

Sherman Act, Section 1 (15 U.S.C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$300,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, Section 2 (15 U.S.C. § 2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$300,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act, Section 7 (15 U.S.C. § 7) No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

ANTITRUST MODERNIZATION COMMISSION

REPORT AND RECOMMENDATIONS

APRIL 2007

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April 2, 2007

TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES:

Three years ago, as authorized by statute, this Commission undertook a comprehensive review of U.S. antitrust law to determine whether it should be modernized. It is our pleasure to present the results of that effort, the enclosed Report and Recommendations of the Antitrust Modernization Commission ("Report").

This Report is the product of a truly bipartisan effort. The members of the Commission were appointed by the President and the respective majority and minority Leadership of the House of Representatives and Senate with the goal of ensuring "fair and equitable representation of various points of view in the Commission."¹ In fact, the Commissioners represented a diversity of viewpoints, which were fully and forcefully expressed during many hours of hearings and thoughtful deliberation. As one Commissioner has said, the Commission's recommendations were "fashioned on the anvil of rigorous discussion and debate." The Commission also endeavored at every turn to obtain a diversity of views from the public. In the end, the Commission was able to reach a remarkable degree of consensus on a number of important principles and recommendations.

First, the Report is fundamentally an endorsement of free-market principles. These principles have driven the success of the U.S. economy and will continue to fuel the investment and innovation that are essential to ensuring our continued welfare. They remain as applicable today as they ever have been. Free trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare.

Second, the Report judges the state of the U.S. antitrust laws as "sound." Certainly, there are ways in which antitrust enforcement can be improved. The Report identifies several. A few Commissioners have greater concerns about aspects of current enforcement, as expressed in their separate statements. On balance, however, the Commission believes that

¹ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

U.S. antitrust enforcement has achieved an appropriate focus on (1) fostering innovation, (2) promoting competition and consumer welfare, rather than protecting competitors, and (3) aggressively punishing criminal cartel activity, while more carefully assessing other conduct that may offer substantial benefits. The laws are sufficiently flexible as written, moreover, to allow for their continued “modernization” as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies.

Third, the Commission does not believe that new or different rules are needed to address so-called “new economy” issues. Consistent application of the principles and focus noted above will ensure that the antitrust laws remain relevant in today’s environment and tomorrow’s as well. The same applies to different rules for different industries. The Commission respectfully submits that such differential treatment is unnecessary, whether in the form of immunities, exemptions, or special industry-specific standards.

That does not mean the Commission sees no room for improvement. To the contrary, the Commission makes several recommendations for change. A few of these recommendations call for bold action by Congress that likely will require considerable further debate. We look forward to that debate.

The following summarizes some of the more significant changes the Commission recommends.²

Substantive Antitrust Standards (Mergers and Monopoly)

The Commission does not recommend legislative change to the Sherman Act or to Section 7 of the Clayton Act. There is a general consensus that, while there may be disagreement about specific enforcement decisions, the basic legal standards that govern the conduct of firms under those laws are sound.

The Commission nevertheless makes several recommendations in the area of merger enforcement. The purpose of these recommendations is to ensure that policy is appropriately sensitive to the needs of companies to innovate and compete while continuing to protect the interests of U.S. consumers. In particular, the Commission urges that substantial weight be given to evidence demonstrating a merger will achieve efficiencies, including innovation-relat-

² Although many recommendations garnered unanimous or nearly unanimous support, not all Commissioners fully agreed with all recommendations. Differences are identified in the text of the Report and in some instances are discussed in separate Commissioner statements. Recommendations with the support of at least seven Commissioners are reported as recommendations of the Commission. With respect to 96 percent of the recommendations, at least nine Commissioners agreed in whole or in part with the recommendations. Approximately 57 percent of the recommendations were unanimous.

ed efficiencies. The Commission also recommends that the federal enforcement agencies continue to examine the basis for, and efficacy of, merger enforcement policy. We urge the agencies to further study the economic foundations for merger enforcement policy, including the relationship between market performance and market concentration and other factors. We also recommend increased retrospective study of the effects of decisions to challenge or not challenge specific transactions. Such empirical evidence, although difficult to gather, is critical to an informed and effective merger policy.

With respect to monopoly conduct, the Commission believes U.S. courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies are generally not improper, even for a “dominant” firm and even where competitors may lose. However, there is a need for greater clarity and improvement to standards in two areas: (1) the offering of bundled discounts or rebates, and (2) unilateral refusals to deal with rivals in the same market. Clarity will be best achieved in the courts, rather than through legislation. The Commission recommends a specific standard for the courts to apply in determining whether bundled discounts or rebates violate antitrust law.

Repeal of the Robinson-Patman Act

The Commission recommends that Congress finally repeal the Robinson-Patman Act (RPA). This law, enacted in 1936, appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit. Continued existence of the RPA also makes it difficult for the United States to advocate against the adoption and use of similar laws against U.S. companies operating in other jurisdictions. Small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.

Patents and Antitrust

Patent protection and the antitrust laws are generally complementary. Both are designed to promote innovation that benefits consumer welfare. In addition, a patent does not necessarily confer market power. Nevertheless, problems in the application of either patent or antitrust law can actually deter innovation and unreasonably restrain trade. Many of the Commission’s recommendations relating to the Sherman Act address the antitrust side of the balance. On the patent side, the Commission urges Congress to give serious consideration to recent recommendations by the Federal Trade Commission (FTC) and National

Academy of Sciences designed to improve the quality of the patent process and patents. The Commission also recommends that the joint negotiation of license terms within standard-setting bodies ordinarily should be treated under a rule of reason standard, which considers both potential benefits of such joint negotiation to avoid “hold up” and the possibility that such joint negotiation might suppress innovation.

Improving the Enforcement Process

To be effective, any enforcement regime must be clear, fairly administered, and not unreasonably burdensome. Several of the Commission’s recommendations are designed to improve current processes to better meet these goals.

Eliminate Inefficiencies Resulting from Dual Federal Enforcement. Except in the area of criminal enforcement (which is the responsibility of the Justice Department), federal antitrust law is enforced by both the Justice Department (DOJ) and the FTC. Both agencies, for example, are equally authorized to review mergers under the Hart-Scott-Rodino Act (HSR Act), which essentially requires all mergers valued at above \$59.7 million to be notified to the agencies and suspended until the expiration or termination of certain waiting periods. The Commission does not believe it would be feasible or wise to eliminate the antitrust enforcement role of either agency at this time. However, we make a number of recommendations designed to eliminate inconsistencies and problems that may result from dual enforcement.

Merger Clearance. The agencies have done a good job minimizing problems that can result from dual enforcement. But there is room for improvement that can only be achieved with the help of Congress. At the time of her confirmation, the current head of the FTC was asked to agree not to pursue a global merger clearance agreement between the agencies. The Commission calls on the appropriate congressional committees to revisit that position and authorize the DOJ and the FTC to implement a new merger clearance agreement based on the principles of the 2002 clearance agreement between the agencies. It is bad government for mergers to be delayed by turf battles between the agencies. Such battles undermine confidence in government, damage agency staff morale, and potentially delay the realization of significant merger efficiencies without good reason. The Commission recommends that Congress revise the HSR Act to require the DOJ and the FTC to resolve all clearance requests under the HSR Act within a short period of time after the parties report their transaction.

The Commission also recommends changes to ensure that mergers are treated the same no matter which agency reviews them. Specifically, the Commission recommends that Congress amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR Act merger cases. The Commission further recommends that the FTC

adopt a policy that when it seeks to block a merger in federal court, it will seek both preliminary and permanent relief in a combined proceeding where possible.

Improve the HSR Act Pre-Merger Review Process. The DOJ and FTC should continue to pursue reforms to their internal review processes that will reduce unnecessary burden and delay. The Commission also makes a number of specific recommendations designed to reduce the burden of HSR merger reviews and increase the transparency of government enforcement. For example, the Commission recommends that the agencies update their Merger Guidelines to explain how they evaluate non-horizontal mergers as well as a proposed merger's potential impact on innovation competition. The Commission also recommends that the agencies issue statements explaining why they have declined to take enforcement action with respect to transactions raising potentially significant competitive concerns.

Improve Coordination Between State and Federal Enforcement. State and federal enforcement can be strong complements in achieving optimal enforcement. But the existence of fifty independent state enforcers on top of two federal agencies can, at times, also result in uncertainty, conflict, and burden. The Commission encourages state and federal enforcers to coordinate their activities to seek to avoid subjecting businesses to multiple, and potentially conflicting, proceedings. We make a number of specific recommendations in this regard. In addition, the Commission believes States should continue to focus their efforts primarily on matters involving localized conduct or competitive effects. In addition, state and federal agencies should work to harmonize their substantive enforcement standards, particularly with respect to mergers.

De-link Agency Funding and HSR Act Filing Fees. HSR Act filing fees are used to fund DOJ and FTC antitrust enforcement activity. These fees are a tax on mergers, the vast majority of which are not anticompetitive. They do not accurately reflect costs to the government of reviewing a given filing, nor do they confer a benefit on notifying parties. But they set a precedent for other countries with merger control regimes. In the past, moreover, dips in merger activity (and filing fees) have threatened to affect the level of appropriations available for critical agency activities. The Commission recommends that Congress de-link agency funding from HSR Act filing fee revenues.

Private Litigation

Uniquely in the United States, private litigation has been a key part of antitrust enforcement. Under current rules, private plaintiffs are entitled to recover three times their actual damages, plus attorneys' fees. Defendants are jointly and severally liable for alleged conspiracies. There is no right of contribution among defendants. There is also only a limited right of claim reduction when one or more defendants settle. The combined effect of these

rules is that one defendant can be liable for nearly all of the damages caused by an antitrust conspiracy. Defendants thus face significant pressure to settle antitrust claims of questionable merit simply to avoid the potential for excessive liability. While the rules can maximize deterrence and encourage the resolution of claims through quick settlement, they can also overdeter conduct that may not be anticompetitive.

The Commission recommends no change to the fundamental remedial scheme of the antitrust laws: the treble damage remedy and plaintiffs' ability to recover attorneys' fees. On balance, the current scheme appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensates victims. However, the Commission recommends that Congress enact legislation that would permit non-settling defendants to obtain a more equitable reduction of the judgment against them and allow for contribution among non-settling defendants.

Indirect and Direct Purchaser Litigation. There are different rules at the federal level and among the states as to whether both direct purchasers of price-fixed goods or services and indirect purchasers may sue to recover damages. Under federal law, only direct purchasers can sue (this is commonly known as the rule of *Illinois Brick*). Defendants cannot argue that direct purchasers have "passed on" any amount of the overcharge to indirect purchasers (this is commonly known as the rule of *Hanover Shoe*). In thirty-six states and the District of Columbia, however, indirect purchasers can sue under state law providing that *Illinois Brick* does not apply to state court actions.

As a result, there is typically a morass of litigation in various state and federal courts relating to a single alleged conspiracy. Injured parties are treated differently depending on where they reside and defendants are subject to suit in multiple jurisdictions. In addition, federal *Illinois Brick/Hanover Shoe* policy provides a "windfall" to purchasers who have passed on an overcharge, while depriving any recovery at all to purchasers who actually bear the overcharge. Such a system that compensates the uninjured and denies recovery to the injured seems fundamentally unfair. The Class Action Fairness Act may ameliorate some of the administrative issues caused by conflicting federal and state rules by facilitating the removal of state actions to a single federal court for pre-trial proceedings. However, that Act applies only to pre-trial proceedings and does nothing to address the fairness issues associated with current federal policy. The Commission believes it is time to enact comprehensive legislation reforming the law in this area.

The Commission recommends that Congress overrule the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to recover for their injuries. Other aspects of the Commission's recommendation are designed to ensure that damages would not exceed the overcharges (trebled) paid by direct purchasers, that the full adjudication of such claims occurs in a single federal

forum, and that current class action standards would continue to apply to the certification of direct purchasers regardless of differences in the degree to which overcharges may have been passed on to indirect purchasers.

Criminal Penalties

There is a strong consensus worldwide favoring vigorous enforcement against cartels. Cartels offer no benefit to society and invariably harm consumers. Sentencing and fines under the Sherman Act are generally determined by the courts based on guidance in the Sentencing Guidelines issued by the U.S. Sentencing Commission. The Sentencing Guidelines employ a proxy of harm from cartels based on twenty percent of the volume of commerce affected. This twenty percent proxy is based on an assumed average overcharge of ten percent, which is doubled to account for dead-weight loss to society. The Commission recommends that the Sentencing Commission evaluate whether it remains reasonable to assume an overcharge of ten percent (*i.e.*, whether it should be higher or lower) and the difficulty of proving actual gain or loss in lieu of using a proxy. It also recommends that the Sentencing Guidelines be amended to make explicit that the twenty percent proxy may be rebutted by proof by a preponderance of evidence that the actual amount of overcharge was higher or lower where a difference is material.

International Antitrust

The United States was once the only major country actively enforcing a comprehensive set of antitrust laws. Today, more than 100 countries have adopted competition laws. On the one hand, this development has helped the United States in its fight to stamp out international cartels. It has also benefited world trade by opening up markets to competition. On the other hand, the proliferation of competition authorities has increased the risk of burden, inconsistency, and even conflict. There is some concern about the potential effect on U.S.-based companies of differences in the way that other countries treat so-called dominant firm behavior and the exploitation of rights in intellectual property.

The Commission recommends a number of steps to address these concerns. First, “as a matter of priority” the DOJ and the FTC should study and report to Congress on the possibility of developing a centralized international pre-merger notification system that would ease the burden of companies engaged in cross-border transactions. Second, the DOJ and the FTC should seek procedural and substantive convergence around the world on sound principles of competition law. Third, the United States should pursue bilateral and multilateral cooperation agreements with more of its trading partners. These agreements should explicitly recognize that conflicting antitrust enforcement can impede global trade, investment, and

consumer welfare. They should also promote comity by providing for the exercise of deference where appropriate, the harmonization of remedies, consultation and cooperation, and benchmarking reviews. Fourth, the DOJ and the FTC should be provided with direct budgetary authority to provide antitrust technical assistance to other countries for the purpose of enhancing convergence and cooperation.

Cooperation from other countries can be essential to punishing international cartels that exact hundreds of millions of dollars from U.S. consumers. But the United States has had limited success in entering Antitrust Mutual Assistance Agreements (AMAAs) with other countries. Many believe this is because U.S. law appears to require that those nations agree to allow the United States to use confidential information obtained under such agreements for non-antitrust enforcement purposes. The Commission recommends that Congress amend the International Antitrust Enforcement Assistance Act to clarify that it does not require such a commitment as the cost of entering into an AMAA.

Finally, the Commission recommends that, as a general principle, purchases made outside the United States from sellers outside the United States should not give rise to a cause of action in U.S. courts. The Commission was split as to whether this principle should be codified through amendment to the Foreign Trade Antitrust Improvements Act.

Immunities and Exemptions

Free-market competition is the foundation of our economy, and the antitrust laws stand as a bulwark to protect free-market competition. Nevertheless, we have identified thirty statutory immunities from the antitrust laws. The Commission is skeptical about the value and basis for many, if not most or all, of these immunities. Many are vestiges of earlier antitrust enforcement policies that were deemed to be insufficiently sensitive to the benefits of certain types of conduct. Others are fairly characterized as special interest legislation that sacrifices general consumer welfare for the benefit of a few. Congress is currently considering the repeal of several immunities, including those covering the business of insurance and international shipping conferences. The Commission strongly encourages such review.

The Commission believes that statutory immunity from the antitrust laws should be disfavored. Immunities should rarely (if ever) be granted and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition. The Commission recommends a framework for such a review and recommends that Congress consult with the DOJ and FTC about the likely competitive effects of existing and proposed immunities. In those rare instances in which Congress does grant an immunity, the Commission recommends (1) that the immunity be as limited in scope as

possible to accomplish the intended objective, (2) that it include a sunset provision pursuant to which the immunity would terminate at the end of a specified period unless renewed, and (3) that the FTC, in consultation with the DOJ, report to Congress on the effects of the immunity before any vote on renewal.

The judicial state action doctrine immunizes private action undertaken pursuant to a clearly articulated state policy deliberately intended to displace competition. In addition, the state must provide sufficient “active supervision” to ensure that conduct is truly a manifestation of state policy rather than private interests. A recent report by the FTC staff raises concern that courts have been applying the doctrine without sufficient care to ensure that private anticompetitive conduct has actually been authorized by the state pursuant to a clear policy to displace competition. The Commission agrees that courts should adhere more closely to Supreme Court state action precedents. It recommends that the doctrine should *not* apply where the effects of conduct are not predominantly intrastate. In addition, the doctrine should equally apply to governmental entities when they act as participants in the marketplace.

Regulated Industries

During the early part of the 20th century, several industries—including electricity, natural gas, telecommunications, and transportation—were thought to be natural monopolies or at risk of “excessive competition.” Since then, however, technological advancement and changed economic precepts have led to substantial deregulation. The unleashing of competition in these industries has greatly increased efficiency and provided substantial benefits to consumers. The Commission believes the trend toward deregulation should continue.

Antitrust enforcement is an important counterpart to deregulation. Where government regulation does exist, the antitrust laws should continue to apply to the maximum extent consistent with the regulatory regime. Ideally, statutes should clearly state whether, and to what extent, Congress intended to displace the antitrust laws, if at all. The courts, of course, should interpret antitrust “savings clauses” to give full effect to congressional intent that the antitrust laws continue to apply. Where there is no antitrust savings clause, the courts should imply immunity from the antitrust laws only where there is a clear repugnancy between those laws and the regulatory scheme.

The filed-rate doctrine prohibits private treble damage actions alleging that industry rates approved by a regulator resulted from unlawful collusion. Today, however, few filed rates are actually reviewed by regulators for their reasonableness. In 1986, the Supreme Court opined that a number of factors appeared to undermine the continued validity of the filed-

rate doctrine,³ but concluded that it was for Congress to make that determination. The Commission believes it is time for Congress to reevaluate the filed-rate doctrine and consider overruling it where a regulator no longer specifically reviews and approves proposed rates agreed to among an industry.

The DOJ and FTC review mergers pursuant to the HSR Act, applying the same standards across all industries. In several industries, however, the DOJ and the FTC share merger review authority with a regulatory agency that reviews the merger under a “public interest” standard. Review by two different government agencies can impose substantial and duplicative costs. It can also lead to conflict. The Commission recommends that the DOJ or the FTC should have full antitrust merger enforcement authority with respect to regulated industries. In addition, Congress should review whether separate review under a public interest standard is needed to protect particular interests that cannot be adequately protected under application of an antitrust standard.

* * *

The federal antitrust laws are more than 115 years old. Although the free-market principles on which they stand remain a rock-solid foundation, the world, our economy, and our understanding of how markets work have changed substantially. For that reason, we believe it was a wise decision to authorize this Commission to assess those laws and whether the policies developed to enforce them are serving the nation well.

The almost constitutional generality of the central provisions of the antitrust laws has provided the needed flexibility to adjust to new developments. In this sense, “antitrust modernization” has occurred continuously. But, even so, the interplay of statutes, enforcement activity, and court decisions has suggested a substantial number of areas that the Commission believes can be improved.

The issues the Commission examined are complex. Reasonable minds can, and likely will, differ on many of the Commission’s findings and recommendations. But we hope this Report will prompt an important national conversation on those recommendations that will result in the adoption of many, if not all, of them.



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³ Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423–24 (1986).

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The Commission relied on the assistance and contributions of many people in preparing this Report. It thanks all of the many persons who provided comments, testimony, and other assistance to the Commission. In addition, the Commission especially acknowledges the contribution of the following persons and organizations.

The Commission thanks Federal Trade Commission (FTC) Chairman Deborah Platt Majoras and her colleagues at the FTC for the extraordinary support they provided to the Commission. In addition to providing testimony, comments, and data, the FTC made its facilities available to the Commission until the Commission established its own office and allowed the Commission to hold most of its hearings and meetings at the FTC. The FTC also detailed Andrew J. Heimert to the Commission for three years to serve as the Commission's Executive Director and General Counsel.

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The Commission thanks the state attorneys general and the National Association of Attorneys General (NAAG). Several state attorneys general submitted comments to and testified before the Commission. In addition, NAAG collected and provided substantial data about the antitrust enforcement activities of the states. Emily Myers, Antitrust Counsel for NAAG, was particularly helpful in assisting the Commission staff in understanding the data. Patrick Cafferty, Daniel Gustafson, and Bernard Persky submitted extensive information about indirect purchaser litigation.

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Although the Commission greatly appreciates every organization that submitted comments or testified before it, the Antitrust Section of the American Bar Association (ABA) and the American Antitrust Institute (AAI) in particular expended extraordinary resources in support of the Commission's work. Each organization submitted several thoughtful comments to the Commission, which provided significant insights for the Commission's consideration. They assisted the Commission in identifying witnesses that would provide the Commission with

balanced and diverse viewpoints and helped to disseminate information about the Commission's activities. ABA Antitrust Section publications were a rich source of detailed information on many issues covered by the Report.

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The Commission thanks Morgan Lewis LLP for graciously making its meeting facilities and support staff available on several occasions for Commission deliberations.

The Commissioners would like to acknowledge the Commission staff for its tireless labor and extraordinary service to the Commission. Andrew J. Heimert, Susan S. DeSanti, William F. Adkinson, Jr., Todd Anderson, Nadine Jones, Marni B. Karlin, Alan E. Meese, Michael W. Klass, George P. Slover, Hiram R. Andrews, Kristen M. Gorzelany, Christopher N. Bryan, Sylvia Boone, and James Abell, each performed outstandingly. Although they made the work look effortless, we appreciate that the tasks with which they were charged could easily have supported a staff twice the size. They can be very proud of their accomplishments.

Without in any way diminishing the strong contribution made by each and every staff member, we would like to especially acknowledge the contributions of Andrew Heimert and Susan DeSanti.

Andrew deserves special recognition for his unflagging, able, and good-humored shepherding of the Commission as Executive Director and General Counsel from its inception through to the completion of its work. There is no instruction manual for setting up and running a Commission such as this. But Andrew has shown how it successfully can be done, setting a very high bar for others. He created an operating commission out of whole cloth: Within the period of three years, he found office space, negotiated the lease, had the space built out, and furnished it; created a website; hired staff; managed appropriations; developed the Commission's procedures and processes; handled relations with the press, Executive Branch, and Congress; ran flawless meetings and hearings; managed the preparation of thousands of pages of staff memoranda, minutes, transcripts, notices and correspondence; advised the Commissioners on Federal Advisory Committee Act and other legal obligations; produced this 500+-page Report; was on time and under budget; and remained cool, calm, collected, and cheerful while dealing with twelve demanding Commissioners. It is impossible to underestimate the effort Andrew expended for the Commission, the difficulty of his job at times, or how essential he was to the Commission's successes.

Susan DeSanti came to the Commission in May 2006 specifically to assist in writing the Report. The Commission was extremely fortunate to persuade Susan to join us from the FTC. As she has done so many times before at the FTC during both Democratic and Republican Administrations, Susan helped guide the Commission staff in writing a Report that fairly and clearly communicates the complex issues it covers and the consensus views of twelve Commissioners. We are particularly grateful to her for jumping into the game during the third

quarter, which no doubt added to the challenge of her task. The quality of the Report is in very large part a credit to Susan's skill and intellect.

Commissioners Garza and Yarowsky, who co-chaired the Commission, would like to thank their colleagues for their collegiality and commitment to producing a Report in which we could all join. At the beginning of this enterprise, it was quite clear that Commissioners differed in their view on a host of issues, sometimes significantly. But, as with all collective bodies, there came a moment when this assembly of diverse, strong-minded, well-versed individuals reached a critical juncture that would define themselves as a group: whether to fracture into small or even individual units of position-taking, or to come together to seek convergence and concordance, whenever possible. This group unhesitatingly chose the latter path. That choice led to extensive public deliberations—rather than instant decision-making—over recommendations to the President and the Congress. These bipartisan deliberations continued right through to the tenth month of the third Commission year; but the result was indeed an unusual consensus fashioned in the heat of debate and in the light of common purpose.

THE ANTITRUST MODERNIZATION COMMISSION

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Bobby R. Burchfield <i>Commissioner</i>	Donald G. Kempf, Jr. <i>Commissioner</i>
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TABLE OF CONTENTS

Introduction and Recommendations	1
I. Substantive Standards of Antitrust Law	
A. Antitrust Law and the “New Economy”	31
B. Substantive Merger Law	47
C. Exclusionary Conduct	81
D. Antitrust and Patents	117
II. Enforcement Institutions and Processes	
A. Dual Federal Enforcement	129
B. The Hart-Scott-Rodino Act Pre-Merger Review Process	151
C. State Enforcement of Antitrust Laws	185
D. International Antitrust Enforcement	213
III. Civil and Criminal Remedies	
A. Private Monetary Remedies and Liability Rules	241
B. Indirect Purchaser Litigation	265
C. Government Civil Monetary Remedies	285
D. Criminal Remedies	293
IV. Government Exceptions to Free-Market Competition	
A. The Robinson-Patman Act	311
B. Immunities and Exemptions, Regulated Industries, and the State Action Doctrine	333
Separate Statements of Commissioners	
Commissioners Burchfield, Delrahim, Jacobson, Kempf, Litvack, Valentine, and Warden	395
Commissioner Carlton	398
Commissioner Delrahim	403
Commissioner Jacobson	412
Commissioner Kempf	428
Commissioner Shenefield	442
Commissioner Warden	444
Appendices	
A. Relevant Statutes	A.1
B. Antitrust Modernization Commission Hearings	A.43
C. Comments Received by the Antitrust Modernization Commission	A.51
D. Biographies of Commissioners and Commission Staff	A.65

Introduction and Recommendations

1. INTRODUCTION

Congress established the Antitrust Modernization Commission “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.”¹ This Report sets forth the Commission’s recommendations and findings on how antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today.

The antitrust laws seek to deter or eliminate anticompetitive restraints that impede free-market competition. To do so properly, antitrust law must reflect an economically sound understanding of how competition operates. As Congress recognized, competition in the twenty-first century increasingly involves innovation, intellectual property, technological change, and global trade.

In many high-tech sectors of the economy, firms must constantly innovate to keep pace in markets in which product life cycles are counted in months, not years.² To protect their innovations, firms may rely on intellectual property. In some cases, intellectual property assets may be more important to businesses than specialized manufacturing facilities.

The digital revolution has produced new, general-purpose technologies that enable firms to create many new goods and services for consumers.³ New information and communication technologies have revolutionized firms’ production and distribution processes as well, allowing faster and easier access to suppliers and distributors. Technological advances have played an important role in facilitating global integration,⁴ as newly available communication technologies have shrunk the time and distance that separate markets around the world.⁵ New markets across the globe have opened for trade following the determination by policymakers in many developing countries that free-market competition yields productivity and other benefits far superior to the results produced by central planning.⁶

Antitrust analysis must reflect a proper understanding of how these forces affect competition. To be sure, many of these seemingly new phenomena raise competitive issues parallel to those that confronted antitrust in earlier decades.⁷ So-called “general-purpose technologies,” such as electricity, railroads, and the internal combustion engine, for example, also revolutionized production, made many new goods and services available to consumers, and created industries that produced analogous competitive issues.⁸ Nonetheless, a present-day assessment of how well antitrust law is operating to address current issues is important to ensure that competitive markets continue to benefit consumer welfare. As the nature of competition evolves, so must antitrust law.

A. Antitrust Law Seeks to Protect Competition and Consumer Welfare

The Supreme Court has explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁹

As this language confirms, free-market competition is, and has long been, the fundamental economic policy of the United States.¹⁰ Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—forces firms to lower prices, improve quality, and innovate.¹¹ Businesses in competitive markets develop and sell the kinds and quality of goods and services that consumers desire, and firms seek to do so as efficiently as possible, so they can offer those goods and services at competitive prices.¹²

In free markets, consumers determine which firms succeed. Consumers benefit as firms offer discounts, improve product reliability, or create new services, for example, to keep existing customers and attract new ones. The free-market mechanism generally provides greater success “to those firms that are more efficient and whose products are most closely adapted to the wishes of consumers.”¹³

Competitive markets also drive an economy’s resources toward their fullest and most efficient uses, thereby providing a fundamental basis for economic development.¹⁴ Competition facilitates the process by which innovative, cutting-edge technologies replace less efficient productive capacity. Market forces continuously prod firms to innovate—that is, to develop new products, services, methods of doing business, and technologies—that will enable them to compete more successfully.¹⁵ The ongoing churning of a flexible competitive economy leads to the creation of wealth, thus making possible improved living standards and greater prosperity.¹⁶

To be competitive, markets need not conform to the economic ideal in which many firms compete and no firm has control over price. In fact, the real world contains very few such markets.¹⁷ Rather, competition generally “refers to a state of affairs in which prices are sufficient to cover a firm’s costs, but not excessively higher, and firms are given the correct set of incentives to innovate.”¹⁸ Experience has shown that intense competition can take place in a wide variety of market circumstances.¹⁹ Some factors—such as many sellers and buyers, small market shares, homogeneous products, and easy entry into a market—may suggest competitive behavior is likely.²⁰ The absence of those factors, however, “does not nec-

essarily prevent a market from behaving competitively.”²¹ Economic learning in recent decades has afforded a greater appreciation of the variety of factors that can affect competitive forces at work in particular markets.

Antitrust law prohibits anticompetitive conduct that harms consumer welfare.²² Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to “improve” competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct.²³ Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

B. Periodic Assessments of the Antitrust Laws Are Advisable

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy.²⁴ In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years.²⁵ Prior commissions have made recommendations about both the substance and procedure of antitrust law.

The tradition of assigning commissions to evaluate antitrust law began in 1938, when President Roosevelt recommended that Congress appropriate funds for the study of the antitrust laws.²⁶ Recommendations from that first commission, the Temporary National Economic Commission (TNEC), played a role in spurring Congress to strengthen the law against anticompetitive mergers.²⁷ In 1955 the Attorney General’s National Committee to Study the Antitrust Laws recommended important changes to antitrust analysis, most notably to reduce the use of per se rules that deemed many types of conduct automatically illegal.²⁸ Twenty years later, these proposals combined with further economic learning to produce significant changes in antitrust law.²⁹

Between 1969 and 1979, three commissions issued reports, each known by the names of those who led them—the Neal Report,³⁰ the Stigler Report,³¹ and the Shenefield Report.³² Among other things, these reports reflected ongoing debates about whether and when monopolies, or firms with large market shares in highly concentrated markets (oligopolies), should be subject to more stringent antitrust enforcement.³³ The recommendation of the Neal Report to reduce concentration in oligopolies by requiring firms to divest assets was opposed by the Stigler Report, which described the connection between concentration and competition as “weak.”³⁴ The recommendation of the Shenefield Report to make it easier to prove monopolization also did not gain traction.³⁵

Recommendations from these commissions for revised or new antitrust procedures and remedies were more successful. For example, the Neal Report recommended that, in certain circumstances, businesses be required to notify the antitrust agencies before consummating a merger;³⁶ in 1976 Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act, which imposed pre-merger notification requirements.³⁷ The Stigler Report recommended substantial increases in government antitrust penalties, a recommendation adopted into law through The Antitrust Procedures and Penalties Act of 1974.³⁸ The Shenefield Report led directly to passage of the Antitrust Procedural Improvements Act of 1980³⁹ and “provided important encouragement to federal judges to manage trials—including the massive *AT&T* trial—effectively.”⁴⁰ The Shenefield Report also issued twenty recommendations for further deregulation, providing significant support to the deregulation movement.⁴¹

Most recently, the increasing importance of global trade spurred the 1998 establishment of the International Competition Policy Advisory Committee (ICPAC)—chaired by former Assistant Attorney General James F. Rill and former International Trade Commission Chairwoman Paula Stern—to study international aspects of antitrust law.⁴² The ICPAC Report provided the impetus for the International Competition Network, through which nearly one hundred nations now discuss antitrust procedures and policies.⁴³

C. Major Changes in Antitrust Analysis over the Past Twenty-Five Years Make this a Timely Report

In the decades since the Neal, Stigler, and Shenefield Reports undertook their assessments, antitrust law has gone through what is arguably the most important period in its development. The antitrust landscape differs greatly from earlier decades in terms of antitrust analysis and the role of antitrust enforcement agencies, among other things.

Most important, antitrust case law has become grounded in the related principles that antitrust protects competition, not competitors, and that it does so to ensure consumer welfare. Substantial economic learning now undergirds and informs antitrust analysis. Time and again in recent decades, the Supreme Court has used economic reasoning to develop standards for antitrust analysis. Case-by-case decision-making has provided myriad opportunities for the integration of economics into antitrust analysis, and litigating parties and the courts have used them.

Economic learning has provided the foundation for updated antitrust analysis in part by revealing the potential procompetitive benefits of some business conduct previously assumed to be anticompetitive. The accommodation of such advances in economic learning has increased the flexibility of antitrust law, with courts and the antitrust agencies now considering a wide variety of economic factors in their analyses. Improved economic understanding and greater analytical flexibility have increased the potential for a sound competitive assessment of business conduct in all industries, including those characterized by innovation, intellectual property, and technological change.

The improvements in economic understanding and the increases in analytical flexibility have added further complexity to antitrust law, however. In response, courts have searched for standards that can make antitrust analysis more manageable. They also have given increased attention to whether businesses can understand and comply with, and courts can efficiently and competently administer, particular antitrust rules. Whether particular antitrust rules overdeter procompetitive conduct or underdeter anticompetitive conduct has received greater scrutiny as well.

D. The Commission's History and Process

The Antitrust Modernization Commission began the three years of work that culminated in this Report in April 2004. The Commission met for the first time on April 1 that year, shortly after all appointments to the Commission had been made. The Commission has over those three years engaged in a careful, deliberate course of study to fulfill its statutory mandate of examining “whether the need exists to modernize the antitrust laws” and soliciting the “views of all parties concerned with the operation of the antitrust laws.”⁴⁴ Interested members of the public have participated substantially through the submission of comments and testimony and attendance at the Commission's many hearings and meetings.

1. Legislative History of the Commission

The Commission was created by an act of Congress in 2002. The original bill was introduced by F. James Sensenbrenner, Jr., then-Chairman of the House Judiciary Committee.⁴⁵ Although the bill did not limit the scope of the Commission's study, at the time of its introduction, Chairman Sensenbrenner highlighted three issues he believed the Commission should review in the course of its study: (1) “the role of intellectual property law in antitrust law”; (2) “how antitrust enforcement should change in the global economy”; and (3) “the role of state attorneys general in enforcing antitrust laws.”⁴⁶

The Act obliged the Commission to perform four tasks:

1. “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues”;
2. “to solicit views of all parties concerned with the operation of the antitrust laws”;

3. “to evaluate the advisability of proposals and current arrangements with respect to any issues so identified”; and
4. “to prepare and submit to Congress and the President a report”⁴⁷

The Act provided the Commission with three years to complete these tasks⁴⁸ and authorized \$4 million to be appropriated for the Commission to perform its work.⁴⁹

2. Organization of the Commission

The Antitrust Modernization Commission Act called for the appointment of twelve Commissioners, four by the House of Representatives, four by the Senate, and four by the President.⁵⁰ Appointments by both houses of Congress were split equally between the Democratic and Republican parties.⁵¹ No more than two of the President’s four appointments could be from the same political party.⁵² The Chair was designated by the President; the Vice-Chair was designated jointly by the Democratic leadership of the House of Representatives and the Senate.⁵³

The House of Representatives appointed as Commissioners Donald G. Kempf, Jr., John L. Warden,⁵⁴ John H. Shenefield, and Debra A. Valentine.⁵⁵ The Senate appointed W. Stephen Cannon, Makan Delrahim,⁵⁶ Jonathan M. Jacobson, and Jonathan R. Yarowsky.⁵⁷ The President appointed to the Commission Bobby R. Burchfield, Dennis W. Carlton, Deborah A. Garza, and Sanford M. Litvack.⁵⁸ The President designated Commissioner Garza as Chair; the Democratic leadership of the House of Representatives and the Senate designated Commissioner Yarowsky as Vice-Chair. Pursuant to the AMC Act, the Commission appointed Andrew J. Heimert to be the Executive Director and General Counsel.⁵⁹ The Commission subsequently hired additional staff and appointed advisors to assist it in its work.⁶⁰

3. Transparency and Involvement of the Public

The Commission’s work proceeded in three general phases: selection of issues for study, study of those issues, and deliberation upon the recommendations the Commission would make on the issues it studied. At each phase, the public was invited to participate through written comments and testimony and by observing the Commission’s hearings and deliberations.

The Commission’s principal mechanism for informing the public of its work was through its website, www.amc.gov. All materials that the Commission discussed at its meetings were posted on the website in advance of the meetings. The Commission placed its entire record on the website as it was developed. Comments from the public were posted as soon after receipt as possible. Witness statements for hearings were made available on the website as far in advance of the hearing as the witnesses provided them, and transcripts from the hearings were posted shortly after each hearing.

a. Issue Selection Through Public Comment and Outreach

The first phase of the Commission's work was to select issues for study. Consistent with its mandate to solicit the views of interested persons, the Commission requested that the public propose issues for study.⁶¹ The Commission received comments from fifty-six entities proposing a variety of issues for study.⁶² Commissioners also specifically solicited the views of a variety of persons and organizations, including consumer organizations, current and former state and federal antitrust enforcement officials, and federal judges. The Commission met in January 2005 to deliberate publicly on a list of approximately sixty possible issues synthesized by Commission staff from the comments and input received in the fall of 2004.⁶³ Ultimately, the Commission adopted twenty-five issues (broadly defined) for study.

b. Information Gathering Through Public Comment and Hearings

Having selected issues for study, the Commission began an extended study and evaluation of these issues and proposals regarding them.⁶⁴ The Commission compiled its record through two principal mechanisms: comments from the public and hearings.⁶⁵

The Commission requested comment from the public on the issues it selected, including specific questions about the U.S. antitrust laws and whether change was advisable to any of them.⁶⁶ Although the majority of comments were provided to the Commission in 2005—during the Commission's major study period—members of the public continued to submit comments throughout the entire period of the Commission's work. Overall, the Commission received 192 comments from 126 persons or organizations.⁶⁷

Between June 2005 and October 2006, the Commission held 18 hearings over 13 days, with testimony by 120 witnesses, generating almost 2500 pages of transcripts.⁶⁸ Witnesses were selected to provide a balance and diversity of views. The public was invited to, and did, comment on issues addressed in the hearings.⁶⁹ All hearings were open to the public.

c. Deliberations on Possible Recommendations and Report Drafting

Commission deliberations on the recommendations in this Report occurred between May 2006 and February 2007. Overall, the Commission met to deliberate on eleven days. All deliberations of the Commission were held in public. Documents prepared by staff to assist the Commissioners in their deliberations were made available to the public in advance of the meetings and at the meetings themselves. The Report was drafted to explain the recommendations agreed to by a majority of Commissioners, and reflects the views of the Commissioners supporting each recommendation.

2. RECOMMENDATIONS

The charge to this Commission has been to study, evaluate, and make recommendations for the antitrust landscape as it now exists, much changed from earlier years. The current antitrust panorama, of course, covers a broad array of issues; to study all of the possible issues would be neither efficient nor desirable. To use its resources most productively, the Commission chose to focus on four primary areas: substantive standards of antitrust law; enforcement institutions and processes; civil and criminal remedies; and statutory and other exceptions to competition (such as immunities and exemptions from the antitrust laws). The Chapters that address these issues are briefly described below.

Chapter I addresses certain aspects of substantive antitrust law. Chapter I.A reviews changes in antitrust law in recent decades and discusses antitrust analysis in industries in which innovation, intellectual property, and technological change are central features (the “new economy”). Chapters I.B and I.C assess two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, in light of the importance of intellectual property to competition in a high-technology economy, Chapter I.D briefly discusses how the operation of patent law can affect competition.

Chapter II discusses enforcement institutions and processes. Chapter II.A deals with the two federal antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, and Chapter II.B addresses issues surrounding these agencies’ implementation and enforcement of the Hart-Scott-Rodino Act’s pre-merger notification process. Chapter II.C discusses antitrust enforcement at the state level, while Chapter II.D addresses international antitrust enforcement.

Chapter III addresses civil and criminal antitrust remedies. Chapter III.A discusses the monetary remedies available to private parties, such as treble damages, as well as liability rules. Issues related to indirect purchaser litigation are assessed in Chapter III.B. Chapter III.C examines civil remedies available to the federal government, and Chapter III.D discusses criminal remedies that the government may obtain.

Finally, Chapter IV evaluates statutes and particular doctrines that provide exceptions to free-market competition. Chapter IV.A addresses the Robinson-Patman Act. Chapter IV.B discusses statutory immunities and exemptions from antitrust law, regulated industries, and the state action doctrine.

The following are recommendations agreed to by a majority of the Commission. Dissenting votes are identified in the text of the Report and, in some instances, are discussed in separate statements of Commissioners.

Chapter I: Substantive Standards of Antitrust Law

A. Antitrust Law and the “New Economy”

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.
2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

B. Substantive Merger Law

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.
 - 3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.
 - 3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.
4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.
 - 4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.

5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.
6. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.
7. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.
8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.
9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.
10. The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.
 - 10a. The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.
 - 10b. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.

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- 11.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.
- 11a.** The agencies should issue “closing statements,” when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies’ merger enforcement policy.
- 11b.** The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.
- 11c.** The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.
- 11d.** The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.
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C. Exclusionary Conduct

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- 12.** In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.
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13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.
14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.
15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.
16. The lack of clear standards regarding bundling, as reflected in *LePage’s v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.
17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.
18. In general, firms have no duty to deal with a rival in the same market.
19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

D. Antitrust and Patents

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- 20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.
 - 21. Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition. In particular:
 - 21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.
 - 21b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.
 - 21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.
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Chapter II: Enforcement Institutions and Processes

A. Dual Federal Enforcement

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

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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.
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- 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.
 - 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.
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C. State Enforcement of Antitrust Laws

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- 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.
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- 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.
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D. International Antitrust Enforcement

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- 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.
- 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.
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- 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.”
 - 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.
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Chapter III: Civil and Criminal Remedies

A. Private Monetary Remedies and Liability Rules

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- 43. No change is recommended to the statute providing for treble damages in antitrust cases.
 - 44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.
 - 45. No change is recommended to the statute providing for attorneys’ fees for successful antitrust plaintiffs. In considering an award of attorneys’ fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.
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46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.
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B. Indirect Purchaser Litigation

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47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:
- Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.
 - Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.
 - Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.
 - Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.
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C. Government Civil Monetary Remedies

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48. There is no need to give the antitrust agencies expanded authority to seek civil fines.
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49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.
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D. Criminal Remedies

50. While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.
51. No change should be made to the current maximum Sherman Act fine of \$100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.
52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.
53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.
54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.
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Chapter IV: Government Exceptions to Free-Market Competition

A. The Robinson-Patman Act

55. Congress should repeal the Robinson-Patman Act in its entirety.

B. Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.

Immunities and Exemptions

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

- Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
- The likely adverse impact of the existing or proposed immunity on consumer welfare; and
- Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.

59. The following steps are important to assist Congress in its consideration of those factors:

- Create a full public record on any existing or proposed immunity under consideration by Congress.
- Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.
- Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.

60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:

- Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).
- Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.
- Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.

61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.

Regulated Industries

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62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.
 63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.
 64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.
 65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.
 66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.
 67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.
 68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.
 69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.
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70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.
 71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.
 72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.
 73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.
 74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.
 - In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers' interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.
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The State Action Doctrine

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75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.
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76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.
77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state; and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.
78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.
79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.
80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.

Notes

- ¹ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002), *amended by* Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007) [hereinafter AMC Act].
- ² WILLIAM J. BAUMOL, *THE FREE-MARKET INNOVATION MACHINE: ANALYZING THE GROWTH MIRACLE OF CAPITALISM* 3 (2002) [hereinafter BAUMOL, *FREE-MARKET INNOVATION MACHINE*].
- ³ Ben S. Bernanke, Gov., Fed. Reserve, Productivity, Remarks at the C. Peter McColough Roundtable Series on International Economics, Council on Foreign Relations (Jan. 19, 2005) [hereinafter Bernanke, Productivity] (citing Timothy F. Bresnahan & Manuel Trajtenberg, *General Purpose Technologies: “Engines of Growth?”*, 65 J. OF ECONOMETRICS 83–108 (1995)).
- ⁴ Ben S. Bernanke, Chairman, Fed. Reserve, Global Economic Integration: What’s New and What’s Not?, Remarks Before Federal Reserve Bank of Kansas City’s Thirtieth Annual Economic Symposium (Aug. 25, 2006) [hereinafter Bernanke, Global Economic Integration].
- ⁵ Alan Greenspan, Chairman, Fed. Reserve, Current Account, Remarks at Advancing Enterprise 2005 Conference (Feb. 4, 2005).
- ⁶ Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference (Jan. 26, 2004) [hereinafter Greenspan, Economic Flexibility]; INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE, FINAL REPORT 33 (2000) [hereinafter ICPAC REPORT].
- ⁷ See Jonathan M. Jacobson, *Do We Need A “New Economy” Exception for Antitrust*, 16 ANTITRUST, Fall 2001, at 89, 89.
- ⁸ See Bernanke, Productivity; Bernanke, Global Economic Integration.
- ⁹ Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
- ¹⁰ See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL at 177 (1979) [hereinafter SHENEFIELD REPORT] (“Free market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy.”); Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before National Association for Business Economics Annual Meeting (Sept. 27, 2005); *see also* J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 1 (Dec. 5, 2005) (“The fundamental premise of the federal antitrust laws is that free and open competition is the most effective means to ensure lower prices, increased quality . . . and great innovation.”).
- ¹¹ ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 57 (5th ed. 2004) [hereinafter GELLHORN, ANTITRUST LAW AND ECONOMICS] (“[C]ompetition presses producers to satisfy consumer wants at the lowest price while using the fewest resources.”).
- ¹² See, e.g., Terry Calvani, *Consumer Welfare is the Prime Objective of Antitrust*, LEGAL TIMES, Dec. 24, 1984, at 14 (“In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.”).
- ¹³ BAUMOL, *FREE-MARKET INNOVATION MACHINE*, at 10.
- ¹⁴ See WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* 90–91 (2004).
- ¹⁵ BAUMOL, *FREE-MARKET INNOVATION MACHINE*, at 10.
- ¹⁶ Greenspan, Economic Flexibility.
- ¹⁷ DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 57 (4th ed. 2005) (stating that “perfect competition is rarely, if ever, encountered in the real world”); *see also* David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 BERKELEY TECH. L.J. 729, 734–35 (Spring 2001).

¹⁸ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 13 (2005) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*].

¹⁹ See, e.g., William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Legal and Economic Thinking*, 14 J.L. & ECON. PERSP. 43, 52 (2000) [hereinafter Kovacic & Shapiro, *Antitrust Policy*] (“[E]conomists came to realize that departures from the perfect competition model are normal, indeed inevitable, even in ‘competitive’ industries.”).

²⁰ GELLHORN, *ANTITRUST LAW AND ECONOMICS*, at 72.

²¹ *Id.* at 72–73.

²² Debate continues about the precise definition of “consumer welfare.” See, e.g., Merger Enforcement Transcript at 112–195 (Nov. 17, 2005) (various witnesses debating the proper meaning). The Supreme Court has not ruled specifically on this issue. The Commission’s use of the term “consumer welfare” does not imply a choice of a particular definition.

Judge Robert Bork argued that Congress’s goal in passing the Sherman Act was to optimize efficiency, regardless of whether producers or consumers capture the gains. See generally ROBERT BORK, *THE ANTITRUST PARADOX* 61–66 (1978) [hereinafter BORK, *ANTITRUST PARADOX*]. This will achieve consumer welfare, proponents maintain, because *all* consumers in the economy benefit when fewer resources are needed to make a product and those freed-up resources can be put to a higher and better use. See, e.g., Merger Enforcement Trans. at 171–72 (Rule). In certain limited cases—for example, if a merger to monopoly would significantly lower costs and lead to a more efficient allocation of resources, but would also raise consumer prices—Judge Bork’s approach would permit the transaction to be consummated, despite an increase in consumer prices, because the merger would create efficiency gains that outweighed deadweight losses. See BORK, *ANTITRUST PARADOX*, at 91, 107–11.

Others, however, argue that Congress’s main goal was to prevent price increases to consumers—that is, wealth transfers from consumers to producers. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concerns of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982) [hereinafter Lande, *Wealth Transfers*]. Proponents of this approach distinguish between the consumers of products in a relevant market (consumers) and the shareholders of the firms in that market (producers). See, e.g., Merger Enforcement Trans. at 121, 161 (Baker). They maintain that antitrust law should not allow wealth transfers from consumers to producers, even if gains in overall efficiency must be sacrificed. See Lande, *Wealth Transfers*, at 69–70; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1592 (1983).

The use of one standard or the other can have various implications for antitrust analysis. See, e.g., Merger Enforcement Trans. at 118–19, 137–38 (Cary) (discussing circumstances in which fixed-cost savings should, or should not, be considered in merger analysis). Nonetheless, the use of one standard versus the other often does not change the results of that analysis, and the cases in which the choice of standard would make a difference are relatively few. See Merger Enforcement Trans. at 166–67 (Cary) (standards often do not produce inconsistent results); *id.* at 122 (Baker) (stating that “possibilities for conflict are largely hypothetical,” and that in his experience, “agency investigations rarely turn on the welfare standard”); *id.* at 172–73 (Rule) (difficulties in calculating with precision different types of efficiencies raises questions about how much difference using one standard rather than another makes).

²³ See generally Kovacic & Shapiro, *Antitrust Policy*, at 43 (“As economic learning changed, the contours of antitrust doctrine . . . would shift as well.”).

²⁴ See generally Timothy J. Muris, FTC Chairman, Improving the Economic Foundations of Competition Policy, Remarks at George Mason University Law Review’s Winter Antitrust Symposium (Jan. 15, 2003) (referring to the “importance of regularly reassessing the economic assumptions of current policy, of distilling economic insights . . . and of doing empirical research . . .”).

²⁵ See Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421, 425 (2006) [hereinafter Calkins, *Looking Backwards*]; Albert Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1029 (2003) [hereinafter Foer, *Putting AMC into Perspective*]; Thomas E. Kauper, *The Report of the Attorney General’s National Committee to Study the Antitrust Laws*:

A Retrospective, 100 MICH. L. REV. 1867, 1867 (2002) [hereinafter, Kauper, *Antitrust Laws: A Retrospective*].

- ²⁶ Foer, *Putting AMC into Perspective*, at 1032–33. The TNEC had twelve members, including members of Congress and antitrust agency officials. *Id.* at 1033.
- ²⁷ *Id.* at 1036 (crediting the TNEC with leading to Clayton Act amendments that “strengthened the law against anticompetitive mergers”).
- ²⁸ Kauper, *Antitrust Laws: A Retrospective*, at 1871–72 (“The general thrust of the Report is clear. It contemplates an antitrust world virtually free of per se rules.”).
- ²⁹ *Id.* at 1873 (stating that “[m]ost of the per se rules adopted in the previous two decades have disappeared”).
- ³⁰ PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11 (1968–69).
- ³¹ REPORT OF THE NIXON TASK FORCE ON PRODUCTIVITY AND COMPETITION, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 413, at X-1 to X-14 (June 10, 1969).
- ³² SHENEFIELD REPORT.
- ³³ See generally William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1134–38 (1989).
- ³⁴ Calkins, *Looking Backwards*, at 436; see also Foer, *Putting AMC into Perspective*, at 1040–41 (citing CHARLES R. GEISST, MONOPOLIES IN AMERICA 240 (2000)).
- ³⁵ See Foer, *Putting AMC into Perspective*, at 1043–44 & n.55.
- ³⁶ Calkins, *Looking Backwards*, at 434–35.
- ³⁷ 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).
- ³⁸ Calkins, *Looking Backwards*, at 439.
- ³⁹ *Id.* at 442 (“The Shenefield Report’s most immediate consequence was passage of the Antitrust Procedural Improvements Act of 1980”); Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 2, 94 Stat. 1154, 1154–58; see H.R. REP. NO. 96-870 (1980) (legislative history). Among other things, the Act increased potential sanctions for attorney delay, authorized prejudgment interest especially in response to delay, and encouraged wider use of collateral estoppel. Calkins, *Looking Backwards*, at 442.
- ⁴⁰ Calkins, *Looking Backwards*, at 447.
- ⁴¹ Foer, *Putting AMC into Perspective*, at 1043 (“Probably the most important contribution of [the Shenefield Report] was to underscore . . . the desirability of continuing the nation’s . . . movement toward deregulation.”); see also Calkins, *Looking Backwards*, at 440.
- ⁴² Foer, *Putting AMC into Perspective*, at 1044; *id.* at 1045 (citing the launch of the International Competition Network as ICPAC’s “most important effect” and “the materialization of [ICPAC’s] Global Competition Initiative—a new venue where governmental officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work towards common solutions of competition law and policy problems”) (quoting ICPAC REPORT, at 29) (internal quotations and emphasis omitted).
- ⁴³ See International Competition Network Website, *available at* <http://www.internationalcompetitionnetwork.org>.
- ⁴⁴ AMC Act, § 11053.
- ⁴⁵ Antitrust Modernization Commission Act of 2001, H.R. 2325, 107th Cong. (2001).
- ⁴⁶ Press Release, H. Comm. On the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001), *available at* http://judiciary.house.gov/Legacy/news_062701.htm.

⁴⁷ AMC Act, § 11053.

⁴⁸ *Id.* § 11058.

⁴⁹ *Id.* § 11060. Actual appropriations to the Commission made in fiscal years 2004, 2005, 2006, and 2007 totaled slightly less than \$4 million after application of across-the-board rescissions.

⁵⁰ *Id.* § 11054(a).

⁵¹ *Id.*

⁵² *Id.* § 11054(a)(1).

⁵³ *Id.* § 11054(i).

⁵⁴ 150 CONG. REC. H224 (daily ed. Jan. 28, 2004).

⁵⁵ 149 CONG. REC. H44 (daily ed. Jan. 7, 2003).

⁵⁶ 149 CONG. REC. S2872 (daily ed. Feb. 26, 2003).

⁵⁷ 149 CONG. REC. S87 (daily ed. Jan. 7, 2003).

⁵⁸ The White House, Personnel Announcement (Mar. 5, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/03/20040305-5.html>. Bobby Burchfield was appointed by the President to replace Deborah Platt Majoras, who resigned her position as a Commissioner upon her appointment to be the Chairman of the Federal Trade Commission in August 2004. See The White House, Personnel Announcement (Dec. 17, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/12/20041217-17.html>.

⁵⁹ AMC Act, § 11056(a)(1).

⁶⁰ *Id.* Short biographies of Commissioners and Commission staff are provided in Appendix D of the Report.

⁶¹ See 69 Fed. Reg. 43,969 (July 23, 2004).

⁶² See *generally* Appendix C (listing comments proposing issues for Commission study).

⁶³ See 69 Fed. Reg. 70,627 (Dec. 7, 2004). The Commission held brief subsequent meetings to consider the adoption of additional specific issues for study. See 70 Fed. Reg. 8568 (Feb. 22, 2005); 70 Fed. Reg. 37,747 (June 30, 2005).

⁶⁴ See AMC Act, § 11053(3).

⁶⁵ The Commission's Record is contained on the CD-ROM included with this Report.

⁶⁶ See 70 Fed. Reg. 28,902 (May 19, 2005). The Commission issued several additional requests for comment from the public on issues it adopted for study at later points and when its study revealed the desirability of obtaining more specific comments on certain issues. See 70 Fed. Reg. 46,474 (Aug. 10, 2005); 70 Fed. Reg. 69,510 (Nov. 16, 2005); 71 Fed. Reg. 30,863 (May 31, 2006); 71 Fed. Reg. 34,590 (June 15, 2006).

⁶⁷ See Appendix C of this Report (listing comments received on issues selected for study).

⁶⁸ Panels generally consisted of four or five witnesses each, although for some panels there were as few as one or two, or as many as seven, witnesses. A list of hearings and panelists appears in Appendix B of this Report.

⁶⁹ See, e.g., 70 Fed. Reg. 37,746 (June 24, 2005); 71 Fed. Reg. 57,462 (Sept. 29, 2006).

Chapter I

Substantive Standards Of Antitrust Law

In this Chapter the Commission discusses aspects of the current substantive standards of antitrust law. Those standards should meet several criteria. The rules of antitrust must be economically sound and flexible enough to accommodate new economic learning and changes in the nature of competition. The rules also should be clear, predictable, and administrable, so that businesses can comply with them and courts can administer them.

Clarity, predictability, and administrability can be hard to maintain in a system that is flexible enough to adapt to new economic learning and changing business environments. For example, per se rules that deem specified conduct automatically illegal are clear, predictable, and administrable. Yet the courts, scholars, and antitrust practitioners have reached consensus that—although appropriate in particular limited circumstances—per se rules can all too often condemn business conduct that actually benefits, not harms, consumers. As antitrust law has more fully incorporated economic learning into the substantive rules of antitrust, the courts and the antitrust agencies have sought to develop revised rules that combine economically sound principles and flexible analysis with clarity, predictability, and administrability.

This Chapter first reviews these developments and then discusses their application in industries in which innovation, intellectual property, and technological change are central features. Chapter I.A discusses general antitrust standards in light of the competitive forces at work in the twenty-first century. Chapters I.B and I.C review two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, Chapter I.D, in light of the importance of intellectual property to competition in a high-technology economy, briefly discusses how the operation of patent law can affect competition as well.

