the states, and dividing up the workload; (3) entering into a cost share agreement to fund the review; and (4) seeking to coordinate with the reviewing federal antitrust agency (assuming one is involved).\(^5\)

After forming a multistate working group, states will initially conduct joint interviews, and the lead states will issue subpoenas or civil investigative demands (CIDs) under their authorizing statutes and seek waivers from the parties to share responses with other interested states. The states may also seek waivers from potentially affected third parties. The multistate working group may decide to retain an economist or industry expert to assist with the review. During a review (or if the review proceeds to a litigated challenge), the working group members are divided into various committees that manage the workload. Depending on the posture of the matter, these might include an executive committee, a discovery committee, a settlement committee, or an expert committee.\(^6\)

Should the review proceed to litigation, it is typical for one state to take the lead on drafting a complaint and to circulate it among the multistate working group. The draft complaint and other relevant materials are subsequently sent to the larger group of states and may be sent to all 50 states, the District of Columbia, and the U.S. territories. Individual states then decide whether to join the litigation. Participating states typically provide allegations under state-specific statutes, or common-law causes of action, and a single complaint is filed in federal court alleging federal and state law claims.\(^7\) While states typically bear their own litigation costs, the joint costs of a multistate review or litigation may be funded through a cost share agreement.\(^8\) The participating states agree to fund certain common expenses, such as expert retention, discovery costs, and transcripts.\(^9\)

If the DOJ or the FTC is also reviewing a proposed transaction, states will often coordinate with the reviewing federal agency. Joint investigations can provide efficiencies for the participating states, the reviewing federal agency, and the parties. The states benefit from additional resources and expertise, and the federal agency benefits from insights into the local markets at issue. The parties may obtain economies of scale by not having to respond to the reviewing entities with multiple submissions.\(^10\)

The Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (Merger Protocol)\(^11\) establishes a process to facilitate cooperation in joint enforcement efforts, including the sharing of confidential documents that are obtained through state or federal enforcement actions, as well as coordination on strategic planning, document production, expert witnesses, and settlement negotiations. The Merger Protocol states that,

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5 See ABA State Antitrust Enforcement Handbook, supra note 1, at 55–56.

6 See id. at 56.

7 See id. at 54–55.

8 See id. at 56–57. In addition, a multistate review may receive money to pay experts from a fund known as the Milk Fund. It is administered by a committee of three attorneys general and its monies are distributed via a grant process. The Milk Fund was established from proceeds of a settlement from a case brought by New York, and has been replenished over the years through contributions and repayments from other settlements.

9 See id. at 56–57.

10 See id. at 232–33.

Cooperation with the States: A First Step to Optimizing a Multistate Review

To the uninitiated, a multistate merger review may be perceived as an annoyance or distraction from getting the deal done, and the parties’ first instinct may be to disregard or challenge a state’s requests for information or to force individual states to separately request documents and information. Delay tactics such as moving to quash a subpoena or demanding that the states work independently are typically counterproductive to optimizing the merger review process. Each of these tactics will lead to an increased amount of resources expended by the parties. Additionally, they may also lead the states to request more information and could increase the number of reviewing states. In some circumstances, the parties’ failure to cooperate with the lead state or other participating states may undermine the ability of the multistate working group to streamline the investigation and might complicate efforts to reach a global resolution of the review.

In order to ensure that the review is conducted as efficiently as possible, it is advisable for the merging parties to cooperate with the reviewing states regarding confidentiality agreements, and to initiate contact with them early on in the review process. While the NAAG Compact and the

12 See ABA State Antitrust Enforcement Handbook, supra note 1, at 96.
13 See id.
14 See id.
Merger Protocol state that the reviewing states will not make the parties’ submissions public, neither document overrides a state’s freedom of information act (FOIA) or open records laws. For this reason it may make sense to request a “friendly” subpoena from the states.