Chapter I.A

Antitrust Law and the “New Economy”

1. INTRODUCTION

The term “new economy” can describe a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades. For purposes of this Report, the key question is whether antitrust analysis can properly account for the economic characteristics of these markets. Those economic characteristics include innovation, intellectual property, and technological change. As referenced in this Report, the new economy includes those industries in which innovation, intellectual property, and technological change are central features.

To assess how well antitrust law addresses competitive issues in such industries first requires an understanding of the major changes in antitrust analysis in recent decades. During this period a quiet transformation has strengthened the economic foundations of antitrust and increased its flexibility. These changes have improved the likelihood of an accurate assessment of competitive effects. In particular, the flexibility to account properly for the efficiencies associated with business conduct means that antitrust analysis has become less likely to condemn improperly business conduct that in fact benefits consumer welfare.

The Commission sought comment on and testimony about the application of antitrust analysis in industries in which innovation, intellectual property, and technological change are central features. Among other things, the Commission asked whether antitrust law encouraged a static analysis of dynamic industries or whether particular features of new economy industries posed distinctive problems for antitrust analysis. The Commission also asked whether antitrust law should use different benchmarks for market definition or market power assessments in new economy industries because innovation-driven firms may need to set prices above marginal costs to earn reasonable returns on their investments in innovation.

Commenters and witnesses largely agree that antitrust analysis has sufficient grounding in sound economic analysis, openness to new economic learning, and flexibility to enable the courts and the antitrust agencies properly to assess competitive issues in new economy industries. Most importantly, commenters noted, the economic principles on which antitrust is based do not require revision for application to those industries. As one economist noted, basic economic principles do not become “outdated” simply because industries become highly dynamic.¹

The Commission agrees and makes the following recommendations.

- 1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.**
- 2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.**

The economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property, and technological change are central features. Antitrust analysis, as refined to incorporate new economic learning, is sufficiently flexible to provide a sound competitive assessment in such industries. This has improved the potential for a sound competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change.

To be sure, not all agree with the results in particular cases. That antitrust has the proper tools for an economically sound analysis of competitive effects does not mean that everyone agrees on how to use those tools in particular cases or interpret the results of their use. Nonetheless, the Commission concluded that current antitrust analysis is up to the task of properly assessing the competitive effects of business conduct in new economy industries.

Just as in other industries, of course, antitrust enforcers evaluating business conduct in new economy industries must ensure proper attention to particular market dynamics and economic characteristics that may play a role in determining likely competitive effects. Certain characteristics may arise more frequently in markets in which innovation, intellectual property, and technological change are key factors than in some other industries. These characteristics can include:

- very high rates of rapid innovation;
- falling average costs (on a product, not a firm-wide, basis) over a broad range of output;
- relatively modest capital requirements;
- quick and frequent entry and exit;
- demand-side economies of scale;

- switching costs; and
- first-mover advantages.

That one or more of these characteristics may be important in the context of a new economy industry, however, does not suggest that such characteristics never appear in other industries or that all of the listed characteristics always appear in new economy industries. Rather, the point is simply that proper antitrust analysis in *all* industries requires careful consideration of economic characteristics of the industry, and the listed characteristics are ones that may play important roles in industries in which innovation, intellectual property, and technological change are central features.

2. BACKGROUND

Antitrust law has gone through many changes. From the 1950s through the early 1970s, antitrust law was expansively interpreted and broadly enforced. Plaintiffs frequently won, and a wide variety of business practices were presumed to be illegal.² The bases for such expansive interpretations was sometimes questionable, however. Courts, for example, in some cases seemed more concerned about protecting competitors than consumers. Business practices might be quickly condemned, seemingly on the basis of courts' skepticism that businesses would try to maximize profits by becoming more efficient, rather than by obtaining greater market power.

These expansive interpretations of antitrust law precipitated a sea change, led by critics who questioned the basic premises of antitrust law as it was then enforced. "In the 1960s through the 1980s, [antitrust scholars generally associated with the University of Chicago] explained how many market structures and practices that antitrust treated with hostility could be beneficial."³ Around the same time, antitrust scholars generally associated with Harvard advanced the concept that, in developing antitrust rules, courts and enforcers should keep in mind institutional limits, so that "antitrust rules [do] not outrun the capabilities of implementing institutions."⁴ In the 1980s, developments in economics continued to influence antitrust thinking, with "'post-Chicago' economic literature argu[ing] that certain market structures and types of collaborative activity are more likely to be anticompetitive than Chicago School antitrust writers imagined."⁵

All of these schools of thought "emphasize[] reliance on economic theory in the formulation of antitrust rules."⁶ The reassessment of antitrust doctrine based on economic learning has resulted in significant improvements to antitrust law over the past thirty years. This Section briefly reviews a few of the most important developments below. First, antitrust case law integrated the related principles that antitrust protects competition, not competitors, and it does so in order to ensure consumer welfare. Second, as new economic learning suggested possible procompetitive explanations for conduct previously assumed to be anticompetitive, the courts moved away from *per se* rules of automatic illegality toward a more

flexible rule of reason analysis that would allow consideration of procompetitive explanations of challenged business conduct. Finally, antitrust enforcers have recognized the importance of intellectual property as a spur to innovation and have adopted policies that reflect a greater sensitivity to the need to protect incentives to innovate.

A. Antitrust Protects Competition, Not Competitors, and Should Ensure Consumer Welfare

During the 1960s and early 1970s antitrust decisions from the Supreme Court sometimes seemed more directed to protecting small businesses than to protecting competition that would benefit consumers through lower prices, improved quality, or innovation.⁷ Indeed, in some instances the Court “condemned conduct precisely *because* it reduced costs or generated more desirable products [for consumers].”⁸ For example, in *FTC v. Procter & Gamble* the Court affirmed that a merger was illegal because it created efficiencies its rivals could not match.⁹ Decisions such as this were criticized as likely to deprive consumers of lower prices or other benefits from the increased competition that a more efficient merged firm could provide.¹⁰

Such decisions also were criticized for the absence of a coherent rule of law that could explain them.¹¹ On what basis should courts decide to disallow cost-saving, pro-consumer transactions so that smaller, less efficient firms could be kept afloat? The Court’s premise seemed to be that all markets should be made up of many small firms, staying as close as possible to the economic ideal of “perfect competition.”¹² “The Warren Court defined ‘competitive’ as a market containing many firms, the small ones having a ‘right’ to compete with the bigger ones.”¹³ The underlying economic assumption was that a “certain [industry] structure made certain types of conduct inevitable, so antitrust should be directed mainly toward anticompetitive industry structures.”¹⁴

Developments in economic learning seriously undermined these premises and sent antitrust law in a new direction. Economic research found procompetitive reasons to explain highly concentrated markets—that is, that the most efficient firms were winning the competitive struggle and thereby achieving high market shares.¹⁵ Some economists and lawyers further contended that effective competition did not require dozens of little firms, but instead could occur with relatively few firms in a market.¹⁶ If effective competition could occur without many small firms in a market, then courts did not need to interpret antitrust law to protect small businesses at the expense of consumers.

In response to this and other advances in economic understanding, the Supreme Court in 1977 stated without caveat that the “antitrust laws . . . were enacted for ‘the protection of *competition*, not *competitors*.’”¹⁷ The adoption of this principle represented a marked change in the direction of antitrust law. There is now a better understanding that trade-offs exist between the goals of consumer welfare and protecting small firms. To protect small firms can mean a less efficient economy in which consumers must pay higher prices.

Conversely, to allow firms to achieve economies of scale may harm small firms. “For example, large scale production and distribution may reduce costs but also eliminate competitive opportunities for small firms.”¹⁸

In 1979 the Supreme Court once again chose to interpret the antitrust law to protect consumers, not small businesses, describing the Sherman Act as a “consumer welfare prescription.”¹⁹ Other courts have adopted similar views.²⁰ For the last few decades courts, agencies, and antitrust practitioners have recognized consumer welfare as the unifying goal of antitrust law.²¹ “Few people dispute that antitrust’s core mission is protecting consumers’ right to the low prices, innovation, and diverse production that competition promises.”²²

B. Procompetitive Explanations May Exist for Much Business Conduct, So Antitrust Law Should Avoid Per Se Rules of Automatic Illegality

Over time, new economic learning has brought to the fore procompetitive explanations for certain business practices previously condemned outright.²³ Some have argued that many practices reflect aggressive competition or innovation and “that nearly all vertical practices [e.g., arrangements between manufacturers and distributors], price discrimination and most strategic pricing, many patent practices, and business torts were rarely or never anticompetitive.”²⁴ New anticompetitive theories have also emerged.²⁵ Given the potential for either procompetitive or anticompetitive explanations for business conduct, antitrust analysis needed to move away from per se rules of automatic illegality.

In 1977 in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court relied on economic reasoning to hold that territorial restraints on franchisees should be evaluated under the rule of reason, rather than viewed as per se illegal.²⁶ Territorial restraints forbid franchisee retailers from selling the manufacturer’s products outside their agreed-upon locations, which typically do not overlap with those of other franchisees. Although such restrictions could reduce competition among franchisees of the same manufacturer (“intra-brand competition”), the Court explained that they also could increase competition among different manufacturers’ franchisees (“interbrand competition”).²⁷

“Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers,” the Court stated.²⁸ For example, such restrictions may be used to provide franchisees with sufficient incentives to engage in promotional activities or to provide service and repair facilities for the manufacturer’s products. Franchisees might be reluctant to make such investments without territorial restraints because they would worry that other franchisees of the same manufacturer would “free ride” on their efforts to promote the manufacturer’s brand, the Court pointed out.²⁹ In light of these potentially “redeeming virtues,” the rule of reason, not a per se rule of automatic illegality, should be applied.³⁰ Moreover, the Court directed, “departure from

the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.”³¹

The Court’s decision in *Sylvania* marked a major turning point in antitrust law. After this decision, “the Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act.”³² Indeed, only two years later, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court refused to apply a per se rule to circumstances in which alleged price-fixing among competitors provided substantial efficiencies that could not be obtained through other means.³³ Defendants were the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), both of which had thousands of composers as members. The composers granted nonexclusive licenses to their compositions to ASCAP or BMI, which then created blanket licenses authorizing the playing of millions of copyrighted musical compositions at agreed-upon fees. Plaintiff CBS objected that the blanket licenses issued to television networks were per se illegal price-fixing. The Court described the critical question as “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to ‘increase economic efficiency and render markets more, rather than less, competitive.’”³⁴ For several reasons, including a substantial lowering of costs through eliminating thousands of individual transactions, the Court held the blanket licenses should be “subjected to a more discriminating examination under the rule of reason.”³⁵

Since *Sylvania* and *BMI*, the Supreme Court and lower courts have often looked to economic learning to understand why firms may use particular business practices. Rule of reason analysis allows this examination of potential efficiency rationales for challenged conduct. Although there are exceptions, of course,³⁶ the use of per se rules of automatic illegality is now substantially reduced, replaced by a more discriminating analysis under the rule of reason.

C. Antitrust Analysis Has Incorporated a More Sophisticated Understanding of How Intellectual Property Can Benefit Competition and Consumer Welfare

During much of the twentieth century, the courts, antitrust enforcers, and antitrust practitioners viewed intellectual property with deep skepticism.³⁷ Most assumed that a patent or other intellectual property automatically created a monopoly,³⁸ and Supreme Court cases fostered that presumption.³⁹ Antitrust enforcers attempted to restrict the use of intellectual property so that competition would be protected.⁴⁰ Over-zealous antitrust rules for the use of patents reached a pinnacle when, in 1972, the Antitrust Division of the Department of Justice (DOJ) issued the so-called “Nine No-Nos,” a list of nine patent licensing practices the DOJ generally viewed as per se illegal.⁴¹

The influence of economic learning about the competitive benefits of intellectual property and the potential efficiencies of intellectual property licensing and other conduct reversed this trend. In 1981 the Chief of the Intellectual Property Section of the Antitrust Division explained that because patents increase the reward for research and development, inventions are produced that otherwise would not have come about (or would not have come about as quickly); in those cases, “the availability of a patent [serves] only to benefit competition—to make additional or less expensive choices available to consumers.”⁴² In 1981 officials from the DOJ renounced the Nine No-Nos.⁴³ The 1995 Antitrust Guidelines for the Licensing of Intellectual Property (DOJ/FTC IP Guidelines), issued jointly by the DOJ and the Federal Trade Commission (FTC), take the view that “intellectual property licensing . . . is generally procompetitive”⁴⁴ and should be examined under the rule of reason.⁴⁵

As part of this trend, Congress in 1988 amended the Patent Code to eliminate a presumption that a patent confers market power in the context of patent misuse.⁴⁶ The antitrust agencies expanded that concept to include copyrights and trade secrets, stating in the DOJ/FTC IP Guidelines that the antitrust agencies “will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.”⁴⁷ In 2006 the Supreme Court recognized that “Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee.”⁴⁸ In light of this consensus, the Court reversed its prior holdings and held that, in a tying case, “the mere fact that a tying product is patented does not support . . . a presumption [of market power.]”⁴⁹

Over the course of recent decades, the courts and the antitrust agencies have thus moved away from a presumption that intellectual property automatically creates a monopoly and intellectual property arrangements are likely to harm competition. They now assess whether particular intellectual property in fact confers market power and consider how business arrangements involving intellectual property can benefit consumer welfare. This move has opened antitrust analysis to a more economically sophisticated approach to intellectual property issues, increasing the likelihood that antitrust will properly value the contribution of intellectual property rights to innovation and competition.

3. RECOMMENDATIONS AND FINDINGS

- 1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.**

Current antitrust analysis has a sufficient grounding in economics and is sufficiently flexible to reach appropriate conclusions in matters involving industries in which innovation, intellectual property, and technological change are central features. Judge Richard A. Posner, for example, has concluded that “antitrust doctrine is sufficiently supple, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents.”⁵⁰ Others agree, finding, for example, that “[w]hile the new economy has a number of distinct characteristics, antitrust enforcement is sufficiently flexible to account for the distinguishing features of the new economy and to preserve competition when it benefits consumers.”⁵¹

The fundamental economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of new economy industries. Over the years, antitrust analysis has been refined to incorporate useful aspects of new economic learning. This has improved the potential for a proper competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change.

Moreover, antitrust analysis, guided by valid economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries. Rule of reason analysis, for example, can accommodate the assessment of a wide variety of factors, including likely procompetitive effects of challenged conduct. As discussed above, advances in economic learning have persuaded courts to replace many per se rules of automatic illegality with a more flexible analysis under the rule of reason.

Increased flexibility and improved economic understanding can be seen in the evaluation of both joint and unilateral conduct under the Sherman Act, where courts have largely turned away from the application of per se rules of automatic illegality and moved toward rule of reason analysis. Likewise, the analysis of mergers has moved away from structural presumptions that increased concentration will necessarily result in anticompetitive conduct, toward a more complex analysis that incorporates predictions of competitive effects using tools of modern economic analysis. Significantly, both rule of reason analysis and current merger analysis require an evaluation of procompetitive efficiencies that may result from firms’ agreements, unilateral conduct, or proposed transactions. This is a significant positive change from the typical antitrust analysis of thirty years ago.

In addition, as discussed above, the courts and the antitrust agencies in recent decades have evidenced a greater appreciation of the importance of intellectual property in promoting

innovation and, accordingly, the need to incorporate this recognition into a dynamic analysis of competitive effects. Witnesses and commenters remarked there is an improved understanding that antitrust law and patent law are complementary, with both seeking to encourage innovation and competition.⁵²

Antitrust analysis can be properly applied in dynamic, innovation-driven industries.⁵³ Rapid technological progress and innovation are not new issues in antitrust law.⁵⁴ One witness pointed out “innovation has been the driver of American economic growth since at least the passage of the Sherman Act in 1890” and maintained “antitrust doctrine does not focus on static analysis.”⁵⁵ Yet another stated that “[a]ntitrust law is sufficiently flexible to take innovation concerns into account, and today’s theories, which may be replaced over time, need not be codified into the statute.”⁵⁶

Indeed, the evolution of antitrust law—both through case law and agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change. Industries that fall into those categories will keep changing over time; attempts to define them would likely be difficult and impermanent at best. Furthermore, economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate. It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis.

2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

Antitrust analysis in *all* industries requires careful assessments of each industry’s market dynamics and economic characteristics. To take proper account of market dynamics, antitrust analysis should carefully consider the incentives and obstacles that firms seeking to develop and commercialize new technologies may face.⁵⁷ Antitrust enforcers should “explicitly recognize that market conditions, business strategies, and industry structure can be highly dynamic.”⁵⁸

Innovation provides a significant share of the consumer benefits associated with competition, particularly in the most dynamic industries.⁵⁹ New and improved products and serv-

ices, as well as new business methods and production processes, are created through innovation.⁶⁰ To improve the application of antitrust in new economy industries, antitrust enforcers should give further consideration to efficiencies that lead to more rapid or enhanced innovation.⁶¹ The potential benefits to consumer welfare from such efficiencies are great, thus warranting careful assessments of the potential for certain business conduct to create more rapid or enhanced innovation.

“[A] proper market-power inquiry in new economy industries must include a serious analysis of the vigor of dynamic competition” that looks beyond current sales figures.⁶² To account properly for dynamic effects, antitrust enforcers must recognize that current market shares may overstate or understate likely future competitive significance. The Supreme Court identified this issue thirty years ago in *United States v. General Dynamics*, a merger case in which a coal company’s share of uncommitted coal reserves was a better indicator of its likely ability to compete for future supply contracts than its historical market share.⁶³

Analogous examples can be found in new economy industries, in which there may be “sequences of races to develop a new product or . . . to replace an existing product through drastic innovation.”⁶⁴ For example, if a firm has failed recently to introduce new and improved products comparable to rivals’ new offerings, and has no plans to do so, its likely future competitive significance may be far less than would be indicated by its historical market share.⁶⁵ A recent entrant with a promising new product, on the other hand, may have greater likely future competitive significance than its current low market share might suggest.⁶⁶

Intellectual property may be critical to future innovation in an industry, so it is also important “to examine ownership of and investment in relevant intellectual property—which may involve technologies not currently in commercial use.”⁶⁷ If, for example, the current leader “owns all intellectual property necessary for radical innovation, dynamic competition will not be effective.”⁶⁸ If a firm with a low market share holds an intellectual property asset essential for future product development, that firm’s likely future competitive significance may be far greater than that of a current market leader that has no promising new products or intellectual property assets in the pipeline.⁶⁹

Antitrust analysis also must recognize that a price above marginal cost, by itself, does not necessarily suggest that a firm has market power that should be relevant in an antitrust matter or is operating anticompetitively in a relevant antitrust market.⁷⁰ Particularly in innovative industries, such as those in which intellectual property assets are key, firms may have large, up-front fixed costs for research and development, and relatively small marginal costs of production.⁷¹ In pharmaceuticals, for example, a drug that costs millions of dollars to research, develop, and put through clinical testing may cost only a few cents per pill to produce.⁷² Over the long run, the pharmaceutical company must set a competitive price that will cover its up-front fixed costs, including a risk-adjusted cost of capital.⁷³ Firms in innovative industries also must cover the costs of innovation failures, such as drug products that fail before or during clinical testing.⁷⁴

For these reasons, firms with low marginal costs but large fixed costs, for research and development and other innovative activity, for instance, often need to price significantly above marginal costs simply to earn a competitive return in the long run. “This basic economic observation is not new, either in practice or in theory: it holds in any industry with large fixed costs, from railroads to microprocessors, from newspapers to computer software.”⁷⁵

A number of industries in which innovation, intellectual property, and technological change are central features also have one or more of the characteristics described briefly below. Depending on the facts at issue, such characteristics may have an important bearing on a proper antitrust analysis.

Very high rates of rapid innovation. One critical feature of new economy industries is innovation competition.⁷⁶ Competitive pressure to get new products or services to market ahead of one’s competitors can lead to short product life cycles,⁷⁷ with new products replacing the old every few months instead of years. In addition, in some industries, “[s]uccessful incumbents . . . are constrained primarily . . . by the threat that another firm will come up with a drastic innovation that causes demand for the incumbent’s product to collapse.”⁷⁸ Threats of drastic innovations may “force new-economy firms to invest heavily in R&D and to bring out new versions of their products—including versions that lead to the demise of their old versions.”⁷⁹

Relatively modest capital requirements. Some new economy industries do not require entrants to incur substantial sunk costs. Depending on the circumstances, some software markets, for example, may require only modest capital investments for entry. Ease of entry is relevant to assessment of whether a firm has or could obtain market power.

Quick and frequent entry and exit. In industries with relatively modest capital requirements entry and exit may be quick and frequent. Start-up software enterprises, for instance, particularly during the 1990s, were frequently born only to die while very young.⁸⁰ The extent to which quick and frequent entry and exit characterize an industry also will be relevant to whether a firm in such an industry could possess durable market power.

Falling average costs (on a product, not a firm, basis) over a broad range of output. Economies of scale over a wide range of output are typical of industries with “large fixed costs (most of which are sunk R&D expenditures) and low marginal costs.”⁸¹ New entrants may not be able to duplicate these economies of scale and therefore may not be able to constrain incumbent firms.⁸²

Demand-side economies of scale. “Economies of scale in consumption describe the situation in which the larger the firm’s output is, up to some point, the more valuable that output is to its customers.”⁸³ Examples include telephones and other interactive services, such as email and online auctions.⁸⁴ Computer programs also “tend to be more valuable the more people use them because training, support by information-technology personnel, and standardization of equipment and procedures are facilitated.”⁸⁵ The presence of demand-side

economies of scale can have a variety of implications for antitrust analysis, including that common standards typically are necessary to benefit from such economies.

Switching costs. In industries with demand-side economies of scale consumers may need to incur costs to switch from one competitor to another. Such switching costs may deter customers from moving from an incumbent to a new entrant and thus cause entrants to be an ineffective competitive constraint.⁸⁶

First-mover advantages. “There is often a substantial advantage to being the first in a high-tech industry to develop and introduce a new product or the first to gain a significant market presence.”⁸⁷ This advantage can arise, for instance, because the first to market can quickly take advantage of demand-side economies of scale or gain a head-start on moving down the learning curve for making the new product.⁸⁸ Whatever the source of a first-mover advantage in a particular industry, its effect is to encourage fierce competition by firms to be the first to market. Antitrust analysis should take into account such competitive incentives.

In sum, antitrust law has sufficient grounding in economic learning and flexibility to provide appropriate analyses of competitive issues in new economy industries. Developments in antitrust law in recent decades have made this possible. To tether antitrust law to the goal of consumer welfare, achieved through free-market competition, with an analysis based on economic learning, has benefited consumers and produced more consistency and predictability in antitrust doctrine.

Notes

¹ Prof. Carl Shapiro, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Shapiro Statement re New Economy].

² See *generally* HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 1–10 (2005) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*].

³ GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS* 105 (5th ed. 2004) [hereinafter GELLHORN, *ANTITRUST LAW AND ECONOMICS*].

⁴ William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 101, 138 [hereinafter Kovacic, *Intellectual DNA of Modern U.S. Competition Law*] (“A hallmark of the antitrust treatise authored by Professors Areeda and Turner is the recurring attention to institutional factors and the precept that antitrust rules should not outrun the capabilities of implementing institutions.”).

⁵ HOVENKAMP, *ANTITRUST ENTERPRISE*, at 36.

⁶ Kovacic, *Intellectual DNA of Modern U.S. Competition Law*, at 136.

⁷ See HOVENKAMP, *ANTITRUST ENTERPRISE*, at 2; GELLHORN, *ANTITRUST LAW AND ECONOMICS*, at 47 & n.14.

⁸ HOVENKAMP, *ANTITRUST ENTERPRISE*, at 1 (citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (per se unlawful for dealer to limit maximum price charged by its dealers); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (merger unlawful, in part because it would enable resulting firm to undersell its rivals);

FTC v. Procter & Gamble, 386 U.S. 568 (1967) (merger illegal for creating efficiencies its rivals could not match)).

⁹ See *Procter & Gamble*, 386 U.S. at 579.

¹⁰ See, e.g., HOVENKAMP, ANTITRUST ENTERPRISE, at 2 (“[I]n the 1960s and 1970s the Supreme Court went overboard in protecting small business from larger firms, often at the expense of consumers.”).

¹¹ See, e.g., *id.* (result “was a mélange of incoherent policies that confused competition with small business protection”).

¹² GELLHORN, ANTITRUST LAW AND ECONOMICS, at 105 (“During the 1960s, when the antitrust laws were applied expansively, real market divergences from the model of perfect competition were viewed suspiciously and often were subject to prosecution.”).

¹³ HOVENKAMP, ANTITRUST ENTERPRISE, at 2.

¹⁴ *Id.* at 37.

¹⁵ See GELLHORN, ANTITRUST LAW AND ECONOMICS, at 92–93 (quoting Harold Demsetz, *Two Systems of Belief about Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164 (Harvey J. Goldschmid et al. eds., 1974)).

¹⁶ HOVENKAMP, ANTITRUST ENTERPRISE, at 32.

¹⁷ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320). The Court had made this observation fifteen years earlier as well, but in that case had disallowed a merger that would produce a firm with a 5 percent market share, noting “Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.” *Brown Shoe*, 370 U.S. at 344. By contrast, “[i]n *Brunswick*, the Court studied the Janus-like features of *Brown Shoe* and ignored the face of business egalitarianism.” GELLHORN, ANTITRUST LAW AND ECONOMICS, at 47.

¹⁸ GELLHORN, ANTITRUST LAW AND ECONOMICS, at 45.

¹⁹ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978)); see GELLHORN, ANTITRUST LAW AND ECONOMICS, at 47. Debate continues over whether the Supreme Court implicitly adopted the goal of allocative efficiency or the goal of preventing wealth transfers as the standard by which consumer welfare should be measured. See Merger Enforcement Transcript at 112–15 (Rule) (Nov. 17, 2005). See generally Introduction of this Report, note 22.

²⁰ See GELLHORN, ANTITRUST LAW AND ECONOMICS, at 47.

²¹ See, e.g., *id.*

²² HOVENKAMP, ANTITRUST ENTERPRISE, at 1.

²³ See generally *id.* at 25–39.

²⁴ *Id.* at 32.

²⁵ For example, “[p]ost-Chicago scholars developed a fairly robust theory of ‘raising rivals’ costs,’ under which dominant firms or cartels adopt strategies that impose higher costs on rivals, thus creating a price umbrella for the strategizing firms.” *Id.* at 38.

²⁶ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977).

²⁷ *Id.* at 54–55.

²⁸ *Id.* (citation omitted).

²⁹ *Id.* at 55.

³⁰ *Id.* at 54–59.

³¹ *Id.* at 58–59.

³² GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 358 (2002) [hereinafter GAVIL, ANTITRUST LAW IN PERSPECTIVE].

- ³³ *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).
- ³⁴ *Id.* at 19–20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).
- ³⁵ *BMI*, 441 U.S. at 24.
- ³⁶ See, e.g., *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982).
- ³⁷ See *generally* GAVIL, *ANTITRUST LAW IN PERSPECTIVE*, at 1109.
- ³⁸ See, e.g., ROBERT P. MERGES & JOHN F. DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 1349 (3d ed. 2002) (“During the middle part of the twentieth century, the courts tended to associate patents with monopolies, and hence to view them as narrow exceptions to the nation’s antitrust laws. This view [was] especially prominent in the Supreme Court cases from the 1930s until the 1960s . . .”).
- ³⁹ See, e.g., *International Salt Co. v. United States*, 332 U.S. 392 (1947) (in tying context, court will presume market power from a patent), *overruled by* *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006).
- ⁴⁰ See *generally* Willard K. Tom & Joshua Newberg, *Antitrust and Intellectual Property: From Two Separate Spheres to Unified Field*, 66 *ANTITRUST L.J.* 167 (1997); HERBERT HOVENKAMP ET AL., *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* 115–117 (2002).
- ⁴¹ See Bruce B. Wilson, Deputy Ass’t Att’y Gen., Antitrust Div., Dep’t of Justice, Remarks Before Michigan State Bar Antitrust Law Section and Patent, Trademark and Copyright Law Section (Sept. 21, 1972), *reprinted in* 5 CCH Trade Reg. Rep. 50,146 (current comment transfer binder 1969–83) (DOJ official’s speech articulating what came to be called the “Nine No-Nos”).
- ⁴² Roger B. Andewelt, Chief, Intellectual Property Section, Antitrust Div., Dep’t of Justice, Basic Principles to Apply at the Patent-Antitrust Interface, Remarks Before Houston Patent Law Association, at 4–5 (Dec. 3, 1981).
- ⁴³ See Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 *ANTITRUST L.J.* 515, 517–24 (1981). Mr. Lipsky was then a Deputy Assistant Attorney General in the Antitrust Division of the DOJ.
- ⁴⁴ Dep’t of Justice & Federal Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property*, § 2.0 (1995) [hereinafter DOJ/FTC IP Guidelines].
- ⁴⁵ The DOJ/FTC IP Guidelines call for per se treatment in certain limited circumstances, but still make clear that the agencies use the rule of reason “[i]n the vast majority of cases.” *Id.* § 3.4.
- ⁴⁶⁰ 35 U.S.C. § 271(d)(5); see also *Independent Ink*, 126 S. Ct. at 1290.
- ⁴⁷ DOJ/FTC IP Guidelines, § 2.2.
- ⁴⁸ *Independent Ink*, 126 S. Ct. at 1292.
- ⁴⁹ *Id.* at 1284.
- ⁵⁰ POSNER, *ANTITRUST LAW*, at 256. Judge Posner finds more “troublesome” the institutional structure of antitrust enforcement. *Id.* The Commission addresses antitrust enforcement institutions in Chapter II of this Report.
- ⁵¹ Prof. Richard J. Gilbert, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Gilbert Statement].
- ⁵² See, e.g., M. Howard Morse, Statement at AMC New Economy Hearing, at 6 (Nov. 8, 2005) [hereinafter Morse Statement] (patents and antitrust are complementary, “as both are aimed at encouraging innovation, industry, and competition”) (citing *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990)).
- ⁵³ See, e.g., Gilbert Statement, at 4.
- ⁵⁴ See, e.g., Jonathan M. Jacobson, *Do We Need a ‘New Economy’ Exception for Antitrust Law?*, 16 *ANTITRUST*, Fall 2001, at 89–90.

⁵⁵ Shapiro Statement re New Economy, at 2–3.

⁵⁶ Morse Statement, at 5.

⁵⁷ See Shapiro Statement re New Economy, at 2; see also *id.* (endorsing this Commission’s description of new economy industries because it focuses on the economic characteristics of those industries).

⁵⁸ See *id.*

⁵⁹ See, e.g., Gilbert Statement, at 4 (“[D]ynamic competition to develop new products and to improve existing products [in innovation-driven industries] can have much greater impacts on consumer welfare than static price competition.”); Morse Statement, at 5 (“Everyone should understand that small increases in productivity from innovation dwarf even significant reductions in static efficiency over time.”) (citing F.M. SCHERER & D. ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 31, 613 (3d ed. 1990)); Shapiro Statement re New Economy, at 2 (“[A]t least over the medium to long term, the lion’s share of consumer benefits associated with competition in our most dynamic industries results from innovation.”).

⁶⁰ See Shapiro Statement re New Economy, at 2.

⁶¹ See Morse Statement, at 4 (noting that “such efficiencies often drive [merger] transactions in high-tech industries”). Conversely, because of innovation’s importance, “anticompetitive effects on innovation can have much greater impact than effects on price.” *Id.* at 5.

⁶² David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, at 25 (National Bureau of Economic Research, Working Paper 8268, May 2001) [hereinafter Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*].

⁶³ *United States v. General Dynamics Corp.*, 415 U.S. 486, 498, 502, 510–11 (1974).

⁶⁴ See Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*, at 11.

⁶⁵ Shapiro Statement re New Economy, at 3.

⁶⁶ *Id.* at 3–4.

⁶⁷ Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*, at 25.

⁶⁸ *Id.*

⁶⁹ See Shapiro Statement re New Economy, at 3–4.

⁷⁰ See Gilbert Statement, at 9–10; Shapiro Statement re New Economy, at 6–7.

⁷¹ See, e.g., Gilbert Statement, at 9–10; Morse Statement, at 7; Shapiro Statement re New Economy, at 7.

⁷² See, e.g., Gilbert Statement, at 9 (reporting an estimate that researching, developing, and testing a new drug costs \$800 million) (citing Joseph DiMasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151 (2003)).

⁷³ See Shapiro Statement re New Economy, at 7.

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ See Gilbert Statement, at 7.

⁷⁷ Morse Statement, at 6.

⁷⁸ Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*, at 20.

⁷⁹ *Id.* at 21.

⁸⁰ WILLIAM J. BAUMOL, *THE FREE-MARKET INNOVATION MACHINE: ANALYZING THE GROWTH MIRACLE OF CAPITALISM* 172 (2002) (discussing the frequency of entry and exit in new economy industries).

⁸¹ Gilbert Statement, at 4.

⁸² See *id.* at 4–5.

⁸³ POSNER, ANTITRUST LAW, at 247.

⁸⁴ *Id.*

⁸⁵ *Id.* at 248.

⁸⁶ See Gilbert Statement, at 5.

⁸⁷ Morse Statement, at 8.

⁸⁸ *Id.*

Chapter I.B

Substantive Merger Law

1. INTRODUCTION

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, prohibits mergers or acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly” in a relevant market.¹ Both the substance and the procedures of antitrust merger enforcement have changed significantly in recent decades. These changes are to some extent interrelated.

Before 1976, antitrust challenges typically occurred after a merger already had been consummated; such challenges sometimes took years to litigate. In cases where a court ultimately ruled the merger illegal and ordered the merged firm to divest the acquired assets, it was sometimes difficult to recreate a competitively viable firm—that is, to “unscramble the eggs”—and effectively restore lost competition.

Passage of the Hart-Scott-Rodino Antitrust Improvements Act in 1976 (HSR Act) changed this dynamic.² The HSR Act requires firms that propose mergers or acquisitions of a certain size to notify the antitrust agencies and to adhere to certain waiting periods before consummating the proposed transaction.³ The HSR Act enables the agencies to obtain documents and other information to assess whether to challenge the proposed transaction. Either the agencies can sue to block the entire transaction, or they can seek the divestiture of assets in order to resolve competitive concerns while allowing the overall transaction to proceed. In practice, merging companies most often consent to relief sought by the agencies in order to avoid time-consuming litigation that would delay closing the transaction and the realization of related efficiencies.

As a result, there have been fewer litigated merger cases interpreting application of the antitrust laws to mergers and acquisitions and greater reliance on agency enforcement guidelines and other guidance explaining how the agencies assess mergers and exercise their prosecutorial discretion. This development has made merger enforcement more predictable, due to the issuance of agency guidelines and other guidance and the fact that the enforcement agencies systematically review a greater number of transactions than was the case prior to enactment of the HSR Act. Such expanded review has led to the development of substantial expertise within the agencies. Agency guidelines have served as both a source of guidance to business and a mechanism through which advances in economic learning have been integrated into substantive merger analysis. At the same time, the paucity of litigated court cases has made the merger review process much more administrative in nature.

Over time, the antitrust agencies and courts have moved away from the stringent enforcement standards that prevailed during the 1950s and 1960s, when mergers resulting in a

merged firm's market share as small as 5 percent had sometimes been found unlawful.⁴ The agencies' promulgation of guidelines for merger analysis played an important role in this process. In 1968 Assistant Attorney General Donald Turner "used the first merger guidelines to bring rigor and transparency to the merger review process."⁵ In 1982, and again in 1984, Assistant Attorney General William Baxter further advanced merger analysis with new guidelines outlining specific issues that must be addressed to answer the critical question of whether a merger would tend to "create or enhance market power or . . . facilitate its exercise."⁶ The antitrust agencies have jointly updated these guidelines two more times: first in 1992, when the agencies revised the guidelines to clarify their analysis of competitive effects, and most recently in 1997, when they added a section specifically addressing efficiencies. The courts have played significant roles in interpreting and applying these guidelines.⁷

The Commission's review and study of current merger enforcement standards revealed a general consensus that the framework for analyzing mergers used by the antitrust agencies and the courts is basically sound. Most agree that current law, including as interpreted and applied under the agencies' merger guidelines, is sufficiently grounded in economic learning and has sufficient flexibility to analyze properly the competitive issues that can arise in industries in which innovation, intellectual property, and technological change are central features.

Nonetheless, room for improvement exists. The Commission has agreed on recommendations that the agencies give substantial weight to certain factors in merger analysis, particularly with respect to efficiencies related to innovation; that the agencies further study the bases for merger enforcement policy; and that the agencies increase the transparency of merger review through a variety of means. The Commission makes the following recommendations.

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.

3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*

3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.†

* Commissioner Kempf does not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Commissioner Garza joins this recommendation with qualifications.

4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.*
 - 4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.†
5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.
6. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.
7. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.
8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.
9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.

* Commissioner Delrahim does not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Commissioner Garza joins this recommendation with qualifications.

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- 10.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.
 - 10a.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.
 - 10b.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.
 - 11.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.
 - 11a.** The agencies should issue “closing statements,” when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies’ merger enforcement policy.
 - 11b.** The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.*
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* Commissioner Kempf does not join this recommendation.

11c. The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.*

11d. The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.†

2. BACKGROUND

Federal antitrust merger enforcement has evolved significantly since enactment of the Clayton Act in 1914. It has shifted in emphasis from a litigation-based system focused on judicial review of consummated deals to an administrative regime in which two federal agencies, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), review mergers above a certain size prior to consummation.⁸ In recent years, the DOJ/FTC Horizontal Merger Guidelines (Merger Guidelines or Guidelines) have described the analytical framework used by the agencies for merger enforcement and guided the agencies' enforcement approach.⁹

The Antitrust Division (under Assistant Attorney General Donald Turner) issued its first set of merger enforcement guidelines in 1968.¹⁰ The DOJ explained that its purpose in publishing the 1968 Merger Guidelines was to inform business, counsel, and others of "the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers."¹¹ The 1968 Merger Guidelines used concentration within the relevant market as a guidepost for whether enforcement action should be taken, setting thresholds by which merger challenges became more likely as market concentration and the market shares of the merging firms increased.¹²

In 1982 the DOJ issued a revised set of merger guidelines, under the leadership of Assistant Attorney General William Baxter.¹³ To measure market concentration, the 1982 Merger Guidelines introduced use of the Herfindahl-Hirschman Index (HHI) and established revised concentration thresholds, which are still in use today.¹⁴ More important, the 1982 Merger Guidelines expanded merger analysis beyond concentration thresholds to explain how mergers may raise competitive concerns and to include an assessment of additional factors in the markets of relevance to the merger.¹⁵

The 1982 Merger Guidelines explained that antitrust law seeks to prevent mergers that could increase the likelihood of collusion, either tacit or explicit, in a post-merger market.¹⁶

* Commissioners Carlton and Kempf do not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Thus, merger enforcement is one of the ways in which antitrust enforcers attempt to prevent tacit coordination in oligopolistic markets.¹⁷ Antitrust law also seeks to prevent mergers that would enhance market power by creating or strengthening a dominant firm, the 1982 Merger Guidelines explained.¹⁸

To ground the analytical framework of merger analysis more firmly, the 1982 Merger Guidelines set forth a methodology for assessing market definition based on the behavior that would be profitable post-merger for a hypothetical profit-maximizing monopolist.¹⁹ Market definition requires an assessment of substitutes to which customers could turn if the merged firm attempted to raise price. The 1982 Merger Guidelines also introduced the concept that entry by other firms into the relevant market might deter or counteract attempts by a merged firm to raise prices post-merger, thus negating a merger's potential anticompetitive effects.²⁰

Several factors, including ongoing economic research that questioned the extent to which market concentration was correlated with reduced competition, prompted these revisions to merger analysis.²¹ In 1984 the DOJ made modest revisions to update the 1982 Merger Guidelines with recent thinking and “to correct any misperception that the Merger Guidelines are a set of rigid mathematical formulas that ignore market realities, and rely solely on a static view of the marketplace.”²²

In 1992 the DOJ and the FTC jointly issued merger guidelines, the first time both agencies set forth a unified approach to merger analysis.²³ For market definition, the 1992 Merger Guidelines continued to ask whether a hypothetical monopolist could successfully impose a small but significant non-transitory increase in price.²⁴ The 1992 Merger Guidelines further deemphasized the HHI thresholds. Although mergers that would increase concentration by a certain amount in a highly concentrated market remained subject to a presumption of anticompetitive effects, the 1992 Merger Guidelines explained that “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger.”²⁵

Once past this starting point, the 1992 Merger Guidelines emphasized a need to explain how the proposed transaction could harm competition and which factors suggest the likelihood of such harm. The 1992 Merger Guidelines articulated more fully two mechanisms of anticompetitive effects: (1) coordinated effects, that is explicit or tacit collusion, and (2) unilateral effects resulting from the relaxation of competitive constraints on the combined firm due to the acquisition of a close competitor. For each mechanism, the Guidelines outlined how particular factors might be more or less conducive to a particular theory of anticompetitive effects.²⁶ In addition, the Guidelines refined the analysis of entry to focus on the potential entrants' need to sink costs in a relevant market as a key determinant of whether entry would be “timely, likely, and sufficient” to deter or counteract anticompetitive effects.²⁷

In 1997 the FTC and the DOJ revised the 1992 Merger Guidelines to elaborate on the treatment of merger-related efficiencies. The revisions recognized that the main benefit of mergers to the economy is their potential to achieve efficiencies.²⁸ The Guidelines explained that merging parties must show that the efficiencies resulting from the merger “would be sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in the market.”²⁹

Although the Merger Guidelines have not been altered since 1997, the FTC and the DOJ issued a Commentary on the Horizontal Merger Guidelines in 2006.³⁰ The Commentary provides further explication of the Merger Guidelines, including examples of how the agencies have applied them in particular matters. The Commentary does not change the standards of the Merger Guidelines, however. Rather, the antitrust agencies issued the Commentary “to provide greater transparency and foster deeper understanding regarding antitrust law enforcement.”³¹

3. RECOMMENDATIONS AND FINDINGS

A. Merger Policy in General

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.

3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*

3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.†

* Commissioner Kempf does not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Commissioner Garza joins this recommendation but notes that the Commission was unable to assess evidence sufficient to opine on the actual efficacy or effects of merger enforcement policy.

4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.*
- 4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.†
5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.

1. U.S. Merger Policy is Fundamentally Sound

The current merger policy of the United States is fundamentally sound. The testimony of numerous antitrust practitioners and economists and comments from a variety of interested parties show general consensus on this point. Commentators agree that merger policy has significantly improved since the 1950s and 1960s and, as a general matter, is on the right course. Accordingly, the Commission does not recommend any statutory change to Section 7 of the Clayton Act or any wholesale changes to merger policy overall.

Merger policy has seen significant improvements over the past twenty-five years. One witness reported that, during that period, “merger enforcement has become increasingly predictable, transparent, and analytically sound.”³² He also explained that merger policy has become stable and bipartisan, affording “a sense of gravity that previously was lacking.”³³ Changes since the early 1980s mark a significant improvement from the policies reflected in court cases of the 1950s and 1960s.³⁴ Several witnesses stated that U.S. merger enforcement policy is readily defensible³⁵ and that room for improvement exists only on the margins.³⁶

Commenters agreed that merger policy in the United States has benefited significantly from the introduction of the Merger Guidelines, along with subsequent revisions and refinements to them.³⁷ There is general consensus that the Merger Guidelines have acted as the

* Commissioner Delrahim does not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Commissioner Garza joins this recommendation with the proviso that current enforcement can be improved in the ways suggested in the Commission’s other recommendations.

“blueprint[] for the architecture” of merger analysis and, overall, provide a guide that “functions well.”³⁸ The Guidelines have had a significant influence on judicial development of merger law, which is reflected in their widespread acceptance by the courts as the relevant framework for analyzing merger cases.³⁹ Conversely, the courts have occasionally influenced how the agencies have revised the Guidelines.⁴⁰ The Guidelines have also provided useful guidance and transparency to the business community and antitrust bar.⁴¹ Finally, the Guidelines have helped to influence the development of merger policy by jurisdictions outside the United States.⁴²

To be sure, some disagree with the outcomes of particular merger cases. Different antitrust enforcers may interpret evidence differently and therefore reach different conclusions as to the likelihood of anticompetitive effects. Nonetheless, there does not appear to be a systematic bias toward either overenforcement or underenforcement.⁴³ The ongoing debate over merger policy is an important one. Overall, however, the Commission found no need to recommend changes to Section 7 of the Clayton Act or wholesale changes to merger policy in the United States.

2. U.S. Merger Policy is Sufficiently Flexible to Address Industries in Which Innovation, Intellectual Property, and Technological Change are Central Features

As discussed in Chapter I.A, the common-law development of antitrust doctrine has permitted the courts and the agencies to adapt the contours of the antitrust laws to new economic learning, changes in markets, shifting consumer and business behavior, and numerous other factors. Innovation has driven the U.S. economy since before the passage of the Sherman Act.⁴⁴ In some respects, the challenges for antitrust analysis presented by dynamic, innovation-driven industries today are analogous to those presented in past years.⁴⁵ Current merger policy has met this challenge. It is well grounded in economics and is sufficiently flexible to provide a sound competitive assessment in matters involving industries in which innovation, intellectual property, and technological change are central features.⁴⁶

As described above, merger analysis has moved away from structural presumptions, which presume increased concentration will likely lead to anticompetitive outcomes, toward a more complex analysis that predicts competitive effects using modern economic tools.⁴⁷ Furthermore, as explained below, current merger analysis requires an evaluation of procompetitive efficiencies that may result from transactions and an assessment of whether these efficiencies offset the potential anticompetitive effects of a merger. These changes have positioned U.S. merger policy so that it does not currently need substantial change to account for innovation, intellectual property, and technological change.

Merger law and policy—as it has developed through both agency guidelines and case law—has incorporated new or improved economic learning. Industries characterized by innovation, intellectual property, and technological change will continue to evolve, and economic learning will progress.⁴⁸ Guidelines and case law provide flexible vehicles through which antitrust

analysis can continue to develop. In contrast, efforts to adjust antitrust analysis through statutory change would likely prove difficult, and would require continual amendment or pose the risk of codifying economic learning at only one point in time.⁴⁹ For these reasons as well, the Commission does not recommend any changes to Section 7 of the Clayton Act.

3. U.S. Merger Policy Must Continue to Protect U.S. Consumers While Allowing Companies to Innovate and Compete Effectively

U.S. merger policy has served U.S. consumers well in recent years. By and large, it has done so without preventing companies from competing effectively and continuing to innovate.⁵⁰ The agencies should remain mindful of the importance of both objectives going forward to ensure that U.S. merger policy remains the leading paradigm for competition policy throughout the world.

B. Efficiencies and Innovation

- 6. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.**
- 7. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.**
- 8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.**
- 9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.**

1. *The Importance of Efficiencies*

Since the 1980s, the courts and the antitrust agencies have recognized that efficiencies resulting from a merger can improve consumer welfare and should be considered in the overall assessment of the merger's likely effects on competition.⁵¹ A merger can allow firms to realize efficiencies from the combination of two complementary companies. Such efficiencies can benefit firms by lowering their costs and can benefit consumers through lower prices, higher quality products, or entirely new products.

The DOJ and the FTC formally recognized the relevance of efficiencies to their evaluation of mergers in 1997, when they revised the Merger Guidelines to add a section describing the circumstances in which the agencies would consider the efficiencies that would result from a merger.⁵² The Guidelines now explicitly recognize that “the primary benefit of mergers to the economy is their potential to generate . . . efficiencies.”⁵³ As the agencies explain, “mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction.”⁵⁴ When a firm is able to lower its costs (or increase quality) consumers benefit from the merger.

The Guidelines generally require that the savings from efficiencies be “passed on” to consumers; that is, they must be “sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.”⁵⁵ This is because “[e]ven when efficiencies generated through merger enhance a firm’s ability to compete . . . a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive.”⁵⁶ Accordingly, the agencies take into account both the benefits that efficiencies would bring to consumers along with the anticompetitive effects a merger is predicted to have. Thus the FTC or the DOJ “will not challenge a merger . . . if cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.”⁵⁷

Overall, the Commission was presented with little evidence the agencies were routinely failing to take efficiencies into account. A number of witnesses and commenters argued that the agencies’ current approach to assessing efficiency claims works well and is appropriate.⁵⁸ The FTC and the DOJ readily acknowledge that they do and must, as part of any complete evaluation of a merger, take into account efficiencies that will result from the merger and the effect those efficiencies will have on a firm’s incentives to reduce output or increase prices.⁵⁹

In particular, there was little support for the argument that, as a general matter, the agencies impose too high a burden on the parties to demonstrate efficiencies offsetting competitive concerns raised by a merger. Witnesses and commenters generally agreed that the evidentiary burden imposed by the agencies on parties to demonstrate the likelihood and magnitude of asserted efficiencies is appropriate where other evidence indicates that the

merger would likely have anticompetitive effects.⁶⁰ Requiring merging companies to demonstrate efficiencies is also appropriate because the companies have the best access to information regarding the value and likelihood of achieving the efficiencies they assert.⁶¹

The explicit acknowledgment in the Merger Guidelines of the importance of efficiencies underscores the important role efficiencies play in both driving mergers and bringing lower cost, higher quality products to consumers.⁶² Of course, for a substantial majority of proposed mergers, efficiencies will not play a role in the agency's assessment, because market conditions will ensure that the merger will not have an anticompetitive effect. In such cases, any efficiencies can be fully realized by the companies. However, in cases where a merger may raise competitive concerns, a detailed assessment of the potential efficiencies the parties will realize may be necessary. The agencies should ensure that they give substantial weight to efficiencies in formulating merger enforcement policy and in evaluating specific transactions.

2. The Agencies Should Ensure that they Give Sufficient Credit to Certain Fixed-Cost Efficiencies

The agencies should account for the value of fixed-cost efficiencies in assessing the likely competitive effects of a merger.⁶³ As one commenter explained, “[s]ince all costs vary in the long run, reductions in capital expenses or other costs fixed in the short run should also be considered.”⁶⁴ Failure to take account of and give proper weight to such fixed costs in evaluating a merger could deprive consumers and the U.S. economy of significant benefits from a procompetitive merger.

The agencies currently place the greatest weight on efficiencies that will reduce prices to consumers in the short run.⁶⁵ Efficiencies that do not lower prices in the short run are given less weight.⁶⁶ Thus, for example, a merger that allows a company to reduce the cost of producing each widget by 10 percent (for example, through improved production line technology or streamlining of distribution) can quickly benefit consumers in the form of lower prices. Such efficiencies are typically fully credited by the agency (if substantiated). By comparison, reductions in total costs (including fixed costs)—such as through the elimination of redundant facilities or by improvement upon the rate and quality of innovation—have less (if any) effect on pricing in the short run. In the longer run, however, some (if not all) such efficiencies are also likely to benefit consumers in the form of lower prices or improved quality.⁶⁷

The Commission identified one type of fixed-cost efficiency in particular—those increasing innovation through research and development—to which the agencies may be giving insufficient credit. As one witness explained, “an increasing part of the economy is comprised of research-intensive products . . . such as computer chips, software, pharmaceuticals and media content [that] have very high fixed costs.”⁶⁸ Mergers generally benefit consumers by making innovation more likely or less costly in such industries, rather than by reducing (the generally very low) marginal costs.⁶⁹ Indeed, such innovation efficiencies

“often drive transactions in high-tech mergers.”⁷⁰ More generally, there is “broad agreement . . . that research and development is a major source of economic growth.”⁷¹ It is important to make sure that merger policy does not unduly inhibit that basis for growth.

Innovation efficiencies can result in a variety of ways. For example, a merger may make it easier to “combine complementary assets and know-how.”⁷² Alternatively, a merged company may be better able to share risks associated with research and development.⁷³ In some industries, such as pharmaceuticals, a merger can “increase the odds of successful commercialization of the product.”⁷⁴ In each of these instances, the efficiencies do not necessarily lower prices to consumers immediately, but have the potential to bring significant benefits to consumers through new, improved, or lower priced products in the longer run. If the agencies discount those benefits too greatly, they run the risk of preventing mergers that may have short-term anticompetitive effects but long-run procompetitive benefits to consumer welfare.⁷⁵

The enforcement policy of the FTC and the DOJ may give insufficient recognition to innovation efficiencies in some mergers in which they believe anticompetitive effects may result in the short term. For example, although the Merger Guidelines recognize that R&D efficiencies should be considered, they appear to view them with particular skepticism: “Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions.”⁷⁶ One witness testified that the FTC failed to give proper credit to innovation efficiencies in its evaluation of the merger his company was proposing.⁷⁷ More generally, the American Bar Association, Section of Antitrust Law observed that the agencies emphasize potential anticompetitive short-term price effects from a merger and pay insufficient attention to how a merger could increase the merged firm’s ability to produce better products and to innovate.⁷⁸

As the nation’s economy moves toward an increasing role for goods and services involving intellectual property—such as computer software, electronics, and biotechnology—it becomes even more important for U.S. consumers that the value of efficiencies and innovation that can result from mergers in such industries be realized where possible.⁷⁹ A failure by the agencies to take into account fully the benefit of such efficiencies in evaluating whether a merger will harm or benefit consumers could deprive consumers of significant benefits and value.⁸⁰ In addition, it “may end up limiting some firms’ ability to compete more effectively.”⁸¹ Although some witnesses stated that the agencies were not, in fact, hostile to innovation benefits cited by merging parties,⁸² on balance, the agencies may in some cases give insufficient credit or weight to such efficiencies. The agencies should ensure that they give substantial weight in evaluating a merger to evidence presented by the merging parties that demonstrates a merger will enhance consumer welfare through innovation and similar efficiencies.

To be sure, such efficiencies are often not easy to measure.⁸³ Moreover, the agencies may need to balance the value of future benefits that potentially will result from innovation against any current costs to consumers.⁸⁴ While analytical methods to assess a merger's likely anticompetitive effects are relatively well developed, methods for analyzing whether a merger will encourage innovation are far less advanced.⁸⁵ Nonetheless, the agencies should endeavor to weigh more heavily the potential for welfare-enhancing innovation that a merger will create.

3. The Antitrust Agencies Should be Flexible in Considering the Time Horizon for Entry

Innovation can give rise to dynamic change in markets. Such change may occur over a short or long period of time. For example, although computer software programs may be outdated within six months, approval of a new drug may take years. Under the Merger Guidelines, the possibility of dynamic change over a longer period of time is not clearly taken into account by their treatment of entry. The Guidelines provide that a merger is unlikely to harm competition where entry is sufficiently easy that market participants cannot, collectively or unilaterally, raise prices from pre-merger levels.⁸⁶ To meet this requirement, entry must be “timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.”⁸⁷ As a general matter, the FTC and the DOJ will consider timely “only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.”⁸⁸

The two-year time horizon may be inappropriately short in some cases. In particular, innovation may result in entry beyond the two-year horizon. The agencies should consider the potential for such entry in assessing the likely competitive effects of the merger.⁸⁹ Although it appears that the Guidelines provision represents an approximation, not a hard-and-fast rule,⁹⁰ the Commission recommends that the agencies increase their flexibility in this regard to ensure that innovation that will change competitive conditions more than two years in the future receives proper credit. This will help ensure that the agencies' analysis of competitive effects appropriately takes account of competitive dynamics in the markets at issue and that they will not seek to block mergers that, as a result of innovation, may not present a longer-term threat to competition and consumer welfare.

C. Further Study of Merger Policy

- 10.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.
- 10a.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.
- 10b.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.

While there is general consensus that the basic framework for current U.S. merger enforcement policy has improved markedly over the past forty years and appears to be fundamentally sound, there is limited empirical support for these conclusions. This shortfall in support allows for reasonable criticism both that merger policy is too lenient or too strict. Indeed, one recent, prominent study questioned whether merger policy has benefited consumers at all,⁹¹ while one commenter suggested that policy should be more aggressive.⁹²

The agencies should undertake further study of merger policy and its effects. The potential benefits of such study are substantial; empirical studies and the development of the economics of antitrust law have played a central role in the transformation of merger policy over the past forty years. Further research in this area would improve the empirical basis for merger policy and could improve understanding of the overall costs and benefits of that policy.⁹³

To be most useful, further study should focus on questions of particular importance to the evaluation and implementation of merger policy. While there are numerous potentially valuable avenues for research, the Commission identifies two areas in which further research would be especially desirable: (1) studies of the effects on competition of market concentration and other market characteristics; and (2) retrospective studies of the results of merger enforcement decisions.

1. Studies of the Effects of Concentration and Other Market Characteristics on Competition

Current U.S. merger enforcement policy is premised on assumptions about how concentration and other market characteristics (such as ease of entry) affect competition and

market power. Empirical evidence gives only limited support for these assumptions, however.⁹⁴ In particular, one of the central assumptions of current merger policy is that increased concentration in a relevant market potentially (but not necessarily) leads to a reduction in competition. This basic assumption is reflected in the Merger Guidelines, which use concentration and market-share thresholds as screens that indicate the need for further analysis of the proposed transaction.⁹⁵ Nonetheless, several observers have pointed out that there is limited economic knowledge about the levels of concentration at which market power emerges, increases substantially, or becomes problematic for competition.⁹⁶ Indeed, although a variety of studies suggest a relationship between concentration and market power, none of these studies, either alone or together, provide a good sense as to the level of concentration at which “antitrust should bite.”⁹⁷ Furthermore, understanding regarding the impact on competition of other market characteristics, such as the ease of entry, is also limited. Focused study to increase understanding of how these important characteristics of the competitive landscape affect a merger’s impact could improve the enforcement agencies’ understanding and ability to enforce the antitrust laws in a manner that maximizes benefits for U.S. consumers.

Increasing learning about the validity of the economic theories and assumptions that inform current merger policy, such as empirical study of the relationship between concentration and the probability of the exercise of market power, would be beneficial. To be sure, it can be difficult to obtain the necessary data, to differentiate the effects of concentration from other factors affecting operation of a market, or to draw conclusions about the effects of concentration that apply across diverse industries. For that reason, several witnesses advised that such studies would be unlikely to shed much light on merger policy.⁹⁸ However, greater understanding of these relationships is essential to the design and evaluation of merger policy, and similar advances in understanding have promoted substantial improvement in merger policy in the recent past.

2. Retrospective Studies of Merger Enforcement Decisions

The FTC and the DOJ should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy. Such retrospective studies would review enforcement decisions in a particular merger or for several mergers in a given industry. Such studies—both in markets in which mergers were allowed to proceed and in those in which mergers were blocked—will help the agencies to evaluate whether their previous decisions have incorrectly blocked mergers that would not have been anticompetitive or permitted mergers that were ultimately anticompetitive.⁹⁹ Such studies may also be informative about such things as what levels of concentration or market shares give rise to competitive issues and the effectiveness of entry.¹⁰⁰ More important, such studies may shed light on why a particular decision was later shown to be erroneous, thereby allowing the agencies to modify the models and approaches they use in conducting merger analysis.

3. The Agencies Should Consider “Outsourcing” Studies of Both Types

The agencies should consider whether much of the work for the studies can be more effectively done by outsourcing it to economists and researchers outside the agency. Such studies can require extensive work, and conducting them internally may distract the agencies from their principal mission of detecting and preventing anticompetitive conduct. In addition, outsourcing will help avoid the perception (and possible reality) that the results of such studies are biased toward justifying agency practice. Placing responsibility for conducting the study with economists and other consultants who are not closely connected with the agency largely avoids this problem.

D. Increased Transparency

11. The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.

“Transparency” can mean several things with respect to merger policy. The Commission uses it here to mean providing the public with information about both the decisions the agency makes and the methods or approaches that drive those decisions. Transparency promotes basic fairness to parties contemplating mergers by enabling them to predict the legal consequences of contemplated transactions. For example, a firm can determine whether a potential transaction will be likely to be cleared or blocked by the agencies. Moreover, when parties are able to predict in advance what types of transactions are likely to result in enforcement actions, they can eschew them in the first instance, thereby reducing the need for costly investigations and enforcement actions.¹⁰¹ Transparency thereby economizes on the agencies’ scarce merger enforcement resources, which can cover only a small number of transactions. Ultimately, the public’s confidence in the ability of the antitrust laws to promote competition relies upon transparent decision-making that can be predicted with some confidence in advance.

Both agencies have taken numerous steps in recent years to provide antitrust practitioners and the general public with information about their enforcement activities. To provide the public with a clear statement of the basic principles of enforcement policy, the agencies have issued, and periodically revised, the Merger Guidelines. In 2006 the agencies issued an extensive “commentary” on those Guidelines that includes various examples illustrating the principles in the Guidelines by describing their application to particular merger matters. The agencies also use various other vehicles—such as speeches, testimony, and reports—to explain their merger policy priorities. In addition, the agencies have issued several other guidelines for conduct, including regarding the licensing of intellectual property and regard-

ing joint conduct. Finally, the agencies provide information regarding their enforcement activity. The agencies routinely provide explanations of the enforcement actions they take, and, in a few instances, have provided some explanation of decisions not to take enforcement actions. Moreover, they also have recently begun to provide data on merger enforcement activities.

On the whole, agency policy statements, commentary, and data on enforcement activity supplement the current Merger Guidelines, and thereby provide informative guidance to merging parties and the public regarding current enforcement policy.* Nonetheless, the Commission believes that the agencies could further improve upon their efforts, including in four specific respects, described below: (1) increase the use of closing statements explaining decisions not to challenge transactions; (2) continue regular reporting of statistics regarding merger enforcement activity; (3) update the Merger Guidelines to explain how the agencies evaluate the potential impact of a merger on innovation; and (4) update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers. While the agencies have already taken some steps toward these recommendations, the Commission concludes that further efforts in these specific areas are of particular importance.

11a. The agencies should issue “closing statements,” when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies’ merger enforcement policy.

Both the DOJ and the FTC generally provide a statement of reasons as to why they are taking an enforcement action against a merger. If either agency seeks a preliminary injunction to block an allegedly anticompetitive merger, the complaint and subsequent pleadings will spell out the agency’s concerns with the proposed transaction. Similarly, when either the FTC or the DOJ enters into a consent decree with respect to a merger, it will provide a statement explaining the reasons why the agency sought relief and how the relief resolves its concerns that the merger would otherwise be anticompetitive.¹⁰²

The agencies often decide, after a thorough review of a proposed merger, not to seek any relief and to allow the merger to be completed. In the vast majority of cases, when either agency decides to close a merger investigation, it provides no explanation as to why it did not seek relief. In many of those investigations, the decision not to seek relief is non-controversial; over 95 percent of mergers that are notified to the FTC or the DOJ are determined not to pose competitive problems sufficient to warrant an extended investigation.¹⁰³ Nonetheless, in the instances when the FTC or the DOJ closes the investigation of a merg-

* Commissioner Kempf does not agree with this assessment.

er after an extended investigation, the public and antitrust bar may be left to speculate why the agency declined to seek relief.

Although the agencies are not required to explain why they decided not to challenge a merger, they have in recent years issued such explanations with respect to a limited number of transactions. For example, the FTC and the DOJ have issued explanations as to why they closed investigations without seeking relief in the cruise line, airline, media, and telecommunications industries.¹⁰⁴ This increased use of closing statements has benefited the merging parties, interested observers, and the agencies themselves, by reducing uncertainty, increasing predictability, and promoting voluntary business compliance.

Increased issuance of such statements would further benefit the public and businesses.¹⁰⁵ In particular, the agencies have tended to issue closing statements in higher-profile, “close” cases for which there is keen interest from the public in the outcome. The Commission recommends that the FTC and the DOJ expand issuance of closing statements to other matters in which they undertake significant reviews of a transaction (that is, issuance of a second request along with an extended, as opposed to “quick look,” investigation). Such statements need not be lengthy, and will necessarily omit details containing confidential business information.

The Commission does not recommend imposition of a requirement that the FTC and the DOJ explain why they decided not to seek relief, as advocated by some.¹⁰⁶ The agencies have already issued explanatory statements in many matters, and can be expected to continue to do so. Requiring a statement in all cases, however, could place burdens on the agencies and might present problems with respect to the confidentiality that the HSR Act provides to the merging parties and third parties who provide information to the agencies.¹⁰⁷ Leaving the publication of such statements to the discretion of the agencies leaves them free not to issue statements where the burden of doing so might be substantial. Accordingly, the Commission believes that continued encouragement of expanded efforts to issue closing statements is sufficient to improve agency transparency in this regard.

11b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.*

The DOJ and the FTC have recently undertaken several efforts to complement their statements on merger enforcement policy with statistical information concerning their actual enforcement activity. In 2003 the FTC and the DOJ published a report summarizing data on market structure for the horizontal mergers in which they had sought relief during Fiscal Years (FY) 1999–2003.¹⁰⁸ During 2004 the Federal Trade Commission published a report containing similar (and some additional) data on nearly all of the mergers it had investigated through the issuance of a second request, covering FY1996–2003.¹⁰⁹ In January 2007 the FTC updated this report with data through the end of FY2005.¹¹⁰

The FTC and the DOJ should continue to conduct, and make available to the public, periodic reviews of data and other statistics regarding enforcement activity. While general statements of policy provide useful guidance to business, data on actual enforcement actions provide particularly valuable insights into how the agencies actually apply the relevant policies. In combination with statements about individual cases, systematically collected data about enforcement practices—released on a regular (for example, a biennial or triennial) basis—can provide additional valuable transparency regarding agency enforcement practices.¹¹¹ Such data collection and publication would be most useful if it focuses on the key considerations that govern whether the agency takes an enforcement action.¹¹² Among other things, it will help supplement the Guidelines’ information on the concentration levels used as screens and information on the levels of concentration that actually draw challenges.

The Commission’s recommendation contemplates that the agencies will regularly engage in careful internal reviews of data regarding enforcement activity. However, not all such reviews need be released publicly. Rather, more frequent internal reviews could form the basis

* Commissioner Kempf does not join this recommendation.

for less frequent, but regular public reports. Keeping the reviews internal in most cases will permit the agencies to focus resources on broadening their data analysis to determine whether there are new trends in their enforcement practices, rather than devoting energy to preparing frequent reports for public review. In addition, it will permit the agencies to focus their public releases on the data and analysis that are most likely to improve public understanding of the key variables driving agency enforcement practice.

Finally, the Commission is concerned that current efforts to develop such data may be hindered by differences in the data collection and retention policies followed by each agency. The ability of the agencies to discern trends and provide meaningful information to the public, particularly in a form that permits useful comparisons between the approach each agency takes, requires consistency in the data and other information retained. As part of undertaking studies of this type, the agencies will inevitably identify ways in which they retain data and other information differently. The Commission encourages the agencies to undertake efforts to adopt a common approach to and standards for retention of data and other information about their enforcement activities.¹¹³

11c. The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.*

The ability to increase innovation is a significant reason for some mergers, as explained above. However, the current Merger Guidelines offer little explanation as to how the agencies will analyze the claims of parties that a merger will enhance their ability to innovate and how the agencies will balance a predicted increase in innovation with potential anticompetitive effects from the merger. Indeed, the only mention of innovation is in a passing reference in a footnote.¹¹⁴ The agencies have provided limited guidance on these issues through actions in individual matters, albeit in large part because the issue is not presented squarely in many investigations.

The agencies should update the Merger Guidelines to provide more extensive discussion regarding how they evaluate the competitive effects of a merger on innovation. As explained above, innovation is extremely important to economic welfare, and it is important for the agencies to articulate clearly how they analyze the effects of a merger on innovation.¹¹⁵ The Commission recognizes that there remains a need for additional learning regarding innovation.¹¹⁶ However, it believes that the agencies have sufficiently considered the issues involved to produce useful guidelines in this area.

* Commissioners Carlton and Kempf do not join this recommendation.

11d. The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.*

Horizontal mergers involve a merger between two companies that generally compete with each other to sell products in the same markets. Vertical (or non-horizontal) mergers, in comparison, occur between two companies in a distribution chain, where one company sells an input to the second company's business in a "vertical" relationship. The analysis of each type of merger differs substantially (mergers may present both horizontal and vertical "issues"). ("Conglomerate" mergers, which are neither horizontal nor vertical, generally do not raise antitrust issues.)

The 1982 Merger Guidelines contained a section addressing non-horizontal mergers, including vertical mergers and mergers raising potential competition concerns.¹¹⁷ These provisions were also included in the 1984 Merger Guidelines. However, subsequent Guidelines revisions in 1992 and 1997 did not include the non-horizontal mergers section, although the agencies did not formally abandon that part of the 1984 Guidelines.¹¹⁸ Significant thinking regarding vertical mergers has taken place since then, but the Guidelines have not been updated or separate guidelines issued to address non-horizontal mergers.

The existing Merger Guidelines have brought significant transparency to the business community and antitrust bar as to how the agencies evaluate horizontal mergers. Businesses and antitrust practitioners would benefit greatly from a similar statement of how the agencies assess the competitive effects of vertical mergers.¹¹⁹ While the issues are challenging, providing an explanation of how the agencies undertake analysis in non-horizontal mergers would supply beneficial transparency.

* Commissioner Kempf does not join this recommendation.

Notes

- ¹ 15 U.S.C. § 18. The Act contains several additional paragraphs of extending and limiting coverage. See *id.*
- ² 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).
- ³ See *generally* Chapter II.B of this Report regarding the Hart-Scott-Rodino Act pre-merger review process.
- ⁴ See AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MONOGRAPH No. 12, HORIZONTAL MERGERS: LAW AND POLICY 37–38 (1986) [hereinafter ABA, HORIZONTAL MERGERS] (citing *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (combined shares of 4.49 percent); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (combined shares of 7.5 percent)). One Supreme Court Justice concluded from this string of cases that the “sole consistency . . . is that . . . the Government always wins.” *Von's*, 384 U.S. at 301 (Stewart, J., dissenting).
- ⁵ ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 421 (5th ed. 2004) [hereinafter GELLHORN, ANTITRUST LAW AND ECONOMICS] (citing Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice—In Perspective* (June 10, 2002), available at <http://www.usdoj.gov/atr/hmerger/11257.htm>).
- ⁶ Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, § 0.1 (1992, revised 1997) [hereinafter DOJ/FTC Horizontal Merger Guidelines] (“The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”). Unless otherwise specified or clear from the context, all citations to the DOJ/FTC Horizontal Merger Guidelines are to the Horizontal Merger Guidelines, as revised in 1997 and currently in effect.
- ⁷ See *generally* GELLHORN, ANTITRUST LAW AND ECONOMICS, at 453–64.
- ⁸ A description of the procedural aspects of this pre-merger review, including the size-of-transaction threshold, appears in Chapter II.B of this Report regarding the HSR Act.

The FTC does not have jurisdiction to review mergers of certain common carriers, certain banks and financial institutions, and certain entities in the meatpacking business. See 15 U.S.C. § 45(a)(2). In addition, several regulatory agencies have principal or exclusive authority to review mergers in the industries they regulate. See, e.g., 12 U.S.C. § 1828(c) (banks subject to Comptroller of the Currency, Federal Reserve Board of Governors, FDIC, or the Office of Thrift Savings Director); 47 U.S.C. §§ 214, 310(b) (FCC authority to review license transfers incident to mergers); 49 U.S.C. § 11321(a) (Surface Transportation Board's exclusive jurisdiction over rail mergers).
- ⁹ See *generally* DOJ/FTC Horizontal Merger Guidelines.
- ¹⁰ Dep't of Justice, Merger Guidelines (1968), *reprinted in* ABA, HORIZONTAL MERGERS, at 264–76 [hereinafter 1968 DOJ Merger Guidelines]. The FTC neither participated nor joined in the issuance of these Guidelines. *Id.* at Introduction, ¶ 1 (explaining that “these Guidelines are announced solely as a statement of current Department [of Justice] policy”). See *generally* Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 ANTITRUST L.J. 1039 (2005) (contrasting the 1968 Guidelines (as well as subsequent guidelines and FTC statements) with prior and contemporaneous industry-specific guidelines promulgated by the FTC).
- ¹¹ 1968 DOJ Merger Guidelines, at Purpose, ¶ 1.
- ¹² See *id.* § 1, ¶¶ 4–6. The 1968 DOJ Merger Guidelines used the four-firm concentration ratio, which is the sum of the market shares (as a percentage) of the four largest firms in the relevant market, in determining whether to challenge a merger. *Id.* § 1, ¶¶ 5–6.
- ¹³ Dep't of Justice, Merger Guidelines (1982), *reprinted in* ABA, HORIZONTAL MERGERS, at 277–98 [hereinafter 1982 DOJ Merger Guidelines].
- ¹⁴ 1982 DOJ Merger Guidelines, pt. III.A.

¹⁵ *Id.* pt. III.

¹⁶ *Id.* pt. III.C.

¹⁷ See, e.g., GELLHORN, ANTITRUST LAW AND ECONOMICS, at 410.

¹⁸ 1982 DOJ Merger Guidelines, pt. III.

¹⁹ *Id.* pt. II.A.

²⁰ *Id.* pt. III.B.

²¹ ABA, HORIZONTAL MERGERS, at 45 (“[O]ngoing economics research continued to cast doubt on the strength of inferences that could be drawn from concentration data.”).

²² Dep’t of Justice, Statement to Accompany Release of 1984 Merger Guidelines (June 14, 1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103. The 1984 revisions continued to cover non-horizontal mergers of various types, including vertical mergers and those raising potential competition issues. AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 20 (2d ed. 2004) [hereinafter ABA, MERGERS AND ACQUISITIONS]. Although not much used, the non-horizontal portions have not been superseded. *Id.*

²³ Dep’t of Justice & Federal Trade Comm’n, Horizontal Merger Guidelines (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 DOJ/FTC Horizontal Merger Guidelines].

²⁴ *Id.* § 1.11.

²⁵ *Id.* § 2.0. *But see* GELLHORN, ANTITRUST LAW AND ECONOMICS, at 406 (“On the other hand, concentration can matter: ‘In cross-section comparisons involving markets in the same industry, seller concentration is positively related to the level of price.’”) (quoting Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951, 988 (Richard Schmalensee & Robert D. Willig eds., 1989) (stylized fact 5.1)); *id.* (citing Paul A. Pautler, Evidence on Mergers and Acquisitions, 48 ANTITRUST BULL. 119, 207 (2003) (“[S]everal studies of differing industries using price to measure performance suggest that increasing concentration may indeed lead to higher prices.”)).

²⁶ See 1992 DOJ/FTC Horizontal Merger Guidelines, § 2.

²⁷ *Id.* § 3.

²⁸ DOJ/FTC Horizontal Merger Guidelines, § 4.

²⁹ *Id.*

³⁰ Dep’t of Justice & Federal Trade Comm’n, Commentary on the Horizontal Merger Guidelines (2006).

³¹ *Id.* at v. (Foreword).

³² Merger Enforcement Transcript at 26 (Baer) (Nov. 17, 2005); William J. Baer, Statement at AMC Merger Enforcement Hearing, at 14 (Nov. 17, 2005) [hereinafter Baer Statement] (“Merger enforcement is more predictable, transparent and analytically sound than ever before.”); Merger Enforcement Trans. at 16 (Rill) (opining that “the current merger enforcement regime [is] on the right track”).

³³ Baer Statement, at 5–6 (citing similarities in policies pursued by Pitofsky and Muris); see also Merger Enforcement Trans. at 46–47 (Scheffman) (policy is bipartisan); Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 107 (2002).

³⁴ David T. Scheffman, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) [hereinafter Scheffman Statement] (“There are few if any knowledgeable people that would defend the pre-1982 merger enforcement policy in the U.S.”); Economists’ Roundtable on Merger Enforcement Transcript at 29 (Bresnahan) (Jan. 19, 2006) (there is “nothing as remotely troubling about merger review today as there was in the early 1980s.”).

- ³⁵ Economists' Roundtable Trans. at 107–08 (White, Rubinfeld, Reiss, Kaplan, Bresnahan); see also Statement of Prof. Robert D. Willig, at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005) [hereinafter Willig statement]; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Horizontal Merger Guidelines, at 1 (Nov. 10, 2005) [hereinafter ABA Comments re Guidelines] (opining that, “generally speaking, federal merger policy has been effective without unduly limiting the ability of firms to achieve efficiencies and expand internationally” while noting “room for improvement”); Economists' Roundtable Trans. at 10–11 (Rubinfeld) (“My sense is that the merger laws, the Clayton and FTC Acts, really work well and that the level of enforcement has generally been good.”).
- ³⁶ Merger Enforcement Trans. at 26 (Baer) (stating that “the need for changes, really are at the margins”); Baer Statement, at 14 (cautioning about the effect of uncertainty resulting from change); James F. Rill, Statement at AMC Merger Enforcement Hearing, at 3 (Nov. 17, 2005) [hereinafter Rill Statement] (while there have been some critical observations with “some kernel of validity” in recent years, “they are marginal criticisms that misjudge the flexibility of the *Merger Guidelines* to adapt”).
- ³⁷ Rill Statement, at 2 (“[T]he 1982 *Merger Guidelines* were a fundamental turning point in merger enforcement.”); Baer Statement, at 2 (“Today’s approach to merger enforcement largely dates to the adoption of the 1982 *Merger Guidelines*.”); Scheffman Statement, at 2 (merger enforcement policy has continued to improve since 1982 from the perspective of both economic efficiency and consumer welfare).
- ³⁸ Willig Statement, at 2; see also Merger Enforcement Trans. at 22 (Baer) (commending agencies for achieving “better internal discipline about how [they] look at a merger”); *id.* at 23 (Baer) (the system “basically works well”; quarrels focus on particular decisions).
- ³⁹ Rill Statement, at 3–5 (citing cases); Baer Statement, at 6–8; Merger Enforcement Trans. at 77–78 (Baer) (although twenty years ago there was a “tremendous divergence” between courts relying on 1960s precedents and agency enforcement practice, courts have since then largely adopted the Guidelines’ approach); *id.* at 17–18 (Rill) (noting improvement in U.S. courts and internationally); see also *id.* at 80 (Scheffman) (Guidelines provide judges with a “roadmap”); *id.* at 81–82 (Willig) (it is a slow process, but judges appear to be making “some pretty good decisions” on market definition) (citing *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004)).
- ⁴⁰ For example, after losing a series of merger challenges because courts found that easy entry would deter any anticompetitive effects, the agencies adopted a more extensive entry provision in their next revisions to the Guidelines. This section set forth what the agencies believe is required for entry to be “timely, likely, and sufficient to deter or counteract anticompetitive effects.” DOJ/FTC Horizontal Merger Guidelines, § 0.2. See generally *id.* § 3. So far, courts appear to have accepted this change. See generally GELLHORN, ANTITRUST LAW AND ECONOMICS, at 456–57.
- ⁴¹ See, e.g., ABA Comments re Guidelines, at 1 (the Guidelines “have stood the test of time and provide valuable guidance to the bar and business community”); Merger Enforcement Trans. at 22–23 (Baer).
- ⁴² Rill Statement, at 4–5 (citing the development of the Canadian and E.U. guidelines); Baer Statement, at 8 (focusing on the acceptance by the European Union and other jurisdictions of a substantial lessening of competition standard for merger enforcement).
- ⁴³ See Merger Enforcement Trans. at 39 (Willig) (“I don’t see systematic errors” in merger enforcement); *id.* at 38 (Rill) (“I think the error rate is low.”). But see American Antitrust Institute, Public Comments Submitted to AMC Regarding Merger Enforcement, at 2 (July 15, 2005) [hereinafter AAI Comments re Merger Enforcement] (“It appears that enforcement policy has evolved to the point where 2 to 1 or 3 to 2 mergers are the only ones that the agencies will regularly consider dangerous to competition.”).

The fact that the agencies sometimes lose in court does not necessarily mean that they are over-enforcing. See Economists' Roundtable Trans. at 11 (Rubinfeld) (“If the agencies are not out there aggressively pursuing mergers that they think are anticompetitive because they’re afraid of losing a case, we’re going to be having under-enforcement.”).

- ⁴⁴ Prof. Carl Shapiro, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Shapiro Statement re New Economy]; M. Howard Morse, Statement at AMC New Economy Hearing, at 5 (Nov. 8, 2005) [hereinafter Morse Statement].
- ⁴⁵ See, e.g., Jonathan M. Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, 16 ANTITRUST, Fall 2001, at 89, 89–90.
- ⁴⁶ See Willig Statement, at 2 (“[T]he standards for merger enforcement have appropriately adapted to major changes in the economy and in our capabilities and methodologies for analyzing competition.”); see also New Economy Transcript at 6–7 (O’Connell) (Nov. 8, 2005) (stating that antitrust laws “are flexible enough . . . to work in all industries, including those that are constantly evolving through the introduction of new technologies. . . . This is a flexible fact-based analysis that’s supported by sound economic principles that don’t change from industry to industry, and it enables us to deal with industries that experience fast-paced changes while serving the primary goal of protecting competition in rapidly evolving markets.”); see also Prof. Richard J. Gilbert, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Gilbert Statement] (“[A]dvocates of an antitrust exemption for the new economy represent another special interest group”); New Economy Trans. at 20 (Morse) (“[T]he broad language of Sherman and Clayton Acts are sufficiently flexible to take innovation concerns into account.”); Shapiro Statement, at 1–2.
- ⁴⁷ See Part 2 of this Section; see, e.g., Deborah Platt Majoras, Reforms to the Merger Review Process, at 6 (Feb. 16, 2006), available at www.ftc.gov/os/2006/02/mergerreviewprocess.pdf (“[S]tandards for reviewing transactions have changed substantially since the passage of the HSR Act, such that today the agencies rely less on readily apparent structural indicators, such as market shares, and more on detailed and direct market analyses.”); Susan A. Creighton, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) (emphasizing the impact of “increasing sophistication of substantive merger analysis,” “rigorous [judicial] standards,” 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 re Merger Enforcement] (“US 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.”); Mark D. Whitener, Statement at AMC Merger Enforcement Hearing, at 6 (Nov. 17, 2005) (agencies and courts “rely more heavily on econometric analysis of business data,” and companies in turn are able to collect more data); Shapiro Statement re New Economy, at 4 (“Gone are the days when the government could rely heavily on a static measure of market shares to challenge a merger in a dynamic industry. Modern merger analysis is far from static.”); Baer Statement, at 4 (“Market concentration and the market shares of the merging parties correlate with the likelihood of investigation but do not alone dictate enforcement decisions.”); Morse Statement, at 3.
- ⁴⁸ See Willig Statement, at 2 (“[E]conomic understanding has continued to deepen and be guided in new directions by both the changes in the economy and by continuing progress of productive thinkers in academe, government, and antitrust practice.”).
- ⁴⁹ See Shapiro Statement re New Economy, at 2 (“Technology changes. Economic laws do not. . . . [T]he Commission should be wary of proposals to modify the antitrust laws, or their enforcement, based on claims that we are living in a ‘New Economy.’”) (internal quotations omitted); Morse Statement, at 5 (“Antitrust law is sufficiently flexible to take innovation concerns into account, and today’s theories, which may be replaced over time, need not be codified into the statute.”); see also Merger Enforcement Trans. at 21 (Rill) (“please, no” to the idea of “legislation in the merger area”; things are working well).
- ⁵⁰ See Part 3.B.2 of this Section (discussing the Commission’s recommendations on ensuring appropriate weight is given to increased innovation that may result from a merger).
- ⁵¹ See, e.g., *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054–55 (8th Cir. 1999); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720–22 (D.C. Cir. 2001); *United States v. Carilion Health Sys.*, 707 F. Supp. 840, 849 (W.D. Va.) (denying preliminary injunction, in part based on finding that the merger would help the parties achieve economies), *aff’d mem.*, 892 F.2d 1042 (4th Cir. 1989); *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 53 (D.D.C.) (granting preliminary injunction in part based on finding that “defendants’ con-

tention as to realization of economies is, at this preliminary stage of review, the more persuasive”), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988); see also William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 214 (2003) [hereinafter Kolasky & Dick, *The Merger Guidelines and the Integration of Efficiencies*] (“parties began increasingly in the late 1970s and early 1980s to include efficiencies arguments in presentations to the agencies in merger investigations” with some success). See generally AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 360–63 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS].

⁵² DOJ/FTC Horizontal Merger Guidelines, § 4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* The Guidelines provide that the agencies may also take into consideration efficiencies that do not have a “short-term, direct effect on prices in the relevant market.” *Id.* § 4 n.37. The Guidelines call for giving such savings less weight because they are “less proximate and more difficult to predict.” *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* § 4 (footnote omitted)

⁵⁸ See, e.g., Prof. Jonathan Baker, Statement at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005); Merger Enforcement Trans. at 120 (Baker) (“[T]here’s no serious problem involving efficiencies in merger analysis that would call for intervention by your Commission, and . . . in particular, there’s no need to recommend any legislation to address anything concerning efficiencies.”); George S. Cary, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2006) [hereinafter Cary Statement] (“The Agencies, by and large, have taken appropriate account of efficiencies in deciding whether to challenge mergers, and the courts have done quite well in evaluating efficiency arguments in litigation.”); Merger Enforcement Trans. at 116 (Cary) (“[A]fter eight years of seeing the Guidelines in action . . . it’s my view that the basic trade-offs made in the Guidelines were right. . . . the process of actually doing the efficiency analysis that is set forth in the Guidelines is more manageable and more administrable than one might have thought going into the process of creating the Guidelines’ analysis in the first place.”); Baer Statement, at 12 (“The 1997 amendments to the Merger Guidelines in my view handle efficiencies appropriately.”) (footnote omitted); Rill Statement, at 14–16 (the Merger Guidelines provide a proper approach to analyzing efficiencies); see also Kolasky & Dick, *The Merger Guidelines and the Integration of Efficiencies*, at 207–10.

Others believe the agencies should give more credit to efficiencies. See Charles F. (Rick) Rule, Statement at AMC Merger Enforcement Hearing, at 13 (Nov. 17, 2005) [hereinafter Rule Statement re Merger Enforcement] (“To the extent that merger enforcement continues to focus exclusively on price effects (and reductions in consumer surplus) and ignores the way in which increases in productive efficiency benefit consumers as whole even when such increases generate producer surplus, the thresholds for identifying anticompetitive mergers are likely to be too low and the explicit *and* implicit treatment of productive efficiencies is likely to be too limited.”); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Efficiencies, at 1 (Nov. 10, 2005) [hereinafter ABA Comments re Efficiencies] (stating that the 1997 revisions to the Merger Guidelines “clarified and improved the [agencies’] treatment of efficiencies in merger review,” while suggesting improvements in the treatment of efficiencies that result in “substantial reductions in fixed costs” or “development of new products”).

⁵⁹ Kenneth Heyer, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) [hereinafter Heyer Statement] (“[T]he Merger Guidelines underscore the central role of efficiencies in the evaluation of the likely competitive effects of proposed mergers. . . . There is simply no way to evaluate whether a merger will give the merged firm the ability and incentive to raise prices, either unilaterally or in coordination with other firms, without examining the efficiencies a merger may produce.”); see Michael A. Salinger, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) [hereinafter Salinger Statement] (“As the merger guidelines have developed through their various iterations, efficiencies have moved, in

part, from a possible ‘defense’ to part of an integrated analysis of competitive effects.”); Scheffman Statement, at 10 (suggesting that standard of proof required by agencies in efficiency analysis is “sometimes unrealistic”).

⁶⁰ See, e.g., Rill Statement, at 14 (“The Merger Guidelines do not preclude recognition of longer-term cost savings that are demonstrable and merger specific.”); see also Merger Enforcement Trans. at 107 (Heyer) (“We actually need some evidence to support the fact that there may be efficiencies from what might otherwise be a troublesome merger . . .”); Salinger Statement, at 4 (“[W]e cannot conclude that a merger will generate efficiencies simply because the parties say it is so. Mere assertion is not proof or even, by itself, supporting evidence.”). *But see* Merger Enforcement Trans. at 84–85 (Scheffman) (efficiencies claims are “speculative,” but so are predictions of anticompetitive effects).

⁶¹ Cary Statement, at 8–9 (“Requiring the party with greater access to information to come forward with evidence of a proposition that is helpful to its position is not at all unusual in antitrust cases generally or merger cases particularly.”); see Heyer Statement, at 4 (“[T]he information needed to make an informed and reasoned judgment about such claims is almost always uniquely in the hands of the merging parties. We cannot verify efficiency claims without their cooperation.”).

⁶² Some assert that enforcement could be more aggressive without limiting merger-related efficiency gains. See AAI Comments re Merger Enforcement, at 3, 6–7 (citing economic literature suggesting many mergers do not increase market value or ultimately provide efficiency gains); *id.* at app. 19–20 (Statement of AAI on Horizontal Mergers and the Role of Concentration in the Merger Guidelines); F.M. Scherer, Public Comments Submitted to AMC, at 1–3 (Mar. 1, 2006); see also Economists’ Roundtable Trans. at 72 (Rubinfeld) (opining that many mergers reviewed by the DOJ during his tenure as the Economics Deputy were bad for the company but pursued due to “the stupidity or the egos of the CEOs of the two companies”); Charles D. Weller, Public Comments Submitted to AMC Regarding Merger Enforcement, at 2–3 (July 16, 2005) (arguing that most mergers are not successful).

Others argue that enforcement could be less aggressive by pointing to economic literature suggesting few mergers are undertaken to enhance market power, and rather are generally driven by efficiencies. See Economists’ Roundtable Trans. at 22–28 (Kaplan); Prof. Steven N. Kaplan, Statement at AMC Economists’ Roundtable on Merger Enforcement, at 13–15 (Jan. 19, 2006) (economics literature, based on a number of stock-market “event” studies on mergers, suggests that mergers seldom increase market power and, on average, increase the total economic value of the parties).

⁶³ Rill Statement, at 14 (“[A]n arbitrary exclusion of fixed costs from cognizable efficiencies is unwarranted because savings in fixed costs may affect competition and have an ultimate downward effect on price.”) (quoting FEDERAL TRADE COMM’N STAFF REPORT, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE, ch. 2, at 34; Rule Statement re Merger Enforcement, at 13 (“Consumer welfare benefits from fixed cost savings just as much as variable savings.”); Merger Enforcement Trans. at 86 (Scheffman) (courts should consider fixed-cost efficiencies and “things that fall into this pass-through trap”); IBA Comments re Merger Enforcement, at 47–48 (“For example, industries with significant R&D investments may have pricing unrelated to marginal cost, but rather geared towards recouping large investments in fixed costs. Large fixed cost efficiencies in such industries can directly affect price and should be given greater consideration where appropriate.”); ABA Comments re Efficiencies, at 6 (“[W]here fixed cost savings in a merger have the potential to lead to lower prices or will lead to reduced allocations of direct, shared or common fixed costs that are incorporated in the economic justifications underlying such investment decisions, fixed cost savings should be accorded specific credit in evaluating the benefits of the proposed merger or acquisition.”).

⁶⁴ AAI Comments re Merger Enforcement, at 8–9 (footnotes omitted). *But see* Merger Enforcement Trans. at 110 (Salinger) (claims of overhead savings are often properly rejected, not because they are fixed costs (which they are not), but because overhead costs tend to bear the same ratio to total expenses for both large and small companies, meaning a merger will not likely create savings in such costs); see also *id.* at 128 (Salinger) (“[O]n the pass-through, we make a distinction between fixed-cost savings and marginal-cost savings, because we operate under a consumer welfare standard.”).

⁶⁵ DOJ/FTC Horizontal Merger Guidelines, § 4 & n.37.

⁶⁶ *Id.* § 4 n.37. The Guidelines do not rule out taking account of longer-run efficiencies; ordinarily, however, “the result of [the Agency’s] analysis over the short term will determine the Agency’s enforcement decision in most cases. The Agency also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market.” *Id.*

⁶⁷ Over the longer run, costs that are at one time fixed (or sunk) become variable. Thus, savings in such costs could lower prices. See, e.g., William J. Kolasky, *The Role of Economics in Merger Enforcement: Efficiencies and Market Definition under Conditions of Price Discrimination*, Presented at Charles River Associates Conference: Current Topics in Merger & Antitrust Enforcement, at 10 (Dec. 11, 2002) (“[F]ixed cost savings matter. . . . First, which costs are variable depends in part on how long our time horizon is. With a longer horizon, costs that might otherwise appear fixed may indeed impact marginal pricing decisions.”); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 55 (2007) [hereinafter Katz & Shelanski, *Mergers and Innovation*] (“[I]t is important to remember that, over a long enough time horizon, everything is variable.”).

⁶⁸ Cary Statement, at 12; see Prof. Daniel L. Rubinfeld, Statement at AMC Economists’ Roundtable on Merger Enforcement, at 4 (Jan. 19, 2006) [hereinafter Rubinfeld Statement] (“[M]any firms have relatively high price-cost margins, yet little or no market power in the antitrust sense. This is particularly true in high-fixed cost, low variable cost industries, including high technology, where incremental costs are low and profit margins are high (to cover the fixed costs).”).

⁶⁹ Cary Statement, at 12 (“Competition takes the form of expenditures in R&D designed to differentiate the product from those of rivals and to increase the value of the product in terms of enhanced productivity for customers. In such a market, efficiencies that reduce already trivial marginal costs are irrelevant. . . . For example, even a small increase in the productivity of an oil refinery through better computer modeling can be worth hundreds of millions of dollars a year.”).

⁷⁰ Morse Statement, at 4; see also New Economy Trans. at 22 (Morse) (“[I]t is just such efficiencies from the combination of complementary expertise, while not easily measured, that drive many transactions and have great potential consumer benefit.”).

⁷¹ See Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in 6 INNOVATION POLICY AND THE ECONOMY 159 (Adam B. Jaffe et al. eds., 2006) [hereinafter Gilbert, *Looking for Mr. Schumpeter*]; see also Katz & Shelanski, *Mergers and Innovation*, at 1 (“Policymakers and economists strongly agree that innovation is a critical component of a sustained healthy economy.”).

⁷² Gilbert Statement, at 14.

⁷³ Gilbert Statement, at 14; cf. Morse Statement, at 7 (emphasizing “notoriously expensive and risky” investments required in the pharmaceutical industry, including the high percentage of “dry wells”); John E. Osborn, Statement at AMC New Economy Hearing, at 4–5 (Nov. 8, 2005) [hereinafter Osborn Statement].

⁷⁴ New Economy Trans. at 18 (Osborn). Mr. Osborn explained that mergers enable “research-stage” firms with an innovative product to combine with commercial-stage firms that have critical expertise (for example, regulatory, clinical, marketing, sales, or medical) necessary to develop a product, gain FDA approval, and commercialize a product. New Economy Trans. at 16–17 (Osborn); see also Osborn Statement, at 4–6 (Nov. 8, 2005) (companies must deal with high development costs and high probabilities that products will ultimately not be developed or commercially successful). *But* see New Economy Trans. at 92 (Shapiro) (must consider alternative ways that the smaller firm might have commercialized the technology).

⁷⁵ See ABA Comments re Guidelines, at 4 (“[T]he costs of short-term anticompetitive pricing can quickly be overwhelmed by the benefits provided by even small efficiencies, as these benefits can be expected to be long-lived and potentially widely distributed.”).

⁷⁶ DOJ/FTC Horizontal Merger Guidelines, § 4. Moreover, “delayed benefits from efficiencies (due to delay in the achievement of, or the realization of consumer benefits from, the efficiencies) will be given less

weight because they are less proximate and more difficult to predict.” *Id.* § 4 n.37.

⁷⁷ New Economy Trans. at 18, 44 (Osborn) (investigating staff tended “to resolve uncertainties against the proposed merger” without “putting a lot of value on the consumer benefits” from innovation); Osborn Statement, at 3–4.

⁷⁸ ABA Comments re Guidelines, at 2.

⁷⁹ See ABA Comments re Guidelines, at 4 (“[G]iven the importance of innovation to the economy’s overall productivity . . . there might well be benefit in expanding the efficiencies that are recognized to include those that allow the combined firm to conduct R&D more efficiently”); see also Morse Statement, at 4–5; Osborn Statement, at 3.

⁸⁰ See Daniel Cooperman Statement at AMC New Economy Hearing, at 1 (Nov. 8, 2005) (due to the rapid nature of innovation in the software industry, “a procompetitive transaction that is delayed [by merger review] may be derailed altogether”).

⁸¹ ABA Comments re Guidelines, at 2.

⁸² New Economy Trans. at 9 (O’Connell) (“[The DOJ] does care about the effects of a merger on innovation”); *id.* at 49–50 (O’Connell, Morse) (observing no general anti-merger bias at the agencies); *id.* at 50–51 (Shapiro) (suggesting that appearance of such biases may reflect skepticism of staff as part of building its case).

⁸³ See Morse Statement, at 4; see also New Economy Trans. at 22 (Morse) (“[I]t is just such efficiencies from the combination of complementary expertise, while not easily measured, that drive many transactions and have great potential consumer benefit.”).

⁸⁴ See Katz & Shelanski, *Mergers & Innovation*, at 2–3 (“Consumers benefit from competition because, when producers face rivalry, they seek to attract customers through lower prices and higher quality. Consumers also benefit from technological innovation because, when firms invest in research and development (R&D), they can create valuable new products and reduce the costs of producing existing products. Product-market competition and innovation are both, therefore, natural objectives of public policies designed to further consumer welfare. But policies designed to pursue one of these objectives cannot always be implemented without costs for the other.”); *id.* at 56–57; see also Introduction of this Report, at note 22 (discussing different definitions of “consumer welfare” and the tradeoffs each definition would make).

⁸⁵ See Gilbert Statement, at 8 (“Economic theory is ambiguous on the relationship between competition and innovation.”); Shapiro Statement re New Economy, at 11–12 (“[T]here is no consensus among industrial organization economists about the general relationship between concentration and innovation competition.”); Gilbert, *Looking for Mr. Schumpeter*, at 206 (“We remain far from a general theory of innovation competition”); see also Katz & Shelanski, *Mergers & Innovation*, at 14 (“[I]n markets in which innovation is significant, the traditional concentration-competition relationship is on a weaker or more nuanced empirical and theoretical footing than otherwise.”); *id.* at 18–19 (describing ways in which competition can either drive or hamper innovation).

⁸⁶ DOJ/FTC Horizontal Merger Guidelines, § 3.0.

⁸⁷ *Id.*

⁸⁸ *Id.* § 3.2 (footnote omitted).

⁸⁹ Morse Statement, at 9 (“[W]here later entry will deter anticompetitive effects, it should be considered timely.”); see also Gilbert Statement, at 11 (recommending flexible application based on capacity to deter anticompetitive effects). Of course, impacts further in the future may be more uncertain, and the agencies should take such uncertainty into account in their assessments. See DOJ/FTC Horizontal Merger Guidelines, § 4 n.37.

⁹⁰ James J. O’Connell Jr., Statement at AMC New Economy Hearing, at 5 (Nov. 8, 2005) (the DOJ “certainly has considered expected effects—both positive and negative—more than two years into the future in

its merger analysis, particularly in matters involving the development of innovative, next-generation products”); *id.* at 5 n.9 (pursuant to the Guidelines, in the case of durable goods, entry that is expected to occur outside the two-year window will be considered timely “so long as it would deter or counteract the competitive effects of concern within the two-year period and subsequently”) (quoting DOJ/FTC Horizontal Merger Guidelines, § 3.2); Shapiro Statement re New Economy, at 9 (“[T]here is nothing magical about the two-year time horizon in this calculus.”). *But see* Katz & Shelanski, *Mergers & Innovation*, at 56 (“Under current practice . . . the agencies often take an approach of considering a two-year horizon in assessing the effects of entry, with little or no discounting within the horizon and complete discounting of anything beyond.”).

⁹¹ See Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 3–4 (2003). For criticisms of this study, see Jonathan Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27 (2003); Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook* (Dep’t of Justice, Antitrust Div., Discussion Paper No. EAG 03-2, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384100.

⁹² See AAI Comments re Merger Enforcement, at 2–3 (arguing that U.S. merger policy should be more strict).

⁹³ See, e.g., Public Comments Submitted to AMC Proposing Issues for Study, at 1 (Jan. 5, 2005) (proposing that this Commission undertake comprehensive empirical study of the antitrust laws).

⁹⁴ See ABA Comments re Guidelines, at 2 (“[T]here has been insufficient empirical research to create confidence that particular merger enforcement decisions (and the *Merger Guidelines*) are based upon accurate assumptions about the relationship between concentration and performance of the market.”); Economists’ Roundtable Trans. at 6–8 (White) (none of the empirical studies provide a good sense as to the level of concentration at which “antitrust should bite”); Economists’ Roundtable Trans. at 33 (Bresnahan) (knowledge of the “functional relationship” of concentration and market power is limited, but “we do know the extreme end of it around the range that modern merger policy would intervene”).

⁹⁵ DOJ/FTC Horizontal Merger Guidelines, § 1.5. See *generally* ANTITRUST LAW DEVELOPMENTS, at 344–50.

⁹⁶ See, e.g., ABA Comments re Guidelines, at 2; Economists’ Roundtable Trans. at 32 (Bresnahan); *cf. id.* at 40 (White) (“[W]e now have 20 or so years of price-oriented data and studies that show that concentration matters and that show up as price effects.”). *But see* AAI Comments re Merger Enforcement, at 14 (stating that the “consensus conclusion from more recent studies using more sophisticated research tools is that increased concentration, at high levels, is associated with higher prices, and is therefore a suitable proxy, at least in the first instance, for an expectation of market power”); *id.* at 3 (“[C]urrent economic thinking . . . and evidence still support the presumption that concentration implies anticompetitive potential . . .”).

⁹⁷ Economists’ Roundtable Trans. at 6–8 (White); *id.* at 78–80 (White) (citing the need for pricing studies).

⁹⁸ See, e.g., *id.* at 30–31 (Bresnahan) (because there’s substantial “heterogeneity in industries,” it is not possible to draw generalizations about the effect of concentration that will apply broadly across industries); see also *id.* at 63–64 (Reiss) (heterogeneity of industries and firms have led economists away from cross-industry studies of the effect of entry and to “within-industry studies”); *id.* at 31 (Bresnahan) (similar past efforts—structure-conduct-performance studies and Chicago Economics—“were empirical disasters”).

⁹⁹ See, e.g., ABA Comments re Guidelines, at 5–6 (recommending “case studies” examining “the market effects from particular mergers that were cleared by the antitrust agencies to see if they led to neutral or procompetitive outcomes in the relevant industries . . . or to higher prices/less innovation/etc.”); Merger Enforcement Trans. at 66–67 (Scheffman) (noting similar FTC studies); *id.* at 68 (Baer) (“[S]uch studies are a good idea, and more ought to be done.”); *id.* at 71–72 (Rill) (supporting the use of “retrospective reviews”); *id.* at 73 (Scheffman) (“retrospectives are very important”).

¹⁰⁰ Economists’ Roundtable Trans. at 8, 69, 79–80 (White); Prof. Lawrence White, Statement at AMC

Economists' Roundtable on Merger Enforcement, at 7–8 (Jan. 19, 2006).

- ¹⁰¹ Barnett/Majoras Transcript at 20 (Majoras) (Mar. 21, 2006) (explaining that “transparency . . . [is] a high priority” because “[v]oluntary compliance with the law is the best outcome for consumers, and compliance depends on knowing when the line is being crossed”).
- ¹⁰² The DOJ provides a statement pursuant to the Tunney Act. See 15 U.S.C. § 16(b). The FTC provides an analysis to aid public comment pursuant to regulation. See 16 C.F.R. § 2.34(c) (2006). For examples of such statements, see Competitive Impact Statement, *United States v. Verizon*, No. 1:05CV02103 (D.D.C. Nov. 16, 2005), and Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re Procter & Gamble Co. and Gillette Co.*, FTC File No. 051-0115 (Sept. 30, 2005).
- ¹⁰³ See Chapter II.B of this Report summarizing data regarding enforcement under the HSR Act.
- ¹⁰⁴ See, e.g., Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation, *In re Comcast, Time Warner Cable, and Adelphia Commc'ns*, FTC File No. 051-0151 (Jan. 31, 2006) (approving decision by Bureau of Competition to close investigation, and setting forth reasons); Dep't of Justice, Antitrust Div., Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006) (setting forth background on transaction and reasons for allowing the merger to proceed); see also Dep't of Justice, Antitrust Div., Issuance of Public Statements Upon Closing of Investigations (Dec. 12, 2003); Thomas Barnett, Statement at AMC Barnett/Majoras Hearing, at attachment 6 (Mar. 21, 2006) (reporting that the DOJ had issued 12 statements upon closing investigations); Federal Trade Comm'n, Commission Closing Letters, *available at* <http://www.ftc.gov/os/closings/commclosing.htm> (collecting a number of closing letters issued by the FTC).
- ¹⁰⁵ See *generally* Merger Enforcement Trans. at 71 (Baer) (advocating public statements “as to major matters”); IBA Comments re Merger Enforcement, at 15; Scheffman Statement, at 7 (“[M]ore detailed explanations for agency decisions, as is routinely done in the EU . . . would clearly be beneficial.”).
- ¹⁰⁶ IBA Comments re Merger Enforcement, at 4 (“FTC and DOJ should publish reasoned decisions (or summaries of their findings) in all cases where a Second Request has been issued.”); *id.* at 15–16; U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 14 (Nov. 8, 2005); see also U.S. Chamber of Commerce, Public Comments Proposing Issues for Study, at 2 (Sept. 30, 2004); International Chamber of Commerce, Public Comments Submitted to AMC, at 6–7 (Sept. 5, 2005) (proposing that speeches, press releases and other communications be used to publish information about agency decisions in high-profile cases).
- ¹⁰⁷ American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding the Hart-Scott-Rodino Second Request Process, at 15 (Dec. 7, 2005).
- ¹⁰⁸ Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Merger Challenges Data, Fiscal Years 1999–2003 (Dec. 18, 2003), *available at* <http://www.ftc.gov/os/2003/12/mdp.pdf>. Mergers were deemed to have been challenged by the FTC if it voted to challenge the transaction (either in court or administratively). Mergers were deemed to have been challenged by the DOJ if a complaint was filed in court or a press release was issued by the DOJ announcing that the transaction had been abandoned or restructured in response to the DOJ's concerns. In addition, mergers involving financial institutions subject to the Bank Merger Acts of 1960 and 1966 or the Bank Merger Holding Company Act were deemed to have been challenged by the DOJ if the transactions were restructured to satisfy the DOJ's concerns, even absent a press release. *Id.* at 2.
- ¹⁰⁹ Federal Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (Feb. 2, 2004, revised Aug. 31, 2004), *available at* <http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf>.
- ¹¹⁰ Federal Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2005 (Jan. 25, 2007),

available at <http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf>.

¹¹¹ See Merger Enforcement Trans. at 91–92 (Willig) (suggesting that the agencies keep records of basic information (for example, on relevant market and concentration levels) for transactions for which a second request is issued); see also *id.* at 94–95 (Baer) (advocating systematic collection of information on enforcement).

¹¹² See *id.* at 94 (Rill).

¹¹³ See also Chapter II.B of this Report, regarding a recommendation for the agencies to collect data on the burdens imposed by the HSR Act.

¹¹⁴ See DOJ/FTC Horizontal Merger Guidelines, § 0.1 n.6.

¹¹⁵ New Economy Trans. at 22, 46 (Morse); *id.* at 83–84 (Shapiro); Morse Statement, at 2. *But* see New Economy Trans. at 65–66 (O’Connell) (the Guidelines are “not meant to address every possible theory or even every way of looking at a merger. . . . The Division doesn’t believe that the Guidelines need to be amended to reflect or address additional theories, because we believe that those theories are already incorporated where appropriate in the analysis that we conduct.”).

¹¹⁶ Merger Enforcement Trans. at 59–60 (Rill).

¹¹⁷ 1982 DOJ Merger Guidelines, pt. IV.

¹¹⁸ ABA, MERGERS AND ACQUISITIONS, at 20.

¹¹⁹ See, e.g., AAI Comments re Merger Enforcement, at 5 (“Formally updating the agencies’ policy on vertical mergers would provide much needed guidance.”).

Chapter I.C

Exclusionary Conduct

1. INTRODUCTION

Section 2 of the Sherman Act outlaws conduct, joint or by a single firm, to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.”¹ The law directs itself to improper conduct, not the possession of a monopoly. Section 2 does not prohibit firms from having monopoly power in a relevant market or from charging monopoly prices.² Rather, it prohibits conduct that improperly maintains or facilitates acquiring, or attempting to acquire, a monopoly.

How to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law. Appropriate antitrust enforcement must distinguish aggressive competition that benefits consumers, such as most price discounting, from conduct that tends to destroy competition itself, and thus maintains, or facilitates acquiring, monopoly power. The Supreme Court has defined improper “exclusionary” conduct under Section 2 to “comprehend[] at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”³ Thus, a crucial distinction in Section 2 enforcement entails whether a firm’s conduct represents competition on the merits or improper “exclusionary” conduct.

To ask whether a firm’s conduct is “exclusionary” is not sufficient to make this determination. After all, companies routinely attempt to “exclude” competitors from the market simply by producing the best quality product at the lowest price. Accordingly, an observation that a particular firm’s conduct “excludes” its competitor does not answer whether the conduct is harmful to competition or just to the firm’s competitor. Antitrust law is concerned with harm to competition, not particular competitors.

In addition, a firm may achieve monopoly power through competition on the merits. Judge Learned Hand long ago pointed out that a “single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins.”⁴

The Commission examined whether the substantive standards for evaluating alleged anti-competitive conduct under Section 2 should be revisited, and, if so, whether improvements could best be achieved through legislation or case law development. In recent decades the courts have adopted and applied sound general principles for Section 2 enforcement. These general principles emphasize that appropriate legal rules should identify unreasonably exclusionary conduct, without discouraging aggressive competition that benefits consumers or creating excessive litigation and compliance costs for businesses and problems

of administrability for courts. The use of these principles has assisted courts in developing appropriate tests to identify when certain types of conduct, such as predatory pricing, are unreasonably exclusionary.

Section 2 standards are not fully developed with respect to all types of conduct, however. In particular, the Commission focused on two types of conduct that have been the subject of recent court decisions and ongoing debate. One type of conduct involves the sale of products bundled together at a discount from their prices when purchased separately. Widespread agreement exists that discounts offered for bundled products (for example, “meal deals” combining a hamburger and a soda) often benefit consumers. Economic theories suggest, however, that in certain circumstances a firm may be able to use discounts on bundled products to obtain or maintain a monopoly by excluding rivals, or otherwise harm consumers, on some basis other than competition on the merits. A recent decision by the United States Court of Appeals for the Third Circuit that upheld a finding of Section 2 liability for discounts on bundled products, *LePage’s v. 3M*, has provoked criticism and argument about the circumstances in which bundled discounts could violate Section 2.⁵

The second type of conduct involves a firm’s refusal to deal with its rival in the same market. In 1919 the Supreme Court confirmed the right of a firm to make its own decisions about the business entities with which it will deal, absent “any purpose to create or maintain a monopoly.”⁶ Whether—and, if so, when—a firm’s refusal to deal with its rival may violate Section 2 has long troubled antitrust courts and commentators. The Commission studied this issue in light of the Supreme Court’s recent decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*.⁷

The Commission also examined the question of whether courts should apply a presumption of market power for patents in tying cases, a question that the Supreme Court has recently resolved, as well as whether such a market-power presumption should be applied to copyrights or trademarks in tying cases.

The Commission’s study and analysis lead it to make the following recommendations.

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- 12. In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.**
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13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.
14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.
15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.
16. The lack of clear standards regarding bundling, as reflected in *LePage’s v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.
17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.*
18. In general, firms have no duty to deal with a rival in the same market.†
19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

* Commissioners Carlton and Garza join this recommendation with qualifications.

† Commissioners Shenefield and Jacobson join this recommendation with qualifications.

2. BACKGROUND

A. General Standards

Section 2 of the Sherman Act forbids “monopolization” and “attempted monopolization” (as well as combinations and conspiracies to monopolize) of any part of the trade or commerce of the United States.⁸ The classic statement of unlawful monopolization is found in *United States v. Grinnell Corp.*:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.⁹

The Supreme Court has defined “monopoly” power as the power to “control prices or exclude competition.”¹⁰ In general, “monopoly” power is treated as “substantial market power.”¹¹ Modern economics generally defines “market power” as “the ability to raise prices above a competitive level *without suffering an immediate and unprofitably substantial loss of sales*,”¹² thus emphasizing that the power to control price or exclude competition must have some degree of durability to constitute market power of concern to antitrust law. A plaintiff may prove a defendant’s possession of monopoly power through direct evidence of the defendant’s actual control over price or exclusion of competition within a relevant market, or through indirect evidence, most typically a defendant’s high market share and barriers to entry that make challenge to the defendant’s market position unlikely.¹³

After establishing the defendant’s monopoly power, a plaintiff must prove the monopolist has obtained or maintained its dominant position through unlawful exclusionary or predatory conduct.¹⁴ As the Supreme Court stated in *Spectrum Sports, Inc. v. McQuillan*, the Sherman Act “directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”¹⁵ Courts and commentators have often found it easier to identify conduct that is not or should not be unlawful under Section 2 than to identify conduct that Section 2 does prohibit. For example, two of the most commonly cited articulations explain that Section 2 is *not* violated by either “growth or development as a consequence of a superior product, business acumen, or historic accident”¹⁶ or conduct attributable to “superior skill, foresight and industry.”¹⁷ Attempts to develop more definitive standards have evolved over time.