In the absence of a subpoena or CID, a state’s law may not protect a party’s filings or submissions from disclosure should an individual or entity make an open records request. Because of the variations in state law on this issue, it is recommended that the merging parties seek state-specific confidentiality agreements with the participating states. Although negotiating these agreements with multiple states can be a significant undertaking, most states are open to entering into such an agreement, and are familiar with the process and the nuances of their particular law. The negotiations also offer an opportunity for the parties to obtain information about the status of the review and a particular state’s interest in the matter. In the absence of guidance by experienced counsel, this may be an area where the parties may be tempted to delay negotiations or expend significant resources going back and forth with the states on the agreement’s language. These tactics will not lead to a more efficient or expeditious resolution for the parties.

While a confidentiality agreement cannot preempt state law, it may require the state to act in a certain manner within the confines of its law. Certain common provisions include: (1) providing the signatory states materials that are filed with the reviewing federal agency at the same time, and waiver by the merging party of certain confidentiality rights it would otherwise have regarding these materials and all related communications with the federal reviewing agency; (2) providing the signatory states the right to attend interviews, depositions, and presentations made by the parties to the federal agency; (3) acknowledging the right of the signatory states to issue CIDs and voluntary requests for information; and (4) requiring the state, at the end of a review, to return or destroy documents provided by the parties, to provide notices of FOIA or open records requests, return inadvertently produced materials, and protect the confidentiality of nonpublic documents and information to the extent possible under state law.

Communication: A Component of an Efficient Multistate Review

Once the parties and their counsel reach a decision on the posture of the proposed response to a multistate investigation and move forward with confidentiality agreements, they should establish an open line of communication with the assistant attorneys general responsible for the review, and any staff antitrust attorneys working on the matter. Generally speaking, informal contacts with assistant attorneys general may result in helpful information that can inform the parties’ approach to the review. Generally speaking, informal contacts with assistant attorneys general should be considered as part of a multi-pronged strategy, the parties should ensure that this request is not perceived as trying to go around the assistant attorneys general or staff attorneys. The assistant attorneys general who work on multistate cases often have garnered the respect of their attorneys general. If a meeting with an attorney general is desired, the meeting can be arranged through the assistant attorney gen-

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16 See ABA STATE ANTITRUST ENFORCEMENT HANDBOOK, supra note 1, at 97.
17 See id.
18 See id. at 98.
19 See id. at 70.
eral who is responsible for the matter. It is very likely that the attorney general will include the assistant attorney general in the meeting, and may ask him or her to lead the meeting.20 Likewise, some parties may opt to contact or attend meetings of the Republican and Democratic Attorneys General Associations (RAGA and DAGA, respectively). These are two partisan organizations that solicit and receive funds from corporations and others that may be parties to a merger review, and parties to a merger review may attempt to lobby members of RAGA and DAGA. While these efforts may be pursued on a parallel path, the parties and their counsel should not pursue contacts with RAGA and DAGA at the expense of the day-to-day requests by the assistant attorneys general participating in a multistate review. The assistant attorneys general and staff attorneys working on a merger review typically maintain a professional and non-partisan approach to their participation in multistate working groups.

As a multistate review moves forward, the staff antitrust attorneys (including the assistant attorneys general) assess the strength of the states’ legal position based on the information and documents produced by the merging parties and third parties.21 Participating states can help ensure a more efficient review process if they are transparent about the potential legal issues and communicate with the parties about any additional information they may need to further investigate and resolve these issues. This transparency and open line of communication will enable both sides to position themselves for a more efficient settlement process.

Coordination and the End Game: Strategic Settlement Considerations

While the multistate merger review process is relatively streamlined, it is a possible that, at the conclusion of the review, the state attorneys general involved in the review may request settlement conditions or seek relief independent of that which is requested by another state or federal government entity.22 Alternatively, a state or federal government entity may choose to move forward with litigation. Thus, at the outset of a multistate review and as it evolves, the parties need to assess the potential for divergent resolutions among the participating states and federal agency and adjust their focus and strategy accordingly. The states’ willingness to press the parties on local issues and concerns should not be underestimated.