B. Definitions of “Exclusionary” Conduct

A variety of factors, including changing perspectives on the significance of monopoly power, have influenced courts’ views on the scope of conduct that should be considered potentially exclusionary. In the mid-twentieth century, courts evidenced deep concern about the dan-

gers of monopoly power. The opinion of Judge Learned Hand in *United States v. Aluminum Co. of America* provides the best-known expression of this attitude:

Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.¹⁸

In *Alcoa* the Second Circuit held that a firm with 90 percent of the market for virgin ingot aluminum had violated Section 2 by repeatedly building new capacity to serve new demand in that market, thus discouraging its rivals from expanding their existing capacity or entering with new capacity.¹⁹ In the court's view, "[i]t was *not inevitable* that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them."²⁰

The Supreme Court quickly endorsed this expansive view of exclusionary conduct.²¹ The question of whether the challenged conduct was "inevitable" appeared in other cases as well.²² With such a broad scope of conduct that might be viewed as exclusionary, the government pursued and won several monopolization cases over the next few decades.²³ This aggressive view of the law reached its zenith in the 1970s, with proposals from well-regarded antitrust practitioners and scholars that proof of monopoly itself should be sufficient to establish a violation of Section 2.²⁴

Questions about this approach arose with increasing frequency during the 1960s and 1970s, however, as developments in economic analysis spurred antitrust scholars to examine more closely what types of incentives encouraged vigorous competition and how certain business practices might benefit, rather than harm, consumers.²⁵ Commentators questioned the bases of many prior court decisions, including *Alcoa*, asking, for example, whether antitrust law should require a firm with a dominant position not to compete to serve new demand.²⁶ Courts and commentators began to reexamine whether the standards for exclusionary conduct were likely actually to discourage aggressive competition that could benefit consumers.²⁷

One of the first court decisions to evidence this shifting attitude was *Berkey Photo, Inc. v. Eastman Kodak Co.*²⁸ The defendant, Eastman Kodak, sold cameras and held a monopoly in the film market; the plaintiff, Berkey Photo, sold cameras and also competed with Kodak in other photo-related services. When Kodak introduced a new kind of film compatible with only one of Kodak's cameras, Berkey alleged that Kodak had violated Section 2 by failing to give Berkey advance notice of the new product design so that Berkey could develop its own cameras to handle the new Kodak film. The Second Circuit reversed the jury verdict in Berkey's favor, holding that "a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced."²⁹ The court emphasized that firms' incentives to innovate rested on the prospect of market success:

It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.³⁰

Unlike the Second Circuit's decision in *Alcoa*, which associated *existing* monopoly power with deadened initiative and competition, the Second Circuit's decision in *Berkey Photo* used a wider lens to see how *the prospect of market success* spurred competition and innovation. This perspective has been preeminent in recent decades.³¹

Most recently, the Supreme Court expressed the view in *Trinko* that the “prospect of market success” includes the prospect of obtaining monopoly power:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.³²

This view—that the prospect of gaining monopoly is an appropriate incentive for competition and innovation—implies that the application of overly stringent antitrust rules for monopolists’ conduct could discourage competition and innovation. Some disagree, pointing to economic studies that either suggest monopoly affirmatively discourages innovation³³ or are ambiguous as to whether monopoly power encourages innovation.³⁴

Courts have also increasingly scrutinized the potential for consumers to benefit from precisely the type of conduct once commonly condemned as exclusionary. The theory of predatory pricing, for example, involves a company selling its product at very low prices to force its competitors out of business, and then raising its prices to a supracompetitive level that enables it to recoup its losses and earn monopoly profits. Thus, the first step in a predatory pricing scheme is to sell at low prices—something that generally benefits consumers. As the Supreme Court has observed, if a court erroneously concludes that a firm has engaged in illegal predatory pricing, “the costs of [such] an erroneous finding of liability are high”³⁵ because firms may be reluctant to cut prices aggressively if they fear predatory pricing allegations. Overdeterrence could harm consumers.

In addition, courts have carefully examined the likelihood that an alleged exclusionary scheme could succeed. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* the Supreme Court joined commentators who had concluded that “predatory pricing schemes are rarely tried, and even more rarely successful.”³⁶ The reasons for this skepticism include the speculative nature of the scheme: it requires a firm to forgo definite profits in the short run, in hopes that competitors will leave the market and allow the firm, in the long run, to reap monopoly profits sufficient to make up for its prior losses and provide significant gains for the future.

The improbability of predatory pricing schemes, combined with the certainty that lower prices benefit consumers, persuaded the Supreme Court to select a test that may fail to capture all instances of predatory pricing, but will not incorrectly condemn price discounting.³⁷ This test excludes the possibility that above-cost pricing could constitute price predation. The Court cited the difficulty that courts would have determining just *how much* above cost a defendant's prices must be to avoid liability for predatory pricing, as well as the Court's concern that the possibility of such liability would chill aggressive price cutting.³⁸

The adoption of a "safe harbor" in the area of predatory pricing also illustrates courts' desire to adopt bright-line legal rules that businesses can understand and follow with relatively little difficulty. This issue has become increasingly important as economic understandings of business conduct have become more sophisticated, and courts have struggled to take into account a wide variety of factors that may be relevant to judging the likely competitive effects of a particular business practice. Then-Judge (current Justice) Breyer explained the need for simplifying rules more than two decades ago:

[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.³⁹

Particularly in the context of Section 2 predatory pricing enforcement—where overdeterrence may deprive consumers of the benefits of aggressive competition—courts have been increasingly willing to adopt potentially underinclusive, but simple and objective cost-based legal rules.

This is not to say, however, that developments in the understanding of monopolizing conduct have all tended to restrict potential liability for such conduct. There have been a number of recent Section 2 cases in which liability was found. *Microsoft*, for example, is the most prominent Section 2 case in the last decade. In that case the United States Court of Appeals for the District of Columbia Circuit upheld portions of the lower court's ruling that Microsoft had engaged in various forms of unreasonably exclusionary conduct in maintaining its operating system monopoly.⁴⁰ The court held that the evidence established that Microsoft had engaged in various forms of anticompetitive conduct to prevent its rival, Netscape, from attaining a market position from which Netscape could challenge Microsoft's monopoly of Intel-compatible PC operating systems.⁴¹ The case ultimately was settled by consent decree.⁴²

The Federal Trade Commission (FTC) recently investigated and filed complaints against two companies that allegedly achieved monopoly power through unreasonably exclusionary conduct. In *Unocal* the FTC alleged that Unocal falsely represented to a government panel that Unocal's technologies were nonproprietary, when it knew it held patents on these technologies,⁴³ and that Unocal thereby was able to obtain monopoly power over certain gasoline formulas dictated by government regulation.⁴⁴ The matter was ultimately settled by consent decree in connection with another firm's acquisition of Unocal.⁴⁵

In *Rambus* the FTC recently held that Rambus illegally monopolized certain technologies required for computer memory. The FTC concluded that Rambus exploited its participation in a standard-setting organization to obtain patents that would cover technologies incorporated into the standards adopted by the organization, without revealing its patent position to other members of the standard-setting organization. As a result, the FTC stated, Rambus was able to "distort the standard-setting process" and unlawfully gain monopoly power in the computer memory industry.⁴⁶

Some degree of controversy has surrounded each of these cases, illustrating the ongoing debate in the antitrust community about the proper role of, and legal standards for, Section 2 enforcement. The Commission discusses some of the issues in this debate below.

3. RECOMMENDATIONS AND FINDINGS

As discussed below, the Commission concludes that, compared to legal standards in the mid-twentieth century, the Supreme Court has now adopted and is applying legal standards and rules for Section 2 that are more sensitive to the possible efficiencies of business conduct and more attuned to the potential for consumer harm from overly stringent application of Section 2 standards in some cases. This represents progress.

This Part discusses the general principles underlying Section 2 enforcement below, as well as tests that have been proposed for general use in identifying exclusionary conduct. It then turns to specific observations about the need to develop improved legal standards to evaluate discounts for bundled products and refusals to deal with a rival in the same market.

A. General Principles for Section 2 Standards

12. In general, standards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.

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- 13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.**
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In recent decades, more often than not, courts have used appropriate caution in assessing single-firm conduct. Courts have relied on general principles, including those that follow, to guide the development and application of rules for Section 2 enforcement. The use of these principles has benefited and encouraged appropriate antitrust enforcement.

Section 2 standards should be clear and predictable in application and administrable. The area of predatory pricing law provides the best example of success in achieving these goals. In *Brooke Group* the Supreme Court established an objective, cost-based test that first requires a predatory pricing plaintiff to prove that the alleged predatory prices are below an appropriate measure of the defendant’s costs.⁴⁷ This rule is relatively clear, predictable, and administrable. The Court’s test further requires predatory pricing plaintiffs to demonstrate that the defendant “had a reasonable prospect, or, under Section 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.”⁴⁸ This part of the test not only ensures that a Section 2 violation is found only if consumer welfare can be harmed, but also enhances administrability for the courts by allowing summary disposition of claims where market circumstances—such as easy entry—preclude the possibility of recoupment.⁴⁹

The Supreme Court has taken other steps as well to enhance the administrability of predatory pricing litigation. In *Matsushita* the Court affirmed summary judgment for the defendant, refusing to allow the case to go to trial based on ambiguous evidence, which included rebates and other price-cutting activities that the plaintiff alleged tended to prove a conspiracy to suppress prices.⁵⁰ The Court explained that “cutting prices in order to increase business often is the very essence of competition.”⁵¹ To avoid summary judgment, the Court required the plaintiffs to produce evidence that “tends to exclude the possibility” that the challenged conduct was permissible competition that did not involve a conspiracy.⁵² This comparatively clear and administrable rule has enabled courts to avoid costly and extensive litigation based solely on evidence from which inferences of permissible competition and anticompetitive joint conduct were equally plausible.

Section 2 standards should be designed to minimize overdeterrence and underdeterrence, both of which impair long-run consumer welfare. At least two observations underlie this general principle. One is that business practices typically offer more efficiencies and, thus, benefits to consumer welfare, than recognized in the early-to-mid-twentieth century. A second observation is that aggressive competition on the merits may resemble unreasonably exclusionary conduct. As discussed earlier, for example, price discounting may appear the same as predatory pricing.

These observations have given courts a better understanding that, like underdeterrence, overdeterrence also can harm consumer welfare. Thus, it is important to consider whether proposed legal rules are likely to chill procompetitive conduct or create unintended consequences. For example, the Supreme Court has observed that “[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.”⁵³

The recognition of potential consumer harm from overdeterrence has led courts to try to avoid “false positives”—that is, finding Section 2 liability for a firm that has not engaged in unreasonably exclusionary conduct, but instead was simply competing aggressively on the merits.⁵⁴ Nonetheless, it remains important to avoid underdeterrence that results in “false negatives”—that is, failing to condemn anticompetitive conduct—when the challenged conduct typically provides few or no benefits to consumer welfare and does not resemble competition on the merits.⁵⁵ In an ideal world, of course, legal rules would avoid both underdeterrence and overdeterrence. In practical reality, however, such precision is often difficult to achieve. Thus, courts may need to make a trade-off between accuracy and the risks of either chilling procompetitive, or encouraging anticompetitive, conduct.

B. Further Development of Section 2 Standards

1. Continued Case Law Development in the Courts

- 14.** Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

As noted earlier, the Supreme Court defined improper “exclusionary” conduct under Section 2 to “comprehend[] at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”⁵⁶ This articulation improves on earlier analysis asking

whether the conduct at issue was “inevitable,” but it begs the question of what specific types of conduct in what circumstances should be considered “competition on the merits.” This issue has precipitated much debate and discussion.

The appropriate legal standards should continue to evolve in the courts, with continuing sensitivity to the need to avoid chilling procompetitive conduct and undue enforcement costs. The federal enforcement agencies should use appropriate opportunities to aid development of the law.⁵⁷ The FTC and the Antitrust Division of the Department of Justice (DOJ) are currently soliciting comments and holding hearings on Section 2 standards,⁵⁸ and the FTC is co-chairing the International Competition Network Unilateral Conduct Working Group, which plans to conduct an in-depth study of the issue over the next several years. The Commission is hopeful that those research efforts will prove useful.

2. Tests for Particular Types of Conduct or a Single Test for All Conduct

- 15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.**

Many commentators are skeptical that any one legal standard should be used to evaluate the wide variety of different types of conduct that may be challenged under Section 2.⁵⁹ Others, however, have urged the use of a single test. Two proposals—the “no economic sense” and “profit sacrifice” tests—have their genesis in the predatory pricing test, which implicitly defines “competition on the merits” as pricing that is above an appropriate measure of the defendant’s costs. Those and other proposals are discussed below.

“No Economic Sense” Test. The DOJ has advocated the use of a “no economic sense” test,⁶⁰ which asks “whether, on the basis of information available to a firm at the time of the challenged conduct, the challenged conduct would have made economic sense even if it did not reduce or eliminate competition.”⁶¹ The test condemns conduct only when its anti-competitive objective is unambiguous because the conduct would not have been undertaken “but for” the prospect of obtaining or maintaining monopoly power.⁶² Although the DOJ has advanced this test in several cases, including *Microsoft*,⁶³ *Dentsply*,⁶⁴ and *Trinko*,⁶⁵ no court has ever adopted it.

Proponents contend the test is consistent with existing case law and “can be administered effectively by courts and businesses alike”⁶⁶ because the test essentially focuses on the economic rationality or profitability of the defendant’s conduct from the defendant’s perspective at the time the defendant decides whether to undertake a particular course of conduct.⁶⁷ Although this test may not capture all anticompetitive single-firm conduct, pro-

ponents believe underinclusiveness is preferable to requirements for complex evidentiary judgments.⁶⁸

Others counter that the test can fail to capture substantially anticompetitive conduct by focusing exclusively on the profitability of the conduct for the defendant. Thus, the test fails to examine the challenged conduct's effects on consumer welfare, critics assert.⁶⁹ The test exculpates conduct that offers some minimal efficiencies—that is, that makes *some* economic sense—even where the conduct may cause disproportionately great anticompetitive effects.⁷⁰ In addition, in exclusive dealing cases the application of the “no economic sense” test is arguably unintelligible because exclusive dealing “makes economic sense” for the defendant “precisely through the mechanism of exclusion.”⁷¹ “In most cases, there is no way to separate the economic benefit to the defendant from the exclusionary impact on rivals.”⁷² This criticism suggests the test may be overinclusive as well as underinclusive.

“Profit Sacrifice” Test. The “profit sacrifice” test is closely related to the “no economic sense” test. One variant asks whether the defendant has sacrificed immediate profits as part of a strategy whose profitability depends on the recoupment of those profits through the exclusion of rivals.⁷³ Although it has not specifically adopted this test, the Supreme Court has asked this question in refusal-to-deal cases, noting, for example, that the defendant in *Aspen* “was willing to sacrifice short-run benefits and goodwill in exchange for a perceived long-run impact on its smaller rival.”⁷⁴ Another variant asks “whether the allegedly anticompetitive conduct would be profitable for the defendant and would make good business sense even if it did not exclude rivals and thereby create or preserve market power for the defendant.”⁷⁵

As with the “no economic sense” test, proponents maintain the “profit sacrifice” test is easy to administer and provides clear guidance to businesses, thereby increasing the likelihood that businesses will engage in procompetitive conduct that other legal tests might misconstrue as anticompetitive.⁷⁶ The test does not condemn all conduct that might reduce welfare overall, but proponents judge the test to be preferable to “market-wide balancing tests.”⁷⁷

Opponents apply basically the same criticisms to the “profit sacrifice” test as to the “no economic sense” test. In particular, one commentator argues the test is “both too broad and too narrow.”⁷⁸ The test is too broad, this critic contends, because it could condemn a firm “invest[ing] heavily in designing a better mousetrap that, once marketed, will ruin rivals or significantly limit their sales.”⁷⁹ The test is too narrow, he asserts, “because some exclusionary practices don’t involve sacrifice at all.”⁸⁰ He agrees the test is dispositive in predatory pricing cases, however, and also finds the test “quite helpful in cases involving unilateral refusals to deal.”⁸¹

Less Efficient Competitor Test. Judge Richard A. Posner has proposed that an unreasonably exclusionary practice is one that is “likely in the circumstances to exclude from the defendant’s market an equally or more efficient competitor.”⁸² Proponents see value in this

test,⁸³ but caution that it, too, may be too narrow “where the dominant firm is able to keep the output of rivals inefficiently low by engaging in practices that confer no significant social benefits.”⁸⁴ Others point out that exclusion of an inefficient rival may harm consumer welfare if the rival is excluded before it reaches minimum efficient scale, or if the less efficient rival has been keeping prices in the relevant market below the monopoly level.⁸⁵ Critics also raise concern that the test may be very difficult administratively.⁸⁶ Nonetheless, commentators and courts have found this test useful in evaluating bundled discounts or rebates.⁸⁷

Balancing Test. In its *Microsoft* decision, the D.C. Circuit employed a balancing test, which examines both competitive effects and efficiencies, to assess claims under Section 2.⁸⁸ That test requires a plaintiff first to establish that the monopolist’s conduct had an “‘anticompetitive effect.’ That is, it must harm the competitive *process* and thereby harm consumers.”⁸⁹ Once the plaintiff establishes a *prima facie* case, to avoid liability the defendant must provide a procompetitive justification for its conduct, that is, “a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.”⁹⁰ If the defendant makes this showing, then the plaintiff either must rebut the claim of procompetitive benefits or show that the anticompetitive harm nevertheless “outweighs” those benefits.⁹¹ Proponents point out this is the basic rule of reason test that courts have applied for many years, and continue to apply, in Section 1 and Section 2 cases.⁹² They contend that use of this test is necessary to answer the basic question of whether the challenged conduct, on balance, harmed consumer welfare.⁹³

Opponents criticize this test as too complex and difficult to administer. They argue that, because businesses will be uncertain of how their course of conduct might be judged, they will be reluctant to undertake procompetitive conduct.⁹⁴ Proponents respond that other tests, including the “no economic sense” and “profit sacrifice” tests, are equally complex and less accurate.⁹⁵

As this brief review of possible tests for evaluating conduct under Section 2 suggests, they each seek to identify conduct that harms consumer welfare.⁹⁶ Some tests place greater value on the avoidance of chilling procompetitive conduct and undue enforcement costs than on ensuring that the test captures all or most instances of anticompetitive conduct. Others emphasize the importance of focusing on consumer welfare effects and contend that accuracy can be achieved without perverse influences on firms’ incentives or undue enforcement costs.

Thus far, no consensus exists that any one test can suffice to assess all types of conduct that may be challenged under Section 2. The current test for predatory pricing, for example, works well in that context, but problems have been identified with the application of its progeny—the “no economic sense” and “profit sacrifice” tests—in some other contexts. The more extensive inquiry mandated by the *Microsoft* balancing test may be appropriate in some circumstances, but, as exemplified by the case of predatory pricing, is not necessarily war-

ranted or desirable for all types of conduct challenged under Section 2. Some contend that the best approach is to develop different tests for different types of conduct.⁹⁷

As courts, antitrust agencies, and commentators continue to refine the antitrust standards for conduct challenged under Section 2, a focal point for their assessment should be whether a particular test is the one most likely to protect consumer welfare in the context of the type of conduct at issue. To answer this question will require, among other things, an evaluation of whether a particular test is likely to overdeter procompetitive, or underdeter anticompetitive, conduct. Particular attention should be given to long-run, as well as short-run, consumer interests. For example, any Section 2 test for refusals to deal with a rival should reflect proper consideration of consumers' long-run interests in maintaining firms' incentives to invest in valuable competitive assets—incentives that could be significantly diminished by forced sharing of assets with a rival in particular circumstances.

C. Specific Areas of Concern—Bundled Discounts and Refusals to Deal with a Rival in the Same Market

1. Discounts on Bundled Products

16. The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

“Bundling” entails the sale of two or more products as a package. Bundled products may be sold only in a package or as part of a package and separately as well.⁹⁸ When bundled products are also sold separately, manufacturers may provide a discount or rebate to buyers that purchase the entire bundle, instead of purchasing only certain products in the bundle. These are known as “bundled discounts” or “bundled rebates.” Large and small firms, incumbents, and new entrants use bundled discounts and rebates in a wide variety of industries and market circumstances. Because they involve lower prices, bundled discounts and bundled rebates typically benefit consumers.

Despite the ubiquity of bundling, there is a paucity of case law addressing the practice.⁹⁹ One prominent and recent appellate decision is *LePage's v. 3M*, in which the Third Circuit, sitting en banc, condemned bundled rebates as a violation of Section 2.¹⁰⁰ Because the court failed to evaluate whether 3M's program of bundled rebates represented competition on the merits, its decision offers no clear standards by which firms can assess whether their bundled rebates are likely to pass antitrust muster. Therefore, the Third Circuit's decision is likely to discourage firms from offering procompetitive bundled discounts and rebates to consumers.

The proconsumer benefits and possible anticompetitive harms of bundled discounts, the *LePage*'s decision, and various proposals for legal standards that will deter unfounded claims that bundled discounts violate Section 2 are discussed below. A test that compares incremental revenues with incremental costs, as described below, offers the most promising source of an economically sensible and administrable safe harbor for bundled rebates or discounts.

a. Consumer Benefits, and Theories of Harm, from Bundled Discounts

Product bundling and bundled discounts are widespread throughout the U.S. economy.¹⁰¹ Fitness clubs may offer their sessions separately or as a package at a discount; a furniture retailer may offer a bed and two dressers separately or together as a bedroom set at a discount; retailers may bundle free parking with a purchase in their stores.¹⁰² Other examples abound.¹⁰³

Businesses may offer bundled products for a variety of reasons. Firms can use bundling to save costs in distribution and packaging, to reduce transaction costs for themselves and their customers, and to increase reliability for customers.¹⁰⁴ Selling products as a package may reduce a manufacturer's costs, and the manufacturer may pass these cost reductions on to purchasers as bundled discounts.¹⁰⁵ Instead of advertising, firms can use bundled discounts to increase demand.¹⁰⁶ When a retailer reduces the number of its suppliers to save costs, multiproduct manufacturers may offer multiproduct discounts to keep the retailer's business.¹⁰⁷ A firm selling a product in one market may employ a bundling strategy as a means of encouraging consumers in another market to try a new product.¹⁰⁸ In some cases, bundling can help a firm enter a new market and compete with established firms. As one witness explained:

Cable companies attempt to compete with telecommunications companies by offering bundles of digital telephone service, high speed internet service, and digital cable. Telecommunications companies have responded by offering discounts if consumers bundle their phone service with DSL and with satellite television The resulting bundle versus bundle competition will likely continue to drive down prices, increasing consumer welfare.¹⁰⁹

These types of bundling can result in bundled discounts or rebates that significantly lower prices to consumers. One witness noted that "virtually everyone who submitted a paper tends to agree that bundling is pro-consumer. It is a way of discounting; it's a way of waging competition."¹¹⁰ Moreover, the fact that firms without market power often offer bundled discounts suggests that efficiencies, not schemes to acquire or maintain monopoly power, typically explain their use.¹¹¹

Nonetheless, recent economic literature has suggested three theories by which, in certain circumstances, bundled discounts could be unreasonably exclusionary:¹¹² (1) as a

form of predatory pricing; (2) as *de facto* tying; and (3) as exclusionary conduct that deters entry.¹¹³ If bundled discounts were used as a form of predatory pricing, a dominant firm might eliminate competition by forcing its competitors to sell at unprofitably low prices.¹¹⁴ Under standard predatory pricing law, for this strategy to be plausible, the predator must be able to recoup its investment in below-cost pricing by using its increased market power to capture monopoly profits in the long run.¹¹⁵

In the case of *de facto* tying, while consumers are free to buy components separately, the components are priced to make it more attractive to buy the bundled components together.¹¹⁶ Under this theory, the prices of the components are actually increased, including the stand-alone price of the monopolized good.¹¹⁷ Thus, instead of receiving a discount, consumers are actually paying more for the bundled products.¹¹⁸

Finally, a dominant firm selling multiple products might use bundled discounts to deter entry or otherwise foreclose competition by firms that do not sell multiple products. By providing bundled discounts that reduce the price (net of discounts) of the competing good, a competitor that sells only that good may not be able to compete effectively if it does not also sell the monopoly good.¹¹⁹ Suppose, for example, each of two manufacturers produces product A at a cost of \$10 per unit. The manufacturer that earns monopoly profits in related product B, which it produces at a cost of \$10 per unit but sells for \$20, can bundle A and B and sell the bundle for \$28. The manufacturer that produces only A, however, cannot sell product A for \$8 without losing money.

There was disagreement among witnesses before the Commission as to the plausibility of these strategies, the conditions necessary to make them plausible, and the optimal legal standards to assess such anticompetitive risks. All appeared to agree, however, that further empirical study would benefit enforcement and policymakers. In addition, whatever legal standards are adopted should be sufficiently clear to enable companies to conform their conduct to the law, be administrable by the courts, and avoid chilling procompetitive discounting.

b. The Third Circuit's LePage's Decision

In *LePage's* the Third Circuit, sitting en banc, upheld a jury verdict that 3M had violated Section 2 through its program of bundled rebates. Plaintiff *LePage's* and defendant 3M competed in sales of transparent tape. *LePage's* alleged that 3M used its monopoly in its Scotch-brand tape to gain a competitive advantage in private-label transparent tape by offering higher rebates—that is, lower prices—when purchasers, such as office superstores, bought certain amounts of products across a number of 3M's product lines (including Scotch tape)¹²⁰ or increased the amount of Scotch tape purchased in proportion to 3M's private-label tape.¹²¹ If an eligible buyer met certain targets across all of the product lines, a rebate of up to 2 percent was applied to all of its purchases from 3M. Conversely, if the buyer failed to meet any one of the targets in each product line, the 2 percent rebate for all purchases

would be rescinded.¹²² LePage's alleged that such rebates gave buyers the incentive to purchase either 3M's Scotch tape or 3M's private-label tape, instead of LePage's private-label tape.

3M responded that its pricing was above cost, no matter how cost was calculated, and that, following the Supreme Court's decision in *Brooke Group*, above-cost pricing could not give rise to antitrust liability.¹²³ The court specifically rejected 3M's argument, stating that "a monopolist will be found to violate Section 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification."¹²⁴ The court upheld the jury's finding that 3M had no legitimate business justification, in part because no evidence showed that the amount of 3M's savings from bundling its products equaled the amount that 3M had given its customers through bundled rebates.¹²⁵ In explaining why such bundled rebates harmed consumers, the court stated that the "principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer."¹²⁶

c. Criticisms of LePage's

The fundamental criticism of the Third Circuit's decision is that it did not assess whether 3M's bundled rebates constituted competition on the merits. The court focused on the claimed harm to LePage's, including its loss of market share in the market for transparent tape and its loss of efficiencies in manufacturing.¹²⁷ But, as one critic points out, that a monopolist's conduct weakens a rival is not sufficient to trigger liability under Section 2.¹²⁸ "Price cutting may result . . . in some competitors being driven out of business, a result that is tolerated as a natural product of legitimate competition when an exit is the product of an inability to compete efficiently on the merits."¹²⁹ Lower prices may harm a rival but benefit consumers.

The Third Circuit did not require LePage's to prove it could make tape as efficiently as 3M and therefore that 3M's conduct had excluded an equally efficient rival.¹³⁰ In fact, 3M and LePage's both agreed that 3M was a more efficient, lower-cost producer of transparent tape than LePage's.¹³¹ Nor did the court require LePage's to prove that, regardless of LePage's ability to operate efficiently, 3M's conduct would have excluded a hypothetical competitor that was as efficient as 3M.¹³² The court did not even consider 3M's assertion that its bundled pricing was above cost, no matter how cost was calculated—an assertion that LePage's did not dispute.¹³³ Thus, it is unclear what would have been sufficient to convince the court that 3M was competing on the merits, rather than on some basis other than efficiency, with its bundled rebates. The decision is too vague¹³⁴ and is therefore likely to chill welfare-enhancing bundled discounts or rebates.¹³⁵

d. Possible “Safe Harbors” for Bundled Discounts

Given the likelihood that most bundled discounts or rebates benefit consumers, many have proposed a safe harbor for bundled discounts that clearly constitute competition on the merits. One proposal, relevant to the use of bundled discounts as *de facto* tying arrangements, would ask what proportion of buyers accepted the bundled discount. If all or almost all buyers accepted the bundled discount, then it should be evaluated under tying law; if a substantial proportion of buyers rejected the bundled discount, it should be deemed legal.¹³⁶

Other proposals relate to the possible use of bundled discounts or rebates in a manner analogous to predatory pricing. One type of safe harbor would also operate as a screen, requiring plaintiffs pursuing a Section 2 challenge first to establish that the bundled prices at issue fell below an appropriate measure of the defendant’s cost.¹³⁷ If a defendant’s costs are properly defined, “below-cost pricing, unlike pricing at or above that level, carries with it the threat that the party so engaged will drive equally efficient competitors out of business, thus setting the stage for recoupment at the expense of consumers.”¹³⁸ Prices below an appropriate measure of cost would be a necessary, but not sufficient, condition for liability.¹³⁹ In addition, plaintiffs would be required to establish that the defendant could recoup the profits it sacrificed through bundled discounts,¹⁴⁰ as well as establish actual or probable harm to competition.

Proposals differ on the appropriate measure of the defendant’s costs, although most involve some type of comparison between the defendant’s costs and revenues.¹⁴¹ One approach, comparable to the approach adopted by a decision in the Southern District of New York,¹⁴² would allocate all discounts attributable to the entire bundle of products to the competitive product, and then ask if, after reallocation of those discounts, the competitive product is sold at or above incremental cost.¹⁴³ If the competitive product is being sold at or above incremental cost after allocation to it of all bundled discounts, then the bundle would fall within the safe harbor. If not, then the plaintiff would need to demonstrate a likelihood that the defendant could recoup the short-term losses. Put another way, this test would find potential liability under Section 2 if the defendant’s incremental price of the competitively supplied good is less than the defendant’s incremental cost of producing it.¹⁴⁴

By comparison, one witness proposed that bundled discounts be evaluated under a modified *Brooke Group* standard that would reject bundling claims whenever the defendant’s total revenues derived from the entire bundle exceeded the total of the average variable costs to produce all of the products in the bundle—essentially, a total revenue versus total cost approach.¹⁴⁵ The witness argued this test was appropriate because it would allow a dominant firm to offer a bundled discount “that effectively lowers the price of a supracompetitively priced good.”¹⁴⁶ Others see significant problems with the test. They contend the test ignores the effects of bundling insofar as it permits bundled discounts where a monopolist lowered its price in a competitive market below the monopolist’s average variable cost for the competitively priced product.¹⁴⁷ Another witness suggested that courts should prorate

the total discount and allocate an equal share to each of the products in the bundle, then ask whether any product was sold below incremental cost.¹⁴⁸ In deciding which test to apply, some would ask whether a firm has near monopoly power in a well-defined market, and whether any competing firm can match the defendant's discounts across all product lines.¹⁴⁹

These and other proposed tests raise various issues, as the federal antitrust agencies recognized in recommending that the Supreme Court decline to grant certiorari in *LePage's* to allow further development in the case law and economic analysis.¹⁵⁰ One witness noted that competitors less efficient than a dominant firm might still constrain the dominant firm to price below a monopoly level.¹⁵¹ Thus, a test asking whether a bundled discount could exclude a hypothetical equally efficient competitor would not capture instances in which a bundled discount enabled a dominant firm to exclude a less efficient rival that had in fact benefited consumers by constraining prices.¹⁵² Others concede that, just as above-cost predatory pricing could occur, above-cost predatory bundled discounts could occur.¹⁵³ Nonetheless, they believe that a safe harbor for above-cost bundled discounts “provides valuable clarity to the business community and reduces the number of false positives, which would otherwise discourage procompetitive discounting.”¹⁵⁴ Moreover, some courts have concluded that “only price cutting that threatens equally or more efficient firms is condemned under Section 2.”¹⁵⁵ They explain that “[t]he antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business.”¹⁵⁶

e. Conclusion

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- 17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.***
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* Commissioners Carlton and Garza join this recommendation, but are concerned that the first screen in the three-part test would still require many pricing schemes where exclusion is not at issue to receive further scrutiny under the second and third parts of the test. Bundled discounts that do not pass the first screen in the Commission's proposed test can be used to price discriminate with no exclusionary effect on competition. Failure to recognize that price discrimination is a motive for mixed bundling implies that the incremental revenue is not correctly calculated by the Commission's proposal. Commissioner Carlton elaborates on these points in his separate statement.

The first screen in the recommended three-part test would establish that bundled discounts should be subject to scrutiny under Section 2 only if they could exclude a hypothetical equally efficient competitor. This standard would permit bundled discounts that could exclude a less efficient competitor, even if the less efficient competitor had provided some constraint on pricing of the competitive product. The difficulties of assessing such circumstances, the lack of predictability and administrability in any standard that would capture such instances, and the undesirability of a test that would protect less efficient competitors, however, counsel against the adoption of a screen that protects less efficient competitors.

Importantly, the first screen would provide sufficient clarity to enable businesses to determine whether a particular bundled discount would be “screened out” from further scrutiny under the second and third parts of the tests. In this sense, the first screen could operate as a “safe harbor” and thus ameliorate the chilling of procompetitive bundled discounts that now exists. The first screen is also sufficiently administrable for courts to apply, although the Commission acknowledges it could be difficult to apply in circumstances where the alleged competitive product is separate from the other products in the bundle. This issue arises with other proposed tests as well, however.

The first screen is not perfect; it could reserve for further scrutiny bundled discounts with no anticompetitive exclusionary effects. Thus, it is crucial to apply the second and third parts of the test. Under the second part of the test, a plaintiff would need to prove that the defendant was likely to recoup its losses from its use of the challenged bundled discount or rebate. This would typically require a plaintiff to show that entry into the relevant market is not easy and therefore is unlikely to undermine the defendant’s ability to recoup its losses. Like the first screen, this portion of the test also might be considered a “safe harbor” for defendants in relevant markets where entry is easy. Under the third part of the test, a plaintiff would have to establish actual or probable harm to competition.¹⁵⁷ Use of the Commission’s proposed three-part test would bring the case law on bundled discounts into line with the reasoning of *Brooke Group*.

The Commission also encourages additional empirical economic research in this area. The courts, the antitrust agencies, and antitrust practitioners generally would benefit from a more thorough and empirically based understanding of the likely competitive effects of bundled discounts in a variety of settings.

2. Refusals to Deal with a Rival in the Same Market.

18. In general, firms have no duty to deal with a rival in the same market.*

The Supreme Court has long held that, “[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”¹⁵⁸ Recently, in *Trinko* the Supreme Court confirmed there is no general duty to aid rivals under Section 2 of the Sherman Act.¹⁵⁹ Rather, the Court characterized its earlier decisions, including *Aspen Skiing* and *Otter Tail*, as “limited exception[s]” in which the defendant was found liable under Section 2 for a failure to deal with a rival.¹⁶⁰

Although the Court’s decision in *Trinko* provided some guidance on the factors that might suggest liability for a refusal to deal with a rival, the decision is far from definitive. Businesses need better guidance from the courts on how to avoid antitrust scrutiny for a refusal to deal with a rival. The following briefly reviews the reasoning and guidance that can be gleaned from the *Trinko* decision, as well as proposals to the Commission on how courts should evaluate refusals to deal with a rival.

a. Refusals to Deal with Rivals Should Rarely, if Ever, Be Unlawful

Refusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist.¹⁶¹ In *Trinko* the Supreme Court explained:

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.¹⁶²

Thus, absent a right to refuse to deal with a rival, a firm that lawfully obtained a monopoly through superior acumen, skill, foresight, or industry would find itself forced to share the fruits of its investment with rivals, thereby undermining the value of its lawfully acquired

* Commissioners Jacobson and Shenefield join this recommendation with qualifications. They believe that, if the refusal to deal with a rival in the same market is likely to raise price or reduce output in that relevant market, and is insufficiently supported by legitimate procompetitive justifications, the conduct is appropriately prohibited. A refusal to deal with a customer in an adjacent market (or different level of distribution), unless the customer agrees not to do business with a rival, is analytically the same as exclusive dealing and should be treated under the same principles. A refusal to deal with a rival in an adjacent market may be harmful to consumers if the defendant is using its monopoly power in one market to attempt to monopolize a second market.

monopoly and discouraging others from making similar investments.¹⁶³ Because investments in new facilities and assets often enhance consumer welfare, antitrust rules that discourage such activity should be avoided.¹⁶⁴ Forced sharing stultifies the incentives of smaller firms to develop alternatives to the monopolist's product.¹⁶⁵ Moreover, forced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role to which they are ill suited.¹⁶⁶ Setting a price too low, for example, could dampen the incentives of monopolists and others to develop substitutes for the monopolist's product¹⁶⁷ and ultimately disserve the interests of consumers.¹⁶⁸

In *Trinko*, the Court noted it has been cautious in finding exceptions to the general rule of no duty to aid a rival, precisely “because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.”¹⁶⁹ The Court appeared to link its prior exceptions to two factors: (1) the defendant's unilateral termination of a voluntary, and thus presumably profitable, prior course of dealing with the plaintiff (*Aspen Skiing*), and (2) the defendant's refusal to provide to a customer rival the same service that it provided to other customers (retail sales of ski-lift tickets in *Aspen*, power transmission over its network in *Otter Tail*). Questions have been raised concerning the Court's use of these two factual circumstances as key indicators of a potentially anticompetitive refusal to deal with a rival in the same market.¹⁷⁰ The Court seemed to suggest that either type of conduct might be worthy of scrutiny to assess whether it reflected a willingness to forsake short-term profits to achieve an anticompetitive end.¹⁷¹ The Court did not clarify that point, however, and it also did not explain what additional factors would be required to establish Section 2 liability in such circumstances.

b. Further Proposals for Evaluating Refusals to Deal

The principal approaches advanced at the Commission's hearings were: (1) a rule of reason test centered on a pricing benchmark; (2) a “no economic sense” or “profit sacrifice” test; and (3) an examination of whether the conduct or pricing at issue is coercive or provides incentives.

Rule of Reason/“Consumer Welfare Effect” Test. The purpose of this test is to determine whether the refusal to deal would enable the monopolist to charge supracompetitive prices in any market.¹⁷² If the defendant possessed monopoly power in a relevant market for inputs used by the firm's rivals, the court would determine whether the defendant's refusal to sell such inputs—or its insistence on terms so unattractive as to constitute an effective refusal to deal (a “non-negotiable” refusal to deal)—would lead to supracompetitive prices in a market.¹⁷³ Because requiring a monopolist to share inputs or facilities with its rivals at any price could destroy a firm's incentive to develop the capacity to produce such inputs in the first place,¹⁷⁴ this test would require the plaintiff to demonstrate that the rival was willing to pay a *sufficient* price for the monopolized product. The fact finder would ask whether

the rival was willing to pay a price high enough to support an inference that the refusal to sell at that price was exclusionary.¹⁷⁵ The monopolist could rebut a prima facie claim by showing that the refusal was necessary to create efficiencies, and that these efficiencies counteracted any harmful impact of the refusal.¹⁷⁶ The court would then balance the harmful effects of the refusal against the benefits proved by the defendant in a way analogous to the rule of reason analysis that courts employ in the merger and Section 1 contexts.¹⁷⁷

Objections to this proposal centered on its complexity, the difficulty of determining the proper “non-exclusionary benchmark price,” and questions whether the conduct the standard would condemn as unreasonably exclusionary actually would harm consumer welfare.¹⁷⁸ Some questioned whether there was sufficient evidence of durable monopoly power to support the use of such a complex test instead of a simpler test that could better avoid “false positives.” Witnesses also argued that courts are not rate-making bodies and are ill equipped to determine the “non-exclusion benchmark price” as required by this test.¹⁷⁹ Finally, a determination of harm to consumer welfare would require a determination whether rivals would be able to obtain alternative, cost-effective sources of supply, and other factors that could increase the potential for error in application of the test.¹⁸⁰

The “Profit Sacrifice” and “No Economic Sense” Tests. As discussed earlier, to establish liability for a refusal to deal with a rival, the “no economic sense” and “profit sacrifice” tests would require proof that the refusal makes “no economic sense” or is unprofitable but for the refusal’s tendency to fortify preexisting market power or help the monopolist acquire new market power.¹⁸¹ If the refusal does make economic sense absent such a contribution to market power (or the expectation of acquiring market power), the conduct survives Section 2 scrutiny, without additional analysis.

Although proof that a monopolist’s refusal to deal makes no economic sense is a necessary condition for liability under this test, it is not sufficient, and thus the test acts only as a screen.¹⁸² The second step of the inquiry requires a determination that the conduct harmed competition.¹⁸³ Thus, under the “no economic sense test,” a plaintiff may prevail by proving four elements: (1) the defendant’s possession of a monopoly over an input; (2) the refusal to sell the input or the sale of the input at a price that significantly disadvantages rivals; (3) the absence of any economic rationale for the refusal, apart from its tendency to maintain or acquire monopoly power; and (4) the maintenance or acquisition of market power as a result of such refusal.¹⁸⁴

Some have found this test useful in the context of refusals to deal with rivals.¹⁸⁵ Nonetheless, some antitrust practitioners question whether the test can be applied sensibly in all circumstances, given the fine distinction between seeking to exclude competitors by increasing a firm’s sales as opposed to seeking to obtain or maintain monopoly power.¹⁸⁶

“Coercing” versus “Incentivizing” Conduct. A third proposal focuses on whether the challenged conduct is “coercing” or “incentivizing.”¹⁸⁷ This question is the third, and most important part, of a three-part inquiry under this approach. The first part calls for courts to

determine whether conduct is “excluding” or “exploiting.”¹⁸⁸ Exploiting conduct is that which may be undertaken by a monopolist as a fruit of its monopoly, and should not give rise to an antitrust claim.¹⁸⁹ Excluding conduct is conduct that is designed to eliminate rivals, and potentially is actionable.¹⁹⁰ Second, this approach asks whether the challenged conduct is horizontal or vertical. If the conduct relates only to horizontal dealings among competitors, this approach concludes that antitrust law should rarely (if ever) be concerned with the conduct.¹⁹¹ Vertical conduct, however, may be actionable.

If the conduct is excluding and vertical, then the analysis asks whether the challenged conduct is coercing or incentivizing. Coercing conduct occurs when a firm refuses to deal with a (potential) customer because that customer also deals with the firm’s rivals.¹⁹² By comparison, a firm engages in incentivizing conduct when it continues to deal with a customer, despite that customer’s dealing with the rival, but not necessarily on the same favorable price terms.¹⁹³

The proponent of this test argues that this proposed distinction is important for three reasons. First, a monopolist is uniquely capable of coercing because of its monopoly status; any firm is capable of engaging in incentivizing conduct (at least to the limits of its “checkbook”).¹⁹⁴ Second, coercing conduct hurts the customer by issuing a “take it or leave it” choice; incentivizing conduct provides a choice to the customer.¹⁹⁵ Third, a monopolist’s competitors can respond to incentivizing conduct by providing their own incentive offers.¹⁹⁶

Under this test, coercing conduct would be presumptively unlawful, with the presumption overcome only if the defendant could show procompetitive justifications for the conduct.¹⁹⁷ By comparison, incentivizing conduct would be presumptively lawful.¹⁹⁸ The only exception would be for price incentives so great that they would constitute predatory pricing under the *Brooke Group* standard.¹⁹⁹ The test’s author contended it has several advantages because, among other things, it provides companies with clarity as to what conduct is permissible,²⁰⁰ and it would harmonize refusal-to-deal analysis with tying law by making unlawful only that conduct that creates the type of coercion that an unlawful tie-in creates.²⁰¹

c. Conclusion

The Commission endorses the longstanding principle that, in general, firms have no duty to deal with a rival in the same market. To the extent that circumstances exist in which firms may be liable for a refusal to deal with a rival in the same market, the courts should further clarify those circumstances.

3. Intellectual Property in Tying Cases

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

In *Illinois Tool Works, Inc. v. Independent Ink, Inc.* the Supreme Court reversed a decision by the Court of Appeals for the Federal Circuit adhering to previous Supreme Court precedents that provided for a presumption of market power.²⁰² The Court unanimously held that “a patent does not necessarily confer market power upon the patentee” and that, “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”²⁰³

In reaching this decision, the Court reviewed the history of tying law generally and its application in cases involving intellectual property in particular. It explained that the presumption originated in patent misuse cases involving tying of patented and unpatented goods, and that subsequent cases—particularly *International Salt Co. v. United States*²⁰⁴—“imported” this doctrine into tying law, in part on the ground that the policy considerations were the same.²⁰⁵ As a result, the Court had characterized such patent ties as “illegal per se.”²⁰⁶

The Court explained that its reconsideration of the “presumption of per se illegality of a tying arrangement involving a patented product” was appropriate in light of developments since those earlier rulings.²⁰⁷ Most important, in 1988 Congress “amended the Patent Code to eliminate [the market power] presumption in the patent misuse context.”²⁰⁸ After considering “the congressional judgment reflected” in this amendment, the Court concluded that ties involving patented products should be treated like other ties, and not be condemned without a showing of market power.²⁰⁹ The Court also observed that imposing this requirement was supported by “the vast majority of academic literature” addressing the question and by “a virtual consensus among economists” on this matter.²¹⁰ Furthermore, it noted, the antitrust enforcement agencies’ Intellectual Property Guidelines provide that the agencies “will not presume that a patent, copyright or trade secret necessarily confers market power upon its owner.”²¹¹

Consistent with the “virtual consensus” the Court identified in *Independent Ink*, witnesses at the Commission’s hearing (which took place before *Independent Ink* was decided) were united in their opposition to the market-power presumption.²¹² Similarly, a number of commenters argued that there should be no presumption of market power from patents or copyrights.²¹³ Thus this Commission’s witnesses and commenters generally advocated what is now the state of the law.

The Supreme Court decision in *Independent Ink* is clearly correct. For similar reasons, courts should not presume market power from a copyright or trademark in tying cases.

Notes

¹ 15 U.S.C. § 2.

² See, e.g., *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004). Section 2 also does not make mere size an offense. *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927); *United States v. United Shoe Mach. Co.*, 247 U.S. 32 (1918); *American Tobacco Co. v. United States*, 221 U.S. 106 (1911).

³ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (quoting III PHILLIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* 78 (1978)); see also *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1074 (2007); *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1288 (2006); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993).

⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.).

⁵ *LePage's, Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (en banc).

⁶ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁷ *Trinko*, 540 U.S. at 398.

⁸ See 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . .”).

⁹ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

¹⁰ See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

¹¹ ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 564–65 (2002) [hereinafter GAVIL, *ANTITRUST LAW IN PERSPECTIVE*].

¹² *Id.* at 564 (emphasis added).

¹³ See *id.* at 564–71; see also *United States v. Microsoft Corp.*, 253 F.3d 34, 57–58 (D.C. Cir. 2001) (monopolization claim supported by direct evidence that a firm can raise prices substantially above a competitive level in a relevant market); *United States v. Syufy*, 903 F.2d 659 (9th Cir. 1989) (ease of entry dooms monopolization claim); *Alcoa*, 148 F.2d at 424–26 (market share screen).

¹⁴ See *Aspen Skiing*, 472 U.S. at 605; *Grinnell*, 384 U.S. at 570–71; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482–83 (1992).

¹⁵ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

¹⁶ *Grinnell*, 384 U.S. at 570–71.

¹⁷ *Alcoa*, 148 F.2d at 430.

¹⁸ *Id.* at 427.

¹⁹ *Id.* at 430–31.

²⁰ *Id.* at 431 (emphasis added). Judge Hand’s decision in *Alcoa*, although expansive, rejected the view that monopolization was illegal per se. *Id.* at 429–30.

²¹ See *American Tobacco Co. v. United States*, 328 U.S. 781, 813–15 (1946) (quoting approvingly large sections of *Alcoa* decision, specifically including *Alcoa*’s statement that “we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened,” *Alcoa*, 148 F.2d at 431).

²² For example, in *United States v. United Shoe Machinery Corp.*, where the government challenged the terms on which the largest maker of shoe-making machines leased those machines, the court explained that the defendant “is denied the right to exercise effective control of the market by business policies that are not the inevitable consequences of its capacities or its natural advantages.” *United States v. United Shoe Mach. Corp.*, 110 F. Supp., 295, 345 (D. Mass. 1953), *aff’d per curiam*, 347 U.S. 521 (1954) (emphasis added).

- ²³ See generally GAVIL, *ANTITRUST LAW IN PERSPECTIVE*, at 593–99.
- ²⁴ See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL* 150–63 (1979); cf. Eleanor M. Fox, *Monopoly and Competition; Tilting the Law Towards a More Competitive Economy*, 37 WASH. & LEE L. REV. 49, 55–62 (1980) (advocating an approach to monopolization doctrine whereby proof of monopoly would itself establish liability under Section 2 and “[w]illfulness or bad conduct would not be a requisite part of the case”). This approach no longer has support. See, e.g., *Exclusionary Conduct Transcript* at 121 (Pitofsky) (Sept. 29, 2005) (Section 2 should not ban obtaining monopoly power through superior skill, foresight, and industry).
- ²⁵ See Chapter I.A of this Report.
- ²⁶ See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 165–70 (1978) [hereinafter BORK, *ANTITRUST PARADOX*]; Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1512–13 (1972); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1596–97 (1969); Aaron Director & Edward Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 286 (1956).
- ²⁷ See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX* 431–34 (2d ed. 1993) (discussing in epilogue general improvements in Section 2 enforcement).
- ²⁸ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).
- ²⁹ *Id.* at 281.
- ³⁰ *Id.* The Federal Circuit has held, and other cases have suggested, however, that, absent any product improvement or reduced costs, a deliberate effort to create incompatibility with a rival’s product violates Section 2. See *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1382 (Fed. Cir. 1998). See generally GAVIL, *ANTITRUST LAW IN PERSPECTIVE*, at 627.
- ³¹ See, e.g., Thomas A. Piraino, Jr., *Identifying Monopolists’ Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 824–25 (2000) (“To punish a firm simply because it has achieved a monopoly is to discourage superior business performance.”); Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 834–35 (2005).
- ³² *Trinko*, 540 U.S. at 407.
- ³³ See, e.g., Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY* 609–25 (Richard R. Nelson ed., 1962); see also Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation* (Feb. 8, 2007), available at <http://ssrn.com/abstract=962261>; M. Howard Morse, *Statement at AMC New Economy Hearing*, at 10 (Nov. 8, 2005) (citing economic studies that suggest smaller firms or new entrants without a vested interest in the status quo are more likely to introduce paradigm-shifting innovations); cf. *New Economy Transcript* at 68–69 (Shapiro) (Nov. 8, 2005) (business documents show competition is “a very powerful force to innovate”).
- ³⁴ See Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen/Kodak Rule*, 7 GEO. MASON L. REV. 495, 512 (1999) (“As a matter of economic theory, it is impossible to say for certain whether enforcement of the antitrust prohibition against monopolization, which might restrict the conduct of a dominant firm, will on balance enhance or reduce aggregate industry innovation in general.”); see also RICHARD A. POSNER, *ANTITRUST LAW* 20 (2d ed. 2001) [hereinafter POSNER, *ANTITRUST LAW*] (explaining that empirical studies indicate it is unclear “whether monopoly retards or advances innovation”); American Bar Association, Section of Antitrust Law, *Public Comments Submitted to AMC Regarding Exclusionary Conduct*, at 8 (Mar. 17, 2006) [hereinafter ABA Comments re Exclusionary Conduct] (“Some disagreement exists among experts as to whether the ability to charge monopoly profits indeed induces risk taking, innovation and economic growth.”); cf. Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 43 (2004) (“[U]nless firms are hopelessly disconnected from the real world, the pipe dream of ‘monopoly’ can hardly be the major incentive that drives most firms to innovate . . . Profits, not monopoly profits, are the principal spur to innovation that attracts ‘business acumen.’”) (citations omitted).

- ³⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)).
- ³⁶ *Matsushita*, 475 U.S. at 589.
- ³⁷ See *Brooke Group*, 509 U.S. at 226–27.
- ³⁸ *Id.* at 223 (Section 2 does not forbid above-cost pricing that preserves a dominant position); Phillip E. Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 733 (1975) (proposing that prices above average variable cost be presumptively lawful, and that prices below average variable cost be presumptively predatory); see also Carl Shapiro, Statement at AMC Exclusionary Conduct Hearing, at 4 (Sept. 29, 2005) [hereinafter Shapiro Statement re Exclusionary Conduct]; Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense” Test*, 73 ANTITRUST L.J. 413, 418–20 (2006) [hereinafter Werden, *No Economic Sense Test*] (explaining how *Brooke Group* created a “prudential safe harbor” for above-cost pricing).
- ³⁹ See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983). One witness expressly endorsed the reasoning of Justice Breyer in *Barry Wright*. See Exclusionary Conduct Trans. at 10 (Popofsky) (stating that *Barry Wright* is “perhaps the most important Section 2 case that was ever decided”). Two other witnesses embraced similar reasoning without mentioning the decision. See *id.* at 55–56 (Rule) (“I think the issue is that: how do you—can you really develop a cost-effective rule for evaluating [the impact of unilateral conduct] in these circumstances?”); Shapiro Statement re Exclusionary Conduct, at 3–4.
- ⁴⁰ *Microsoft*, 253 F.3d at 61–64 (holding restrictions on licenses with computer manufacturers were unlawfully exclusionary); *id.* at 64–67 (holding that “Microsoft’s exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct”); *id.* at 66–71 (holding agreements with Internet access providers were unlawful, exclusionary devices); *id.* at 72–74 (holding exclusive-dealing arrangements with independent software vendors and Apple were unlawfully exclusionary); *id.* at 74–78 (holding certain actions involving Java were unlawfully exclusionary).
- ⁴¹ See *id.* at 50, 53–54.
- ⁴² See Final Judgment, *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (CKK) (Nov. 12, 2002).
- ⁴³ Complaint, *In re Union Oil Co. of Cal.*, FTC Docket No. 9305 (Mar. 4, 2003).
- ⁴⁴ *Id.*; see also Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 985–87 (2005) [hereinafter Creighton, *Cheap Exclusion*].
- ⁴⁵ Agreement Containing Consent Order, *In re Union Oil Co. of Cal.*, FTC Docket No. 9305 (June 6, 2005).
- ⁴⁶ Opinion of the Commission, *In re Rambus Inc.*, FTC Docket No. 9302, at 3 (Aug. 2, 2006).
- ⁴⁷ *Brooke Group*, 509 U.S. at 222.
- ⁴⁸ *Id.* at 224.
- ⁴⁹ See *id.* at 226.
- ⁵⁰ *Matsushita*, 475 U.S. at 594–95.
- ⁵¹ *Id.* at 594.
- ⁵² *Id.* at 588.
- ⁵³ *Brooke Group*, 509 U.S. at 226–27.
- ⁵⁴ See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984); Frank H. Easterbrook, *When is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 357–58. See generally BORK, ANTITRUST PARADOX.
- ⁵⁵ See Creighton, *Cheap Exclusion*, at 981–82.
- ⁵⁶ *Aspen Skiing*, 472 U.S. at 605 n.32 (quoting III PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

- ⁵⁷ See, e.g., Kenneth L. Glazer, Statement at AMC Exclusionary Conduct Hearing, at 11 (Sept. 29, 2005) [hereinafter Glazer Statement]; R. Hewitt Pate, Statement at AMC Exclusionary Conduct Hearing, at 1 (Sept. 29, 2005) [hereinafter Pate Statement]; Robert Pitofsky, Statement at AMC Exclusionary Conduct Hearing, at 9 (Sept. 29, 2005) [hereinafter Pitofsky Statement]. Mr. Rule, the sole witness who recommended repeal of Section 2, recognized that repeal was unlikely. Charles F. (Rick) Rule, Statement at AMC Exclusionary Conduct Hearing, at 15 (Sept. 29, 2005) [hereinafter Rule Statement re Exclusionary Conduct]. He accordingly made ten suggestions for courts to consider in deciding Section 2 claims that would not be effectuated through legislative change. *Id.* at 16–17.
- ⁵⁸ See Thomas O. Barnett, The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act, Opening Remarks for FTC and DOJ Hearings Regarding Section 2, at 2–3 (June 20, 2006) (hearings to increase understanding and advance development of law).
- ⁵⁹ See Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006) [hereinafter M.S. Popofsky, *Defining Exclusionary Conduct*]; see also Exclusionary Conduct Trans. at 158–59 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 3.
- ⁶⁰ Pate Statement, at 2.
- ⁶¹ *Id.*; see also Werden, *No Economic Sense Test*.
- ⁶² Werden, *No Economic Sense Test*, at 413.
- ⁶³ The DOJ alleged that Microsoft’s conduct to protect its operating system monopoly was exclusionary because it “would not make economic sense unless it eliminated or softened competition.” See ABA Comments re Exclusionary Conduct, at 10; Brief for Appellees, *United States v. Microsoft Corp.*, Nos. 00-5212, 00-5213 (D.C. Cir. Feb. 9, 2001).
- ⁶⁴ The DOJ argued that the defendant’s policies of not using dealers who distributed the products of rivals “made no economic sense but for their tendency to harm rivals” because the policies were costly to defendant but produced no benefit except reducing competition. ABA Comments re Exclusionary Conduct, at 10; Brief for the United States, *United States v. Dentsply Int’l, Inc.*, No. 03-4097 (3d Cir. May 14, 2004). The DOJ won the case on appeal, but the Third Circuit applied a business-justification test similar to the balancing test applied in *Microsoft*. *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 196–97 (3d Cir. 2005) (citing *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993)).
- ⁶⁵ In their amicus brief on the merits, the FTC and the DOJ argued that Trinko’s complaint failed to allege exclusionary conduct because it did not explain how Verizon’s failure to assist rivals “would not make business sense apart from the effect on competition, the pertinent standard here.” Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, at 7–8 (May 2003) [hereinafter DOJ & FTC, *Trinko* Amicus Brief].
- ⁶⁶ Pate Statement, at 3; see also Werden, *No Economic Sense Test*, at 472–73.
- ⁶⁷ Werden, *No Economic Sense Test*, at 416–17.
- ⁶⁸ Pate Statement, at 8 (stating “while the [no economic sense] test will lead to some false negatives, this criticism has more purchase in the seminar room than in the real world”).
- ⁶⁹ See, e.g., Jonathan M. Jacobson & Scott A. Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, 73 ANTITRUST L.J. 779, 780–81 (2006) [hereinafter Jacobson & Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing]; Steven C. Salop, Statement at AMC Exclusionary Conduct Hearing, at 16–17 (Sept. 29, 2005) [hereinafter Salop Statement]; Pitofsky Statement, at 5–6.
- ⁷⁰ Pitofsky Statement, at 4.
- ⁷¹ See Jacobson & Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, at 781.
- ⁷² *Id.*
- ⁷³ See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE & EXECUTION* 152 (2006) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*].

⁷⁴ *Aspen Skiing*, 472 U.S. at 610–11.

⁷⁵ A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1255 (2005) [hereinafter Melamed, *Exclusionary Conduct Under the Antitrust Laws*].

⁷⁶ See A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 389–403 (2006) [hereinafter Melamed, *Exclusive Dealing Agreements*].

⁷⁷ Melamed, *Exclusionary Conduct Under the Antitrust Laws*, at 1258.

⁷⁸ HOVENKAMP, ANTITRUST ENTERPRISE, at 152.

⁷⁹ *Id.*; see also ABA Comments re Exclusionary Conduct, at 10 (short-run profit sacrifice cannot be sufficient to find conduct exclusionary, because that would capture procompetitive conduct, such as R&D or purchasing capital equipment, and would thus overdeter procompetitive conduct).

⁸⁰ HOVENKAMP, ANTITRUST ENTERPRISE, at 152.

⁸¹ *Id.*

⁸² POSNER, ANTITRUST LAW, at 194–95.

⁸³ HOVENKAMP, ANTITRUST ENTERPRISE, at 153 (“[D]efinition works well much of the time and occasionally provides the best analytic tool for determining whether a practice is anticompetitive.”).

⁸⁴ *Id.*

⁸⁵ ABA Comments re Exclusionary Conduct, at 11–12.

⁸⁶ *Id.* at 11.

⁸⁷ See Part 3.C.1 of this Section (discussing bundled discounts).

⁸⁸ See *Microsoft*, 253 F.3d at 58–59. The use of a balancing test in evaluating Section 2 claims is not new. For example, the FTC had already used a similar test in 1980. *In re E. I. DuPont de Nemours & Co.*, 96 F.T.C. 653 (1980) (stating that “a balancing approach, which takes due account of rational, efficiency related conduct, is best suited to the task at hand”).

⁸⁹ *Microsoft*, 253 F.3d at 58.

⁹⁰ *Id.* at 59; see also *Eastman Kodak*, 504 U.S. at 483 (once plaintiff makes out a prima facie case, “liability turns, then, on whether ‘valid business reasons’ can explain [the defendant’s] actions”) (citing *Aspen Skiing*, 472 U.S. at 605).

⁹¹ *Microsoft*, 253 F.3d at 59.

⁹² Jacobson & Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, at 800; Pitofsky Statement, at 5–6. The FTC endorsed this test in evaluating the type of conduct at issue in *Rambus*, while specifically rejecting the “profit sacrifice” (or “no economic sense”) test to evaluate such conduct. Opinion of the Commission, *In re Rambus Inc.*, FTC Docket No. 9302, at 30–31 (Aug. 2, 2006) (noting that the “no economic sense” test may be appropriate in some Section 2 cases “where the risk of interfering with vigorous competitive activity is heightened,” but that it is inappropriate when evaluating the type of conduct engaged in by Rambus).

⁹³ Jacobson & Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, at 800–01; Pitofsky Statement, at 5–6.

⁹⁴ Melamed, *Exclusionary Conduct Under the Antitrust Laws*, at 1257.

⁹⁵ Salop Statement, at 16–17; Jacobson & Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, at 790–93.

⁹⁶ See Shapiro Statement re Exclusionary Conduct, at 2–3 (defining “legitimate competition” as that which “benefits consumers”); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659, 671 (2001) [hereinafter Carlton, *Why*

Aspen and Kodak Are Misguided] (“The key issue is whether one can distinguish when these theories imply a harm to competition as distinct from a harm to a rival.”).

- ⁹⁷ See M.S. Popofsky, *Defining Exclusionary Conduct*, at 437; see also *Exclusionary Conduct Trans.* at 158–59 (Pitofsky); Shapiro Statement re *Exclusionary Conduct*, at 3.
- ⁹⁸ Bundled products sold only as a package are known as “pure” bundles; bundled products also sold separately are termed “mixed” bundles. See, e.g., David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37, 54 (2005) [hereinafter Evans & Salinger, *Why Do Firms Bundle and Tie?*]. One commentator has adopted the terms “forced” bundling and “optional” bundling. See Barry J. Nalebuff, *Bundling as a Way to Leverage Monopoly*, at 4 (Yale School of Management Working Paper ES-36, Sept. 1, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586648.
- ⁹⁹ *LePage's Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (en banc); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1977); *Virgin Atl. Airways Ltd. v. British Airways, PLC*, 69 F. Supp. 2d 571 (S.D.N.Y. 1999); *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455 (S.D.N.Y. 1996).
- ¹⁰⁰ *LePage's*, 324 F.3d at 169.
- ¹⁰¹ Evans & Salinger, *Why Do Firms Bundle and Tie?*, at 89; Prof. Timothy J. Muris, Statement at AMC *Exclusionary Conduct Hearing*, at 2 (Sept. 29, 2005) (Public Comment Regarding Bundling Submitted to AMC on Behalf of USTelecom, July 15, 2005) [hereinafter Muris Statement re *Exclusionary Conduct*] (“The use of bundles to sell goods or services . . . is ubiquitous throughout the American economy.”).
- ¹⁰² Pitofsky Statement, at 7; Muris Statement re *Exclusionary Conduct*, at 2 (citing THOMAS T. NAGLE & REED K. HOLDEN, *THE STRATEGY AND TACTICS OF PRICING: A GUIDE TO PROFITABLE DECISION MAKING* 244–45 (3d ed. 2002)).
- ¹⁰³ See generally Evans & Salinger, *Why Do Firms Bundle and Tie?*, at 40–41.
- ¹⁰⁴ See David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 90 (2005); see also Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. CHI. L. REV. 27, 39–43 (2005).
- ¹⁰⁵ See Business Roundtable, Public Comments Submitted to AMC, at 25 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]. But see Willard K. Tom, Statement at AMC *Exclusionary Conduct Hearing*, at 6 (Sept. 29, 2005) [hereinafter Tom Statement].
- ¹⁰⁶ Muris Statement re *Exclusionary Conduct*, at 4.
- ¹⁰⁷ *Id.*
- ¹⁰⁸ See *id.* at 3–4.
- ¹⁰⁹ *Id.* at 2.
- ¹¹⁰ *Exclusionary Conduct Trans.* at 110 (Pitofsky).
- ¹¹¹ See Evans & Salinger, *Why Do Firms Bundle and Tie?*, at 41–42; Muris Statement re *Exclusionary Conduct*, at 2; *Exclusionary Conduct Trans.* at 102 (Muris).
- ¹¹² See Shapiro Statement re *Exclusionary Conduct*, at 17–18 (“One can construct economic models in which a dominant firm selling multiple products can profitably employ multi-product discounts to drive its smaller rivals from the market and then recoup those discounts in the form of higher prices.”). But see Muris Statement re *Exclusionary Conduct*, at 16–17 (discussing shortcomings of models that purport to show that bundling can produce harms); *id.* at 22 (“Empirical support for the anticompetitive hypothesis is virtually nonexistent.”).
- ¹¹³ See Muris Statement re *Exclusionary Conduct*, at 12–18; Daniel Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. CHI. L. REV. 243, 254–61 (2005) [hereinafter Rubinfeld, *Bundled Rebates*].
- ¹¹⁴ Muris Statement re *Exclusionary Conduct*, at 12; Rubinfeld, *Bundled Rebates*, at 254–56.

¹¹⁵ Muris Statement re Exclusionary Conduct, at 12.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 14.

¹¹⁸ *Id.* This theory relies on the “one monopoly rent” theory not applying to the behavior. See Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts*, at 12 (Economic Analysis Group Discussion Paper EAG 04-13, Oct. 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600799; see also Salop Statement, at 3 (listing circumstances in which one monopoly rent, or “single monopoly profit” (SMP) does not apply).

¹¹⁹ See Rubinfeld, *Bundled Rebates*, at 256–58; Muris Statement re Exclusionary Conduct, at 16.

¹²⁰ *LePage’s*, 324 F.3d at 144–45. The six product lines were: Health Care Products, Home Care Products, Home Improvement Products, Stationery Products (including transparent tape), Retail Auto Products, and Leisure Time. *Id.* at 154.

¹²¹ See *id.* at 171 (Greenberg, J., dissenting); see also Joanna Warren, *LePage’s v. 3M: An Antitrust Analysis of Loyalty Rebates*, 79 N.Y.U. L. REV. 1605, 1614 (2004).

¹²² See *LePage’s*, 324 F.3d at 170–71 (Greenberg, J., dissenting).

¹²³ See *id.* at 147 & n.5.

¹²⁴ *Id.* at 152.

¹²⁵ *Id.* at 164.

¹²⁶ *Id.* at 155.

¹²⁷ *Id.* at 161–62.

¹²⁸ Rubinfeld, *Bundled Rebates*, at 262.

¹²⁹ *Ortho*, 920 F. Supp. at 465.

¹³⁰ See, e.g., Muris Statement re Exclusionary Conduct, at 10 (“The Third Circuit did not require *LePage’s* to prove that it could make tape as efficiently as 3M”); Pate Statement, at 14; see also Business Roundtable Comments, at 25.

¹³¹ Rubinfeld, *Bundled Rebates*, at 248.

¹³² See, e.g., Muris Statement re Exclusionary Conduct, at 10 (“The Third Circuit did not require *LePage’s* to prove . . . that 3M’s conduct would have excluded a hypothetical equally efficient competitor.”); Pate Statement, at 14.

¹³³ Rubinfeld, *Bundled Rebates*, at 249.

¹³⁴ See Muris Statement re Exclusionary Conduct, at 11–12; Pate Statement, at 15–16; Business Roundtable Comments, at 24. *But see* American Antitrust Institute, Public Comments Submitted to AMC Regarding Exclusionary Conduct, at 25 (July 15, 2005) [hereinafter AAI Comments re Exclusionary Conduct] (concluding that the outcome in *LePage’s* was “reasonable and predictable”).

¹³⁵ Business Roundtable Comments, at 24. See, e.g., Crane, *Multiproduct Discounting*, at 38–48; Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. CHI. L. REV. 49, 68–71 (2005); Rubinfeld, *Bundled Rebates*, at 254–62.

¹³⁶ See Pitofsky Statement, at 2; *id.* at 8 & n.12 (citing *SmithKline v. Eli Lilly*, 575 F.2d 1056 (3d Cir. 1978); *Ortho*, 920 F. Supp. 455 (S.D.N.Y. 1996); *LePage’s*, 324 F.3d 141 (3d Cir. 2003)).

¹³⁷ See Exclusionary Conduct Trans. at 39 (Tom); Muris Statement re Exclusionary Conduct, at 23–27; Exclusionary Conduct Trans. at 52 (Popofsky); *id.* at 110–11 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 18; Business Roundtable Comments, at 24–25; International Bar Association, Antitrust and Trade Law Section, Public Comments Submitted to AMC, at 19 (Sept. 26, 2005) [hereinafter IBA Comments]. Professor Salop expressed concern that monopolists could circumvent a cost-based test by manipulating the benchmark against which such a test was applied. See Exclusionary Conduct Trans.

at 72. Nonetheless, he seemed to endorse such a test as a matter of theory. See *id.*; see also *id.* at 81–82 (Salop).

¹³⁸ *Ortho*, 920 F. Supp. at 466.

¹³⁹ See Pate Statement, at 17 (price-cost test should operate as a necessary but not sufficient condition for liability); Shapiro Statement re Exclusionary Conduct, at 18.

¹⁴⁰ Shapiro Statement re Exclusionary Conduct, at 18; Muris Statement re Exclusionary Conduct, at 20–21; Tom Statement, at 8–9 (endorsing the requirement that the market from which a rival is purportedly excluded be characterized by economies of scale that prevent reentry). Some also have suggested that courts require an additional showing that the purportedly excluded rival could not rationally match the challenged discounts, or that courts allow defendants to adduce proof that the bundle produces benefits not reflected in the defendant's production costs. See, e.g., IBA Comments, at 20–21 (courts should also ask whether the injured rival can rationally match the challenged discounts); see also Muris Statement re Exclusionary Conduct, at 17 (explaining that bundling that seems to exclude an equally efficient rival may in fact be a means of reducing transaction costs).

¹⁴¹ See Shapiro Statement re Exclusionary Conduct, at 18; IBA Comments, at 18–19; see also M. Laurence Popofsky, Statement at AMC Exclusionary Conduct Hearing, at 11–13 (Sept. 29, 2005).

¹⁴² See *Virgin Atlantic*, 69 F. Supp. 2d at 580 n.8 (describing *Ortho* as holding “that there would be an antitrust violation if the competitive product in the bundle were sold for a price below average variable cost after the discounts on the monopoly items in the bundle were subtracted from the price of that competitive product”) (citing *Ortho*, 920 F. Supp. at 467–69).

¹⁴³ See Shapiro Statement re Exclusionary Conduct, at 18; Tom Statement, at 9.

¹⁴⁴ See Muris Statement re Exclusionary Conduct, at 23 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 749 (2005 Supp.)).

¹⁴⁵ See Muris Statement re Exclusionary Conduct, at 13, 20–27. Under this approach, courts would “allow bundled discounts as long as the price of the bundle exceeds the sum of the separate costs of the constituent elements. Put another way, if the total price of the bundle exceeds the total cost of its constituents (taking into account the efficiencies directly attributable to bundling), the firm has not engaged in predatory bundling.” *Id.* at 13.

¹⁴⁶ See *id.* at 24.

¹⁴⁷ Exclusionary Conduct Trans. at 60–61 (Salop).

¹⁴⁸ See *id.* at 110–11 (Pitofsky).

¹⁴⁹ Muris Statement re Exclusionary Conduct, at 24 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, III ANTITRUST LAW, ¶ 749, at 184).

¹⁵⁰ Upon the Court's invitation to express the views of the United States, the Solicitor General recommended that the Court deny certiorari in *LePage's*. Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, 3M Co. v. LePage's Inc., No. 02-1865, at 19 (May 2004) (stating that “at this juncture, it would be preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard”).

¹⁵¹ Salop Statement, at 5 (“Entry by higher cost (even clearly less efficient) competitors can provide competition to a monopolist and cause prices to fall and output to rise, which increases consumer welfare and allocative efficiency.”).

¹⁵² See *id.*

¹⁵³ See, e.g., Shapiro Statement re Exclusionary Conduct, at 18.

¹⁵⁴ *Id.*

¹⁵⁵ *Ortho*, 920 F. Supp. at 469.

- ¹⁵⁶ *Id.* at 470 (quoting *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979)).
- ¹⁵⁷ The recommended three-part test is proposed here for challenges to bundled *pricing* practices, and its purpose, as the text explains, is to avoid deterring procompetitive price reductions. The Commission is not recommending application of this test outside the bundled pricing context, for example in tying or exclusive dealing cases. The Commission did not undertake to study tying and exclusive dealing issues more generally.
- ¹⁵⁸ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).
- ¹⁵⁹ *Trinko*, 540 U.S. at 407–09.
- ¹⁶⁰ *Id.* at 409.
- ¹⁶¹ See Exclusionary Conduct Trans. at 161 (Pitofsky); Glazer Statement, at 4; Rule Statement re Exclusionary Conduct, at 16–17 (refusals to deal should be lawful *per se*); Shapiro Statement re Exclusionary Conduct, at 13–16 (advocating *per se* legality except where there has been a prior course of dealing); see also Exclusionary Conduct Trans. at 157–58 (Pate) (appearing to endorse rule of *per se* legality for refusals to deal even when there has been a prior course of dealing).
- ¹⁶² *Trinko*, 540 U.S. at 407–08.
- ¹⁶³ See *id.* at 407 (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place.”); see also Shapiro Statement re Exclusionary Conduct, at 12.
- ¹⁶⁴ See Rule Statement re Exclusionary Conduct, at 17 (investment in “development and deployment of technological innovation should be viewed as an efficiency justification, and never a threat to consumer welfare”); Shapiro Statement re Exclusionary Conduct, at 4 (advocating the use of a safe harbor for investment in “new and superior production capacity” and “unadorned product improvement”).
- ¹⁶⁵ Shapiro Statement re Exclusionary Conduct, at 11; HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY*, § 7.5b (3d ed. 2005) (forced sharing “undermines the competitive market process of forcing firms to develop their own sources of supply”); *Trinko*, 540 U.S. at 408; DOJ & FTC, *Trinko* Amicus Brief, at 17 (“A firm that has the right to utilize an input from an incumbent—or that can claim that right through litigation—may have a reduced financial incentive to develop the input itself.”).
- ¹⁶⁶ Shapiro Statement re Exclusionary Conduct, at 12; Rule Statement re Exclusionary Conduct, at 14; see *Trinko*, 540 U.S. at 408 (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.”); see also *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) (“Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing.”).
- ¹⁶⁷ Shapiro Statement re Exclusionary Conduct, at 11–12; Rule Statement re Exclusionary Conduct, at 14.
- ¹⁶⁸ Shapiro Statement re Exclusionary Conduct, at 11.
- ¹⁶⁹ *Trinko*, 540 U.S. at 408.
- ¹⁷⁰ See Carlton, *Why Aspen and Kodak Are Misguided*, at 676–78.
- ¹⁷¹ *Trinko*, 540 U.S. at 409–10.
- ¹⁷² See Salop Statement, at 5.
- ¹⁷³ See *id.* at 2, 5–6.
- ¹⁷⁴ See *id.* at 7 (“[T]he integrated firm generally should be entitled to earn a return on input sales commensurate with whatever market power it has achieved legitimately. A return on this investment in the input technology also may be needed to maintain adequate investment incentives.”); see also Shapiro Statement re Exclusionary Conduct, at 12; Glazer Statement, at 5.

¹⁷⁵ Salop Statement, at 7.

¹⁷⁶ See *id.* at 6–7.

¹⁷⁷ See, e.g., Dep’t of Justice & Federal Trade Comm’n, Horizontal Merger Guidelines, § 4 (1992, revised 1997); Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993) (“Ultimately it remains for the factfinder to weigh the harms and benefits of the challenged behavior.”).

¹⁷⁸ See Pate Statement, at 10–12; Melamed, *Exclusive Dealing Agreements*, at 387 (A “static market-wide balancing test . . . would still pose a daunting challenge to any decision maker and would place a costly and often impossible burden on the defendant when deciding in real time how to conduct its business.”).

¹⁷⁹ See Pate Statement, at 3, 8–12 (arguing that courts can readily administer the “no economic sense” test, and it is easier to administer than the “consumer welfare effects” test); Shapiro Statement re Exclusionary Conduct, at 12 (experience with regulation “makes me doubt that the courts are well placed to control unconditional refusals to deal by imposing price caps and regulating the terms on which dominant firms deal.”).

¹⁸⁰ See *generally* Pate Statement, at 10.

¹⁸¹ See *id.* at 2–12 (defending the “no economic sense” test and criticizing the “consumer welfare effects” test); Melamed, *Exclusive Dealing Agreements*, at 376, 411–12 (advocating the “profit sacrifice” test for all Section 2 claims); Werden, *No Economic Sense Test*, at 415–22. Moreover, the DOJ and the FTC recently advocated such a test in an amicus brief filed in the *Trinko* case. See DOJ & FTC, *Trinko* Amicus Brief, at 7, 15–20.

¹⁸² See Exclusionary Conduct Trans. at 163–64 (Pate).

¹⁸³ Melamed, *Exclusive Dealing Agreements*, at 391 (the “sacrifice” or “no economic sense” test includes an inquiry into whether the conduct does or will in fact protect or enhance a firm’s monopoly power); see DOJ & FTC, *Trinko* Amicus Brief, at 14 (“A *sine qua non* for any claim of monopolization or attempted monopolization is conduct that ‘reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.’” (quoting III PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 651F, at 83–84)); see also United States Telecom Association, Public Comments Submitted to AMC Regarding Refusals to Deal, at 11 (July 15, 2005) [hereinafter USTA Comments re Refusals to Deal] (endorsing requirement of proof of harm as part of a “no economic sense” test); John E. Lopatka & William H. Page, *Monopolization, Innovation, and Consumer Welfare*, 69 GEO. WASH. L. REV. 367, 387–92 (2001) (arguing that proof of actual consumer harm should be a necessary condition for establishing a violation of Section 2); Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693 (2000) (contending that proof of actual anticompetitive effect should be a *sine qua non* of any Section 2 case); cf. *Brooke Group*, 509 U.S. at 224–26 (holding that some prospect of recoupment is a necessary element of predatory pricing claim, without regard to apparent rationality (or not) of the defendant’s pricing).

¹⁸⁴ See Melamed, *Exclusive Dealing Agreements*, at 389–90; USTA Comments re Refusals to Deal, at 10–12; IBA Comments, at 10–11; see also DOJ & FTC, *Trinko* Amicus Brief, at 15–20; cf. AAI Comments re Exclusionary Conduct, at 15–16 (absence of legitimate business justification as a necessary condition for refusal-to-deal liability).

¹⁸⁵ See, e.g., Pate Statement, at 2; see also DOJ & FTC, *Trinko* Amicus Brief, at 7, 15–20.

¹⁸⁶ See, e.g., Exclusionary Conduct Trans. at 27–30 (Rule); M.S. Popofsky, *Defining Exclusionary Conduct*, at 464; see also Steven C. Salop, 73 ANTITRUST L.J. 311, 373 (2006).

¹⁸⁷ See Glazer Statement, at 1.

¹⁸⁸ *Id.* at 1–2.

¹⁸⁹ See *id.* at 2.

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 4.

¹⁹² See *id.* at 6–7 (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005)).

¹⁹³ Glazer Statement, at 7.

¹⁹⁴ *Id.* at 8.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 9.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 9–10.

²⁰¹ See *id.*

²⁰² *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006), *rev'g* 396 F.3d 1342 (Fed. Cir. 2005).

²⁰³ *Id.* at 1293.

²⁰⁴ *International Salt Co. v. United States*, 332 U.S. 392 (1947).

²⁰⁵ *Illinois Tool Works*, 126 S. Ct. at 1288–89.

²⁰⁶ *Id.* at 1289 (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 522–23 (1948)).

²⁰⁷ *Illinois Tool Works*, 126 S. Ct. at 1290.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1291.

²¹⁰ *Id.* at 1291 n.4, 1292.

²¹¹ *Id.* (quoting Dep't of Justice & Federal Trade Comm'n, Guidelines for the Licensing of Intellectual Property, § 2.2 (1995)).

²¹² New Economy Trans. at 38 (witnesses appeared “unanimous in saying that the mere fact that you have a patent shouldn’t give the presumption of market power”); see also James J. O’Connell, Statement at AMC New Economy Hearing, at 3 (Nov. 8, 2005) (“[T]here should not be a presumption of market power in tying cases when there is a patent.”) (citing Brief for the United States as Amicus Curiae Supporting Petitioners, *Illinois Tool Works Inc. v. Independent Ink, Inc.*, No. 04-1329, *cert. granted*, 73 U.S.L.W. 3729 (June 21, 2005)); Carl Shapiro, Statement at AMC New Economy Hearing, at 7–8 (Nov. 8, 2005) (“[m]any patents are “of limited commercial significance” and “many copyrights merely allow their owners to differentiate their products” from others); Richard J. Gilbert, Statement at AMC New Economy Hearing, at 10 (Nov. 8, 2005) (“There should be no presumption that a patent or copyright is a source of market power in tying cases or in other antitrust contexts.”).

²¹³ See Motion Picture Association of America, Inc., Public Comments Submitted to AMC, at 3–4 (July 15, 2005) (stating that “[t]he great weight of analysis and opinion” opposes the presumption, citing numerous authorities); American Intellectual Property Law Association, Public Comments Submitted to AMC, at 1–3 (July 25, 2005) (urging that this Commission recommend congressional action to eliminate the presumption if the Supreme Court does not do so); Computer & Communications Industry Association, Public Comments Submitted to AMC Regarding New Economy, at 12 (July 20, 2005) (a presumption is “unnecessary”).

Chapter I.D

Antitrust and Patents

1. INTRODUCTION

Patents have played an important role in the innovation that has enabled the United States to become “the world’s preeminent technological and economic superpower.”¹ Patents “are granted on the assumption that, although firms and individuals have many incentives to invent and create, some innovations are less likely to be forthcoming in the absence of a grant of exclusive rights providing an opportunity to recoup initial investments while excluding imitators.”²

A number of issues relating to how antitrust law evaluates conduct and transactions involving patents were proposed to the Commission for study. Several issues were not ripe for resolution by this Commission due to recent congressional action or ongoing litigation about the issue.³ Accordingly, the Commission did not undertake a comprehensive survey of the interaction between antitrust and patent law and policy.

The Commission studied some of these issues, however, which are discussed in other sections of this Report. For example, Chapter I.B proposes that, in merger analysis, the agencies take a flexible approach to the two-year time horizon generally used in assessing the likely competitive impact of new entry, and give greater weight to research-and-development-related efficiencies. These recommendations address how the effect of innovation should be assessed in a dynamic competitive analysis. Chapter I.C discusses the Commission’s recommendation that market power should not be presumed from a patent, copyright, or trademark.

This Section of the Report discusses two additional issues involving competition and patents. The first addresses a situation in which members of a standard-setting organization (SSO) may need to pay higher royalties to license a patent *after* SSO members have chosen a standard covered by that patent than they would have *before* the standard was chosen. SSO members may take a range of approaches to mitigate this possibility, including possible joint negotiation of licensing terms before patented technology is adopted as a standard. Some SSOs apparently have avoided joint negotiations with patent holders out of concern that the conduct would be considered a *per se* unlawful violation of the Sherman Act.⁴

Joint negotiations between SSO members and patent holders, without more, may be reasonably necessary in the circumstances to ensure that SSO members obtain reasonable patent licensing terms. At the same time, joint negotiations carry a risk of anticompetitive conduct, so they should be subject to antitrust scrutiny. Accordingly, without intending to endorse any particular approach by SSOs, the Commission makes the following recommendation.

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.*

The second issue involves the relationship between the patent system and competition. Patents and patent law play an important role in the property rights regime essential to a well-functioning competitive economy. Properly applied, patent and antitrust laws are complementary, as both are aimed at encouraging innovation, industry, and competition. As discussed in Chapter I.A, the courts and antitrust agencies in recent decades have developed a more sophisticated understanding of how certain business arrangements involving patents can benefit innovation and competition and have taken such potential procompetitive effects into account.

Just as the proper application of antitrust law is important to holders of patents, how well the patent system operates matters for competition. Patents on obvious subject matter, for example, may impede competition without the offsetting benefits of rewarding innovation. Recent reports from the Federal Trade Commission (FTC)⁵ and the National Academy of Sciences (NAS),⁶ as well as recent cases in which the Supreme Court has granted certiorari,⁷ have raised questions about whether the patent system is functioning as well as it should. Given the importance of proper operation of the patent system to free-market competition, the Commission makes the following recommendations.

* Commissioner Delrahim does not join this recommendation.

Commission Garza joins this recommendation with qualifications.

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- 21.** Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition.* In particular:
- 21a.** Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.†
- 21b.** Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.
- 22.** The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.
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2. NEGOTIATIONS OF PATENT ROYALTIES BY MEMBERS OF STANDARD-SETTING ORGANIZATIONS

A. Background

Collaborative standard setting can produce many procompetitive benefits. Particularly in high-technology industries, collaborative standard setting is ubiquitous as a means to achieve interoperability among a variety of products. Interoperability typically requires agreement on a technical standard that all manufacturers will use in producing their products. Agreement on a standard that achieves interoperability can increase competition, innovation, and output, as well as significantly reduce costs to manufacturers and consumers.

In many circumstances, particularly in technology-intensive industries, the implementation of a technical standard will require firms to obtain licenses to patents that cover the technology chosen as the standard. Before the standard is chosen, patent holders may compete to have a technology that their patents cover chosen as the standard. As part of that

* Commissioners Delrahim and Kempf do not join this recommendation.

Commissioner Garza joins this recommendation with qualifications.

† Commissioners Delrahim and Kempf do not join this recommendation.

competition, they may offer reasonable patent royalties and other licensing terms. Once the standard has been chosen, however, patent holders may believe they can obtain much higher royalty rates and more restrictive licensing terms. At that point, members of the SSO may already have begun designing, testing, and producing goods that conform to the standard. Competition may not operate as a significant constraint on patent holders' demands in such circumstances because the members of the SSO may find it much too expensive and time-consuming to develop a new standard around a different technology. The higher royalties paid by members of an SSO in such circumstances might be passed on to consumers of the ultimate product.⁸

Some SSOs have adopted various practices to reduce the risk of unexpectedly high licensing demands from a patent holder once a standard has been chosen. For example, some SSOs require members to disclose patents that would cover a technology under consideration as a standard and to promise to license any such patents on "reasonable and nondiscriminatory" terms.⁹ Other organizations have pursued alternative approaches. For example, VITA, a non-profit standards development organization, recently sought review by the Antitrust Division of the Department of Justice (DOJ) of a proposed policy requiring participants in VITA's standard-setting process to "disclose patents that are essential to implement a new standard and declare the most restrictive licensing terms that will be required to license any such patents."¹⁰ Under this proposed plan, the patent holder and each prospective licensee will negotiate separately, "subject only to the restrictions imposed by the patent holder's unilateral declaration of its most restrictive terms."¹¹ The DOJ concluded that "[i]mplementation of the proposed policy should preserve, not restrict, competition among patent holders."¹² Among other things, the DOJ noted that, "[u]nless the standard-setting process is used as a sham to cloak naked price-fixing or bid-rigging, the Department analyzes action during the standard-setting process under the rule of reason."¹³

B. Recommendation and Findings

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.*

Members of some SSOs may wish *jointly* to negotiate with patent holders about patent licensing terms before the members select a standard. Such joint negotiations would carry antitrust risk, of course. One antitrust concern would be that members of the SSO might cross the line from discussing royalty rates for licensing patents they need to discussing prices for products they will sell, a *per se* violation of Section 1 of the Sherman Act.¹⁴ Another concern would arise if the members of an SSO jointly possess monopsony power¹⁵ and can force patent holders to offer royalty rates below a reasonable level, leading innovators to respond by reducing new investments in research and development.¹⁶

Depending on the circumstances, joint negotiations can also offer sufficient potential pro-competitive benefits to merit examination under the rule of reason, however. Joint negotiations can allow members of an SSO to obtain reasonable licensing terms from patent holders, which can lead to lower marginal costs for the standardized product and lower consumer prices.¹⁷ By eliminating a potential threat of demands for unreasonably high royalty rates from patent holders, joint royalty negotiations might also facilitate a more timely and efficient development of standards and reduce the need for litigation to resolve issues of patent royalties and other licensing terms.¹⁸

For these reasons, both the Chairman of the FTC and the Assistant Attorney General for Antitrust at the DOJ have stated the FTC and the DOJ likely would evaluate such joint negotiations under the rule of reason.¹⁹ The Commission agrees.

* Commissioner Delrahim does not join this recommendation for the reasons set forth in his separate statement.

Commissioner Garza joins this recommendation insofar as it simply recommends general rule of reason treatment for the legitimate activities of standard-setting organizations, including the joint negotiation of licensing terms before a particular standard is selected. It is critical to note, however, that the Commission is not recommending that such joint negotiation is a preferred approach under the antitrust laws or a necessary one to avoid “hold up” issues. Issues relating to the adoption of an industry standard are complex, and the Commission did not build a record on them. This recommendation should not be taken as a starting point for analysis.

3. THE RELATIONSHIP BETWEEN COMPETITION AND PATENT LAW

The patent laws encourage invention by granting to those who develop new, useful, and nonobvious inventions the exclusive right to practice their inventions for a period of years. Patents and patent law play an important role in the property rights regime essential to a well-functioning competitive economy.

Just as the proper application of antitrust law is important to patent holders, so the proper application of patent law is important to maintaining effective free-market competition. The U.S. patent laws express “a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”²⁰ Patents on obvious subject matter, for example, may impede competition without the offsetting benefits of rewarding innovation. As the Supreme Court has explained, “[t]aken together, the novelty and nonobviousness requirements [to obtain a patent] express a congressional determination that the purposes behind the Patent Clause [of the U.S. Constitution] are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material.”²¹

Recent reports from the FTC and the NAS have raised questions about whether the patent system is functioning as well as it should.²² In recent years, bills have been introduced in Congress to address some of the concerns that have been raised.²³ In addition, the Supreme Court has granted certiorari and heard oral arguments in *KSR International Co. v. Teleflex, Inc.*, a case that presents the issue whether the Federal Circuit’s test for nonobviousness is sufficiently rigorous to screen out obvious patents.²⁴ In an amicus brief urging the Supreme Court to grant certiorari in that case, the Solicitor General stated that the Federal Circuit’s approach to the non-obviousness inquiry “unnecessarily sustains patents that would otherwise be subject to invalidation as obvious.”²⁵ The brief explained the “extension of patent rights to obvious combinations of familiar elements retards, rather than advances, new discoveries.”²⁶

The Director of the U.S. Patent and Trademark Office (PTO) and Under Secretary of Commerce for Intellectual Property, Jon Dudas, has reported that a record 440,000 patent applications were filed in 2006 and “the volume of patent applications continues to outpace our capacity to examine them.”²⁷ Moreover, he noted that the PTO currently has “a pending application backlog of historic proportions.”²⁸ To meet this challenge, the PTO has introduced new ways to improve the speed of its patent examinations, as well as the quality of its review of patent applications²⁹ and Congress has appropriated funds for the hiring of more examiners.³⁰ Nonetheless, the steadily increasing numbers of patent applications each year—in 2006 about 100,000 more patent applications were filed than in 2001—continue to raise concerns that the PTO receive the resources it needs to do its job properly.

Because the proper operation of the patent system is important to maintaining effective free-market competition, the Commission makes the following recommendations.

21. Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition.* In particular:

21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.†

21b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.

21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.

* Commissioners Delrahim and Kempf do not join this recommendation. While they join their fellow Commissioners in urging Congress to consider taking actions that would help ensure the quality of patents, they believe that some of the specific recommendations made by the FTC are not necessarily designed to accomplish that, do not do so, and may well not be helpful in advancing innovation incentives. Commissioner Garza joins the recommendation to give serious consideration to the recommendations in the FTC and NAS Reports but does not necessarily endorse all of the recommendations.

† Commissioners Delrahim and Kempf do not join this recommendation for the reasons stated in the previous note.

Commissioner Garza joins this recommendation with the reservation expressed in the previous note.

Notes

¹ New Economy Transcript at 102–03 (Pinkos) (Nov. 8, 2005).

² NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES OF SCIENCES (NAS), BOARD ON SCIENCE, TECHNOLOGY, AND ECONOMIC POLICIES (STEP), COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS IN THE KNOWLEDGE-BASED ECONOMY, A PATENT SYSTEM FOR THE 21ST CENTURY 18–19 (Stephen A. Merrill et al. eds., 2004) [hereinafter NAS-STEP REPORT].

³ Congress recently took action in the area of standard setting. See, e.g., Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004). Also, certain issues—such as patent settlements between brand and generic drug manufacturers and alleged abuses of standard-setting processes—are exceedingly fact-specific and are being addressed in the context of ongoing litigation, and perhaps legislation. See Opinion of the Commission, *In re Rambus, Inc.*, FTC Docket No. 9302 (Aug. 2, 2006) (finding anticompetitive abuse of the standard-setting process); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) (agreement between brand and generic drug manufacturers), *cert. denied*, 126 S. Ct. 2929 (2006); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3333 (Dec. 13, 2006) (No. 06-830) (agreement between brand and generic drug manufacturers); see also Preserve Access to Affordable Generics Act, S. 316, 110th Cong. (2007) (proposed legislation sponsored by Senators Kohl, Leahy, and others aimed at preventing brand drug companies from compensating generic drug companies for delaying their entry into the market), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-316>.

⁴ Hewlett-Packard Co., Public Comments Submitted to AMC Proposing Issues for Study, at 6–7 (Jan. 5, 2005); Cisco Systems, Inc., Public Comments Submitted to AMC Proposing Issues for Study, at 1–2 (Jan. 7, 2005); Sun Microsystems, Inc., Public Comments Submitted to AMC Proposing Issues for Study, Regarding Ex Ante Disclosure of IPRs, at app. (Sept. 30, 2004). See generally Qualcomm Inc., Public Comments Submitted to AMC (Mar. 1, 2007); Sun Microsystems, Inc., Public Comments Submitted to AMC Proposing Issues for Study, Regarding Standard-Setting Processes (Jan. 4, 2005).

⁵ FEDERAL TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003) [hereinafter FTC REPORT].

⁶ NAS-STEP REPORT, at 18–19.

⁷ *Teleflex, Inc. v. KSR Int’l Co.*, 2005 WL 23377 (Fed. Cir. Jan. 6, 2005), *cert. granted*, 126 S. Ct. 2965, 2966 (2006) (nonobviousness standard); *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1841 (2006) (standard for injunctive relief); cf. *Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 126 S. Ct. 2921 (2006) (writ of certiorari denied as improvidently granted); see *id.* at 2921, 2929 (Justice Breyer, joined by Justices Stevens and Souter, dissenting from dismissal of writ of certiorari and arguing that a decision by the Court would “contribute to the important ongoing debate . . . as to whether the patent system, as currently administered and enforced, adequately reflects the ‘careful balance’ that ‘the federal patent laws . . . embody’”) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989)).

⁸ Cf. Deborah Platt Majoras, FTC Chairman, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, at 8 & n.13 (Sept. 23, 2005) [hereinafter Majoras, Royalty Discussions] (stating that if such royalty rate increases are prevented, “we can generally expect lower royalty rates to lead to lower marginal costs for the standardized product and lower consumer prices”).

⁹ See Mark. A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1906, 1923–27 (2002).

¹⁰ Letter from Thomas O. Barnett, Ass’t Att’y Gen., Antitrust Div., Dep’t of Justice, to Robert A. Skitol, at 1 (Oct. 30, 2006), available at <http://www.usdoj.gov/atr/public/busreview/219380.pdf> [hereinafter VITA DOJ Business Review Letter].

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ *Id.* at 8.

¹⁴ Majoras, Royalty Discussions, at 10–11; VITA DOJ Business Review Letter, at 9–10 (“Any efforts to reduce competition by using the declaration process as a cover to fix downstream prices of VME products would be a per se violation of section 1 of the Sherman Act, and the Department would not hesitate to condemn such activity.”).

¹⁵ See, e.g., *Mandeville Is. Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 242–43 (1948) (finding per se unlawful an agreement among local sugar refiners to set the price at which the refiners would purchase sugar beets). The Supreme Court recently has remarked that “[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.” *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1076 (2007).

¹⁶ Majoras, Royalty Discussions, at 7–8; *cf.* VITA DOJ Business Review Letter, at 9 (“The proposed policy should not permit licensees to depress the price of licenses for patented technologies through joint action because it prohibits any joint negotiation or discussion of licensing terms among the working group members or with third parties at all VSO and working group meetings.”). *But see* Majoras, Royalty Discussions, at 9–10 (discussing ameliorating factors, such as manufacturers in SSOs recognizing that exercising monopsony power might deter patent holders from joining the SSO, thus preventing manufacturers from obtaining pre-standard-setting disclosures; and that monopsony power might be difficult to exercise when the patent holders themselves are also the manufacturers).

¹⁷ Majoras, Royalty Discussions, at 8 & n.13.

¹⁸ *Id.* at 8 (stating that ex ante discussions could “reduce the extent to which litigation is needed to resolve issues relating to patent and standards”).

¹⁹ Majoras, Royalty Discussions, at 7; VITA DOJ Business Review Letter, at 9 n.27.

²⁰ *Bonito Boats*, 489 U.S. at 146.

²¹ *Id.* at 150. The Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

²² See generally FTC REPORT; NAS-STEP REPORT.

²³ See, e.g., S. 3818, 109th Cong. (2006); H.R. 2795, 109th Cong. (2005).

²⁴ *Teleflex*, 2005 WL 23377, cert. granted, 126 S. Ct. at 2966; see also Brief for the United States as Amicus Curiae, *KSR Int’l Co. v. Teleflex, Inc.*, 2006 WL 1455388 (May 25, 2006) [hereinafter U.S. Amicus Brief]. The Supreme Court granted certiorari on June 26, 2006, and heard oral argument on Nov. 28, 2006. *Teleflex*, 126 S. Ct. at 2966, argued, 75 U.S.L.W. 3311 (Nov. 28, 2006); see also *eBay*, 126 S. Ct. at 1841 (addressing issue of which test courts should employ in awarding permanent injunctive relief under the Patent Act).

²⁵ U.S. Amicus Brief, at *12.

²⁶ *Id.* at *9. Similarly, the Solicitor General’s amicus brief on the merits argued that the Federal Circuit test for nonobviousness “exacts a heavy cost in the form of unwarranted extension of patent protection to obvious subject matter.” Brief for the United States as Amicus Curiae Supporting Petitioner, *KSR Int’l Co. v. Teleflex, Inc.*, 2006 WL 2453601, at *10 (Aug. 22, 2006). Some members of the Supreme Court have also recently shown interest in reevaluating what constitutes eligible subject matter. See *Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 126 S. Ct. 2921, 2925 (2006) (Justice Breyer, joined by Justices Stevens and Souter, argued in a dissent to a dismissal of certiorari as improvidently granted that the Court should address the issue of whether certain patents should be deemed “invalid in light of the ‘law of nature’ principle.”).

²⁷ Performance and Accountability Report Fiscal Year 2006, U.S. Patent and Trademark Office, Message from the Director, at 2, *available* at http://www.uspto.gov/web/offices/com/annual/2006/200_message_director.html.

²⁸ *Id.*

²⁹ For example, the PTO has proposed rule changes “to produce a more focused, higher-quality, and efficient [patent] examination,” and “to provide the most relevant information to examiners as early as possible.” *Id.* at 3.

³⁰ *Id.* at 2.

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 juris-

dictions 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

* 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) pre-merger 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 through 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

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- 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.***
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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/online/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 per-

cent (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* Federal Enforcement Institutions Trans. 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 ABA 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.

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

† Commissioners Carlton and Jacobson do not join this recommendation.

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- 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.
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* 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 they 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 par-

ties 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**

Transaction Size	Second Requests		Enforcement Actions	
	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 Majors'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 picture 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 translation 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 dam-

ages 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 anti-competitive 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 1996³³ 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 lit-

igants. 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.

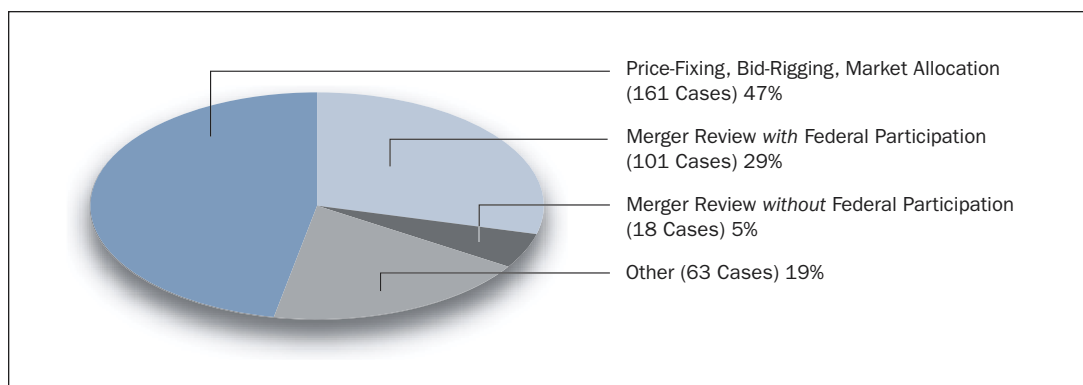


Figure 1: State Antitrust Enforcement by Type of Case

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

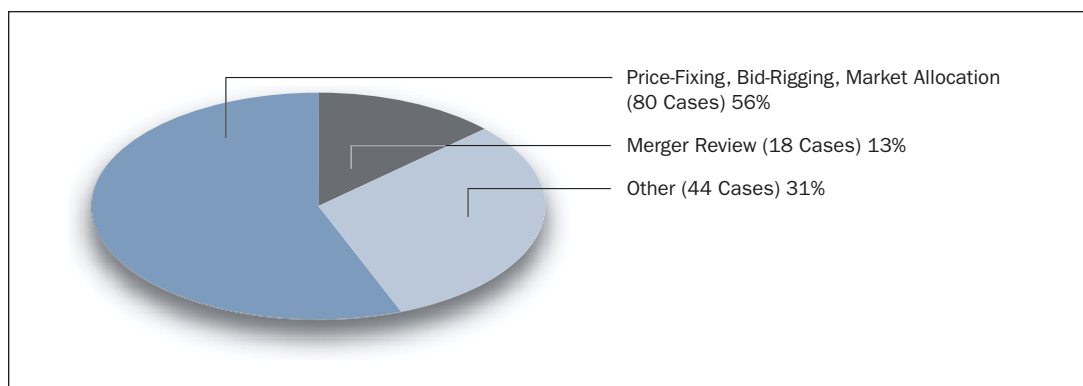


Figure 2: Types of State-Only Antitrust Enforcement

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 anti-competitive 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.

From 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 ENFORCEMENT 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. Connors 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 charges¹²—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 multi-

lateral 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.

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- 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.***
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* Commissioners Shenefield and Valentine do not join this recommendation.

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- 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.”
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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.

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- 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.*
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* 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 2001³⁴ 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 "signif-

ificant 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 IAEEA 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 IAEEA, 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 IAEEA may discourage other jurisdictions from entering into AMAAs with the United States. First, the IAEEA 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 IAEEA 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 con-

sumers 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 cir-

cumstances where the foreign injury was independent of any U.S. effects¹²⁴—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.

* 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 nationality¹⁴⁰

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_1,00.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 IEAA 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 FTIA'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.

Chapter III

Civil and Criminal Remedies

Congress has provided for both private and public enforcement of the antitrust laws. Anticompetitive conduct may be challenged by the Antitrust Division of the Department of Justice, the Federal Trade Commission, state attorneys general, and private parties who have been injured by the antitrust violation and have standing to sue.

When the federal government sues, it can seek a wide range of injunctive relief, including “positive” relief requiring the restructuring of a company or the implementation of certain practices, as well as recover its own damages as a purchaser. In addition, the Department of Justice is uniquely empowered to seek substantial criminal fines against both corporations and individuals and prison sentences against individuals. In more limited circumstances, the federal government may seek civil fines or equitable monetary remedies, including the disgorgement of ill-gotten gains and restitution.

State attorneys general can sue in a *parens patriae* capacity on behalf of injured citizens of their states. They also can recover for state entities where they have been directly injured.

Private parties injured by an alleged antitrust violation can sue to recover three times their actual damages, plus costs and attorneys’ fees, and for equitable relief similar to what the government can obtain. Private antitrust enforcement has been more vigorous in the United States than anywhere else in the world. The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys’ fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs. An aggressive and capable antitrust plaintiffs’ bar has developed to pursue class actions following on to government criminal prosecutions and in situations where individual plaintiffs might not have the ability or incentive to sue. Congress, state legislatures, and the courts have developed rules governing who can recover for injuries that are “passed on” to various levels of consumers, the availability of attorneys’ fees and prejudgment interest on damages, and how liability is allocated among alleged participants in an antitrust conspiracy.

Over the years, observers have debated the effectiveness of this public-private enforcement framework in achieving optimal levels of deterrence and compensation to victims. With respect to private civil actions, for example, the availability of treble damages has been both lauded as the key to an effective enforcement system and blamed for burdening business with litigation of questionable merit. Some observers contend that treble damages are insufficient to deter and compensate at optimal levels and should be increased to some higher

multiplier; others take the opposite view. With respect to government civil and criminal enforcement, observers similarly have suggested both that the government has too great an enforcement arsenal at its disposal and that it has too little.

Because of the interrelated nature of the rules and procedures governing private and public enforcement, the Commission decided to study a range of issues together covering both private and public enforcement. The recommendations described in this chapter accordingly address (A) the availability of treble damages and the rules relating to prejudgment interest and attorneys' fees, as well as the liability of each defendant for the full harm caused by all participants in an antitrust conspiracy (known as "joint and several liability"); (B) which parties in a chain of distribution should be allowed to sue to recover antitrust damages; (C) whether new authorization should be provided for the Department of Justice or the Federal Trade Commission to obtain civil fines for substantive, non-criminal antitrust violations or to seek monetary equitable remedies on an expanded basis; and (D) whether any changes to current criminal antitrust enforcement and sentencing are needed.

Chapter III.A

Private Monetary Remedies and Liability Rules

1. INTRODUCTION

Private antitrust enforcement plays a critically important role in implementing the U.S. antitrust laws. From the outset, Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as “private attorneys general,” and that the antitrust laws should encourage such enforcement.¹

The central feature of private antitrust remedies is its provision for treble damages, which allows plaintiffs in all cases to recover “threefold the damages by him sustained.”² Successful antitrust plaintiffs may, in addition, recover attorneys’ fees and, in certain circumstances, prejudgment interest. The effect of these monetary remedies is reinforced by rules that make defendants jointly and severally liable for damages. That is, each defendant is liable for the full amount of damages even if several defendants jointly engage in the unlawful conduct.

The Commission studied several aspects of private remedies to determine whether they remain sensible and properly serve these goals in light of the development of antitrust law over more than 100 years. In particular, the rule of treble damages has long been questioned by some as potentially too punitive in at least some types of antitrust cases. Much conduct potentially subject to the antitrust laws can be procompetitive, or at least competitively neutral, and the rules on the lawfulness of such conduct are not always clear. As a result, treble damages arguably discourage some conduct that would benefit consumers because the damage exposure exceeds the benefits of the conduct for the company and its customers. Particularly where the law or facts are not clear, imposing treble damages may be considered unfairly punitive. Similarly, the availability of attorneys’ fees for plaintiffs has led to criticism that awarding such fees, in addition to treble damages, encourages the filing of frivolous antitrust cases, particularly if successful defendants are not entitled to recover their fees. Finally, limitations on the availability of prejudgment interest have been criticized for failing to provide successful plaintiffs with full compensation, including compensation for the time from when they suffer harm to when they ultimately recover.

The Commission also reviewed the consequences of the current rule of joint and several liability that applies in antitrust cases. Joint and several liability makes all defendants fully liable for the damages caused by unlawful joint conduct, such that a plaintiff may recover the full amount of the judgment from any one of the defendants. A related rule applicable in antitrust cases bars claims for contribution among defendants. Contribution claims, if allowed, would permit one defendant to seek “contribution” from another defendant if it

has paid more than a “fair” share of the judgment. A second, related rule substantially limits “claim reduction” in antitrust cases. Claim reduction in the antitrust context reduces the plaintiff’s total remaining post-trebling claim to reflect settlement payments already made.

The existing rules of joint and several liability without a right of contribution and only limited claim reduction have given rise to substantial criticism regarding fairness. These rules permit plaintiffs to settle with some defendants at an early stage for a relatively small amount of damages, leaving remaining, non-settling defendants potentially liable for nearly the entire damages caused by the joint conduct, trebled. As a result, these rules can cause a “race” to settle, potentially leaving defendants that had a small or no role in the overall anticompetitive scheme with disproportionately large potential liability.

The Commission recommends the following.

- 43. No change is recommended to the statute providing for treble damages in antitrust cases.***
- 44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.†**
- 45. No change is recommended to the statute providing for attorneys’ fees for successful antitrust plaintiffs. In considering an award of attorneys’ fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.****
- 46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs’ claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.††**

* Commissioners Carlton, Garza, and Warden do not join this recommendation in full.

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

** Commissioners Cannon, Litvack, and Warden do not join this recommendation in full.

†† Commissioners Carlton and Garza do not join this recommendation with respect to contribution among non-settling defendants.

2. TREBLE DAMAGES

A. Background

Section 4 of the Clayton Act allows “any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws” to “recover threefold the damages by him sustained.”³ This provision directly descends from the original Sherman Act, passed in 1890, which included the same treble damages provision.⁴ At the time of the Sherman Act’s passage, congressional debate centered on whether to provide for double or treble damages; single damages were not seriously considered as an alternative.⁵ Senator Sherman and others argued that multiple damages should be “commensurate with the difficulty of maintaining a private action,” punitive, and provide incentives to plaintiffs to act as private attorneys general.⁶

Treble damages have remained the rule in antitrust cases, despite periodic efforts to eliminate or limit their availability.⁷ There are a few instances in which treble damages are not available. For example, Congress has created a small number of statutory exemptions pursuant to which plaintiffs’ damages are not automatically trebled.⁸ Congress has also provided for the elimination of treble damages, in specified circumstances, for organizations that participate in the Department of Justice’s (DOJ) corporate leniency program, which provides incentives to participants in cartel activity to provide evidence to the DOJ for use in criminal prosecutions.⁹

B. Recommendation and Findings

43. No change is recommended to the statute providing for treble damages in antitrust cases.*

* Commissioners Carlton, Garza, and Warden do not join this recommendation in full.

Commissioners Carlton and Garza believe further consideration should be given to increasing treble damages in international price-fixing conspiracies where certain victims of the conduct may not seek compensation in U.S. courts through operation of the Foreign Trade Antitrust Improvements Act. In addition, they believe it would be appropriate to reduce the multiplier in cases where conduct is overt because the likelihood of such conduct’s evading detection and, if unlawful, being prosecuted is much lower than for covert conduct.

As set forth in his separate statement, Commissioner Warden (with whom Commissioner Garza joins) would permit the award of treble damages where there is proof by clear and convincing evidence of clearly unlawful conduct.

Treble damages serve five related and important goals:

- (1) Deterring anticompetitive conduct;
- (2) Punishing violators of the antitrust laws;
- (3) Forcing disgorgement of the benefits of anticompetitive conduct from those violators;
- (4) Providing full compensation to victims of anticompetitive conduct; and
- (5) Providing an incentive to victims to act as “private attorneys general.”¹⁰

Although it has been argued that, in certain circumstances, something more or less than treble damages would better advance one or more of these goals,¹¹ the Commission concludes that an insufficient case has been made for changing the treble damages rule, either universally or in specified instances.¹² The Commission concludes that, on balance, the treble damages rule well serves the defined goals.

Deterrence. The first broadly recognized purpose of treble damages is deterrence. To eliminate the incentive to engage in anticompetitive conduct, a violator must be exposed to forfeiture of potential gains from such conduct. Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge.¹³ If a company realizes that its anticompetitive conduct has only a 50 percent chance of being detected, and if its liability were limited to single damages, it would be more likely to engage in that conduct because the reward exceeds the risk.¹⁴

Punishment of violators. The second recognized purpose of treble damages is to punish offenders, similar to punitive damages under the common law and other statutes.¹⁵ This reason is closely related to the deterrence justification: providing a multiple of damages helps deter such conduct and highlights societal disapproval of such conduct. Furthermore, in addition to raising prices, anticompetitive conduct causes allocative inefficiency (for example, forgone purchases and substitution of less optimal alternatives) that, while reducing consumer welfare, is not reflected in damage calculations.¹⁶ Treble damages help to ensure that the violator pays damages that more fully reflect the harm to society caused by the anticompetitive conduct.¹⁷

Disgorgement of gains. Treble damages also serve the purpose of requiring the disgorgement of unlawfully obtained gains (or profits) that result from anticompetitive conduct.¹⁸ Preventing violators from profiting removes incentives to engage in such conduct and thereby enhances deterrence.¹⁹

Compensation to victims. A fourth purpose of treble damages is to ensure full compensation to the victims of anticompetitive conduct. Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover “speculative” damages) treble damages help ensure that victims will receive at least their actual damages.²⁰

Creating incentives for “private attorneys general.” Finally, providing treble damages creates incentives for private enforcement of the antitrust laws. This is of particular importance in light of limited government resources to identify and prosecute all anticompetitive con-

duct.²¹ Incentives for private enforcement reinforce the other objectives of treble damages by increasing the likelihood that claims will be brought against violators, thereby enhancing deterrence, appropriate disgorgement and punishment, and compensation to victims.²²

The Commission was not presented with substantial evidence or empirical support that treble damages do not advance these goals. However, some have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery.²³ No actual cases or evidence of systematic overdeterrence were presented to the Commission, however.²⁴

The Commission carefully considered a variety of circumstances in which it was proposed that the damages multiplier might be decreased (or increased). As described more fully below, the Commission considered the following (among others): (1) providing treble damages only in cases where the conduct is clearly unlawful and devoid of competitive benefit; (2) limiting damages to single damages when the conduct is overt; and, (3) placing the damages multiplier in the discretion of the trial judge. Ultimately, the Commission declined to recommend these approaches for the reasons set forth below.

There is broad consensus that treble damages are appropriate for hard-core cartel conduct. Even those who advocate eliminating treble damages in some circumstances agree that price-fixing and similar conduct should be subject to treble damages.²⁵ Moreover, some argue that the multiplier should be higher in these cases to compensate for the low likelihood of detection.²⁶ Nonetheless, because the Commission recommends retention of a single, uniform multiplier in all antitrust cases, and because hard-core cartel conduct is often subject to criminal prosecution,²⁷ the Commission does not recommend any increase to the multiplier for hard-core conduct.

The Commission also declines to recommend a change to provide for only single damages in rule of reason cases. Several fundamentally similar proposals were advanced to the Commission to limit treble damages to per se antitrust violations, where the conduct is clearly unlawful and bereft of procompetitive benefits.²⁸ These advocates argue that in cases other than those—where conduct may be procompetitive or is subject to unclear legal standards—treble damages may deter or “chill” potentially procompetitive behavior.²⁹ Although such concerns are reasonable, the Commission concluded that statutorily defining whether conduct was a per se violation or subject to the rule of reason would prove difficult.³⁰ Furthermore, there is anticompetitive conduct that is not per se unlawful can cause as much damage as per se violations such as price-fixing.³¹ Indeed, eliminating treble damages for such cases could greatly hamper incentives to bring actions, and thus reduce deterrence too much.³²

The Commission also evaluated, but declined to recommend, limiting treble damages to conduct that is covert.³³ For conduct that is publicly open (or “overt”)—such as mergers, and most joint ventures, distribution contracts, and single-firm conduct—the probability of detection is close to 100 percent.³⁴ By comparison, much covert cartel activity likely goes

undetected.³⁵ Given that a principal justification for treble damages is to account for the likelihood of detection, there may be no need for multiple damages where the public is aware of the conduct or it is otherwise overt.³⁶ The Commission declined to recommend the creation of such a distinction, however, because some overt conduct, such as aspects of a legitimate joint venture, may be a disguised cartel, or otherwise cause severe harm.³⁷ As with the proposed division between per se and rule of reason conduct, such a distinction might result in increased litigation over whether treble damages are available on the facts of the conduct.