Although the Merger Protocol contemplates discussion among the participating states and the federal antitrust agency regarding the investigation and potential settlements, it recognizes the sovereignty of the states. In addition, participating states may have different perspectives regarding the potential anticompetitive effects at issue due to local market conditions or related factors. Thus, the likelihood that state and federal enforcers will adopt divergent settlement postures is more probable than a disagreement between the participating states and federal agency regarding the general course of the investigation.

Issues may arise when the reviewing federal agency begins or moves forward with settlement discussions without involving the participating states. If the reviewing states are not included in initial or subsequent settlement discussions with the parties, this can lead to states seeking independent relief to address local market concerns that is different than what the federal agency requests. In addition, an agreement by a state that results in less relief than that which is sought by the federal agency can undermine the bargaining position of the DOJ or the FTC. Such a state

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20 See id.

21 See id.

22 A notable example of this is the Microsoft case, where a number of states decided to litigate and request a different remedy separate from other states and the federal government. See Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).
settlement can hamper a federal agency’s effort to seek a preliminary injunction against consummation as it did when the DOJ challenged a New York hospital merger involving Long Island Jewish Medical Center.23 The New York Attorney General entered into a settlement that included behavioral remedies while the DOJ challenged the merger in court. The court cited New York’s settlement with the hospitals when it denied the DOJ’s motion for a preliminary injunction.24

Conversely, states may seek more or different relief as compared to the relief sought by the DOJ or the FTC. This was the case in Wal-Mart Stores v. Rodriguez, in which Puerto Rico secured greater relief than the FTC negotiated with the parties.25 The FTC and the parties entered into a settlement that involved divestiture. Puerto Rico sought and obtained a preliminary injunction, blocking the proposed acquisition. Similarly, the DOJ sought relief consisting only of divestiture of a contract and certain assets in one state: FirstGroup plc agreed to sell off a school bus contract and certain assets in Alaska in connection with a review of a proposed transaction involving Laidlaw International, Inc. In contrast, 11 states filed a complaint in federal district court alleging that the merger violated state and federal antitrust laws, and obtained state-specific relief tailored to what they perceived to be the competitive problems in their particular states, including agreements to divest school bus contracts in the various states, making certain facilities available to school districts or competing bidders, and providing advance notice of future acquisitions.26

Finally, there is no state equivalent to the HSR filing fee.27 Therefore, it is not uncommon for the states to seek reimbursement for the fees and costs associated with the investigation and litigation.

Conclusion

While a multistate merger review may consist of 20 or more reviewing state attorneys general, the review process has evolved over the years to become relatively streamlined in terms of its operational procedure from the states’ point of view. The merging parties are encouraged to take advantage of this process rather than forcing the states to work independently of one another. In so doing, the merging parties’ cooperation with participating states may result in additional efficiencies and help to speed up the review.

In addition, working to foster communication with the participating states regarding procedural and substantive issues may also more quickly lead to a resolution phase. Based on the wide variation in potential paths to reach a settlement or resolution, the merging parties will want to analyze the states’ ability and intention to litigate or reach a settlement independent of other states or the relevant federal antitrust agency. This allows the parties to coordinate with one another, and determine how best to engage a particular state in the settlement process. Rather than waiting until states raise concerns at a later stage (which may disrupt a more global resolution), the merging parties may want to consider taking a more proactive approach to communicating about particular issues that may be unique to a state.


24 Id. at 149.

25 238 F. Supp. 2d 395 (D.P.R. 2002), vacated, 322 F.3d 747 (1st Cir. 2003) (vacating the district court’s issuance of a preliminary injunction after the parties entered into a settlement agreement).


27 HSR filing fee revenue is collected by the FTC and is divided evenly with the DOJ’s Antitrust Division. See, e.g., DOJ Antitrust Division, Congressional Submission FY 2017 Performance Budget 13, https://www.justice.gov/jmd/file/821001/download.