In light of the concerns with these two proposals, as well as several other similar proposals, the Commission also considered, but rejected, a rule that would leave the decision whether to award treble damages to the discretion of a judge. A court may be best positioned to evaluate the severity of the violation, in light of a range of possible factors, and tailor the penalty accordingly.³⁸ This approach would allow a court to decline to award treble damages if, for example, the questions of fact are close or the legal standards unclear, the conduct was overt, or the conduct had sizable procompetitive benefits.³⁹ Allowing judges to award only single damages in such cases would therefore potentially reduce overdeterrence and the chilling of procompetitive conduct that may result from mandatory trebling.⁴⁰ It would also avoid the need for drafting a statute that defines types of conduct that are and are not subject to treble damages. The Commission concluded, however, that such an approach would increase the length and cost of trials as the parties contest factual issues relevant to the factors to be considered.⁴¹ Moreover, judges would be required potentially to balance multiple, conflicting factors, leading to inconsistency across courts and forum shopping.⁴²

3. PREJUDGMENT INTEREST

A. Background

Prior to 1980, prejudgment interest was not available for antitrust claims. In 1980, in response to a recommendation by the National Commission for the Review of Antitrust Law and Procedure, Congress amended Section 4 of the Clayton Act to permit courts to award prejudgment interest when it is “just in the circumstances.”⁴³ The statute permits a court to award prejudgment interest when:

- (1) A party filed motions or asserted claims “so lacking in merit” that they could only have been intended for delay, or “otherwise acted in bad faith”;
- (2) A party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; or
- (3) A party engaged in conduct primarily intended to delay litigation or raise its cost.⁴⁴

In the twenty-six years since the amendment, there has been no reported decision awarding prejudgment interest in an antitrust case.⁴⁵

B. Recommendation and Findings

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.*

The purpose of the current provision regarding prejudgment interest is to compensate plaintiffs for dilatory tactics by defendants, which is appropriate. Prejudgment interest is not, however, more broadly available. When available, prejudgment interest helps to ensure that a plaintiff harmed by a defendant's unlawful conduct is fully compensated for its injury. Where a legal violation has caused harm many years before a plaintiff receives an award of damages, the plaintiff has not earned interest on the lost money for that period of time; conversely, the defendant may have earned returns on the unlawful gains until paying the judgment.⁴⁶ That is, some argue, "the time value of money works in [the] defendants' favor . . . [allowing] defendants to profit from their wrong."⁴⁷ Because antitrust cases can take several years to resolve, prejudgment interest is particularly appropriate.⁴⁸

Treble damages, a rule to which the Commission recommends no change, adequately compensate for the general unavailability of prejudgment interest in antitrust cases.⁴⁹ Treble damages help ensure that injured parties are indirectly compensated for the loss of the time value of their money and that defendants are not able to profit from their wrongs. Antitrust damages are not easily calculated at the time of injury in most cases. The current rule making prejudgment interest unavailable in antitrust cases is thus consistent with the traditional rule in tort lawsuits, which makes prejudgment interest unavailable because damages are not readily quantifiable at the time of injury.⁵⁰ Finally, some courts have effectively compensated for the lack of prejudgment interest by including in the determination of damages elements such as inflation and interest paid on borrowed capital.⁵¹ Changing the rule relating to prejudgment interest could deter courts from developing sounder rules regarding the treatment of opportunity and capital costs. These considerations, together with lim-

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

Commissioners Carlton, Delrahim, Garza, and Shenefield would provide mandatory prejudgment interest from the time of injury in order to compensate injured parties fully for the time value of money.

Commissioner Warden would provide mandatory prejudgment interest from the time of injury in any case where damages are not trebled.

ited evidence and argument in support of greater availability of prejudgment interest in the Commission's record,⁵² leads the Commission not to recommend any change to the current statute.

4. ATTORNEYS' FEES

A. Background

Section 4 of the Clayton Act, as the Sherman Act did before it, permits successful plaintiffs to recover reasonable attorneys' fees and costs.⁵³ A plaintiff is considered to be "successful," and an award of attorneys' fees is mandatory, whenever any damages are awarded.⁵⁴ In addition, a plaintiff seeking injunctive relief under Section 16 of the Clayton Act may, if it "substantially prevails," recover attorneys' fees.⁵⁵ The purpose of awarding attorneys' fees to prevailing plaintiffs is to help ensure that plaintiffs with meritorious claims will have access to counsel to redress antitrust violations.⁵⁶ They also provide additional incentives to private parties to bring lawsuits prosecuting anticompetitive conduct.⁵⁷ A successful defendant, however, is not entitled to recover attorneys' fees.⁵⁸

Although the Clayton Act entitles a successful antitrust plaintiff to recover reasonable attorneys' fees, the courts still must determine whether the requested fees are in fact "reasonable."⁵⁹ Some courts consider factors such as the novelty of the issues in the case, the skill required to perform the legal services properly, the attorney's experience and reputation, the undesirability of the case, and numerous other factors.⁶⁰ Many courts start with a "lodestar" figure, which is the attorney's hourly rate multiplied by the attorney's hours worked.⁶¹ The court then makes adjustments to that lodestar figure if appropriate.⁶²

B. Recommendation and Findings

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.*

* Commissioners Cannon, Litvack, and Warden do not join this recommendation in full.

Commissioner Cannon would not make any recommendation regarding the factors to be considered by courts in awarding attorneys' fees, but otherwise joins the recommendation.

Commissioner Litvack would make attorneys' fees available to prevailing defendants as well.

As set forth in his separate statement, Commissioner Warden would award attorneys' fees to prevailing defendants in cases brought by competitors.

By statute, successful antitrust plaintiffs are entitled to mandatory attorneys' fees. But it is within a court's discretion to determine when those fees are reasonable, and to make upward or downward adjustments when necessary. These fees are intended to compensate plaintiffs for undertaking risky, costly litigation.⁶³

Because fees are intended to provide an incentive to discover and prosecute anticompetitive conduct, they are less necessary where much of that evidence has been developed as part of a government investigation. In such cases the plaintiff's case is often already made by the underlying criminal conviction.⁶⁴ Courts should therefore consider whether the plaintiffs were relying on such evidence, and reduce fees appropriately in such cases to reflect the relative lack of risk and burden.

5. CONTRIBUTION AND CLAIM REDUCTION

A. Background

Under the antitrust laws, liability is joint and several for all defendants, with no right of contribution among defendants.⁶⁵ Thus, a plaintiff may obtain treble the damages resulting from the entire conspiracy from a single participant of a price-fixing conspiracy or other anticompetitive agreement. An antitrust defendant may not seek contribution from any other co-conspirator, however. In addition, if one or more defendants settle an antitrust claim, under the rule governing claim reduction, the plaintiff's remaining claim is reduced, after trebling, by the amount of the settlement.⁶⁶ Under these combined rules, if an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, trebled, non-settling defendants arguably remain liable for more than their "fair" share of damages.⁶⁷

The policy questions raised by these rules have been debated extensively over the past two decades, particularly preceding and in the immediate wake of the Supreme Court's 1981 decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*⁶⁸ That decision explained that any change to the traditional, existing rule was for Congress, not the courts, to make.⁶⁹ Up to now, however, Congress has declined to legislate in the area.⁷⁰ Indeed, Congress recently reconfirmed the general application of the rule of joint and several liability in antitrust cases when it passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) in June 2004.⁷¹

B. Recommendation and Findings

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.*

The current rules concerning contribution and claim reduction are fundamentally unfair.⁷² Antitrust defendants are jointly and severally liable, but defendants may seek reduction of plaintiffs' claims only of the amount paid by settling defendants, after total damages have been determined and trebled, and also may not seek contribution from non-settling defendants. The combination of a very limited right to claim reduction and no right of contribution means that one defendant may be responsible for nearly all of the damage caused by an antitrust conspiracy.⁷³ These rules create significant pressure on defendants to settle antitrust claims, even those claims of questionable merit, simply to avoid the potential for excessive liability.⁷⁴ This dynamic permits plaintiffs to engage in "whipsaw" settlement tactics, playing defendants off one another to race to settle early or be left potentially liable for nearly the full remaining amount of the claims.⁷⁵ As a result, less culpable defendants may pay an unfairly large share of total damages, while more culpable defendants escape significant (or any) liability.⁷⁶ Although the existing rules can maximize deterrence and encourage the resolution of antitrust claims through quick settlement,⁷⁷ they may also overdeter conduct that may not be anticompetitive by exposing individual defendants to potential liability for damages far in excess of the benefits they derived from their conduct.

Congress should enact legislation applicable to all antitrust cases involving joint and several liability that would address both concerns. The legislation should permit non-settling defendants to obtain reduction of the plaintiffs' remaining claims against the non-settling defendants by the ratable share of liability of the settling defendants or the amount of the settlement, whichever is greater. (As explained below, the ratable share of liability would be based in most cases on the defendants' market shares.) The contribution provision should permit non-settling defendants to seek contribution from other non-settling defendants to

* Commissioners Carlton and Garza do not join this recommendation with respect to a right of contribution among non-settling defendants. Commissioner Carlton believes that pursuit of claims for contribution among non-settling defendants would be a misuse of judicial resources. Commissioner Garza believes that current policy better furthers the goal of deterrence by destabilizing cartels and discouraging their formation and that the goals of deterrence and judicial efficiency outweigh any concern for "fairness" among defendants in cartel cases.

the extent a plaintiff has collected a disproportionate share of its judgment from one or more of the non-settling defendants. Together, these provisions would enhance fairness among both settling and non-settling defendants, while not undermining overall deterrence or the efficient resolution of antitrust litigation through settlement. Indeed, the combination of claim reduction and contribution results in defendants paying a properly allocated share of damages. It also helps ensure that all defendants face an appropriate level of deterrence.⁷⁸ The two principal components of the proposed legislation are more fully described below.

Illustration of Effect of Commission's Recommendation

Companies A, B, and C enter into an arrangement to fix prices. The violation is per se illegal. Plaintiff sues all three companies for a total of \$100m (to be trebled). Plaintiff settles with A before trial for \$80 million, and a court finds B and C liable as alleged.

Defendant	Market Share	Liability Under Current Law	Liability Under Proposed Law
A	50%	\$80 million in settlement	\$80 million in settlement
B	30%	\$220 million (joint and several with C)	\$150 million, with claim for contribution against C for up to \$60 million
C	20%	\$220 million (joint and several with B)	\$150 million, with claim for contribution against B for up to \$90 million
Plaintiff's Total Recovery		\$300 million, with \$220 million coming from B and/or C as Plaintiff sees fit to collect.	\$230 million, with \$150 million coming from B and/or C as Plaintiff sees fit to collect.

First, the claim reduction provision would reduce the remaining liability of the non-settling defendants by the amount of the settlement or the ratable share of liability of the settling defendant(s), whichever is greater. This ensures that non-settling defendants are not made worse off, in the form of liability potentially greatly disproportionate to their relative contribution to the anticompetitive conduct, as a result of settlements between the plaintiffs and other defendants.⁷⁹ Claim reduction can thus provide much greater fairness between settling and non-settling defendants.⁸⁰ Plaintiffs' total possible recovery will not be reduced by the availability of claim reduction, however. The only reduction in plaintiffs' recovery will come from its decision to settle a claim rather than pursue it through to judgment, thereby gaining a certain recovery in exchange for forgoing a chance at larger recovery while avoiding the risk of no recovery at all.

The Commission understands that allowing claim reduction will likely reduce incentives for settlement, at least to some extent.⁸¹ Nonetheless, reducing "whipsaw" settlements is worth the reduction in the likelihood of settlements and deterrence that claim reduction may

create.⁸² To be sure, some plaintiffs may be deterred from settling out of fears that they will be doing so “too cheaply.”⁸³ But incentives for settlement will remain, and claim reduction will have the salutary effect of encouraging plaintiffs to consider more carefully the proper amount of the settlement with each defendant.⁸⁴ Finally, claim reduction should not significantly hamper overall deterrence, because non-settling defendants will still face significant, joint and several treble damages liability for the remainder of the plaintiffs’ claim.

Second, the recommended statute should allow claims for contribution, but only among non-settling antitrust violators. Contribution would not be available against settling defendants. By making contribution available only among non-settling defendants, defendants will not be deterred from settling by the threat that their liability may later be increased through a contribution action.⁸⁵ Accordingly, defendants can “buy peace” through settlement without concern over future claims for contribution. Furthermore, this rule should not reduce incentives to settle; on the contrary, it leaves the same incentives to settle as the current rule barring contribution altogether.⁸⁶ Finally, and perhaps most importantly, providing this limited right of contribution in no way reduces the total recovery of the plaintiff, as it serves solely to apportion liability among defendants after a plaintiff has recovered a judgment against them.

This limited right of contribution should not significantly reduce overall deterrence of antitrust violations. First, it helps ensure all defendants will be liable for a fair share of the damages caused; no guilty party can get off “free.”⁸⁷ Second, companies do not appear to consider whether their conduct will give rise to joint and several liability, let alone whether they will have contribution rights, until they are in litigation.⁸⁸ Furthermore, the proposed statute will enhance fairness by ensuring that liability among non-settling defendants is more equitably allocated.⁸⁹ The rule thus also protects innocent parties, or those with a very minor role in an anticompetitive scheme, from having to settle claims due to the threat of liability for industry-wide damages in great disproportion to their role (if any) in the conduct.⁹⁰

Adoption of a rule providing for claim reduction and for contribution requires a method of allocating shares of liability for purposes of determining the plaintiffs’ claims remaining after a settlement. The Commission recommends that each defendant’s allocated share of liability, for either claim reduction or contribution, be equal to each defendant’s market share or gain from the antitrust violation. Allocation based on market share should be relatively easily accomplished in the substantial majority of multiple-defendant cases, such as price-fixing conspiracies, and should not significantly increase litigation costs. For those cases in which market share would not be an appropriate basis for allocating liability, use of relative gain makes for an appropriate substitute that is also reasonably straightforward to calculate. The Commission does not recommend that the statute contain more tailored calculation mechanisms for various types of violations,⁹¹ because such approaches could potentially complicate the contribution proceeding and add to the burden on the courts.

The Commission has provided a possible statute in Annex A that would implement the Commission’s recommendation. It is generally consistent with, although somewhat more

comprehensive than, several other proposals considered by Congress that would implement either claim reduction or contribution, or both.⁹² The model set out here is based largely on a substitute/alternative to S. 995, proposed by Assistant Attorney General William Baxter in 1981. The American Bar Association, Section of Antitrust Law proposed model legislation to the Commission that is also worthy of congressional consideration and would, in large part, implement the Commission's recommendations as well.⁹³

ANNEX A

Proposed Statute

The Clayton Act (15 U.S.C. § 12 et seq.) is amended by inserting after Section 4H the following new section:

SEC. 4I. (a) In any action under Section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of: (1) any amount stipulated for this purpose; (2) the amount of the consideration paid for the release; or (3) treble the actual allocated share of damages of the person released.

(b) Any person who is liable for damages in an action brought under Section 4, 4A, or 4C of this Act may claim contribution, in accordance with this Section, from any other person jointly liable for such damages.

(c) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into in good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

(d) A claim for contribution may be asserted by cross-claim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.

(e) Claim reduction and contribution rights shall, to the extent consistent with the fair and expeditious conduct of litigation, be determined in a proceeding following the trial of the action in respect of which claim reduction or contribution rights are claimed.

(f) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

(g) For the purposes of claim reduction and contribution, the allocated share of damages of each defendant shall be determined on the basis of each defendant's market share, unless so doing would be impractical or unjust in light of the nature of the unlawful conduct. If use of market share is not practical or is unjust, the court shall, in its discretion, use the gain of each defendant from the violation or any other method that would be equitable.

(h) Claim reduction and contribution rights shall be determined by the court sitting without a jury.

(i) Nothing in this section shall affect the joint and several liability of any person.

Section-by-Section Analysis

Subsection (a) provides for claim reduction. Claim reduction would be available for all types of antitrust violations, as explained with respect to Subsection (b). The plaintiff's claim would be reduced by the greatest of the amount of the settlement, the amount stipulated to in the settlement agreement, or treble the allocated share of the settling defendant's damages, as calculated pursuant to Subsection (g).

Subsection (b) makes the right of contribution applicable to all actions brought under the relevant sections of the Clayton Act. Although the substantial majority of cases in which these rules would have significant application are likely to be horizontal price-fixing cases, there is no reason specifically to limit the applicability of the statute to those types of antitrust cases.

Subsection (c) limits contribution claims to non-settling defendants. This limitation ensures that settling defendants will be able to remove themselves completely from the litigation without worrying about subsequent claims of contribution from co-conspirators or other defendants (it also prevents settling defendants who paid "too much" from seeking to recover a portion of their overpayment from non-settling defendants).

Subsection (d) provides non-settling defendants with multiple procedural options for bringing a claim for contribution, and thus maximizes the flexibility of defendants in seeking contribution.

Subsection (e) provides that claim reduction and contribution issues should be adjudicated after the trial on the main action wherever possible. This provision achieves three objectives. (1) It ensures that contribution issues remain exclusively among defendants; (2) it prevents the main action from becoming unduly complicated; and (3) it eliminates unnecessary adjudication of issues relating to contribution if liability is not established. If, however, the court determined that some issues relating to contribution could be resolved more expeditiously during the main case, this provision would permit the court to allow for such issues to be addressed during the main proceeding.

Subsection (f) creates a statute of limitations of six months after the entry of final judgment for contribution claims to be brought.

Subsection (g) addresses the method of allocating liability among multiple antitrust defendants for purposes both of claim reduction and contribution. This provision makes market share the presumptive basis for allocating liability among defendants for purposes of contribution and for purposes of determining the proper claim reduction of plaintiff's claims. It calls for the use of gain from the conduct as a secondary method, or any other method equitable in the circumstances.

Subsection (h) provides that claim reduction and contribution issues are to be decided without the use of a jury.

Subsection (i) reaffirms that the joint and several liability of antitrust defendants is not affected by any of the provisions. This provision ensures that plaintiffs will not bear any risk of reduced recovery from insolvent defendants and thus will be able fully to recover their damages (so long as at least one defendant is sufficiently solvent to pay the entire claim).

Notes

¹ See Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 782 (1987) [hereinafter Cavanagh, *Detrebling Antitrust Damages*] (stating that Senator Sherman expressed concerns about providing a remedy that would be “commensurate with . . . maintaining a private action”); David Boies, Statement at AMC Civil Remedies Hearing, at 2 (July 28, 2005) [hereinafter Boies Statement].

² 15 U.S.C. § 15(a).

³ *Id.*

⁴ Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890); see Cavanagh, *Detrebling Antitrust Damages*, at 778 (citing Section 7 of the Sherman Act as originally enacted).

⁵ See Cavanagh, *Detrebling Antitrust Damages*, at 782.

⁶ *Id.*; see also Boies Statement, at 2 (stating that Senator Sherman viewed multiple damages as being necessary to “deputiz[e] plaintiffs as private attorneys general by creating effective incentives to pursue what was even then viewed as costly and complex litigation”).

⁷ See, e.g., Boies Statement, at 2–4 (recounting statutory proposals in early 20th century to move to single damages, through calls in mid-20th century to make treble damages discretionary, to legislative efforts in 1980s to limit treble damages to per se violations).

⁸ For example, the National Cooperative Research and Production Act limits the liability of certain joint research and development ventures and standards development organizations notified under the Act to single damages (plus interest and reasonable attorneys’ fees). See 15 U.S.C. § 4303(a). The Export Trading Company Act similarly limits a plaintiff to recovering only actual damages for injuries resulting from conduct engaged in pursuant to a certificate of review granted under the Act. See 15 U.S.C. § 4016(b)(1).

⁹ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004) (codified as amended at 15 U.S.C. § 1 note) [hereinafter ACPERA]. The provision expires in 2009. *Id.* § 211(a), 118 Stat. at 666.

¹⁰ Cavanagh, *Detrebling Antitrust Damages*, at 783; Boies Statement, at 6–7; Edward D. Cavanagh, Statement at AMC Civil Remedies Hearing, at 3–7 (July 28, 2005) [hereinafter Cavanagh Statement]; see *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

¹¹ See, e.g., U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 15–18 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; Business Roundtable, Public Comments Submitted to AMC, at 3–4 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]; Abbott B. Lipsky, Jr., Statement at AMC Civil Remedies Hearing, at 14 (July 28, 2005) [hereinafter Lipsky Statement]; Cavanagh Statement, at 9–10.

¹² See, e.g., Thirty Antitrust Practitioners, Public Comments Submitted to AMC (June 17, 2005) [hereinafter Thirty Antitrust Practitioners Comments]; American Antitrust Institute, Comments Submitted to AMC Regarding Civil Remedies (June 17, 2005) [hereinafter AAI Comments re Civil Remedies].

- ¹³ Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 454 (1980) [hereinafter Easterbrook, *Detrebling Antitrust Damages*]; Robert H. Lande, Statement at AMC Civil Remedies Hearing, at 7 (July 28, 2005) [hereinafter Lande Statement] (“No one knows the percentage of antitrust violations that are detected and proven.”); Civil Remedies Transcript at 161–62 (Easterbrook) (July 28, 2005) (suggesting multiplier for concealed cartels might appropriately be higher than three); Cavanagh, *Detrebling Antitrust Damages*, at 813.
- ¹⁴ For a richer discussion of factors impacting deterrence, see Easterbrook, *Detrebling Antitrust Damages*, at 449–51; Cavanagh Statement, at 4–6; Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1017–20 (1986); Thirty Antitrust Practitioners Comments, at 2.
- ¹⁵ Cavanagh Statement, at 6; Cavanagh, *Detrebling Antitrust Damages*, at 786–87.
- ¹⁶ Lande Statement, at 4–6; see also Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages).
- ¹⁷ See Lande Statement, at 5; Easterbrook, *Detrebling Antitrust Damages*, at 455.
- ¹⁸ Boies Statement, at 12; see also John D. Graubert, Statement at AMC Government Civil Remedies Hearing, at 3 (Dec. 1, 2005) (“[A]n essential element of the response to an antitrust violation is to deprive violators of the gains from their unlawful conduct.”) (citing, *inter alia*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961)).
- ¹⁹ See Cavanagh Statement, at 6 (treble damages make it unlikely violators will profit); Cavanagh, *Detrebling Antitrust Damages*, at 787; Boies Statement, at 12; see also Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, *Hearst Trust and Hearst Corporation’s Acquisition of J.B. Laughrey Inc.*, FTC File No. 991-0323 (stating that “private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing” in that case).
- ²⁰ See Lande Statement, at 2, 3–8 (the “‘treble damages’ remedy . . . really only amounts to approximately single damages,” because there is no prejudgment interest, damages do not compensate for allocative inefficiency, and other factors); Boies Statement, at 12 (delay in reaching trial and judgment is particularly long); see also Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages); Stephen D. Susman, Statement at AMC Civil Remedies Hearing, at 5–6 (July 28, 2005) [hereinafter Susman Statement]; Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 124, 130–34 (1993).
- ²¹ See Thirty Antitrust Practitioner Comments, at 3 (“[T]he federal government has limited resources at its disposal, and thus cannot adequately investigate and prosecute all (or even most) illicit anticompetitive behavior.”); Cavanagh, *Detrebling Antitrust Damages*, at 790 ([The] “private remedy permits prosecution of illegal conduct which the federal government is without resources to pursue.”); see also Harry M. Reasoner, Statement at AMC Civil Remedies Hearing, at 2 (July 28, 2005) [hereinafter Reasoner Statement] (“[G]overnmental resources are plainly inadequate to police the American economy.”). But see Business Roundtable Comments, at 3 (“The legislative history suggests that Senator Sherman envisioned private suits as a little-used tool.”) (citing Cavanagh, *Detrebling Antitrust Damages*, at 783).
- ²² See Easterbrook, *Detrebling Antitrust Damages*, at 451–52; Cavanagh, *Detrebling Antitrust Damages*, at 786.
- ²³ See, e.g., U.S. Chamber of Commerce Comments, at 17; Lipsky Statement, at 4–5 (referring to a “cluster bomb” of other remedies, such as equitable disgorgement, state suits, indirect purchaser rights); Cavanagh, *Detrebling Antitrust Damages*, at 792 (stating that mandatory treble damages may far exceed the harm caused).
- ²⁴ See Lande Statement, at 9 (stating that “duplicative recovery” has never occurred).
- ²⁵ See Business Roundtable Comments, at 3 (proposing elimination of treble damages except for “per se illegal conduct—horizontal price-fixing, market allocation, and bid-rigging”); U.S. Chamber of Commerce Comments, at 17 (suggesting limiting treble damages to per se offenses); see also Cavanagh Statement,

at 7–8 (while not necessary in every antitrust case, “trebling is absolutely critical in . . . horizontal price-fixing and horizontal divisions of markets” cases); Lipsky Statement, at 10.

- ²⁶ Thirty Antitrust Practitioners Comments, at 2 (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004)); Lande Statement, at 7–8; Civil Remedies Trans. at 162 (Easterbrook) (suggesting multiplier for concealed cartels might appropriately be higher than three).
- ²⁷ See Cavanagh Statement, at 6–7 (citing recent increases in criminal penalties and enhancement of criminal penalties under 18 U.S.C. § 3571(d)); Lipsky Statement, at 4.
- ²⁸ U.S. Chamber of Commerce Comments, at 20–23; Business Roundtable Comments, at 3–4; Exclusionary Conduct Transcript at 64–65 (Tom) (Sept. 29, 2005) (suggesting the elimination of treble damages for certain single-firm conduct); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OREGON L. REV. 147, 175–77 (2005) [hereinafter Cavanagh, *Antitrust Remedies Revisited*] (discussing various proposals for selective detrebling, including limiting trebling to per se offenses); see also Lipsky Statement, at 14; Cavanagh, *Detrebling Antitrust Damages*, at 794 (“Trebling is particularly harsh where liability turns on close questions of law or fact, on a novel interpretation of a statute, or on reversal of prior precedents upon which defendants have relied.”) (citation omitted).
- ²⁹ Lipsky Statement, at 10 (treble damages can “over deter, . . . thus creating an undesirable chilling effect for legitimate competitive conduct”); Business Roundtable Comments, at 3 (“Trebling for all antitrust cases can lead to over-deterrence because trebling discourages businesses from engaging in legitimate and beneficial competitive conduct.”); see also Cavanagh, *Detrebling Antitrust Damages*, at 801–02; Easterbrook, *Detrebling Antitrust Damages*, at 449–50; WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM 8–12 (1986).
- ³⁰ Lande Statement, at 16 (trebling only for per se offenses would be “complicated” due to “the uncertain line between per se and rule of reason antitrust violations”); see Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) (“[T]here is often no bright line separating per se from Rule of Reason analysis.”).
- ³¹ See Cavanagh, *Detrebling Antitrust Damages*, at 828; Civil Remedies Trans. at 71 (Lipsky) (“I can still imagine cases of exclusionary conduct where you might be sorry that you didn’t have trebling available.”); AAI Comments re Civil Remedies, at 5; Civil Remedies Trans. at 143–44 (Constantine) (citing *Microsoft* as an example of a rule of reason case in which the injury was potentially large and treble damages were therefore sensible).
- ³² Lande Statement, at 18 (“Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement.”); Civil Remedies Trans. at 32 (Lande) (still need treble damages to create incentive for plaintiffs to challenge anticompetitive rule of reason conduct); Susman Statement, at 10–11.
- ³³ See U.S. Chamber of Commerce Comments, at 23; Civil Remedies Trans. at 162 (Easterbrook); Cavanagh, *Antitrust Remedies Revisited*, at 175–76.
- ³⁴ Cavanagh Statement, at 7 (“[O]ne could argue that from a deterrence prospective, trebling is unnecessary in the case of conduct that is open and notorious—as opposed to clandestine—because in such cases, there is no problem of detection.”).
- ³⁵ Lande Statement, at 7 (citing estimate by then-Assistant Attorney General Douglas Ginsburg that no more than 10 percent of cartels were detected); Boies Statement, at 11.
- ³⁶ See William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 657 (1983); Civil Remedies Trans. at 161–62 (Easterbrook) (multiplier should be set by dividing harm by probability of successful prosecution); Cavanagh, *Detrebling Antitrust Damages*, at 831–32.
- ³⁷ See Cavanagh, *Detrebling Antitrust Damages*, at 832; Civil Remedies Trans. at 162 (Reasoner) (noting difficulty of defining concealed and non-concealed conduct).
- ³⁸ Cavanagh Statement, at 9; see also Exclusionary Conduct Trans. at 139 (Pitofsky) (advocating treble damages at a judge’s discretion).

- ³⁹ Cavanagh Statement, at 9; Cavanagh, *Detrebling Antitrust Damages*, at 838–39 (The factors a court might take into account include the “willfulness of the violation”; “whether a reasonably well-informed person should have known that the conduct was illegal”; the possibility of the conduct’s procompetitive benefits; the duration of the illegal acts; whether the conduct was covert; “the scope of the illegal activity”; “the benefits derived by the defendants from the illegal activity”; and the impact of treble damages on the defendant’s business.)
- ⁴⁰ Cavanagh Statement, at 9.
- ⁴¹ *Id.* at 10.
- ⁴² *Id.*; Susman Statement, at 10; Civil Remedies Trans. at 61–62 (Boies) (leaving trebling to judicial discretion will introduce undesirable uncertainty).
- ⁴³ NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 5 (1979); 15 U.S.C. § 15(a).
- ⁴⁴ See 15 U.S.C. § 15(a).
- ⁴⁵ AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 846 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS]. Some courts, while not awarding prejudgment interest, have permitted damages to be increased to account for inflation. See *Law v. Nat’l Collegiate Athletic Ass’n*, 185 F.R.D. 324, 346–48 (D. Kan. 1999) (adjustment based on CPI to account for reduced purchasing power is permitted and is not the functional equivalent of prejudgment interest); *Concord Boat Corp. v. Brunswick Corp.*, 21 F. Supp. 2d 923, 935–36 (E.D. Ark., 1998) (adjustments to award to reflect present value were proper and not an award of prejudgment interest), *rev’d on other grounds*, 207 F.3d 1039 (8th Cir. 2000). Post-judgment interest is mandatory in antitrust cases “as it is in all civil actions.” ANTITRUST LAW DEVELOPMENTS, at 847 (citation omitted).
- ⁴⁶ *Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) (“The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.”).
- ⁴⁷ Lande Statement, at 3 (quoting *Fishman*, 807 F.2d at 583–84 (Easterbrook, J., dissenting)).
- ⁴⁸ *Fishman*, 807 F.2d at 583 (Easterbrook, J., dissenting) (noting that the antitrust litigation at issue took 14 years to resolve, including a 2½-year lag between a finding of liability and the award of damages); see also Lande Statement, at 3 (citing evidence that the average cartel lasts six to nine years “with an additional 3–4 years lag before judgment”) (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 363, 381 (1970)); AAI Comments re Civil Remedies, at 2–3 (“[T]he average cartel probably lasts 7–8 years, with an additional 4-plus-year lag before judgment.”) (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 LOY. CONSUMER L. REV. 329, 337 (2004)).
- ⁴⁹ See, e.g., Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.
- ⁵⁰ See *Wickham Contracting Co., Inc. v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 955 F.2d 831, 835 (2d Cir. 1992) (“The Supreme Court initially embraced the strict common law view that interest may not be recovered where damages are . . . difficult to ascertain with precision at the time of the alleged wrongdoing.”); *id.* at 836 (The speculative nature of damages “will always be relevant to a sound decision on . . . whether prejudgment interest should be awarded . . .”).
- ⁵¹ See, e.g., *Law v. NCAA*, 185 F.R.D. at 347–48 (inflation); *Concord Boat*, 21 F. Supp. 2d at 935–36 (inflation); *Minpeco S.A. v. Hunt*, 686 F. Supp. 420, 425–27 (S.D.N.Y. 1988) (interest on borrowed capital).
- ⁵² See Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.
- ⁵³ 15 U.S.C. § 15(a); see Edward D. Cavanagh, *Attorneys’ Fees in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REV. 51, 52 (1988) [hereinafter Cavanagh, *Attorneys’ Fees in Antitrust Litigation*].
- ⁵⁴ ANTITRUST LAW DEVELOPMENTS, at 988–89. In some circuits, fees may be available to a victorious plaintiff even if nominal damages are awarded. See *id.* at 989; *United States Football League v. Nat’l Football League*, 887 F.2d 408, 411–13 (2d Cir. 1989).

- ⁵⁵ 15 U.S.C. § 26; ANTITRUST LAW DEVELOPMENTS, at 989–90.
- ⁵⁶ Cavanagh, *Attorneys’ Fees in Antitrust Litigation*, at 57–58.
- ⁵⁷ *Id.* at 58.
- ⁵⁸ See ANTITRUST LAW DEVELOPMENTS, at 990; Cavanagh, *Attorneys’ Fees in Antitrust Litigation*, at 57.
- ⁵⁹ *Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am.*, 732 F. Supp. 1209, 1215 (D. Mass. 1990) (“The award of reasonable attorney’s fees incurred in prosecution of the antitrust claims . . . is mandatory. This Court must only determine what award is reasonable.”), *rev’d on other grounds*, 932 F.2d 37 (1st Cir. 1991); see also ANTITRUST LAW DEVELOPMENTS, at 990–94.
- ⁶⁰ See ANTITRUST LAW DEVELOPMENTS, at 990–91.
- ⁶¹ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982) (“The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”); see also ANTITRUST LAW DEVELOPMENTS, at 991–93.
- ⁶² ANTITRUST LAW DEVELOPMENTS, at 993–94.
- ⁶³ Civil Remedies Trans. at 27 (Boies) (fee shifting is intended “to encourage the private attorneys general, to encourage people to bring lawsuits”); Cavanagh Statement, at 13 (fee shifting creates “an important incentive for bringing a private antitrust action”); Thirty Antitrust Practitioners Comments, at 8; AAI Comments re Civil Remedies, at 7–8; Susman Statement, at 13.
- ⁶⁴ See *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 570–71 (1951) (holding that “the criminal judgment was prima facie evidence of the general conspiracy” in an antitrust follow-on civil proceeding).
- ⁶⁵ See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (noting the “judicial determination that defendants should be jointly and severally liable” in antitrust cases, while holding that there is no right of contribution); ANTITRUST LAW DEVELOPMENTS, at 1003–06; see also *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both “firmly rooted” and a “well settled principle”).
- ⁶⁶ See *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 392 (4th Cir. 1982) (rejecting creation of claim reduction remedy); *Hydrolevel Corp. v. Am. Soc’y of Mech. Eng’rs.*, 635 F.2d 118, 130 (2d Cir. 1980); *Flintkote*, 246 F.2d at 398; Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277, 1324 (1987) [hereinafter Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*]; ANTITRUST LAW DEVELOPMENTS, at 1006.
- ⁶⁷ Assume for example, that total overcharges resulting from a conspiracy are found to be \$20 million pre-trebling. If one defendant settles for \$1 million, the court will subtract that amount from the final award of \$60 million (\$20 million trebled). Each non-settling defendant will remain potentially liable for the remaining \$59 million. See Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1283, 1289 n.68.
- ⁶⁸ *Texas Indus.*, 451 U.S. 630.
- ⁶⁹ See *id.* at 646 (holding that the “far-reaching” policy questions presented by the defendant’s claim for contribution were “a matter for Congress, not the courts, to resolve”).
- ⁷⁰ See, e.g., H.R. 1155, 100th Cong. (1987); H.R. 5794, 97th Cong. (1982); S. 1468, 96th Cong. (1979); see also Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1314–22 (describing legislative proposals).
- ⁷¹ ACPERA, § 214 (Section 214 of the Act provides that nothing in the Act “shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . .”).

- ⁷² American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 4 (Dec. 5, 2005) [hereinafter ABA Comments re Contribution and Claim Reduction] (“This inequity has been condemned by most commentators.”).
- ⁷³ See, e.g., *id.* at 9; Reasoner Statement, at 7.
- ⁷⁴ See Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1288–93; Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 220–21 (1980) [hereinafter Jacobson, *Contribution Among Antitrust Defendants*] (innocent defendants frequently must settle due to the staggeringly high potential liability); Reasoner Statement, at 12–13.
- ⁷⁵ See, e.g., ABA Comments Re Contribution and Claim Reduction, at 9–10 (describing “extraordinary pressure on a defendant to settle” due to “exposure greatly disproportionate to its gain from the alleged conspiracy and its size”); Cavanagh, *Contribution, Claims Reduction, and Individual Treble Damage Responsibility*, at 1288–90; Michael D. Hausfeld, Statement at AMC Civil Remedies Hearing, at 5, 7 [hereinafter Hausfeld Statement]. Joint and several liability thus increases the likelihood that any defendant will be held liable for a conspiracy and should also increase deterrence. Hausfeld Statement, at 5.
- ⁷⁶ See, e.g., Reasoner Statement, at 5–6; see also Jacobson, *Contribution Among Antitrust Defendants*, at 219, 221; ABA Comments re Contribution and Claim Reduction, at 9.
- ⁷⁷ See Civil Remedies Trans. at 105–06 (Easterbrook).
- ⁷⁸ See A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 456 (1981).
- ⁷⁹ ABA Comments re Contribution and Claim Reduction, at 11; Reasoner Statement, at 21; see *Antitrust Equal Enforcement Act of 1979*, S. 1468: *Hearings Before the Subcomm. on Antitrust, Monopoly & Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 78–79 (1979) (statement of Donald G. Kempf, Jr.) [hereinafter Kempf Statement at Senate Hearing].
- ⁸⁰ See, e.g., Reasoner Statement, at 21; see also Kempf Statement at Senate Hearing, at 68–70.
- ⁸¹ American Antitrust Institute, Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 3–4 (Feb. 19, 2007).
- ⁸² ABA Comments re Contribution and Claim Reduction, at 26–27.
- ⁸³ See, e.g., Hausfeld Statement, at 15–16; Reasoner Statement, at 21–22 (“[P]laintiffs would bear the risk of settling too cheaply (i.e., for less than the settling defendant’s actual liability) because their ultimate recovery will be reduced by the greater of the settlement or the settling party’s trebled liability.”); Civil Remedies Trans. at 167 (Easterbrook); Cavanagh, *Contribution, Claims Reduction, and Individual Treble Damage Responsibility*, at 1326.
- ⁸⁴ See *Antitrust Equal Enforcement Act: Hearing on S. 995 Before the S. Comm. on the Judiciary*, 97th Cong. 34 (1981) (statement of Griffin B. Bell, former Attorney General of the United States).
- ⁸⁵ Frank. H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 363 (1980) [hereinafter Easterbrook et al., *Contribution Among Antitrust Defendants*]; ABA Comments re Contribution and Claim Reduction, at 16.
- ⁸⁶ See Easterbrook et al., *Contribution Among Antitrust Defendants*, at 363–64 (A “rule that allows contribution only from not-settling defendants . . . is equivalent in its effect on settlement to a rule of no contribution. . . . There are attractive features to this type of contribution rule.”); ABA Comments Re Contribution and Claim Reduction, at 16.
- ⁸⁷ See Jacobson, *Contribution Among Antitrust Defendants*, at 233 (“The absence of contribution can operate to the advantage of equally guilty conspirators by permitting them to go ‘scott free.’”) (quoting *Professional Beauty Supply Inc. v. Nat’l Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979)) (internal quotation marks omitted).
- ⁸⁸ See Don T. Hibner, Jr., Statement at AMC Civil Remedies Hearing, at 15 (July 28, 2005); see also ABA Comments re Contribution and Claim Reduction, at 12, 24.

- ⁸⁹ ABA Comments re Contribution and Claim Reduction, at 11; *Antitrust Equal Enforcement Act of 1979*, S. 1468: *Hearings Before the Subcomm. on Antitrust, Monopoly & Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 2 (1979) (statement of Senator Bayh) [hereinafter Bayh Statement]; Antitrust Damage Allocation: Hearing Before the Subcomm. on Monopolies and Commercial Law of H. Comm. on the Judiciary, 97th Cong. 63 (1981) (statement of William F. Baxter, Assistant Attorney General, Antitrust Div., Dep't of Justice) (“[T]here are significant equitable justifications for allowing contribution.”).
- ⁹⁰ See Bayh Statement, at 1–2 (contribution would reduce the likelihood that “a small or medium-sized company could . . . face legal responsibility on behalf of the entire industry . . . while larger, more culpable businesses go relatively free”); see Kempf Statement at Senate Hearing, at 78–79.
- ⁹¹ See, e.g., *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 119 (1981) (statement of James F. Rill) (proposing formula).
- ⁹² See, e.g., S. 1468, 96th Cong. (1979); S. 995, 97th Cong. (1981); S. 2162, 99th Cong. (1986); S. 1300, 99th Cong. (1985).
- ⁹³ See ABA Comments re Contribution and Claim Reduction, at 28–35.

Chapter III.B

Indirect Purchaser Litigation

1. INTRODUCTION

When an antitrust violation occurs, it may harm many firms and consumers in connected markets. To remedy such injuries, the Clayton Act allows parties to sue for treble damages if they suffer antitrust injury—“injury of the type the antitrust laws were intended to prevent”—as the result of an antitrust violation.¹ Not everyone claiming an antitrust injury may sue, however. The courts have used factors such as whether a plaintiff’s injury is “too remote” from the antitrust violation to determine whether an injured private party is a “proper plaintiff” to bring suit under the Clayton Act.² In addition, even some parties that may sue to enjoin a defendant’s antitrust violation are not permitted to sue for damages. The Supreme Court has limited the standing of parties to sue for antitrust damages, because “Congress did not intend the antitrust laws to provide a remedy in damages for *all* injuries that might conceivably be traced to an antitrust violation.”³

One difficult question is whether all parties in a chain of distribution may sue to recover damages resulting from the same antitrust violation. As an illegal overcharge is passed through a distribution chain, each of the parties in that chain may suffer antitrust injury. For example, when a price-fixing manufacturer overcharges for the goods it sells, the party who purchases the goods directly from that manufacturer pays the overcharge in the first instance. This “direct purchaser” then may incorporate the price-fixed good into the products it sells and pass on to its distributors all or some portion of the manufacturer’s overcharge. In turn, the distributors may be able to pass on all or part of that overcharge to consumers. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are called “indirect purchasers.” Thus, the damages from the original antitrust violation may flow from direct to indirect purchasers.

Such fact patterns raise a question for antitrust law: Should only direct purchasers, or both direct and indirect purchasers, be allowed to sue to recover damages stemming from the same antitrust violation? The Supreme Court first considered a related question in 1968. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* the Court held that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had “passed on” to indirect purchasers the illegal overcharges initially paid by the plaintiff.⁴ Almost ten years later, in 1977, the Court addressed specifically whether indirect, as well as direct, purchasers could sue for damages under federal antitrust law. In *Illinois Brick Co. v. Illinois* the Court held that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges.⁵

State governments have largely refused to take the same approach under state antitrust laws. Through legislation or court decisions, many states have adopted policies that allow indirect, as well as direct, purchasers to sue under state antitrust law to recover damages. The result typically has been that direct purchasers sue in federal court, and indirect purchasers sue in state court, to recover damages resulting from the same antitrust violation.

Vigorous debate over whether to allow only direct, or both direct and indirect, purchasers to seek antitrust damages has continued for almost thirty years. During that time, the conflict between federal and state approaches has itself spawned problems. For example, because indirect purchasers typically cannot join direct purchasers in pursuing remedies in federal court under federal antitrust law, direct and indirect purchasers have often brought multiple, duplicative lawsuits in federal and state courts, where one proceeding might have sufficed to resolve all liability and damage issues in a single forum. During this time, the conflict also has increased the potential for duplicative and otherwise inconsistent recoveries, which then skews the incentives of plaintiffs and defendants to settle.

The Class Action Fairness Act (CAFA), which Congress passed in June 2005, may mitigate certain of these problems to some extent.⁶ Among other things, CAFA allows defendants to remove certain indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions filed in federal court. However, there are exceptions to removal under CAFA. In addition, CAFA does not permit the consolidation of cases in a single federal court for trial. These limitations have led some to question whether CAFA provides a sufficient remedy.

The problems created by duplicative lawsuits in federal and state courts have led many observers to seek a way to eliminate the current conflict between federal and state indirect purchaser policies. Some advocate a federal statute to allow recovery by both direct and indirect purchasers. Others would prefer that Congress preempt the state statutes and case law that allow indirect purchasers to sue and recover damages. The Commission examined the problems that conflicting federal and state policies on indirect purchaser recovery create, and whether the benefits of changing either federal or state law would be worth the costs.

These are difficult and contentious issues. Half of the Commissioners believe that, if one could address this issue on a clean slate, the best policy would be to permit only direct purchaser claims.* Nonetheless, the Commission recognizes that the issue must be addressed

* Commissioners Carlton, Garza, Jacobson, Litvack, Valentine, and Warden would favor allowing only direct purchaser claims, if writing on a clean slate. They believe that allowing only direct purchasers to sue would provide the most effective deterrence mechanism, and would avoid duplicative recoveries, speculative inquiries about how damages may have been passed on through the chain of distribution, and complex litigation. (Commissioner Carlton would allow for minor exceptions to the rule allowing only direct purchasers to sue.) Three of those Commissioners—Carlton, Litvack, and Warden—would recommend preemption of state law to implement that rule because they believe that achievement of those goals overrides considerations of federalism and political pragmatism.

Commissioners Burchfield, Delrahim, Kempf, Shenefield, and Yarowsky would allow suits by both direct and indirect purchasers.

in light of the history of the past thirty years. Accordingly, despite disagreement about which policy would be best *a priori*, the Commission largely reached consensus on a practical approach to reduce the complexity and costs generated by the existing conflict between federal and state policies. The Commission makes the following recommendation.

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:^{*}

- **Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.**
- **Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.**[†]
- **Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.**
- **Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.**

^{*} Commissioners Cannon, Carlton, and Garza do not join this recommendation.

[†] Commissioner Delrahim does not join this aspect of the recommendation.

2. BACKGROUND

The following explains the history of the controversy over direct and indirect purchaser litigation and discusses the problems that conflicting federal and state policies have created, as well as attempts so far to address those problems.

A. History

As noted above, the question of how to treat the “pass on” of antitrust damages from one purchaser to the next first arose in *Hanover Shoe, Inc. v. United Shoe Machinery*.⁷ There, the Supreme Court held that an antitrust defendant could not assert the pass on of overcharges from one purchaser to the next as a defense in a suit brought by the direct purchaser.⁸ The ruling thus enabled direct purchasers to recover all overcharges they suffered from an antitrust violation, even if the direct purchasers passed on some or all of the overcharge to their customers (that is, indirect purchasers). In 1977, nearly ten years later, the Supreme Court in *Illinois Brick Co. v. Illinois* applied what it saw as the logical corollary, holding that federal antitrust law allowed only direct purchasers, and not indirect purchasers, to sue to recover the overcharge they had paid.⁹ The Court viewed this as applying the same rule to both plaintiffs and defendants: neither could rely on the pass on of overcharges to either bring, or defend against, a suit based on federal antitrust law.¹⁰ The Court further reasoned that restricting suits solely to direct purchasers would promote more effective private enforcement and avoid multiple and inconsistent liability for defendants and the need to “trace the complex economic adjustments” to determine the impact on indirect purchasers.¹¹

A vigorous dissent, however, argued that the holding “frustrates both the compensation and deterrence objectives of the treble-damages action.”¹² The dissenters emphasized congressional intent that consumers recover for their antitrust injuries, as had been recently expressed in 1976, when Congress passed legislation to allow state attorneys general to use *parens patriae* authority to sue for Sherman Act violations on behalf of state citizens.¹³ The dissenters were not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was any greater than the complexity of other antitrust issues.¹⁴

The Court’s decision in *Illinois Brick* immediately sparked a heated controversy.¹⁵ Critics, including leading Senators and Representatives, agreed with the dissent that the decision ignored the will of Congress by leaving consumers and other indirect purchasers without a remedy to redress serious antitrust injuries.¹⁶ Bills to overrule the decision by federal statute were quickly introduced.¹⁷ Despite intensive efforts, however, these bills failed, and the rule of *Illinois Brick* has continued to govern in federal courts.¹⁸

Attacks on *Illinois Brick* were not limited to efforts in Congress; opponents brought their case to state legislatures and courthouses as well. Starting with California in 1978, legislatures in many states began passing *Illinois Brick* “repealers”—that is, statutes that specifically authorized indirect purchasers to recover damages under state antitrust laws.¹⁹ In some

states, courts interpreted existing state laws to allow recoveries by indirect purchasers alleging antitrust violations.²⁰ In 1989 the Supreme Court confirmed the validity of state laws permitting indirect purchasers to sue for damages, holding that those laws were not impliedly preempted by federal antitrust law.²¹ At the present, more than thirty-five states permit indirect, as well as direct, purchasers to sue for damages under state law.²²

B. Problems and Attempts to Address Them

Indirect purchaser litigation under state law has become increasingly common, especially since the mid-1990s.²³ Such cases are frequently pursued separately rather than consolidated with other actions in a federal court proceeding. Litigation involving recoveries by direct and indirect purchasers for the same antitrust violation often has proceeded in at least two different courts, with direct purchasers filing under federal antitrust law in federal courts and indirect purchasers pursuing their state antitrust claims in state courts, resulting in wasteful, duplicative litigation.²⁴

Some judges and parties have taken steps to reduce the duplication and wasted resources resulting from multiple federal and state proceedings concerning the same alleged antitrust violation. For example, on occasion, a federal judge presiding over a direct purchaser action has “contact[ed] the various state judges in an attempt to coordinate discovery, thus avoiding duplicative efforts; in most instances, those attempts were successful.”²⁵ Some indirect purchasers have brought their state law damage claims in federal court under the federal court’s supplemental jurisdiction.²⁶ In these cases, the indirect purchasers have asserted a federal antitrust claim seeking injunctive relief (which is not barred under *Illinois Brick*) and have requested that the federal court hear their state law claims for damages pursuant to the court’s supplemental jurisdiction.²⁷ Although this procedure appears to have been used successfully with some frequency in recent years,²⁸ it can provide only a partial remedy to the problems of duplicative litigation. Plaintiffs may not use it when they cannot seek injunctive relief, for example, from a price-fixing cartel that has disbanded following criminal prosecution. In addition, defendants cannot use a federal court’s supplemental jurisdiction to remove cases from state court to federal court, where they can be consolidated.

Under the new CAFA enacted by Congress in June 2005, however, defendants now can remove certain indirect purchaser class actions to federal court, where they may be consolidated with other actions, pursuant to the multidistrict litigation (MDL) process.²⁹ Under CAFA, “[f]ederal jurisdiction, with a few exceptions, now exists over class actions in which (1) minimal diversity exists (that is, where at least one plaintiff and one defendant are diverse), (2) the putative class contains at least 100 members, and (3) the amount in controversy is at least \$5 million.”³⁰ CAFA does create a number of exceptions to this broad grant; however, as discussed below, some predict that these will have limited application to state indirect purchaser class actions.³¹ Even if removal is achieved, the Supreme Court’s

holding in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* limits the purposes for which cases may be consolidated through the MDL process to pretrial proceedings.³² This means that even when CAFA has allowed direct and indirect purchaser cases to be consolidated, those cases must be split up and returned to the originating federal courts for trial.

3. RECOMMENDATION AND FINDINGS

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:*

- **Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.**

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

Commissioner Cannon does not join this recommendation because he believes that the problems due to the conflict between federal and state policy in this area are likely to be ameliorated to a large extent by CAFA, which makes it easier for state antitrust claims to be combined with federal antitrust claims and litigated in one federal court proceeding.

Commissioner Carlton does not join this recommendation because he believes standing should be limited to direct purchasers except where federal courts currently recognize an exception to the rule, including where the direct purchaser is alleged to be participating in the conspiracy. He would also consider allowing, after some period, a class of indirect purchasers to sue in cases where an insufficient number of direct purchasers come forward to sue. Additional study would be needed to refine this exception and to determine how to precisely define “insufficient.”

Although Commissioner Garza would not recommend preemption of those state laws allowing indirect purchasers to sue under state antitrust law, she would not abandon federal policy, which she considers to be the optimal policy for reasons explained in this Report. She concurs in the view of Commissioner Cannon that the very recently adopted CAFA may substantially ameliorate much of the burden arising out of conflicting state and federal policies and is concerned that the benefits of legislation proposed by the Commission would not outweigh the detriment of abandoning federal policy. In addition, while she does not join in this recommendation as a whole, she supports legislation that would allow consolidation of all direct and indirect purchaser actions in a single forum for both pretrial and trial proceedings, and also supports legislation allowing removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.

- Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.*
- Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.
- Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.

A. Reasons for the Commission's Recommendation

1. Duplicative federal direct purchaser and state indirect purchaser litigation imposes undue burdens on the judicial system and the parties, wastes resources, increases the risk of duplicative recoveries, skews the parties' incentives to settle, and hinders efficient global settlements

The conflict between federal and state policies on indirect purchaser damage actions has created a variety of problems. Absent the consolidation of federal and state cases involving direct and indirect purchasers, defendants must respond to complaints about the same conduct in multiple courts.³³ Burdensome and uncoordinated discovery increases costs to defendants and disadvantages plaintiffs as well, because they do not have access to materials produced in other actions. Even when pretrial consolidation of federal direct and state indirect purchaser actions is possible under federal MDL rules, *Lexecon* requires that actions be returned to their originating courts for trial,³⁴ causing duplicative and wasteful trials. With trials proceeding in at least two, and maybe more, different courts, a defendant may be liable for duplicative damages—the amount of the overcharge to the direct purchaser in the first instance, plus whatever overcharges the direct purchaser was able to pass on to indirect purchasers.³⁵ Correspondingly, direct purchasers may receive “windfall” awards exceeding their actual damages. Furthermore, when all parties are not before a single court, it can be difficult to negotiate and implement a global settlement.³⁶ Defendants also may confront costs due to the asymmetric application of collateral estoppel: a finding by one court that the defendant did violate the antitrust law may be used by plaintiffs to establish

* Commissioner Delrahim does not join this aspect of the recommendation. He would not expand the availability of removal of state court actions to federal court.

Although Commissioners Litvack, Shenefield, and Warden join this aspect of the recommendation, they would prefer to preempt state laws to require that any claim for damages by an indirect purchaser must be brought in federal court under federal antitrust law.

liability in other suits, but a finding in one suit that the defendant did not violate the antitrust laws may not be used by the defendant to seek dismissal of other suits.³⁷

2. Current efforts to ameliorate these problems cannot alone provide sufficient remedies

The Commission commends the voluntary coordination among courts overseeing multiple proceedings and the parties involved to reduce the burdens on the parties and the courts. Such efforts alone are insufficient to address these problems, however, and the need for such coordination reveals the types of burdens on courts that duplicative direct and indirect purchaser actions create. Increased use of supplemental jurisdiction promotes consolidation and is therefore commendable, but it cannot adequately address the problem of duplicative litigation. Indirect purchasers of goods from a disbanded cartel cannot seek injunctive relief and therefore do not have a basis on which to request that a court invoke its supplemental jurisdiction. A federal court's supplemental jurisdiction is also not available to defendants as a basis for removal.

CAFA is likely to promote removal of state court indirect purchaser class actions, thereby permitting their consolidation in federal court. It may also lead more plaintiffs to file initially in federal court, likewise permitting consolidation. Indeed, if predictions of some are correct that CAFA will facilitate the removal of a large majority of state indirect purchaser actions to federal court—because CAFA's requirements will generally be met and its exceptions will seldom apply³⁸—that could greatly reduce the waste of resources associated with multiple indirect purchaser actions in state courts, at least at the pretrial phase.³⁹ The Commission is loath to rely on such predictions, however. Because CAFA has several exceptions that may apply to indirect purchaser actions, plaintiffs may seek to use CAFA's exceptions to avoid removal, and a significant number of actions may remain in state court.⁴⁰ In addition, CAFA applies only to class actions—not to claims brought by large indirect purchasers, who can afford to bring lawsuits individually rather than through a class action. Moreover, indirect purchasers may opt out of a class action and assert their claims directly in state court; such actions would be outside CAFA's reach.⁴¹ CAFA also does not apply to *parens patriae* actions by state attorneys general.⁴²

Perhaps most importantly, CAFA does not overrule the Supreme Court's ruling in *Lexecon*, which permits consolidation of class actions in one federal district court only for pretrial matters, such as discovery, class certification, and summary judgment motions. For trial, the Supreme Court's ruling in *Lexecon* requires consolidated cases to be split up again and returned to their originating courts.⁴³ This rule frustrates the goal of resolving interrelated direct and indirect purchaser claims in one forum to avoid duplicative proceedings and recoveries. Finally, CAFA does not address substantive and procedural issues unique to indirect purchaser litigation.

3. Federalism and political pragmatism require deference to many states' clearly expressed preferences that indirect purchasers be allowed to sue for antitrust damages, and these values outweigh arguments in favor of limiting both federal and state recoveries to direct purchasers only

One way to simplify direct and indirect purchaser litigation would be for Congress explicitly to preempt state laws allowing indirect purchaser actions. A majority of the Commission concluded, however, that principles of federalism and practical political concerns counsel in favor of deference to the clear preference expressed by more than thirty-five states that allow indirect purchasers to pursue relief.

In evaluating possible recommendations on direct and indirect purchaser litigation, the Commission considered a wide variety of relevant policy considerations. The most fundamental criticism of the *Illinois Brick* rule is that it leaves many of those actually injured by antitrust violations without compensation.⁴⁴ Indirect purchaser actions can “provide[] an effective vehicle for compensating certain victims . . . including individual consumers”;⁴⁵ on occasion, indirect purchaser actions yield significant distributions to injured indirect purchasers.⁴⁶ The evidence does not point only in one direction, however. Class actions sometimes yield very little compensation to injured indirect purchasers, even when those suits produce large settlements,⁴⁷ because the settlements take the form of vouchers, coupons, or product that few class members even bother to collect, or *cy pres*, typically benefiting worthy causes, but not injured purchasers.⁴⁸

The record before the Commission was mixed on whether the deterrence of antitrust violations is best achieved by limiting recoveries to direct purchasers or permitting indirect purchasers to sue as well. Direct purchasers usually can better perceive the violation and prove overcharges and thus may be more likely to bring an antitrust suit.⁴⁹ Some witnesses argued that direct purchasers are more likely than indirect purchasers to bring antitrust lawsuits and thus to contribute more to the deterrence of antitrust violations.⁵⁰ A sample of indirect purchaser settlements provided by attorneys for indirect purchasers shows that, in virtually all cases, direct purchasers or other private enforcers also challenged the conduct at issue.⁵¹ Nonetheless, indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers.⁵² Moreover, data presented to the Commission show that indirect purchaser suits can provide additional deterrence by increasing the liability faced by violators.⁵³ Taken together, this evidence suggests that direct purchaser litigation is more likely to provide effective deterrence, but indirect purchaser litigation may supplement that deterrence.

If deterrence were the sole objective, one would prohibit indirect purchaser actions if allowing them would reduce the likelihood of direct purchaser actions. Under the existing regime, state indirect purchaser recoveries do not diminish recoveries under federal antitrust law by direct purchasers. However, several witnesses expressed concerns that, if direct pur-

chasers suing under federal antitrust law were required to share the right to recover with indirect purchasers, private enforcement would be significantly diminished.⁵⁴ Others disagreed.⁵⁵

Another policy consideration involves the potential for duplicative recoveries. Proponents of the *Illinois Brick* rule worry that indirect purchaser litigation exposes defendants to duplicative recoveries—that is, direct purchasers recover for treble the entire overcharge, then indirect purchasers recover for treble the amount of the overcharge that the direct purchaser passed on to them, and so on. The American Bar Association, Section of Antitrust Law, among others, has highlighted such concerns.⁵⁶ Although no one identified an instance of unfair or multiple recovery,⁵⁷ that may simply reflect the difficulty of determining whether actual damage awards and settlements exceed total damages.⁵⁸

Testimony revealed that a number of states expressly instruct courts to avoid duplicative damages; no state expressly affords duplicative damages.⁵⁹ Such state policies are important to reduce concerns about duplicative recovery. Nevertheless, the potential for duplicative recoveries remains a serious concern as long as direct and indirect purchaser actions proceed without coordination in separate courts.

The burden on courts to manage the complexity of estimating the damages incurred by indirect purchasers was emphasized by the *Illinois Brick* Court⁶⁰ and has remained an important concern.⁶¹ In particular, courts have found that estimating pass on for a potential class can be a significant barrier to class certification, “confirm[ing], in a new context, the magnitude of the problems of proof the Court sought to avoid in *Illinois Brick*.”⁶² Witnesses argued that recent advances in econometrics and other methodologies have made such assessments somewhat more manageable,⁶³ and at least some indirect purchaser claims may be “non-speculative.”⁶⁴ Nonetheless, managing the complexity of damage calculation for direct and indirect purchasers remains a non-trivial problem.

Outweighing all of these considerations, however, are the values of federalism, compensating injured parties, and practical feasibility. Most states have implemented their preferences to allow indirect, as well as direct, purchasers to sue.⁶⁵ The authority of states to establish antitrust standards that differ from federal law is well established, including specifically with respect to indirect purchaser remedies.⁶⁶ Numerous state attorneys general (and many others) oppose “federal preemption of any state antitrust statutes, including indirect purchaser statutes.”⁶⁷ In particular, they oppose any federal preemption of the right of state attorneys general to bring actions on behalf of their citizens pursuant to the *parens patriae* authority that Congress gave the states in 1976.⁶⁸ The congressional intent underlying the grant of *parens patriae* authority provides additional reason to defer to the rights of the states to allow indirect purchaser damage actions. Therefore, the Commission decided *not* to recommend that Congress pass legislation expressly to preempt state laws permitting indirect purchaser litigation.

B. Specific Explanation of the Commission's Recommendation for the Management of Direct and Indirect Purchaser Litigation

In light of the Commission's recommendation that Congress not preempt state indirect purchaser laws, the question becomes how best to reach a solution that will enable courts to manage direct and indirect purchaser actions to achieve efficiency and fairness. Direct and indirect purchaser litigation would be more efficient and fairer if it took place in one federal court for all purposes, including trial, and did not result in duplicative liability, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. These goals can be best achieved if all direct and indirect purchasers are entitled to recover their actual damages (trebled) under federal law, and if all claims arising out of the same alleged antitrust violation are heard in one federal court, to the maximum extent possible. The Commission's recommendation contains four interrelated components, which are explained below, to achieve these goals.

1. *Overrule Illinois Brick and Hanover Shoe to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of the federal antitrust laws. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers*

To the maximum extent possible, a single federal court should hear all proceedings relevant to actions by direct and indirect purchasers alleging the same antitrust violation. To accomplish this, federal law should permit direct and indirect purchasers to recover the actual damages they suffer as the result of antitrust violations. The first step toward these goals is to overrule *Illinois Brick* and *Hanover Shoe* legislatively to the extent necessary to allow both direct and indirect purchasers to sue under federal law to recover for actual damages they suffer from antitrust violations resulting in an overcharge. Overruling *Illinois Brick* would increase fairness by ensuring that all indirect purchasers, not just those in states permitting such actions, could recover treble their actual damages under federal law for injuries attributable to antitrust violations. Overruling *Hanover Shoe* would limit direct purchasers to recovering treble their actual damages, rather than the full overcharge regardless of pass on, and will thus promote fairness by preventing windfall damage recoveries.

Legislative overruling of *Illinois Brick* may encourage the resolution of direct and indirect purchaser litigation in a single forum, because indirect purchasers may choose to sue under federal antitrust laws rather than to bring state claims. In conjunction with the procedural components of the Commission's recommendation, this also should make resolution of all claims in a single forum easier. Federal recognition of indirect purchaser standing also will promote the development of a body of federal law governing the allocation of damages among direct and indirect purchasers.⁶⁹ (The allocation of damages, a second part of this component of the Commission's recommendation, is described below.)

2. Allow removal of actions brought under state antitrust law by direct and indirect purchasers to federal court to the full extent permitted under Article III

To ensure that direct and indirect purchaser litigation involving the same alleged antitrust violation will take place in a single court, Congress should include as an element of its comprehensive legislation a provision that allows removal of direct and indirect purchaser actions brought pursuant to state law to federal court to the full extent permitted under Article III. It is true that CAFA now permits consolidation of state indirect purchaser actions in one federal district court to a much greater extent than previously was possible. The potential susceptibility of CAFA's exceptions to plaintiff efforts to avoid removal, and other circumstances to which CAFA does not apply, however, generate concern that CAFA will not operate as well as would be desirable in consolidating direct and indirect purchaser actions. An antitrust-specific provision allowing removal of state indirect purchaser actions to federal court to the full extent permitted by Article III would afford a more comprehensive solution. In combination with other components of the Commission's recommendation, removal to the maximum extent permitted will also facilitate the transfer and consolidation of all direct and indirect purchaser actions in a single federal court.

3. Allow consolidation of all purchaser actions in a single federal forum for both pretrial and trial proceedings

In *Lexecon* the Supreme Court held that federal courts in which class actions are consolidated pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407, may only conduct consolidated pretrial hearings on issues such as discovery, class certification, summary judgment, and other pretrial motions.⁷⁰ After that, the federal district court must remand the actions for trial in the courts in which they were originally brought.⁷¹ Because *Lexecon* precludes consolidation for trial, the possibility of duplicative trial litigation and inconsistent results will remain.⁷²

To avoid this result, Congress should legislatively overrule *Lexecon* for purposes of antitrust direct and indirect purchaser litigation only.⁷³ The benefits of consolidation, including reduced waste and enhanced coordination, will be far greater if the actions are consolidated for all purposes, including trial.⁷⁴ Moreover, such reform is especially necessary with respect to antitrust litigation involving claims by direct and indirect purchasers because, due to the problem of pass on, the amounts of injury suffered by different plaintiff groups are closely interrelated. Indeed, unless cases are consolidated for all purposes, it will be impractical to obtain a single determination of liability and damages and appropriately allocate damages awards among claimants, a critical element of the Commission's recommendation.

4. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered

As explained above, one component of the Commission's recommendation calls for both direct and indirect purchasers to be able to recover their actual damages, trebled. Legislatively overruling *Illinois Brick* and *Hanover Shoe* will allow a limitation of the defendant's liability to treble the overcharges suffered by the direct purchasers as a result of the initial overcharge. These damages should be allocated among the different claimants, whether direct or indirect purchasers, according to the evidence regarding their actual damages.

To be sure, determinations of how to allocate damages among direct and indirect purchasers will often involve complex economic assessments of the extent to which each purchaser in the chain of distribution has suffered harm that can be traced to the overcharge. The federal courts have shown great ability to handle such complex economic issues, however, and they will develop rules and procedures to handle these issues. Consolidating all claims in a single proceeding will facilitate an appropriate allocation of relief among the claimants by the court. In addition, once all parties are before a single court, a global settlement becomes possible. Many of these disputes are likely to be settled; once liability and total damages are established, allocations of damages may often be determined by settlements among the claimants. Furthermore, limiting damages to the amount of the initial overcharge should streamline resolution of the litigation. Indeed, once the amount of overcharge has been determined, it may be possible to resolve the issues of how to allocate those damages among direct and indirect purchasers without the further involvement of the defendants.

Without a doubt, the management of a consolidated class action involving direct and indirect purchasers will be challenging. Such a proceeding will likely involve numerous claimants, the application of differing state laws, and difficult economic assessments of the extent to which overcharges flowed from direct to indirect purchasers and how best to apportion damages among claimants. Federal courts managing such proceedings should use their discretion to structure the proceedings as they see fit to achieve fairness and efficiency. Federal judges may wish to consider structuring the proceedings to make three distinct determinations: the liability of the defendants; the damages owed by the defendant (based on overcharges to the direct purchasers only); and the allocation of those damages among direct and indirect purchasers.* However, judges may choose from a variety of different mechanisms to best manage such cases. It is far preferable to have one federal judge oversee and manage the interrelationships among the claims and claimants than to have split proceedings in federal and state courts, as is now too frequently the case.

* Commissioner Burchfield is skeptical about the proposed use of such structured (or "trifurcated") proceedings.

5. Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers

The Commission does not intend its recommended reforms to make class certification more difficult for direct and indirect purchasers to obtain than under current practice. In particular, the Commission recognizes the concerns of some that certification of direct purchaser actions may be rendered more difficult by the legislative overruling of *Hanover Shoe*.⁷⁵ *Hanover Shoe* simplifies the proof of the fact and extent of injury suffered by direct purchasers—the overcharge depends only on the price they actually paid and the price they would have paid absent the violation. If *Hanover Shoe* is overruled legislatively, however, the extent to which the direct purchasers may have passed on the overcharge may become an issue at trial. Defendants thus may seek to argue as well that the extent of pass on is not susceptible of common proof, which potentially provides a basis to deny class certification. Because the extent of pass on affects both direct purchasers’ claims and the indirect purchasers’ claims, it has the potential to prevent *any* class from being certified.

In order to ensure that the proposed reform does not make class certification of purchaser classes more difficult, the legislation should specify that courts should certify direct purchaser classes without regard to whether the injury alleged was passed on by direct purchasers. Thus, the degree of pass on will be an issue only at trial, not at the class certification stage of the proceedings. Because the purpose of this proposed reform is to ensure all injured parties are able to obtain appropriate recoveries, increasing obstacles by creating greater burdens to certify class actions would frustrate the objectives of the proposal.

Notes

¹ Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see 15 U.S.C. § 15(a).

² See *generally* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 532–46 (1983).

³ Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) (emphasis added).

⁴ Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

⁵ Illinois Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

⁶ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note).

⁷ *Hanover Shoe*, 392 U.S. at 481.

⁸ *Id.* at 494.

⁹ *Illinois Brick*, 431 U.S. at 728–29.

¹⁰ *Id.* at 728–30.

¹¹ *Id.* at 730–34.

- ¹² *Id.* at 749 (Brennan, J., dissenting).
- ¹³ *Id.* at 756–58 (Brennan, J., dissenting).
- ¹⁴ *Id.* at 758–60 (Brennan, J., dissenting).
- ¹⁵ Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 GEO. WASH. L. REV. 860, 867–69 (2001) [hereinafter Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*]; Stephen Calkins, *Illinois Brick and Its Legislative Aftermath*, 47 ANTITRUST L.J. 967, 967–68 (1979) [hereinafter Calkins, *Illinois Brick and Its Legislative Aftermath*].
- ¹⁶ For example, Senator Kennedy charged that “the *Illinois Brick* decision effectively frustrates the clear legislative intent of Congress.” *Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 95th Cong. 2 (1977) (statement of Senator Edward Kennedy).
- ¹⁷ See, e.g., S. 1874, 95th Cong. § 5 (1978); H.R. 11942, 95th Cong. § 3 (1978); see also Calkins, *Illinois Brick and Its Legislative Aftermath*, at 967.
- ¹⁸ Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 19, 26 (2004) [hereinafter Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*] (the bills to repeal *Illinois Brick* all died in committee; the most recent, introduced in 1983, would have allowed state attorneys general to sue on behalf of indirect purchasers); see also Edward D. Cavanagh, *The Illinois Brick Dilemma: Is There a Legislative Solution?*, 48 ALB. L. REV. 273, 294–307 (1984).
- ¹⁹ Ronald W. Davis, *Indirect Purchaser Litigation: ARC America’s Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375, 391–93 (1997).
- ²⁰ Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 867–68.
- ²¹ *California v. ARC Am. Corp.*, 490 U.S. 93, 102–06 (1989).
- ²² Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST, Summer 2001, at 34, 34–35 [hereinafter O’Connor, *Is the Illinois Brick Wall Crumbling?*] (reporting that “thirty-six states and the District of Columbia, representing over 70 percent of the nation’s population, now provide for some sort of right of action on behalf of some or all indirect purchasers”); Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, at 19 (“[S]ome thirty states . . . permit[] antitrust suits by indirect purchasers under state law.”); American Bar Association, Section of Antitrust Law, *Report on Remedies*, at 2 (2004) [hereinafter 2004 Task Force Report] (“more than half the states permit” indirect purchaser antitrust suits). There are a variety of remedies available to indirect purchasers under state law. See Mark J. Bennett & Ellen S. Cooper, Statement at AMC Indirect Purchaser Hearing, at 18–19 (June 27, 2005) [hereinafter Bennett & Cooper Statement] (describing state law remedies available to indirect purchasers, including consumer protection and Little FTC Acts); Indirect Purchaser Transcript at 103–04 (Cooper) (June 27, 2005); Dan E. Gustafson, Statement at AMC Indirect Purchaser Hearing, at 6–8 (June 27, 2005) [hereinafter Gustafson Statement]; Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 ANTITRUST, Summer 2001, at 29, 30–31 [hereinafter Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*] (describing features of *Illinois Brick* repealers that vary by state).
- ²³ Indirect Purchaser Trans. at 41 (Zwisler); *id.* at 42–43 (Cuneo); William H. Page, *Class Certification in the Microsoft Indirect Purchaser Litigation*, 1 J. COMPETITION L. & ECON., 303, 335–38 (2005) [hereinafter Page, *Class Certification in the Microsoft Indirect Purchaser Litigation*] (appendix listing class certification decisions in indirect purchaser actions, nearly all dating since the mid-1990s).
- ²⁴ See, e.g., Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, at 30 (describing the “proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact”); Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 876–78.
- ²⁵ H. Laddie Montague, Jr., Statement at AMC Indirect Purchaser Hearing, at 2 (June 27, 2005) [hereinafter Montague Statement]; see Indirect Purchaser Trans. at 135–36 (Gustafson) (describing how “negotiated coordination” results in agreements to coordinate); see also O’Connor, *Is the Illinois Brick Wall Crumbling?*, at 34, 36–37 (“recent attempts at coordination initiated by state attorneys general, in con-

junction with private plaintiffs' and defendants' counsel," have reduced costs and facilitated settlement); Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, at 31–32 ("indirect purchaser litigation has the potential to become unmanageable and extraordinarily expensive," but courts and plaintiffs' counsel are "frequently receptive to efforts to avoid unnecessary burden").

²⁶ Indirect Purchaser Trans. at 48–50 (Montague).

²⁷ *Id.*; Montague Statement, at 11–12.

²⁸ Pamela A. MacLean, *Federal Courts May Face Flood of Price-Fixing Allegations*, NAT'L L.J. (Sept. 21, 2005) (reporting that "[i]ndirect purchaser antitrust cases have flooded back to federal court using pendant state law antitrust claims"). At least eleven federal court pharmaceutical indirect purchaser actions may have been consolidated in this manner. See Patrick E. Cafferty et al., Public Comments Submitted to AMC (June 2, 2006) [hereinafter Cafferty Comments] (listing 11 indirect purchaser actions settled in federal court in recent years, some or all of which may have been brought relying on supplemental jurisdiction).

²⁹ See 28 U.S.C. § 1407 ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

³⁰ Ian Simmons & Charles E. Borden, *The Class Action Fairness Act of 2005 and State Law Antitrust Actions*, 20 ANTITRUST, Fall 2005, at 19 [hereinafter Simmons & Borden, *CAFA and State Law Antitrust Actions*].

³¹ *Id.* at 20. The "Home State" exception is of the greatest potential relevance to the removal of state indirect purchaser class actions. It provides that a class action that otherwise meets CAFA's requirements is not subject to removal under CAFA if, *inter alia*, "(1) all of the primary defendants are citizens of the state in which the class action is being brought, and (2) at least two-thirds of the members of the putative class are also citizens of that state." *Id.* (citing 28 U.S.C. § 1332(d)(4)(B)). Moreover, under this provision, if between one-third and two-thirds of the members of the putative class are citizens of the same state as the defendant or defendants, then a federal court has discretion over whether it will exercise jurisdiction over the class action; it is not obligated to do so. *Id.* (citing 28 U.S.C. § 1332(d)(3)).

There is also a "Local Controversy" exception. See Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, 20 ANTITRUST, Fall 2005, at 12, 14–15 [hereinafter Spiva & Tycko, *Indirect Purchaser Litigation*] (discussing both exceptions).

³² *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

³³ See, e.g., Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 863 ("[T]he artificial division of cases that now flows from *Illinois Brick* imposes unnecessary litigation burdens on the parties and leads to unjustifiable systemic inefficiencies."); Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, at 30 (state indirect litigation outside the scope of federal consolidation poses a "logistical nightmare for the courts").

³⁴ *Lexecon* held that a federal district court conducting pretrial proceedings pursuant to the multidistrict litigation statute has no authority to invoke the change-of-venue provisions of 28 U.S.C. § 1404(a) to assign a transferred case to itself for trial, but rather must remand the transferred case "at or before the conclusion of such pretrial proceedings to the district from which it was transferred," as provided by 28 U.S.C. § 1407(a). *Lexecon*, 523 U.S. at 34–37.

³⁵ A series of ABA Reports had emphasized concerns for duplicative recoveries in identifying numerous problems raised by indirect purchaser suits. See American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 50; 2004 Task Force Report, at 1–2; American Bar Association, Section of Antitrust Law, *Report of the Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993, 995–96 (1995); American Bar Association, Section of Antitrust Law, *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp.*, 59 ANTITRUST L.J. 273, 283–87 (1990); American Bar Association, Section of Antitrust Law, *Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify Illinois Brick*, 52 ANTITRUST L.J. 841, 841 (1983) [hereinafter 1983 Task Force Report]; see also Donald I. Baker, *Federalism and Futility: Hitting the Potholes on the Illinois Brick*

Road, 17 ANTITRUST, Fall 2002, at 14, 15 (stating that the current regime “has produced duplicative litigation and recoveries” on a scale the Court could “scarcely have imagined”); Business Roundtable, Public Comments Submitted to AMC, at 8 (Nov. 4, 2005).

- ³⁶ Michael L. Denger, Statement at AMC Indirect Purchaser Hearing, at 4 (June 27, 2005) [hereinafter Denger Statement]; Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, at 27 (without being subject to a federal court’s pressure to settle, plaintiffs may “behave strategically to exact more favorable settlement terms”).
- ³⁷ Indirect Purchaser Trans. at 9 (Tulchin) (stating that this “domino effect of collateral estoppel” makes it exceedingly difficult for defendants to go to trial); *id.* at 14, 90–91 (Zwisler) (emphasizing the “colossal damage exposure” from potential liability to indirect purchasers); Margaret M. Zwisler, Statement at AMC Indirect Purchaser Hearing, at 7–8 (June 27, 2005) [hereinafter Zwisler Statement].
- ³⁸ The three requirements of CAFA “will be satisfied in the overwhelming majority of indirect purchaser class actions,” and “[m]ost of these exceptions [to CAFA’s applicability] will rarely, if ever, apply in the context of indirect purchaser class actions.” Simmons & Borden, *CAFA and State Law Antitrust Actions*, at 19–20.
- ³⁹ *Id.* at 19 (CAFA should “dramatically reduce the duplication in discovery and work product that defendants currently incur when facing multiple statewide indirect purchaser class actions”); Jonathan W. Cuneo, Statement at AMC Indirect Purchaser Hearing, at 8 (June 27, 2005) [hereinafter Cuneo Statement] (CAFA “will, without doubt, have the effect of moving the vast majority of state indirect purchaser class actions from state to federal court”); Montague Statement, at 3, 5 (“there is good reason to believe that [under CAFA] the federal courts can manage the direct and indirect purchaser cases in the same manner in which they managed them *pre-Illinois Brick*”—that is, “together in federal court”); Indirect Purchaser Trans. at 47–48 (Bennett) (predicting that state attorneys general would file in federal court if *Illinois Brick* were overruled and that few private cases would stay in state court).
- ⁴⁰ See Indirect Purchaser Trans. at 135–36 (Gustafson); *id.* at 53 (Tulchin); *id.* at 144 (Gavil); David B. Tulchin, Statement at AMC Indirect Purchaser Hearing, at 11–12 (June 27, 2005) [hereinafter Tulchin Statement].
- ⁴¹ See Indirect Purchaser Trans. at 134–35 (Denger) (observing that many indirect purchasers and third-party payers are “substantial commercial entities” who could opt out of a class action and thereby avoid application of CAFA if their interests were better served in state court); see also Bennett & Cooper Statement, at 7–10 (reporting that some third party payers opted out of class actions and settled separately in the *Mylan*, *Buspirone*, and *Taxol* cases); Indirect Purchaser Trans. at 158 (Denger) (“[I]ncreasingly, in the last four or five years there have been a lot of opt out settlements.”).
- ⁴² Bennett & Cooper Statement, at 16; 46 State Attorneys General, Public Comments Submitted to AMC, at 8 (July 20, 2006) [hereinafter Comments of 46 State Attorneys General] (*parens patriae* actions are not subject to removal under CAFA).
- ⁴³ See *Lexecon*, 523 U.S. at 34–37.
- ⁴⁴ See, e.g., Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, at 23–24 (*Illinois Brick* “failed to compensate the real victims of price-fixing”); Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN’S L. REV. 553, 565 (2005) (explaining that, under the *Illinois Brick* rule, there is “no compensation whatsoever for the indirect purchasers who were the true victims of the illegal overcharge”).
- ⁴⁵ Thirty Antitrust Practitioners, Public Comments Submitted to AMC, at 15 (June 17, 2005) [hereinafter Thirty Antitrust Practitioners Comments].
- ⁴⁶ For example, Bennett and Cooper report that in several antitrust cases involving pharmaceuticals there were substantial sums paid to the injured class members. See Bennett & Cooper Statement, at 7–10; see also Indirect Purchaser Trans. at 24–25, 60–61, 94–95 (Bennett); *id.* at 178–79 (Cooper).
- ⁴⁷ Tulchin Statement, at 9–10; Zwisler Statement, at 8–9.

- ⁴⁸ See Tulchin Statement, at 9–10. For example, even using extraordinary efforts to contact potential claimants in the *United States Tobacco* litigation, plaintiffs still achieved only a 26 percent participation rate among class members. Zwisler Statement, at 8–9; see also John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 ANTITRUST BULL. 531, 536 (2003). CAFA contains several provisions directed at reforming the use of coupons in settlements of class actions. See, e.g., Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 ANTITRUST, Fall 2005, at 26, 27–28.
- ⁴⁹ William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602, 608–15 (1979) [hereinafter Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?*]; Page, *Class Certification in the Microsoft Indirect Purchaser Litigation*, at 305 (the Supreme Court in *Illinois Brick* reasoned that concentrating the right to recovery in direct purchasers would ensure more effective deterrence).
- ⁵⁰ See Indirect Purchaser Trans. at 37 (Montague); Zwisler Statement, at 13; see also 1983 Task Force Report, at 856–57.
- ⁵¹ See Cafferty Comments, at 1–25.
- ⁵² See Professor Andrew I. Gavil, Statement at AMC Indirect Purchaser Hearing, at 17–18 (June 27, 2005); American Antitrust Institute, Public Comments Submitted to AMC Regarding Remedies, at 18–19 (June 17, 2005); Indirect Purchaser Trans. at 24 (Bennett); Cuneo Statement, at 5–6.
- ⁵³ Thirty Antitrust Practitioners Comments, at 13–14, 19; Indirect Purchaser Trans. at 23–24 (Bennett). Some witnesses reported on large settlements recently obtained on behalf of indirect purchasers through class action suits by state attorneys general. Bennett & Cooper Statement, at 7–10 (*Mylan*—approximately \$137 million total payouts to indirect purchasers; *Buspiron*—\$240 million; *Taxol*—\$70 million). According to one commenter, in 11 recent pharmaceutical cases (including *Mylan*, *Buspiron*, and *Taxol*) brought in federal court, indirect purchasers received over \$900 million in recoveries. Cafferty Comments, at 1–4 (reporting settlement amounts). Three actions brought in state court—*Vitamins*, *Brand Name Prescription Drugs*, and *Infant Formula*—resulted in settlements totaling \$424.9 million in cash and \$160.5 million in product. *Id.* at 5–19. Recent actions brought on behalf of indirect purchasers in fifteen states against Microsoft resulted in the provision of vouchers worth up to \$1.9 billion. See *id.* at 20–23; see also Community Catalyst, Public Comments Submitted to AMC, at 3–4 (July 22, 2005) (reporting recoveries for consumers and third party payers in pharmaceutical cases).
- ⁵⁴ See, e.g., Indirect Purchaser Trans. at 18, 91 (Montague); *id.* at 130–31 (Gustafson).
- ⁵⁵ *Id.* at 129 (Cooper); *id.* at 129–30 (Denger) (“[T]here is no shortage of plaintiffs’ lawyers willing to bring actions.”); *id.* at 132–33 (Steuer) (“[E]ven though the incentive may be then divided up . . . there remains ample incentive collectively to pursue the suit.”).
- ⁵⁶ See, e.g., 2004 Task Force Report, at 1–2 (2004) (expressing concern for multiple litigation, duplicative exposure, and lack of recovery for indirect purchasers in states without repealers, and citing previous studies).
- ⁵⁷ Montague Statement, at 3–4 (“I am not aware of any instance in which an antitrust defendant has paid in settlements or in satisfaction of judgments as much or more than treble damages, or in most cases, more than single damages.”); Indirect Purchaser Trans. at 23 (Bennett) (“The testimony from both panels, I think, is stark in that no one could actually point to any case, despite the large number of *Illinois Brick* repealers, in which any defendant had actually paid too much.”); Gustafson Statement, at 15; Cuneo Statement, at 9.
- ⁵⁸ Indirect Purchaser Trans. at 38–39 (Tulchin) (identifying an instance of unfair multiple recovery is “very difficult” because you would need to know the actual damages suffered); *id.* at 41–42 (Zwisler); Denger Statement, at 6–8.
- ⁵⁹ Indirect Purchaser Trans. at 164–65 (Steuer). Other witnesses believe preemption of indirect purchaser rights under state law may be necessary to ensure that duplicative recoveries do not occur. *Id.* at 161–62 (Gavil).

⁶⁰ *Illinois Brick*, 431 U.S. at 731–37.

⁶¹ 1983 Task Force Report, at 852–55; Chris S. Coutroulis & D. Matthew Allen, *The Pass-on Problem in Indirect Purchaser Class Litigation*, 44 ANTITRUST BULL. 179 (1999) [hereinafter Coutroulis & Allen, *The Pass-on Problem*]; William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1, 12–19 (1999) [hereinafter Page, *The Limits of State Indirect Purchaser Suits*]; see also *In re Brand Name Prescription Drugs Litig.*, 123 F.3d 599, 605 (7th Cir. 1997) (Posner, J.) (“Tracing a price hike through successive resales is an example of what is called ‘incidence analysis,’ and is famously difficult.”); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?*, at 615–21. But see Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 354 (1979) (stating that “there is simply no credible argument that courts cannot handle passing-on issues”).

⁶² Page, *The Limits of State Indirect Purchaser Suits*, at 5; see Coutroulis & Allen, *The Pass-on Problem*, at 184–88. Some Commission witnesses argued that evaluating injury to indirect purchasers would make proceedings very difficult or even “totally unworkable.” Indirect Purchaser Trans. at 91 (Montague); see also Tulchin Statement, at 3–8.

⁶³ Bennett & Cooper Statement, at 6–7 (while difficulties remain, advances in “data capture, storage and manipulation, as well as in econometric modeling has made such allocation less problematic”). Professor Hovenkamp has also argued that the difficulty of computing pass on can largely be avoided by applying standard methods for damage estimation to each level in the chain of distribution. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 74–76 (2005).

⁶⁴ Bennett & Cooper Statement, at 13–14.

⁶⁵ O’Connor, *Is the Illinois Brick Wall Crumbling?*, at 34–35 (reporting that “thirty-six states and the District of Columbia, representing over 70 percent of the nation’s population, now provide for some sort of right of action on behalf of some or all indirect purchasers”); see also generally Comments of 46 State Attorneys General, at 4–7 (arguing that state laws permitting indirect purchasers to assert antitrust claims should not be preempted); Bennett & Cooper Statement, at 16–19.

⁶⁶ See *ARC America*, 490 U.S. 93.

⁶⁷ Bennett & Cooper Statement, at 16; *id.* app. at 2–3; see also Comments of 46 State Attorneys General, at 1. Others share these views. See American Antitrust Institute, Public Comments Submitted to AMC Regarding Indirect Purchaser Litigation, at 8 (July 10, 2006) [hereinafter AAI Comments re Indirect Purchaser Litigation] (opposing strongly “any changes to federal law that would result in preemption of state indirect purchaser remedies”).

⁶⁸ See Indirect Purchaser Trans. at 101–02, 159 (Cooper); Bennett & Cooper Statement, at 19.

⁶⁹ Furthermore, direct and indirect purchasers will be encouraged to develop and present appropriate methods for estimating damages.

⁷⁰ *Lexecon*, 523 U.S. at 34–37; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

⁷¹ *Lexecon*, 523 U.S. at 34–37; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

⁷² Indirect Purchaser Trans. at 134–35 (Denger).

⁷³ The Commission does not take a position as to whether overruling *Lexecon* would be desirable in other circumstances as well.

⁷⁴ Consolidation for all purposes would also avoid one arguably unfair aspect of defending multiple actions. If defendants lose one action, it will face collateral estoppel in subsequent actions against it on the same claim. However, a win in one of those actions may not be used against a different plaintiff in a subsequent action.

⁷⁵ See AAI Comments re Indirect Purchaser Litigation, at 4–6 (repeal of *Hanover Shoe* “would fuel arguments that proof of impact is an individualized question” not susceptible of common proof).

Chapter III.C

Government Civil Monetary Remedies

1. INTRODUCTION

Congress has given the antitrust agencies authority to obtain certain remedies for antitrust violations. For criminal antitrust violations, the Antitrust Division of the Department of Justice (DOJ) may seek significant monetary fines and prison terms.¹ For substantive, non-criminal violations, the agencies can seek broad injunctive relief to prevent future violations. For certain procedural violations, such as Hart-Scott-Rodino Act (HSR Act) violations, and for breaches of consent decrees, both the DOJ and the Federal Trade Commission (FTC) may seek civil fines.

Some have argued that the authority of the U.S. antitrust agencies to seek civil fines should be expanded beyond procedural violations, so that the antitrust agencies could seek civil fines for substantive, non-criminal antitrust violations, just as antitrust enforcers in the European Union and certain countries do. Advocates of expanded monetary remedies for the antitrust agencies also suggest the federal antitrust agencies should increase use of their equitable powers to obtain disgorgement and restitution remedies. Others point out that the U.S. system of antitrust remedies differs from that in many other countries, because the U.S. system gives private plaintiffs the ability to seek treble damages for antitrust violations. Such “private attorneys general” play an important role in antitrust enforcement. Concern exists that allowing the government also to extract monetary remedies for substantive non-criminal antitrust violations—a role currently occupied by private plaintiffs seeking treble damages—could result in defendants making duplicative, excessive payments.

In light of these arguments, the Commission looked at two questions: (1) whether Congress should give the federal antitrust agencies expanded civil fine authority; and (2) whether the agencies’ current authority to seek monetary equitable relief, such as disgorgement and restitution, should be clarified, expanded, or limited. The Commission makes the following recommendations.

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

49. There is no need to clarify, expand, or limit the agencies’ authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission’s policy governing its use of monetary equitable remedies in competition cases.

2. BACKGROUND

A. Civil Fines

Congress has authorized the antitrust agencies to seek civil fines, but only for the breach of an antitrust consent decree with the DOJ or the FTC,² or for procedural violations, such as a failure to file a pre-merger notification as required under the HSR Act.³ The agencies' pursuit of civil fines in these cases presents no threat of duplicative recovery, because no private remedies exist for such matters.⁴

The DOJ's and the FTC's lack of authority to seek civil fines for substantive, non-criminal antitrust violations differs from the authority of many antitrust regimes around the world to impose civil fines for such violations.⁵ In the European Union, for example, antitrust enforcers have used their authority to impose millions of dollars in civil fines for substantive antitrust violations.⁶ European Union antitrust enforcement, however, does not include robust private remedies. In fact, E.U. officials currently are studying ways in which to facilitate private damages actions as a means to "complement public enforcement."⁷

B. Equitable Relief

For substantive, non-criminal antitrust violations, Congress has authorized the DOJ and the FTC to seek equitable relief, including injunctions, temporary restraining orders, and "cease and desist" orders.⁸ Courts generally have interpreted Congress's express authorization to seek broad equitable remedies, such as injunctions and restraining orders, as implied congressional authorization to seek *all* equitable remedies—including restitution and disgorgement. In *Porter v. Warner Holding Co.* the Supreme Court explained that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."⁹

To date, only the FTC has exercised its implied authority to seek monetary equitable remedies, although the DOJ believes it has similar authority.¹⁰ Courts have upheld the FTC's authority to obtain disgorgement and restitution.¹¹ In consumer protection cases, where consumers often have only minimal federal private rights of action,¹² the FTC has regularly obtained restitution and disgorgement.¹³

In only eleven antitrust cases in the past twenty-six years, however, has the FTC sought equitable monetary remedies.¹⁴ Unlike consumer protection, antitrust law does provide private remedies in the form of treble damages.¹⁵ These treble damages generally provide injured parties with recoveries for their antitrust injuries. Nonetheless, in certain circumstances, obstacles, such as statutes of limitations, prohibitions against suits by indirect purchasers, or standing requirements, may hinder the filing of a treble damages suit.¹⁶ In such circumstances, the FTC may seek monetary remedies "because other remedies are likely to fail to accomplish fully the purposes of the antitrust laws."¹⁷

At the urging of former FTC Commissioner Thomas B. Leary, the FTC developed a Policy Statement to articulate the circumstances in which it might pursue restitution or disgorgement in competition cases.¹⁸ The *Policy Statement on Monetary Equitable Remedies in Competition Cases* (“the Policy Statement”) was intended to provide the public with guidance as to when, in its prosecutorial discretion, the FTC will seek such relief.¹⁹ The Policy Statement identified three factors that will govern the FTC’s use of monetary equitable remedies:

- (1) whether the violation was “clear” (i.e., a reasonable party should expect its conduct to be found illegal);
- (2) whether there is a reasonable basis for calculating the amount of disgorgement or remedy, based on the gains or injury from the violation; and
- (3) whether use of the remedy would add value because other remedies will either likely fail or provide incomplete relief.²⁰

The Policy Statement further explained that the FTC did “not view monetary disgorgement or restitution as routine remedies for antitrust cases,” and that the agency would “continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases.”²¹

3. RECOMMENDATIONS AND FINDINGS

A. Civil Fines

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

Neither the DOJ nor the FTC has requested expanded civil fine authority.²² In fact, the head of the Antitrust Division expressed “reservations” about increased government civil fine authority, stating that such a change might “blur[] the distinction between a civil violation and a criminal violation”—a distinction that is important to the DOJ.²³

In the United States, treble damage recoveries by private plaintiffs play a significant role in antitrust enforcement. If the Commission had recommended reducing or eliminating treble damage recoveries, or significantly limiting their availability, it might have been appropriate to consider whether civil fine authority should take their place. The Commission has not recommended any change to treble damage recovery, however.²⁴

Thus, a need for civil fine authority could be shown only if there were significant gaps in the current level of enforcement provided by private plaintiffs seeking damages. The Commission did not receive evidence of significant gaps, however. The Commission has iden-

tified one gap: cases in which civil fine authority might address egregious conduct for which treble damages are not available because no antitrust injuries resulted.²⁵ Such cases are rare and do not, by themselves, provide sufficient reason to expand the agencies' civil fine authority. In addition, as discussed below, the agencies' equitable authority may be used in certain circumstances to obtain disgorgement and restitution where specific circumstances impair the ability of injured parties to recover damages. Thus, to the extent that any gaps remain, they are better addressed through the use of the agencies' equitable powers than through providing additional civil fine authority to the agencies.

B. Equitable Monetary Remedies

49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.*

To the extent treble damage remedies may not be available, or are not sufficient to force disgorgement of defendant's unlawful gains or to redress injured parties' antitrust injuries, a federal antitrust agency may appropriately consider these facts (along with others) in deciding whether to seek equitable monetary remedies such as disgorgement and restitution. The FTC's limited use of this remedy in antitrust cases has been judicious and is commended.

The availability of disgorgement and restitution as government antitrust remedies, along with treble damages as private remedies, could cause defendants to make excessive and duplicative payments.²⁶ It is imperative to avoid duplicative recoveries. Nonetheless, the Commission's record is devoid of any example where government-sought disgorgement or restitution led to duplicative or excessive payments. Instead, the Commission heard testimony that in the thirty years since the FTC first exercised its equitable authority, there has never been a duplicative recovery.²⁷

* Commissioners Valentine, Jacobson, Kempf, and Warden would further recommend that the DOJ adopt a policy similar to the FTC's Policy Statement to articulate the circumstances in which it would exercise its authority to seek equitable monetary remedies.

Notes

- ¹ 15 U.S.C. § 1 (authorizing criminal penalties up to \$100 million for corporate offenders, and up to \$1 million and/or up to 10 years in prison for individuals); 18 U.S.C. § 3571(d) (general statute authorizing criminal penalties up to twice the pecuniary gain, or twice the pecuniary loss caused by a violation).
- ² Courts can retain continuing jurisdiction over decrees filed by the DOJ pursuant to the Antitrust Procedures and Penalties Act (APPA or Tunney Act). A violation of those decrees “whether litigated or consent, is punishable as contempt of court for which severe penalties may be imposed.” AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 708 (6th ed. 2007) (courts have imposed monetary penalties up to \$750,000). The FTC may pursue similar fines pursuant to 15 U.S.C. § 45(j). See, e.g., *United States v. Boston Scientific Corp.*, 253 F. Supp. 2d 85, 86 (D. Mass. 2003) (suit initiated by the DOJ on behalf of the FTC resulted in a \$7 million fine against Boston Scientific for violation of a 1995 FTC Consent Decree).
- ³ See, e.g., 15 U.S.C. § 18a(g)(1) (“Any person . . . who fails to comply with [Hart-Scott-Rodino Act (HSR Act) filing requirements] . . . shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of this section.”). Although 15 U.S.C. § 18a(g)(1) specifically refers to the DOJ’s ability to seek civil fines for non-substantive antitrust violations, the FTC can obtain civil fines for similar violations by asking the DOJ to initiate a proceeding on its behalf. See, e.g., *United States v. Hearst Trust*, Complaint for Civil Penalties For Failure to Comply with Premerger Reporting Requirements of the Hart-Scott-Rodino Act, No. 1:01CV02119 (Oct. 11, 2001) (complaint filed at the request of the FTC, which resulted in a \$4 million civil fine against Hearst for its failure to comply fully with HSR Act requirements).
- ⁴ Stephen Calkins, Statement at AMC Government Civil Remedies Hearing, at 24 (Dec. 1, 2005) [hereinafter Calkins Statement] (“[V]iolation of the Hart-Scott-Rodino Act . . . does not create a private cause of action.”).
- ⁵ R. Hewitt Pate, Public Comments Submitted to AMC Proposing Issues for Commission Study, at 2 (Jan. 5, 2005) [hereinafter Pate Comments Proposing Issues] (“Civil fine authority is a part of enforcement in many foreign jurisdictions.”); Calkins Statement, at 3 (stating that “in Europe, the civil fine is the tool of choice”).
- ⁶ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 83(2)(a); Calkins Statement, at 10 (noting that the European Union imposed both fines and conduct requirements on Microsoft for its violation of Europe’s competition laws).
- ⁷ Neelie Kroes, European Commissioner for Competition, The Green Paper in Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights, Opening Speech at the European Parliament Workshop (June 6, 2006), at 6 (stating that there was “clear consensus” that the European Union needs to “complement public enforcement with stronger private actions”), available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/speech_06062006.pdf; see also European Commission Website, available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html (stating that “[i]n Europe, competition law is mostly enforced by competition agencies” and that the European Union is studying ways in which to “facilitate private damages actions”).
- ⁸ 15 U.S.C. § 45(b) (authorizing the FTC to seek “cease and desist” orders against violators); 15 U.S.C. § 53(b) (authorizing the FTC to seek temporary restraining orders and injunctions from the district courts); 15 U.S.C. § 4 (granting the DOJ the authority to “prevent and restrain violations of [the Sherman Act]”); 15 U.S.C. § 25 (granting the DOJ the authority to “institute proceedings in equity to prevent and restrain . . . violations [of the Clayton Act]”).
- ⁹ *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). If there is an elaborate enforcement scheme, however, the Court has taken a different view. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487–88 (1996) (when Congress creates an elaborate enforcement scheme, such as the Resource Conservation

and Recovery Act, it is inappropriate to assume that Congress also intended to confer the full scope of equitable power, including disgorgement and restitution).

- ¹⁰ See Reply Brief for the United States on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *United States v. Philip Morris USA, Inc.*, No. 05-92, at 4 & n.3 (filed Sept. 2005) (arguing that RICO provides government with disgorgement remedy and refuting contention that antitrust laws preclude disgorgement) (citing *Ford Motor Co. v. United States*, 405 U.S. 562, 573 & n.8 (1972)); see also Thomas B. Leary, Statement at AMC Government Civil Remedies Hearing, at 7–8 (Dec. 1, 2005) (stating that he is not aware of any DOJ cases, but it is reasonable to assume that the Antitrust Division has authority similar to that of the FTC).
- ¹¹ *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999) (“The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.”) (quoting *Porter*, 328 U.S. at 398); see also *FTC v. Munoz*, 17 Fed. Appx. 624, 626 (9th Cir. 2001) (upholding the FTC’s authority to seek equitable monetary relief); accord *FTC v. Febre*, 128 F.3d 530 (7th Cir. 1997); *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982); *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558 (D. Md. 2005).
- ¹² Kevin Arquit, Statement at AMC Government Civil Remedies Hearing, at 13 (Dec. 1, 2005) [hereinafter Arquit Statement] (stating that consumer protection does not have a “wide body of law that allows private damages”).
- ¹³ David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113, 1120 (2005) [hereinafter Balto, *Reassessing the Approach to FTC Remedies*] (“[S]eek[ing] monetary relief in unfair or deceptive practices cases since the early 1980s . . . has become the foundation of the FTC’s consumer fraud program.”); Arquit Statement, at 12 (describing the FTC’s equitable monetary remedies as a “potent tool . . . against consumer fraud”); Calkins Statement, at 13 (stating that the “dominant use [of Section 13(b)] has been against fraud”).
- ¹⁴ John Graubert, Statement at AMC Government Civil Remedies Hearing, at 2 nn.4–5 (Dec. 1, 2005).
- ¹⁵ Arquit Statement, at 12; American Antitrust Institute, Public Comments Submitted to AMC Regarding Civil Remedies, at 12 (June 17, 2005) (“[T]he FTC has endorsed the important complementary role that the private plaintiffs and state attorneys general serve in recovering damages. . . .”); David Boies, Statement at AMC Civil Remedies Hearing, at 12 (July 28, 2005) (stating that “[t]reble damages also play an important role in accomplishing the goal of disgorgement”).
- ¹⁶ Government Civil Remedies Transcript at 12 (Graubert) (Dec. 1, 2005).
- ¹⁷ *Id.* at 11 (Graubert); see also FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,822 (Aug. 4, 2003) [hereinafter FTC Policy Statement].
- ¹⁸ See Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, *FTC v. Mylan Pharms., Inc.*, FTC File No. X990015 (Nov. 29, 2000), available at <http://www.ftc.gov/os/2000/11/mylanlearystatement.htm> (“[I]t is essential that we somehow communicate our views on the appropriate parameters of the Section 13(b) remedy generally for antitrust cases. At the very least, we might indicate that the remedy will not be sought in cases where the violation is unclear and where private damage remedies are available and being pursued.”); see also Government Civil Remedies Trans. at 9 (Graubert) (confirming that the FTC’s 2003 policy resulted from Commissioner Leary’s urging for clarification).
- ¹⁹ FTC Policy Statement, 68 Fed. Reg. at 45,820–21.
- ²⁰ *Id.* at 45,821 n.8.
- ²¹ *Id.* at 45,821.
- ²² See Barnett/Majoras Transcript at 51–52 (Barnett) (March 21, 2006) (expressing reservations about extending civil fine authority to substantive antitrust violations); *id.* at 52 (Majoras) (stating that she “agree[s] with Assistant Attorney General Barnett’s cautionary notes on civil fines,” but also stating there may be circumstances where injunctive relief is not sufficient).

²³ *Id.* at 51–52 (Barnett) (describing the challenge the DOJ sometimes has to persuade courts that criminal prosecution of antitrust violations are is targeted at a narrow range of conduct, stating that “the sharper the distinction [between criminal and civil violations], the better off we are at the end of the day”).

²⁴ See Chapter III.A of this Report regarding triple damages.

²⁵ Calkins Statement, at 8 (referring to time-limited injunctions as little more than a “slap on the wrist”); see also Pate Comments Proposing Issues, at 2 (noting that “injunctive relief alone may not be sufficient to deter or redress violations of the antitrust laws”); Government Civil Remedies Trans. at 14–17 (Calkins). For example, no antitrust injuries resulted in *United States v. American Airlines, Inc.*, when American Airlines’s President, Robert Crandall, invited Braniff Airlines’s President, Howard Putnam, to fix prices. *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1116 (5th Cir. 1984). Putnam refused and reported the conversation to the DOJ. If Putnam had accepted, the resulting conspiracy could have subjected both airline companies to millions of dollars in criminal fines and Crandall and Putnam to possible jail time. *American Airlines*, 743 F.2d at 1116; see also Calkins Statement, at 8 (“[T]he federal government remedy is likely to be limited to an injunction that can be described, often with some justification, as an order not to do it again. On the other hand, if the same conduct is successfully challenged criminally, it can be punished with prison time and massive individual and corporate fines. . . .”). In the absence of any agreement, however, the DOJ sought only injunctive relief—that is, a court order barring Crandall from engaging in similar conduct again. *American Airlines*, 743 F.2d at 1116.

²⁶ See, e.g., Arquit Statement, at 1; Balto, *Reassessing the Approach to FTC Remedies*, at 1123 (“[T]here is no lack of private enforcement against the types of antitrust violations attacked by the FTC.”).

²⁷ Government Civil Remedies Trans. at 11 (Graubert).

Chapter III.D

Criminal Remedies

1. INTRODUCTION

Criminal antitrust prosecution is a vital component of overall antitrust enforcement in the United States. Criminal penalties can include prison sentences for individuals and sizable monetary fines for individuals and corporations. Such criminal enforcement, and the associated sentences and fines, have generally been reserved for “hard-core” offenses. Those offenses typically are “naked” conspiracies between and among competitors to fix prices, rig bids, or allocate markets or customers. Such naked conspiracies lack any plausible relationship to enhancing output or providing other benefits to consumers; the participants usually conduct their activities in secret and know their activities are illegal. A consensus exists that such conspiracies almost invariably inflict harm on consumers and the economy.¹

The Antitrust Division of the Department of Justice (DOJ) has made the detection, criminal prosecution, and deterrence of hard-core antitrust offenses its highest priority.² This priority, in combination with improved enforcement tools, cooperation from international antitrust enforcers, and a robust amnesty program, have led to the detection and prosecution of an ever-increasing number of cartels, often global in scope. These cartels can affect millions, if not billions, of dollars in commerce.³ Congress has recognized the seriousness of these economic crimes, and has recently substantially increased maximum fines and jail sentences and authorized the DOJ to use wiretaps in the investigation of suspected criminal cartel conduct.⁴

Other enforcement authorities around the world have also increased their enforcement efforts against cartels.⁵ Indeed, more than 100 jurisdictions around the world have enacted laws prohibiting cartels.⁶ Moreover, at least fourteen nations make violations of their competition statutes criminal.⁷ Although U.S. cartel enforcement against entities based in foreign countries has been controversial on some occasions in the past, today many nations have their own laws and policies against cartels, and they cooperate with the United States in cartel investigations, pursuant to various treaties and international agreements. Even in the past few years, the changes have been significant. In 2005 the British government commenced proceedings to extradite one of its citizens for prosecution in the United States for antitrust violations. By comparison, as recently as the late 1990s, requests by U.S. antitrust officials for international assistance routinely took a year to be processed, only to be denied ultimately in the majority of cases.⁸

Against this background of the increased role of criminal antitrust enforcement both in the United States and internationally, the Commission undertook to study three issues specific to U.S. criminal antitrust enforcement.

First, the Sherman Act nominally makes all violations of Section 1 and Section 2 subject to criminal prosecution. Some violations of those statutes, however, such as “naked” conspiracies to fix prices, rig bids, and allocate markets, are universally condemned as particularly harmful to consumer welfare and without procompetitive effects that might benefit consumers. By comparison, other violations, such as anticompetitive unilateral or joint conduct, can be more difficult to judge; unilateral or joint business conduct often requires more extensive factual inquiry to assess whether the conduct is likely to benefit or harm consumers. The DOJ has generally limited its criminal prosecutions to violations of the former type, and not the latter. The Commission examined whether the DOJ appropriately exercises its discretion by limiting criminal prosecutions to hard-core offenses.

Second, the Sherman Act establishes a maximum fine of \$100 million for corporate violations, an amount that was increased from \$10 million in 2004. This maximum may be increased through the application of a general criminal provision, 18 U.S.C. § 3571(d), the “alternative fines statute,” if certain proof burdens are met by the government. The Commission reviewed whether continued use of the alternative fines statute to increase fines was appropriate in antitrust cases in light of the complexity of adducing the necessary proof in antitrust cases and recent Supreme Court decisions requiring that juries determine whether the facts have been proven to a sufficient degree to warrant increased sentences.

Third, sentences for criminal offenses of the Sherman Act are determined through application of the United States Sentencing Commission’s Sentencing Guidelines (Sentencing Guidelines). For corporate antitrust violations, the Sentencing Guidelines set the sentence based on an estimate of the harm the violation caused. The estimate of harm is established through a “proxy,” which is set in all cases at 20 percent of the amount of commerce affected by the antitrust violation. This “20 percent harm proxy” assumes the harm caused by the violation bears a direct relationship to the amount of commerce affected by the conduct. The 20 percent harm proxy is adjusted on the basis of a variety of factors, and then is used to set the final sentence. Some have argued that use of the 20 percent harm proxy fails adequately to distinguish between conduct of different severity and that more should be done to take into account a variety of economic factors that can make similar conduct have significantly different costs to consumers. The Commission therefore studied whether the use of the 20 percent harm proxy in the Sentencing Guidelines for antitrust crimes adequately distinguishes cartel activity of differing severity.

The Commission makes the following recommendations regarding these issues.

- 50.** While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to “naked” price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.
- 51.** No change should be made to the current maximum Sherman Act fine of \$100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.*
- 52.** Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.†
- 53.** The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.**
- 54.** No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to “bid-rigging, price-fixing, or market allocation agreements among competitors,” and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

* Commissioners Jacobson and Warden do not join this recommendation.

† Commissioner Carlton does not join this recommendation in full.

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

2. FOCUS OF ENFORCEMENT ON HARD-CORE CONDUCT

A. Background

Violations of the Sherman Act have been criminal offenses since the Act was passed in 1890. Criminal penalties (which are often supplemented by follow-on civil private damage suits) in general are intended to deter unlawful conduct, protect the public, and punish offenders. They are set at levels designed both to reflect the seriousness of the crime and to provide an optimal level of deterrence, considering all relevant factors.

Although Sherman Act violations originally were misdemeanors punishable by up to one year in prison and a maximum of \$5000 in fines, they subsequently became felonies punishable by much larger fines and longer prison sentences. A series of amendments to the Sherman Act—the most recent in 2004—have increased the maximum prison sentence to ten years and increased the maximum fines to \$1 million for individuals and \$100 million for corporations.⁹ The criminal fines obtained by the DOJ have also increased substantially, particularly in the last decade. Between 1997 and 2004, the total amount of annual fines obtained by DOJ ranged from \$204 million to over \$1 billion, in any given year.¹⁰ In 2005, the average jail sentence for antitrust crimes was twenty-four months.¹¹

The DOJ has continued to seek improved methods for finding and punishing cartels. For example, it has enhanced its enforcement efforts through an invigorated amnesty program that encourages cartel participants to assist the DOJ in discovering and prosecuting cartel activity,¹² obtained the authority to use such methods as wire tapping,¹³ and entered into agreements with foreign jurisdictions to investigate international cartels cooperatively.¹⁴ The focus of this enforcement has broadened over time from prosecutions of regional and local price-fixing, territory allocation, and bid-rigging prior to the 1990s,¹⁵ to international cartels involving large, multinational companies and significant amounts of affected commerce.¹⁶

B. Recommendation and Findings

50. While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to “naked” price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.

Although the DOJ has statutory authority to prosecute all violations of Section 1 and 2 of the Sherman Act criminally, over time the DOJ has narrowed the scope of its criminal enforcement of the Sherman Act to “hard-core” offenses such as price-fixing.¹⁷ The DOJ has

in recent years forgone criminal prosecutions of unilateral conduct under Section 2 and joint conduct whose competitive effects are often ambiguous, and the DOJ has at various points in the last fifty years made policy statements narrowing the types of antitrust violations it will prosecute as criminal.¹⁸ The last criminal prosecutions by the DOJ against conduct that did not involve price-fixing, bid-rigging, or market allocation were over twenty-five years ago.¹⁹

The DOJ has made quite clear that it does not currently prosecute anything other than hard-core cartel activity criminally, and it has no plans to change that policy in the future.²⁰ The DOJ's discretionary limitation of criminal prosecution to hard-core offenses allows it to focus its prosecutorial resources on that conduct about which there is general agreement that it harms consumers.²¹ Indeed, the Supreme Court long ago made clear that any conspiracy formed for the purpose of "raising, depressing, fixing, pegging, or stabilizing . . . price . . . is illegal per se."²² Similarly, it has long been recognized that agreements to allocate territories are unlawful without the need for an inquiry into their "business or economic justification, their impact in the marketplace, or their reasonableness."²³

By comparison, other types of potentially anticompetitive conduct can have more ambiguous effects on consumers and consumer welfare, and the legal standards by which such conduct is determined to be anticompetitive are more complex and fact-intensive. Indeed, antitrust law evaluates a wide range of conduct under the "rule of reason," pursuant to which a court compares the anticompetitive harm from the activity with the procompetitive benefits that are likely to accrue to consumers. For example, companies often enter into a variety of joint ventures, whether for research and development, manufacturing, marketing, or distribution. Such joint ventures may "restrain" trade in some respect, but also offer efficiencies that are beneficial to both the companies and consumers.²⁴ Similarly, there is a wide range of unilateral conduct, such as pricing and distribution practices, that can be procompetitive in most instances, and anticompetitive only in very limited circumstances.²⁵ Criminal penalties, by contrast, are typically reserved for cases in which conduct is clearly unlawful. To impose them more broadly, on conduct that is potentially not anticompetitive, runs the risk of penalizing the very procompetitive, proconsumer conduct the antitrust laws are intended to encourage.

The DOJ has reasonably decided to focus its prosecutorial resources on the conduct most likely to harm consumers.²⁶ It likewise has reserved the most burdensome form of punishment—fines and incarceration—for such cases. The Commission therefore commends the DOJ's limitation of criminal prosecution to hard-core conduct and recommends its continuation.

3. THE ALTERNATIVE FINES STATUTE— 18 U.S.C. § 3571(d)

A. Background

Section 3571(d) of Title 18 of the United States Code is a generally applicable statute that permits prosecutors to seek higher fines than those provided for in the statute laying out the offense.²⁷ Section 3571(d), or the “alternative fines statute,” provides that:

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.²⁸

In antitrust cases, this statute permits the DOJ to seek fines in excess of the \$100 million statutory maximum (or \$1 million for individuals) if the Sentencing Guidelines (discussed below) would call for it.²⁹ When the DOJ seeks to invoke the alternative fines statute, fines are still calculated on the basis of the Sentencing Guidelines; the fine range is, however, no longer limited by the Sherman Act maximum.

B. Recommendation and Findings

51. No change should be made to the current maximum Sherman Act fine of \$100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.*

Section 3571(d), the alternative fines statute, is generally applicable to all crimes for which there is a monetary penalty.³⁰ There is nothing unique about antitrust offenses that justifies their being carved out or otherwise exempted from this provision. On the contrary, the alternative fines statute provides a useful means to punish large cartels adequately without the need for Congress to pass frequent statutory increases to the maximum fine.³¹ Indeed, the

* Commissioners Jacobson and Warden do not join this recommendation. They would make Section 3571(d) inapplicable to Sherman Act offenses and increase the maximum fine under the Sherman Act to \$500 million. At a minimum, they would recommend that Congress revisit whether the alternative fines statute should be applicable to antitrust offenses. Because, in light of incentives to strike plea agreements with the DOJ, defendants have been unwilling to challenge the use of Section 3571(d), these Commissioners believe the issue is unlikely to be addressed and resolved by a court.

DOJ has obtained fines above \$100 million in nine cases, and prior to the increase of the maximum fine in 2004, sought fines above the statutory maximum fifty-one times since 1997.³² In the absence of the alternative fines statute, these high fines would have been barred. Congress increased the fines ten-fold in 2004; that increase, in conjunction with the use of the alternative fines statute, permits the DOJ to seek, and courts to impose, sufficiently high fines to continue to provide deterrence through criminal enforcement.

The Commission recommends that certain interpretive questions regarding the statute be left to courts to resolve in the context of actual cases. One such argument is that the term “gain or loss” in the statute refers to the gain or loss caused by the individual defendant, rather than the gain or loss caused by the entire conspiracy. A court is best suited to resolve any ambiguity in the statute and relevant legislative history.

A more substantial question that the Commission also recommends be addressed by courts is whether the alternative fines statute can continue to be used in light of *Apprendi v. New Jersey*, as well as subsequent Supreme Court decisions.³³ That case requires that any fact used to increase a sentence must be proved to a jury beyond a reasonable doubt.³⁴ The DOJ acknowledges that it must prove to a jury, beyond a reasonable doubt, the gain or loss used to establish a higher maximum fine under Section 3571(d).³⁵ Some observers argue that because proof of gain or loss is typically established through expert witnesses, opinion testimony, and econometric analysis in antitrust cases, it is inherently speculative and can never be sufficient for proof beyond a reasonable doubt.³⁶ Alternatively, they contend, because the litigation of gain or loss in any antitrust case is complicated and protracted, the alternative fines statute by its terms may not be applied.³⁷ Although antitrust sentences are typically imposed pursuant to a plea agreement,³⁸ the Commission believes these arguments are nonetheless best left to a court to consider in the first instance.

4. THE SENTENCING GUIDELINES

A. Background

Although the Sherman Act specifies a maximum fine for violations, actual sentences for antitrust crimes are established with reference to the Sentencing Guidelines issued by the United States Sentencing Commission (Sentencing Guidelines).³⁹ Fines for both corporations and individuals are set by a series of calculations, described more fully below, that establish a range of possible fines. A court may impose a fine anywhere within the calculated range. A recent Supreme Court decision, *United States v. Booker*, made the fine range calculated by the Sentencing Guidelines advisory, leaving the court with discretion to impose a fine higher or lower than the calculated range.⁴⁰

The Sentencing Guidelines contain a specific section for the calculation of fines for organizations convicted of criminal antitrust conduct. The Sentencing Guidelines call for the

calculation of a “base fine” that is then adjusted for culpability. The base fine is in most cases determined by the pecuniary loss caused by the organization’s violation.⁴¹ Pecuniary loss is calculated as 20 percent of the volume of commerce affected by the defendant’s anti-competitive conduct (referred to herein as the “20 percent harm proxy”).⁴² The base fine is then multiplied by a minimum and maximum culpability multiplier, and the sentencing judge may impose a fine anywhere within the range calculated.⁴³ The culpability multiplier may range from 0.75 to 4.0,⁴⁴ which depends on various factors relevant to the defendant’s culpability, such as the size of the organization and whether the defendant cooperated with the investigation or accepted responsibility.⁴⁵

The Sentencing Commission established the 20 percent harm proxy in 1991 so that courts could “avoid the time and expense that would be required . . . to determine the actual gain or loss.”⁴⁶ The Sentencing Commission retained the 20 percent harm proxy in its most recent revisions to this part of the Guidelines in 2005. This decision was, in large part, because Congress expressly stated when it increased the maximum Sherman Act fines in 2004 that “Congress does not intend for the [Sentencing] Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy.”⁴⁷

B. Recommendations and Findings

52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.*

The Sentencing Commission adopted its 20 percent harm proxy for antitrust crimes in 1991, concluding that it is difficult to calculate loss or gain with precision in antitrust cases.⁴⁸ Because general deterrence of antitrust violations does not require an exact correlation of expected harm and penalty, the Sentencing Commission determined that reliance on a proxy amount would be appropriate.⁴⁹ The empirical data available at the time showed that price-fixing overcharges tended to be about 10 percent of the volume of affected commerce.⁵⁰ The Sentencing Commission doubled this amount to 20 percent to reflect the fact

* Commissioner Carlton joins this recommendation only to the extent it would lead to an increase in (or no change to) the proxy.

that the cost of antitrust violations to society exceeds the amount of overcharge.⁵¹ The Sentencing Commission therefore concluded that a 20 percent harm proxy was appropriate for use in calculating the base fine.

Some studies suggest that the average overcharge in recent cartel cases has been 40 percent and that the median overcharge is 25 percent.⁵² If these studies are accurate, and confirmed by further research, the presumed 10 percent overcharge reflected in the existing 20 percent harm proxy is inappropriately low. Conversely, some observers argue that the existing presumption results in fines that are too high.⁵³ Furthermore, development of economic learning and estimation techniques over the past fifteen years may have made proving gain or loss in an antitrust case less difficult than it was when the Sentencing Commission created the proxy.⁵⁴ The degree of difficulty of proving gain or loss, and the burdens it would impose on the sentencing process, are worthy of renewed consideration by the Sentencing Commission.

The DOJ believes that no change to the existing 20 percent harm proxy is appropriate, because more precise calculations are unnecessary.⁵⁵ The DOJ argues that criminal fines are not intended to be substitutes for damages, and do not necessitate precise calculation, because their primary purpose is to punish and deter, and they already provide rough justice.⁵⁶ Furthermore, the DOJ contends, more precise calculations would result in damages-like litigation that Congress hoped the sentencing courts could avoid through continued use of a proxy.⁵⁷

On balance, however, the Commission recommends that the Sentencing Commission study these questions, and that Congress should encourage such study. The Sentencing Commission should determine whether the existing proxy is empirically sound and accurately reflects the best estimate of typical harm in antitrust cases. It should also determine the costs that individualized calculations of harm would impose on the sentencing process—in light of the current ability of lawyers and economists to estimate harm caused by antitrust crimes—and should determine whether establishing more individually tailored base fines could justify those additional costs. Such study would be consistent with the Sentencing Commission's more general efforts to increase the correlation between the penalty and the underlying facts of the crime.⁵⁸ The Commission does not take a position on how the Sentencing Commission should weigh these considerations, or whether the proxy should be higher or lower; it recommends only that the Sentencing Commission revisit its fifteen-year-old decision to determine whether change is warranted.

53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.*

The Sentencing Guidelines' use of a proxy for harm (whether the existing 20 percent harm proxy, or another revised proxy amount) does not carefully distinguish between defendants who have caused differing degrees of actual harm. That is, the inflexible presumption that antitrust crimes cause harm equal to 20 percent of the volume of commerce affected can be "inequitable," and potentially "disproportionate."⁵⁹ Just as there is some debate as to whether the existing harm proxy is too high or too low as a general matter, as explained above, it may also be too high or too low in individual cases. Indeed, the use of a proxy runs counter to the Guidelines' approach in other, non-antitrust cases, where the Sentencing Guidelines call for actual calculation of harm.⁶⁰ Furthermore, recent Supreme Court cases have imposed a requirement that any fact that would increase a sentence be proven to a jury beyond a reasonable doubt.⁶¹ Although the holdings of those Supreme Court cases likely do not invalidate the proxy itself, they do highlight the concern of basing sentences on facts other than those proven at trial (or admitted by a defendant).

The Commission recommends that the Sentencing Guidelines be modified to allow the 20 percent harm proxy to be rebutted in certain circumstances, because sentencing calculations should more closely reflect the harm caused by the crime committed where doing so is feasible. Accordingly, the Commission recommends an approach that would permit a defendant to show that the overcharge was well below the presumed 10 percent of commerce affected or that the harm caused by its conduct was well less than double the overcharge. Conversely, the government could seek to prove that the overcharge was more than 10 percent, or that the overall harm caused was more than double the calculated overcharge.⁶² This process would thus allow the fine to be either increased or decreased, depending on the circumstances. To maintain the efficiency of the sentencing process, the

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

Commissioners Burchfield and Garza believe the Sentencing Guidelines provide sufficient alternative mechanisms to take into account individual circumstances. First, the Guidelines calculation results in a range of fines, leaving the sentencing judge free to impose a higher or lower fine as appropriate to the circumstances. Second, the Guidelines are now discretionary, as a result of the Supreme Court's decision in *United States v. Booker*, 530 U.S. 220 (2005), and therefore a judge has even greater latitude to impose a fine above or below the range calculated by the Guidelines.

Commissioner Carlton believes that additional proceedings designed to create more individually tailored base fines are a waste of judicial and prosecutorial resources.

Commission's recommendation calls for allowing such proof only if it would materially change the base fine. This would limit the increases in duration and costs of the sentencing process to instances where the sentence would be most disproportionate (whether too low or too high) to the harm actually caused.

The Commission's recommended rebuttal procedure is not intended to reduce the government's burden of proof when it seeks to impose a fine above the statutory maximum of the Sherman Act. As the government acknowledges, in those instances it must prove gain or loss beyond a reasonable doubt to establish a higher maximum fine. Accordingly, if the government sought to use this procedure to increase the base fine, with a resulting sentence that exceeds the applicable Sherman Act maximum, it would remain obliged to make the proof of gain or loss beyond a reasonable doubt, pursuant to Section 3571(d), for the court to impose that fine, and the burden of proof would not shift. If the government failed to meet this burden, any higher sentence resulting from an increased base fine would remain limited by maximum fine amounts provided for in the Sherman Act.

54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to “bid-rigging, price-fixing, or market allocation agreements among competitors,” and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

The antitrust section of the Sentencing Guidelines specifies that its calculation of penalties is applicable only to bid-rigging, price-fixing and market allocation offenses—that is “hardcore” Section 1 offenses.⁶³ The Sentencing Guidelines do not, as some suggest,⁶⁴ purport to apply to other types of anticompetitive conduct, such as that which might violate Section 2 of the Sherman Act. Indeed, the Sentencing Commission decided to limit these provisions to those offenses because of the DOJ's historical practice not to prosecute other types of antitrust offenses.⁶⁵ As explained above, the Commission endorses continuation of this discretionary limitation. Should the DOJ's prosecutorial policy change in the future, it would be appropriate for the Sentencing Commission to revisit this aspect of the Sentencing Guidelines.

Notes

- ¹ Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (describing price-fixing as having a “pernicious effect on competition and lack[ing] . . . any redeeming virtue”); ROBERT H. BORK, *THE ANTITRUST PARADOX* 268 (1978) [hereinafter BORK, *ANTITRUST PARADOX*].
- ² 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 1 (Jan. 10, 2005) [hereinafter Hammond, *Recent Developments in the Antitrust Division’s Criminal Enforcement Program*].
- ³ Department of Justice, Antitrust Division, Antitrust Enforcement and the Consumer, *available at* http://www.usdoj.gov/atr/public/div_stats/211491.htm; see also William J. Kolasky, Deputy Ass’t Att’y Gen., Antitrust Div., Dep’t of Justice, A Culture of Competition for North America, Speech Before Economic Competition Day: Shared Experiences, Federal Competition Commission, at 3 (June 24, 2002) (stating that “the magnitude of harm from cartels is in the billions of dollars annually”).
- ⁴ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 188 Stat. 661, 668 [hereinafter ACPERA] (codified as amended at 15 U.S.C. §§ 1–3) (increasing criminal maximum penalties from \$10 million to \$100 million in fines for corporate defendants; from \$350,000 to \$1 million in fines for individuals; and from 3 to 10 years in prison); U.S.A. Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 113(g)(3), 120 Stat. 192, 210 [hereinafter U.S.A. Patriot Improvement and Reauthorization Act] (codified as amended at 18 U.S.C. § 2516 (1)(r)) (allowing the Antitrust Division to seek wiretaps for criminal violations of Sections 1, 2, and 3 of the Sherman Act).
- ⁵ 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 Institute on White Collar Crime, ABA Criminal Justice Section, at 2 (Mar. 2, 2006) [hereinafter Hammond, *International Cartel Prosecutions*] (“Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers.”).
- ⁶ See David E. Vann Jr. & Ethan E. Litwin, *Recent Developments in International Cartel Enforcement*, in *GLOBAL COMPETITION REVIEW: CARTEL REGULATION* 3 (2006).
- ⁷ *GLOBAL COMPETITION REVIEW: CARTEL REGULATION* 198–207 (2006).
- ⁸ Hammond, *International Cartel Prosecutions*, at 6.
- ⁹ ACPERA, § 113(g)(3) (codified as amended at 15 U.S.C. §§ 1–3).
- ¹⁰ Scott D. Hammond, Statement at AMC Criminal Remedies Hearing, at 2–3 (Nov. 3, 2005) [hereinafter Hammond Statement].
- ¹¹ Criminal Remedies Transcript at 53 (Hammond) (Nov. 3, 2005); Thomas O. Barnett, Statement at AMC Barnett/Majoras Hearing, at attachment 2 (Mar. 21, 2006) [hereinafter Barnett Statement].
- ¹² In 2004 Congress enacted statutory changes to the Antitrust Division’s Leniency Program that would allow a successful amnesty applicant to be liable for only single damages in a civil follow-on action, if that amnesty applicant cooperated with the civil plaintiffs. ACPERA, § 213 (codified as amended at 15 U.S.C. § 1 note).
- ¹³ U.S.A. Patriot Improvement and Reauthorization Act, § 113(g)(3) (codified as amended at 18 U.S.C. § 2516(1)(r)) (allowing the Antitrust Division to seek wiretaps for criminal violations of Sections 1, 2, and 3 of the Sherman Act).
- ¹⁴ Hammond, *Recent Developments in the Antitrust Division’s Criminal Enforcement Program*, at 5 (the Division has entered antitrust cooperation agreements with Brazil, Israel, Japan, Mexico, Australia, Canada, the European Union, and Germany).
- ¹⁵ See Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 *ANTITRUST L.J.* 157, 159 (1988).

- ¹⁶ Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Speech Before New York State Bar Association Annual Meeting, at 4 (Jan. 20, 2003) ("In some matters currently under legislation, the volume of commerce affected by the suspected conspiracy is well over \$1 billion per year and in more than two-thirds of our international investigations, the volume of commerce affected is over \$100 million over the term of the conspiracy."); see also Barnett Statement, at attachment 1 (reflecting criminal fines imposed from 1996 to 2006 ranging from \$10 million to \$500 million, the most recent being \$300 million imposed in 2006 for the DRAM conspiracy).
- ¹⁷ American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Sentencing Guidelines, at 4 (Nov. 14, 2005) [hereinafter ABA Comments re Sentencing Guidelines]; Anthony V. Nanni, Statement at AMC Criminal Remedies Hearing, at 6–7 (Nov. 3, 2005) [hereinafter Nanni Statement].
- ¹⁸ See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 350 (1955) (limiting prosecution to price-fixing and certain other types of violations); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967) (limiting prosecution to "willful" violations).
- ¹⁹ See *United States v. Empire Gas Co.*, 537 F.2d 296 (8th Cir. 1976) (unsuccessful prosecution under Section 2 for attempted monopolization through destruction of competitor's assets); *United States v. Cuisinarts, Inc.*, Crim. No. J. 80-49 (D. Conn. 1981) (plea *nolo contendere* to Sherman Act indictment for resale price maintenance); see also Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 695 n.14 (2001).
- ²⁰ R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Vigorous And Principled Antitrust Enforcement: Priorities And Goals, Address Before ABA Section of Antitrust Law Annual Meeting, at 6 (Aug. 12, 2003) (the DOJ brings criminal charges only against "hard-core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior."); Criminal Remedies Trans. at 83 (Hammond) (The DOJ will not prosecute cases in which "there is some innocent explanation here or some inadvertence, that they crossed the line without meaning to.").
- ²¹ *Northern Pacific*, 356 U.S. at 5 (describing price-fixing as having a "pernicious effect on competition and lack[ing] . . . any redeeming virtue"); BORK, ANTITRUST PARADOX 268.
- ²² *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).
- ²³ *United States v. Sealy, Inc.*, 388 U.S. 350, 358 (1951).
- ²⁴ See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23–24 (1978).
- ²⁵ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (explaining that price discounts, so long as they are above some measure of cost are always lawful in light of the high likelihood that consumers benefit from the lower prices they bring); *State Oil Co. v. Kahn*, 522 U.S. 3, 14 (1997) (holding that restrictions on maximum resale price imposed by distributor had the potential to "stimulate interbrand competition").
- ²⁶ ABA Comments re Sentencing Guidelines, at 4–5 (applauding the Division's "self-imposed discretion," but still advocating that this Commission make it clear that only hard-core antitrust violations be prosecuted criminally).
- ²⁷ See, e.g., *United States v. Wilder*, 15 F.3d 1292 (5th Cir. 1994) (Section 3571(d) invoked to enhance penalty in case involving defrauding financial institutions and conspiring to defraud the federal government); *United States v. Leonard*, 37 F.3d 32 (2d Cir. 1994) (section 3571(d) implicated in tax evasion case); *United States v. Foote*, No. CR.A. 00-20091-01-KHV, 2003 WL 2466158, *1 (D. Kan. July 31, 2003) (Section 3571(d) used to enhance penalty for trafficking of counterfeit goods).
- ²⁸ 18 U.S.C. § 3571(d).

- ²⁹ Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants, Address Before ABA Section of Antitrust Law, Spring Meeting (Mar. 30, 2005).
- ³⁰ ABA Comments re Sentencing Guidelines, at 6 n.13.
- ³¹ See Thomas O. Barnett, Public Comments Submitted to AMC, at 1 (July 24, 2006) (stating that without Section 3571(d), the DOJ and the sentencing courts would be forced to "treat companies that caused the greatest harm . . . the same as other violators"); American Antitrust Institute, Public Comments Submitted to AMC Regarding Alternative Fines Statute, at 2 (June 30, 2006) [hereinafter AAI Comments re Alternative Fines Statute] (statutory maximum not likely to be increased sufficiently to provide adequate fines for largest cartel cases); Philip C. Zane, Public Comments Submitted to AMC Regarding Alternative Fines Statute, at 1 (June 30, 2006) [hereinafter Zane Comments re Alternative Fines Statute].
- ³² Hammond Statement, at 2.
- ³³ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); see also *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 127 S. Ct. 856 (2007).
- ³⁴ *Apprendi*, 530 U.S. at 490; see also *Booker*, 543 U.S. at 244 (confirming holding of *Apprendi*).
- ³⁵ Criminal Remedies Trans. at 43 (Hammond) (stating that DOJ will "have to prove [gain or loss] to a jury beyond a reasonable doubt").
- ³⁶ AAI Comments re Alternative Fines Statute, at 3 ("Proof of gain or loss in most antitrust cases involves complex econometric analysis about how markets would have performed in the absence of the unlawful conduct."); Zane Comments re Alternative Fines Statute, at 2.
- ³⁷ Tefft W. Smith, Statement at AMC Criminal Remedies Hearing, at 27 (Nov. 3, 2005) [hereinafter Smith Statement] (stating that Section 3571(d) "cannot even be applied where, as in an antitrust case, the Division would need to engage in a civil damage trial-like proceeding, because that would 'unduly complicate the sentencing process'"); *id.* at 25 ("Isn't 'twice the gain or loss' virtually unprovable under § 3571 as 'unduly complicating the sentencing proceedings'?").
- ³⁸ ABA Comments re Sentencing Guidelines, at 9 n.20; see Tara L. Reinhart et al., *The Business of Sentencing: Facing the Facts After Blakely, Booker, and FanFan*, ANTITRUST SOURCE, at 4 (Jan. 1, 2005) (stating that with respect to Section 3571(d) calculations, "the Division offers little more than a stipulation, which the Probation Office adopts"); Antitrust Division and Mitsubishi Corporation Plea Agreement, No. 00-033, at 4 (May 10, 2001) ("[T]he United States and Mitsubishi stipulate that the loss to the victims and/or the gain to Mitsubishi and others from the offense is sufficient to support a fine of \$134 million [under Section 3571(d)]."), available at <http://www.usdoj.gov/atr/cases/f8200/8204.htm>.
- ³⁹ U.S. SENTENCING GUIDELINES MANUAL (2005) [hereinafter U.S.S.G.].
- ⁴⁰ *Booker*, 543 U.S. 220.
- ⁴¹ U.S.S.G. § 8C2.4(a)(3); see AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SENTENCING GUIDELINES IN ANTITRUST: A PRACTITIONER'S HANDBOOK 43 (1999) (Robert E. Hauberg, Jr. et al. eds., 1999).
- ⁴² U.S.S.G. § 2R1.1(d)(1). The use of the 20 percent harm proxy is not discretionary. See *id.* § 8C2.4(b) (a "special instruction for organizational fines . . . shall be applied") (emphasis added).
- ⁴³ A recent Supreme Court case has rendered the Sentencing Guidelines advisory only. See *Booker*, 543 U.S. at 245.
- ⁴⁴ See U.S.S.G. § 2R1.1(d)(2); *id.* at § 8C2.6.
- ⁴⁵ *Id.* at § 8C2.5.
- ⁴⁶ *Id.* at § 2R1.1 cmt. 3.
- ⁴⁷ Hammond Statement, at 8 (citing Supplemental Legislative History by Reps. Sensenbrenner and Conyers, 150 CONG. REC. H3658 (daily ed. June 2, 2004)).
- ⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 6–7.

⁵⁰ U.S.S.G. § 2R1.1 cmt. 3.

⁵¹ *Id.* These costs derive from allocative inefficiency, which includes such inefficiencies that result from consumers who either do not purchase the product because of its artificially high price or who purchase an inferior substitute product. See *id.*

⁵² John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 540–41 (2005); see Comments of the American Bar Association, Section of Antitrust Law, on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Guidelines, at 21 (Mar. 2005) [hereinafter ABA Comments to Sentencing Commission]. For instance, in *FTC v. Mylan*, the alleged overcharge was 1900 percent to 3200 percent. Had that case been prosecuted criminally, a fine based on a 10 percent overcharge and 10 percent deadweight loss would have been well below the estimated harm. See *FTC v. Mylan Labs., Inc.*, Amended Complaint, at ¶ 29, Civ. No. 1:98CV03114 (D.D.C. Feb. 8, 1999).

⁵³ Nanni Statement, at 9–10; Smith Statement, at 18–19, 21.

⁵⁴ ABA Comments re Sentencing Guidelines, at 9–10 & n.21 (“If subsequent events have shown that the determination of gain or loss in antitrust cases is not as complex as the Sentencing Commission assumed in 1991, there is no need to continue to base antitrust fines or jail sentences on volume of affected commerce as opposed to actual harm as is done in most other federal economic crimes.”).

⁵⁵ Hammond Statement, at 6–7.

⁵⁶ *Id.*; Charles R. Tetzlaff, Statement at AMC Criminal Remedies Hearing, at 2 (Nov. 3, 2005) (identifying Guidelines goals as punishment, deterrence, incapacitation, and rehabilitation); *id.* at 4 (noting that Congress endorsed the Guidelines’ 20 percent harm proxy, finding that it was sufficient to promote the interests of justice); Criminal Remedies Trans. at 26 (Nanni) (stating that a corporation’s volume of commerce “roughly reflects its importance to the conspiracy . . . [and] that the Guidelines in terms of fines gets roughly to the right place”).

⁵⁷ Criminal Remedies Trans. at 104 (Hammond) (it “creates a bigger headache”); see Hammond Statement, at 3–4 (stating “the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guidelines levels without the need to engage in damages litigation during the criminal sentencing process”) (quoting 150 CONG. REC. H3658 (daily ed. June 2, 2004)).

⁵⁸ Julie R. O’Sullivan, *Federal Criminal Code*, 96 J. CRIM. L. & CRIMINOLOGY 643, 646 (2006) (stating that the Sentencing Commission wanted to create a “‘real offense’ sentencing system—that is, a system where the sentence . . . was based on the ‘real’ circumstances of [the offender’s] case”).

⁵⁹ ABA Comments re Sentencing Guidelines, at 7.

⁶⁰ See *id.* at 12 n.30 (stating that the Sentencing Guidelines generally do not create proxies for harm for other white-collar crimes and that that calculation of the actual impact “is more consistent with how penalties are imposed in other white collar prosecutions”); see also ABA Comments to Sentencing Commission, at 21.

⁶¹ ABA Comments to Sentencing Commission, at 20 (stating that it is possible that the Sentencing Commission “has not considered whether [Booker] requires amendment or removal of the current method of calculating the base fine for an organization that commits an antitrust violation”).

⁶² See Smith Statement, at 20; Nanni Statement, at 9–10.

⁶³ U.S.S.G. § 2R1.1 (“Bid-rigging, Price-Fixing or Market Allocation Agreements Among Competitors”); American Bar Association, Public Comments Submitted to the AMC Regarding Alternative Fines Statute, at 4 (June 30, 2006).

⁶⁴ ABA Comments to Sentencing Commission, at 5.

⁶⁵ U.S.S.G. § 2R1.1 & Background (stating that “there is near universal agreement that . . . horizontal price-fixing (including bid-rigging) and horizontal market allocation . . . cause serious economic harm . . . [and] other types of antitrust offenses . . . are rarely prosecuted”).

Chapter IV

Government Exceptions to Free-Market Competition

Chapter IV.A

The Robinson-Patman Act

1. INTRODUCTION

Congress passed the Robinson-Patman Act in 1936 to respond to the concern of small businesses—such as “mom and pop” grocery stores—that they were losing share to larger supermarkets and chain stores and in some cases were being forced to leave the market. Small businesses complained that they could not obtain from suppliers the same price discounts that larger businesses demanded and received.

To address this concern, Congress passed the Robinson-Patman Act (RP Act or Act), which prohibits sellers from offering different prices to different purchasers of “commodities of like grade and quality” where the difference injures competition.¹ Different discount levels, or lower prices, can be offered only where: (1) the same discount is practically available to all purchasers; (2) a lower price is justified by a lower per-unit cost of selling to the “favored” buyer; (3) a lower price is offered in good faith to meet (but not beat) the price of a competitor; or (4) a lower price is justified by changing conditions affecting the market or marketability of the goods, such as where goods are perishable or seasonal or the business is closing or in bankruptcy. Other provisions of the Robinson-Patman Act ensure the goal of equal pricing by restricting the use of commissions and promotional expenses, for example. The Supreme Court has described the purpose of the Act:

The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer’s quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages²

In its operation, however, the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would. As one commentator has explained, the Robinson-Patman Act “was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices.”³ Moreover, the Act ironically appears increasingly to be ineffective even in protecting small businesses. Over time, many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller’s costs—and thus increase costs to consumers—but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective.

An act that *restricts* price and other forms of competition is fundamentally inconsistent with the antitrust laws, which *protect* price and other types of competition that benefit consumers. Less than twenty years after Congress enacted the Robinson-Patman Act, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws expressed hope that courts would reconcile interpretations of the Robinson-Patman Act with "broader antitrust policies" and "[a]ccommodate all legal restrictions on the distribution process to dominant Sherman Act policies."⁴ Fourteen years later, the Report of the White House Task Force on Antitrust Policy (Neal Report) concluded, "the Robinson-Patman Act requires a major overhaul to make it consistent with the purposes of the antitrust laws."⁵ In 1977 the Department of Justice Report on the Robinson-Patman Act (1977 DOJ Report) similarly found that the evidence "raises serious questions whether the Act advances the competitive goals of other antitrust laws."⁶ Both the Neal Report in 1969 and the 1977 DOJ Report recommended repeal or substantial modification of the Act due to the Act's high costs, limited or non-existent benefits, and inconsistency with other antitrust laws.⁷ In particular, the 1977 DOJ Report concluded that "serious consideration" should be given to repeal of the Robinson-Patman Act,⁸ and presented draft legislative options.⁹

In light of these longstanding issues, this Commission also examined the Robinson-Patman Act. The Commission makes the following recommendation.

55. Congress should repeal the Robinson-Patman Act in its entirety.*

The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.

* Commissioner Shenefield does not join this recommendation in full.
Commissioner Yarowsky joins this recommendation with qualifications.

2. BACKGROUND

A. The Robinson-Patman Act and Its Case Law

1. History of the Act

The history of the Robinson-Patman Act began in 1914, when Congress first acted to prohibit certain forms of differential pricing through passage of Section 2 of the Clayton Act. At that time, Congress was primarily concerned with price predation through which the trusts might selectively reduce prices to below-cost levels to drive rivals from the market and hamper entry by would-be rivals to replace that lost competition.¹⁰ The statutory language of Section 2 of the Clayton Act was not limited to those situations, however; it was broad enough also to prohibit price differences that disadvantaged one purchaser over another.¹¹

By 1936, during the Great Depression, Congress was concerned that the growth of large chain stores was harming small “mom and pop” competitors. Congress undertook to strengthen the original Clayton Act to give small businesses greater protection from what Congress saw as large, powerful buyers extracting favorable concessions from their suppliers to the detriment of smaller competitors.¹² In particular, Congress wanted to rein in volume discounts, which were then permitted under Section 2 of the Clayton Act, as construed by the courts.¹³ To achieve this purpose, Congress removed the provision permitting volume discounts.¹⁴

At the same time, Congress added an alternative standard for the type of competitive injury required to violate the new statute. The courts had interpreted the original language in the Clayton Act to require a plaintiff to show that the price differences it faced had caused a “generalized competitive injury.”¹⁵ The language Congress added in 1936 also prohibited price differences where the effect may be “to injure, destroy, or prevent competition *with any person . . . or with customers of either of them.*”¹⁶ This language does not ask whether the price differences have caused higher prices, lower output, or other anticompetitive effects in a relevant market. Rather, as the Supreme Court later held, this language “was intended to justify a finding of injury to competition by a showing of ‘injury to the competitor victimized by the discrimination.’”¹⁷

2. Conduct Prohibited by the Act

The Robinson-Patman Act is commonly known as a price discrimination statute. Although economists do not uniformly agree on the precise definition of price discrimination, their definitions generally focus on the sale from the seller’s perspective. This Report will use the definition endorsed by some economists as the economic definition of price discrimination—that is, price discrimination is “charging different customers prices that are not in proportion to marginal costs.”¹⁸ Under this definition, whether conduct amounts to price discrim-

ination depends on whether the seller's margin between price and cost differs among the buyers to whom it sells.

By contrast, “price differences”—that is, charging different prices to different buyers—focus on the sale from the buyer's perspective. The key question is whether different buyers pay different prices for products of like grade and quality. The Robinson-Patman Act asks this question and allows such differential pricing only if particular, limited justifications are proven. Thus, the Act is arguably more of a “price differences” statute than a “price discrimination” statute.¹⁹ Nonetheless, because the Act is understood as a price discrimination statute, this Section generally uses the term “price discrimination” to refer to price differences that the Act addresses.

The structure of the Robinson-Patman Act is to prohibit certain conduct and then provide exceptions from those prohibitions. As a general matter, Section 2(a) of the Robinson-Patman Act prohibits non-cost-justified price discrimination that causes competitive injury.²⁰ For example, if a manufacturer sold the same product to a large retailer at a lower price than to a small retailer, the disfavored, small retailer could allege that the manufacturer (and possibly the favored, large buyer) violated the Robinson-Patman Act.

To establish seller liability under Section 2(a), a plaintiff must show: (1) the relevant sales were made in interstate commerce; (2) the products were of like grade and quality; (3) the seller (defendant) discriminated in price between the plaintiff and another purchaser; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser.²¹ Courts have allowed the plaintiff to prove the “favored competitor received a significant price reduction over a substantial period of time” as a means to show the price discrimination substantially lessened competition.²²

The Robinson-Patman Act addresses other forms of discrimination in the terms of sale as well, largely to prevent sellers from effectively price discriminating through other means. To prevent disguised price discrimination, Section 2(c) prohibits parties to a transaction from receiving brokerage fees or commissions, except for services rendered.²³ Sections 2(d) and 2(e) require that promotional allowances and services be available on proportionately equal terms to all competing customers.²⁴

Liability under the Robinson-Patman Act is not limited to sellers. Section 2(f) of the Act makes it unlawful for buyers “knowingly to induce or receive a discrimination in price” that is prohibited by the Act.²⁵ This provision was designed to address concerns that large buyers would use their buyer power to extract lower prices from manufacturers or suppliers.²⁶ Many observers argue that it is difficult to prove buyer liability, however.²⁷ Buyers cannot be held liable unless the plaintiff can establish a *prima facie* case against the seller and overcome any affirmative defenses that a seller could raise.²⁸

Robinson-Patman Act claims generally can be characterized as either primary-line or secondary-line claims.²⁹ Primary-line claims allege that price discrimination by a manufacturer injures competition at the manufacturer level by harming one or more of the manu-

facturer's competitors. The theory behind primary-line claims is that a manufacturer might sell its product below cost to certain stores, so that a competing manufacturer would not be able to meet the lower prices and would go out of business; this theory depends on high entry barriers that would prevent entry to replace the lost competitor. In such a case, the competing manufacturer would complain of a primary-line injury.

This type of conduct—price predation at the manufacturer level—involves the acquisition or maintenance of market power through below-cost sales. In 1993 the Supreme Court held that primary-line claims must meet standards similar to those applied to predatory pricing claims brought under Section 2 of the Sherman Act.³⁰ The Court explained that primary-line injury is “of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act.”³¹ This interpretation has largely eliminated calls for further reform regarding primary-line claims.

A broad range of cases may raise claims of secondary-line injury, however. Secondary-line claims involve injury alleged at the level of the distributor or retailer, one step removed from the manufacturer that offered the discount. For example, a small retailer that did not receive the same discount as a larger retailer from the same manufacturer might allege secondary-line injury.

Section 3 of the Robinson-Patman Act authorizes the government to seek criminal penalties against any person who participates in a transaction he knows discriminates against a competitor of the purchaser or involves charging “unreasonably low prices” or different prices in a different part of the United States “for the purpose of destroying competition or eliminating a competitor.”³² This criminal provision of the Act has not been enforced since the 1960s.³³

3. Affirmative Defenses to Section 2(a) of the Act

Four basic affirmative defenses are available to Robinson-Patman Act defendants. Section 2(a) itself provides for an affirmative defense if the difference in price is cost-justified.³⁴ For example, if volume discounts for a product are attributable solely to lower per-unit production and shipping costs—that is, if it is cheaper per unit for the manufacturer to make and send 100 widgets than just 20 widgets to a retailer—then those cost savings are permitted to be passed on to that retailer in the form of a lower price per unit. Section 2(a) also provides an affirmative defense for price differences resulting from a “response to changing conditions affecting the market for or marketability of the goods concerned.”³⁵ This defense allows price differences if the demand for the product has decreased significantly due to the perishable nature of the goods, obsolescence of seasonal goods, or discontinuance of the product.³⁶ Section 2(b) of the Act allows an affirmative defense to Section 2(a) claims if the discriminatory pricing is offered “in good faith to meet an equally low price of a competitor” (also known as the meeting-competition defense).³⁷ Lastly, courts have also

provided an affirmative defense if the advantageous price was practically or functionally available to the disfavored buyer.³⁸

Some affirmative defenses are difficult to prove. For example, it is generally recognized as difficult and costly to meet the requirements of the cost-justification defense because the seller must be able to prove actual cost savings equal to or greater than the price difference.³⁹ On the other hand, courts have become more receptive to the meeting-competition defense over time. In 1983 the Supreme Court held that a seller could meet the generally lower price structure of a competitor in a different geographic market without demonstrating that it was meeting competition on a customer-by-customer basis.⁴⁰ Thus, if there were more competition in one area than another, the meeting-competition defense would permit the seller to charge different prices in the two areas.

B. Enforcement of the Robinson-Patman Act

Private parties, the Federal Trade Commission (FTC), and the Antitrust Division of the Department of Justice (DOJ) may enforce the Robinson-Patman Act. The Act is currently enforced primarily through private treble damages actions.⁴¹ As a practical matter, the FTC is the only government enforcer of the Act; the DOJ has left civil enforcement of the Act to the FTC and has not enforced the criminal provisions since the 1960s.⁴²

During the first three decades after the Act's passage, the FTC devoted "an overwhelming preponderance" of its antitrust resources to Robinson-Patman Act enforcement.⁴³ Beginning in 1969, however, the FTC sharply contracted its RP Act enforcement efforts.⁴⁴ From 1965 to 1968, the FTC undertook an average of 97 formal investigations and issued an average of 27 complaints annually.⁴⁵ By contrast, from 1975 to 1978, the FTC averaged only 4.3 formal investigations and 3 complaints annually.⁴⁶ The FTC has issued only one RP Act complaint since 1992.⁴⁷

Private litigation under the Act also has fallen, and plaintiff success has been limited. Of 200 reported cases with Robinson-Patman Act claims filed in federal court in the past ten years, only three jury verdicts in favor of plaintiffs were affirmed on appeal.⁴⁸ One of these three was reversed by the Supreme Court.⁴⁹ Some observers believe this decline is related to the adoption of more restrictive judicial interpretations of the Act.⁵⁰ For example, the Supreme Court has held that an RP Act plaintiff is not entitled to "automatic damages" equal to the amount of the discount it did not receive,⁵¹ but rather "ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale prices or otherwise to solicit business."⁵²

3. RECOMMENDATION AND FINDINGS

55. Congress should repeal the Robinson-Patman Act in its entirety.*

By broadly discouraging price discounts, the Robinson-Patman Act potentially harms competition and consumers. The goal of the antitrust laws is to protect *competition* that benefits consumers. The Robinson-Patman Act does not promote competition, however. Instead, the Act protects *competitors*, often at the expense of competition that otherwise would benefit consumers,⁵³ thereby producing anticompetitive outcomes. The Act prevents or discourages discounting that could enable retailers to lower prices to consumers. “The chief ‘evil’ condemned by the Act [is] low prices, not discriminatory prices.”⁵⁴ The Act thus reflects “faulty economic assumptions” and a significant “misunderstanding of the competitive process.”⁵⁵

Assuming that either price differences or price discrimination (as defined by economists) always or almost always harms consumers is inconsistent with fundamental economic principles. Price discounting generally benefits consumers. Price discrimination, as defined by economists, that is directed at ultimate consumers can have beneficial or harmful impacts, depending on the circumstances.⁵⁶ However, the Robinson-Patman Act is not targeted at harmful price discrimination. Rather, it condemns low prices.⁵⁷ Economists point out that “[t]he difficulty is to distinguish in practice between [beneficial] discrimination and systematic discrimination practiced by an entrenched monopolist that may be harmful. Hence, laws against price discrimination are difficult to write and enforce if they are to promote competition.”⁵⁸

* Commissioner Shenefield does not join this recommendation in full. He recommends repeal of Section 3 of the Act (the criminal provision) as well as 2(c)—the brokerage provision. He favors amending or reinterpreting the statute to make it clear that plaintiffs in secondary-line cases must prove competitive injury through the existence either of market power or buyer power in order to prevail under 2(a). This would cover 2(f) as well. He would introduce a parallel competitive injury requirement into 2(d) and 2(e) as well. Finally, he would relax the cost-justification standard by permitting a preferential price that was “reasonably related” to cost savings attributable to dealing with the favored buyer. Commissioner Shenefield further explains his position in his separate statement.

Commissioner Yarowsky joins the recommendation with the following qualification: In his view, the question unanswered by the Commission is not whether Robinson-Patman is working well—it clearly is not—but whether any price discrimination provision has a role to play in the generic antitrust laws, not just the tortured language of the current statute. On a number of occasions, Congress has considered, or delegated to various regulatory agencies, the creation of mechanisms to oversee price discrimination activities in various industries. With the disappearance of Robinson-Patman, we may well witness the proliferation of even more industry-specific regimes to combat price discrimination. Based on that experience, he believes Congress should actively reconsider the question of whether a re-sculpted, down-sized generic provision would have utility.

The Act imposes other, more indirect costs as well. Some firms incur costs through efforts to comply with the Act. Compliance efforts—such as differentiating products solely to avoid selling “commodities of like grade and quality” to different purchasers at different prices—can raise prices to consumers. Small businesses can incur greater costs in obtaining supplies when manufacturers sell only to large, not small, retailers to avoid violating the Act. All of these costs are likely to result in higher prices to consumers than would be the case if the Robinson-Patman Act were not on the books.

The economic reality is that price differences and price discrimination typically benefit, not harm, consumers. To the extent that price discrimination (as defined by economists) may harm consumer welfare, other antitrust laws already address such conduct. For all of these reasons, as explained in detail below, the Robinson-Patman Act should be repealed.

A. The Robinson-Patman Act Is Likely to Harm Competition and Consumer Welfare by Prohibiting or Discouraging Price Discrimination that Lowers Prices to Consumers

Wide agreement exists that many forms of price discrimination are procompetitive and beneficial to consumers. As long ago as 1969, the Neal Report pointed out that “most price discrimination is affirmatively beneficial to competition,” and the instances in which price discrimination harms competition “are exceptional.”⁵⁹ A substantial amount of recent economic literature shows that price differences among buyers of the same product are ubiquitous and occur in industries with many competitors and free entry that are generally viewed as operating in a competitive manner.⁶⁰

1. Many legitimate, procompetitive reasons exist for price discrimination

Prices to different purchasers for the same or similar products differ for many legitimate reasons. Manufacturers and distributors negotiate prices based not only on costs of production, but on many other factors as well. One important factor is the relative supply and demand characteristics of the parties. One buyer may value the product more than another buyer and therefore may be willing to pay more for the product. A buyer may have more leverage in price negotiations if it can purchase from another supplier or produce the item itself, if the price is not to its liking. The same would be true for the supplier, if it could sell to other purchasers if it was not satisfied with the price offered by the buyer.

Beyond the supply and demand characteristics of individual firms, price differences can reflect differences in supply and demand in different geographic markets. As the Supreme Court has pointed out, levels of competition may vary in different geographic markets, and the “very purpose of the [meeting-competition] defense is to permit a seller to treat different competitive situations differently.”⁶¹ It is not at all clear, however, that the meeting-competition defense would cover all situations in which a manufacturer might wish to dif-

ferentiate in pricing to reflect different supply and demand conditions in different geographic markets.

Volume discounts further illustrate legitimate reasons for price differences between purchasers. A manufacturer may be willing to accept discounted prices on a large order for its products for a number of reasons. First, a large order may allow the seller to achieve scale economies in manufacturing, which makes the large order less costly to fill. As explained above, scale economies and their relationships to price differences can be very difficult to prove, however.⁶² Second, the per-unit cost of delivering a large order may be less than delivering a small order. Third, the large order may reduce the manufacturer's risk of not being able to sell as many products overall. A volume discount also may reflect other means by which a manufacturer wishes to improve its competitiveness. A manufacturer may discount to encourage a new purchaser to try its products in hopes that the first purchase will lead to future purchases. A manufacturer may wish to compensate or provide incentives to a distributor that aggressively promotes the manufacturer's products. The Robinson-Patman Act, however, impedes agreements that afford volume discounts. Indeed, preventing volume discounts was a principal objective of the Act.

Price discrimination can lead to cost-saving distribution practices that are efficient and normally lawful under the Sherman Act.⁶³ Manufacturers typically prefer that their distribution systems function in a competitive manner because this helps them compete more effectively against other manufacturers. Providing greater discounts—that is, charging lower prices—to a manufacturer's more aggressive distributors is generally procompetitive. It can prevent less aggressive distributors from free riding on the promotional services or quality of service provided by the manufacturer's more aggressive distributors, and, by encouraging competition among the distributors, it also can increase the quality of service they provide.⁶⁴ Manufacturers are more likely to use price discrimination among their distributors to increase competition at both the manufacturer and distributor levels than to reduce the competitiveness of the manufacturers' distribution systems.⁶⁵

Whether a buyer may be willing to purchase significant quantities is another factor that can influence price negotiations. Typically, buyers that account for a significant portion of a manufacturer's sales bargain hard to get price discounts from the manufacturer; they can be described as having "bargaining power."⁶⁶ The discounts obtained through bargaining power can reduce a buyer/retailer's marginal cost, and thereby allow the buyer/retailer to pass on those cost savings to consumers. In fact, empirical evidence on drugstore and grocery products indicates that the presence of large chains, which typically have bargaining power, lowers prices to consumers.⁶⁷ Retailer bargaining power also could be better used to mitigate seller market power, absent the potential for Robinson-Patman Act liability.⁶⁸

The Robinson-Patman Act, however, aims to prevent buyers from using their bargaining power to obtain these discounts, unless certain requirements are met. Some argue that the Supreme Court's interpretation of Section 2(f) has made buyer liability difficult to prove.⁶⁹

Nonetheless, the Act creates some level of uncertainty about whether firms with bargaining power can bargain hard to obtain lower prices than less efficient competitors, and it also may provide an excuse for sellers that do not want to lower their prices for hard-bargaining buyers. Thus, the Act can discourage discounting that otherwise would lead to lower consumer prices.

2. Price differences can increase price competition and can encourage entry

The Robinson-Patman Act inhibits price competition that could lead to lower prices in oligopolies. In oligopolies firms monitor each other and recognize their mutual interdependence. Competition in such industries is enhanced when prices vary across buyers, making it harder to keep track of one's rivals. This increased difficulty of keeping track of one's rivals leads generally to more competitive prices. Differential pricing thus can promote more aggressive pricing. Under the Robinson-Patman Act, however, sellers may not selectively lower prices to gain or to retain an important buyer.⁷⁰

Price discrimination also provides a means for new firms to enter a market, thereby making the market more competitive. To enter a new market successfully, an entrant may need to offer prices lower than those charged by existing firms to win one or more large accounts that will provide the entrant with sufficient scale to produce its products efficiently.⁷¹ To overcome existing commercial relationships, would-be entrants may need to reduce prices selectively to such large accounts. The Robinson-Patman Act can make such entry unprofitable, however, by requiring a potential entrant to lower prices to *all* customers. Thus, the reduced price flexibility imposed by the Act can inhibit entry.

This inhibition on entry can prevent consumers from benefiting from the many types of increased competition that a new entrant may provide. New firms entering a market can benefit consumers by offering lower prices and putting downward pressure on prices. Moreover, even the potential for entry can spur existing firms in the relevant market to lower prices and increase quality. In sum, the Robinson-Patman Act requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence.

B. The Robinson-Patman Act Harms Consumer Welfare by Protecting Competitors, Rather than Competition

The purpose of the antitrust laws is to protect competition overall, not individual competitors.⁷² Consumer welfare is protected by competition, not necessarily by the presence of a particular competitor in a relevant antitrust market.⁷³

The Robinson-Patman Act stands this notion on its head. The language Congress added in 1936 prohibited price discrimination where the effect may be “to injure, destroy, or prevent competition *with any person . . . or with customers of either of them.*”⁷⁴ Courts have interpreted this language to mean that an injury to an individual competitor through price dis-

crimination is sufficient to prove a violation of the Act.⁷⁵ This is inconsistent with the purpose of the antitrust laws as interpreted by the courts.

In 1948 the Supreme Court held that the Robinson-Patman Act “was intended to justify a finding of injury to competition by a showing of *injury to the competitor* victimized by the discrimination.”⁷⁶ Moreover, the Court held, competitive injury could be inferred (the “*Morton Salt* inference”) in secondary-line RP Act cases.⁷⁷ Simply showing that some merchants had to pay more than others was “adequate” to conclude that “the competitive opportunities of certain merchants were injured,” the Court held.⁷⁸ Therefore, to achieve an inference of competitive injury in a secondary-line RP Act case, the *Morton Salt* inference requires that a plaintiff prove only that a “favored competitor received a significant price reduction over a substantial period of time.”⁷⁹

Most courts have applied the *Morton Salt* inference broadly, concluding that the statutory language of “competitive injury” in the Robinson-Patman Act refers solely to injury to an individual competitor, not to overall competition in a relevant market.⁸⁰ Under this standard, it does not matter if the defendant can show that competition in a relevant market in fact was *not* harmed. As the Ninth Circuit has stated (without any trace of irony), “in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition.”⁸¹

Some circuits have applied the *Morton Salt* inference more narrowly, and held that competitive injury for purposes of the Robinson-Patman Act refers not to injury to individual competitors, but rather to competition overall in the relevant market. For example, the Eighth Circuit has held that the “Act refers not to the effect upon competitors, but to the effect upon competition in general[;] . . . analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses.”⁸² Consistent with this interpretation, some circuits have held that the *Morton Salt* inference is rebuttable, provided the defendant can show that there has been no harm to overall competition in the relevant market. Specifically, the D.C. Circuit has held that the *Morton Salt* inference “*can . . . be overcome by evidence showing an absence of competitive injury . . . [and that although] a sustained and substantial price discrimination raises an inference, . . . it manifestly does not create an irrebuttable presumption of competitive injury.*”⁸³ Similarly, in a consent decree enjoining certain conduct by McCormick & Co. found to violate the Robinson-Patman Act, the FTC stated that it was willing “to look past the *Morton Salt* factors” in certain market settings to determine whether there was injury to competition overall.⁸⁴

Most recently, the Supreme Court’s opinion in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* renewed, albeit equivocally, the view that the Robinson-Patman Act protects competitors rather than competition.⁸⁵ When defining injury to competition, the Court stated that a “hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser,” and that “a permissible inference

of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.”⁸⁶ The Court therefore reaffirmed the *Morton Salt* inference and indicated that a plaintiff must show only injury to a specific competitor, not injury to competition overall. In the final section of the opinion, however, the Court remarked that it resists “interpretation [of the Robinson-Patman Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*.”⁸⁷

This very recent Supreme Court case reveals that, seventy years after passage of the Robinson-Patman Act, courts remain unable to reconcile the Act with the basic purpose of antitrust laws to protect competition and consumer welfare. The language in the Act regarding competitive injury has resulted in the protection of competitors, at the expense of competition overall and consumer welfare. There is no point in further efforts to reconcile the Act with the antitrust laws in general; the Robinson-Patman Act instead should be repealed.

C. The Robinson-Patman Act May Even Harm Small Firms in Some Cases

The methods that firms sometimes use to avoid liability under the Robinson-Patman Act can harm precisely the small businesses the Act intends to protect. For example, to avoid liability for price discrimination between larger and smaller retailers, a manufacturer can choose to sell its product exclusively to large retailers.⁸⁸ In such cases, small retailers may not be able to purchase the product at all, or may have to settle for second-best substitutes, due to the Robinson-Patman Act.⁸⁹ Alternatively, in the absence of an ability to price discriminate, manufacturers may switch to other means of promotion, such as national advertising, which (if subject to economies of scale) may disadvantage smaller competitors more than the prohibited discounts.

D. The Robinson-Patman Act Increases Costs of Doing Business and Likely Raises Prices to Consumers in a Variety of Ways

It is difficult to know the frequency and amounts of price discounts and corresponding savings for consumers that the Robinson-Patman Act has deterred.⁹⁰ In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.⁹¹ Nonetheless, anecdotal evidence and informed judgment based on economic theory suggests that the additional costs to consumers of seventy years of forgone discounts are likely substantial. The Act’s continued existence can discourage firms from taking procompetitive actions because doing so might lead to litigation asserting Robinson-Patman Act claims that, even were the litigation to be

resolved in the company's favor, would involve distractions, expenses, and risks that make the procompetitive course of action not worth the cost of pursuing it.

Leaving aside the direct cost of lost discounts to consumers, the Act creates substantial compliance costs that also likely flow to consumers as higher prices. These costs include developing and operating compliance systems, training personnel, and obtaining legal advice.⁹² There is typically strong interest in RP Act continuing-legal-education programs and instructional publications.⁹³ In addition, RP Act cases can be lengthy, complex, and expensive, even if the plaintiff does not ultimately win. These costs, too, are difficult, if not impossible, to quantify. The Commission did not receive any empirical data in response to its request for public comment on the compliance or litigation costs and benefits of the Act's enforcement. Nonetheless, there is no reason to believe that compliance and litigation costs are insignificant.

Putting aside these direct and indirect costs, the inefficient business practices that firms sometimes use to avoid liability under the Robinson-Patman Act impose costs that likely show up as higher consumer prices. For example, firms sometimes resort to inefficient product differentiation to avoid potential liability.⁹⁴ One method of avoiding liability under the Act is for a retailer to negotiate with a manufacturer to produce a product that is not "of like grade and quality" to products offered to other, possibly smaller retailers.⁹⁵ This enables the manufacturer to charge a much lower price than it legally could if it also provided the same product to smaller retailers. But the practice is wasteful because, but for the Robinson-Patman Act, there would likely be no need to package these products differently. As a result, with proper counsel and certain (albeit costly) techniques, sellers can avoid liability under the Act, but costs are added due to unnecessary product differentiation.

Finally, the existence of the Robinson-Patman Act may encourage foreign countries to adopt similar anticompetitive legislation. With increasing globalization, many foreign countries look to the United States for guidance in enacting new legislation, including antitrust legislation. To the extent that the Robinson-Patman Act is seen as a model for other countries, the continued existence of the Act can contribute to a proliferation of anticompetitive legislation worldwide.

E. The Existing Antitrust Laws Already Protect Consumers from Anticompetitive Price Discrimination

The term "buyer power" is used generally to describe two different concepts: bargaining power and monopsony power. Bargaining power refers to the bargaining power of a buyer and can increase, not decrease, consumer welfare. For example, bargaining power can help buyer/retailers reduce their marginal costs, which enables them to pass those savings on to consumers.⁹⁶

By contrast, monopsony power is market power on the buyer side of a market.⁹⁷ In certain circumstances, monopsony power can harm consumers.⁹⁸ The main harm resulting from

monopsonist conduct is the reduction of output by the seller, which harms consumer welfare by under-allocating resources to the production of the product.⁹⁹

The Sherman Act, however, already provides a remedy against the exercise of monopsony power. Section 1 of the Sherman Act protects against unlawful price discrimination agreements based on monopsony power. Section 2 outlaws the unlawful acquisition or maintenance of monopsony power.¹⁰⁰ By contrast, the Robinson-Patman Act outlaws a much broader range of alleged “buyer power” that can actually benefit consumers by giving them lower prices.¹⁰¹

Some supporters of the Robinson-Patman Act argue that the Act prevents large firms from obtaining discounts larger than those offered to smaller rivals, then using those unequal concessions to lower prices to levels that small rivals cannot meet, thus eliminating the small rivals and ultimately raising prices for consumers.¹⁰² As one comment asserted, unjustified price discriminations “may lead to *higher* consumer prices” if used by a firm to “acquire[] market power as a seller.”¹⁰³ This argument suggests that large buyer/retailers may put their smaller competitors out of business by selling products below the smaller competitors’ costs—but above the large buyers’ costs—and thus acquire market power in the retail market and ultimately raise prices for consumers.¹⁰⁴

This theory essentially argues that prices above a manufacturer’s costs may be used in a price-predation scenario and should result in liability under the antitrust laws. Yet, the Supreme Court has already rejected this theory: in the context of price-predation allegations, above-cost pricing is legal.¹⁰⁵ To the extent that true price-predation schemes involving below-cost pricing are attempted, they may be challenged under Section 2 of the Sherman Act.

F. The Robinson-Patman Act Is Not the Right Tool Through Which to Achieve “Fairness for Small Businesses” and Other Social Objectives

The main benefits claimed by supporters of the Robinson-Patman Act flow from the Act’s aim of protecting small business.¹⁰⁶ Such supporters claim “fairness to small businesses” as a reason to keep the Act. They argue the Act ensures equality of competitive opportunity and preserves small business by preventing power buyers from obtaining non-cost-justified preferences.¹⁰⁷ Supporters maintain that the Act “levels the playing field” for smaller businesses.¹⁰⁸

In addition, supporters assert that benefits from the Act go beyond protecting competition by small businesses. They argue that preserving small businesses may offer advantages to consumers by expanding available choices, including “convenient locations, distinctive services, [and] superior selection,”¹⁰⁹ and by providing important social benefits, such as “desirable countervailing” political influence.¹¹⁰ One commenter, discussing alleged price discrimination in discounts to booksellers, expressed the belief that a significant narrowing of

the Act would have a “disastrous effect on the dissemination of culture and ideas in America.”¹¹¹

Consumers choose the winners and losers in the competitive process, however, through their purchasing decisions. If consumers desire diversity, for example, then they will be willing to pay for it. Indeed, allowing businesses to respond to consumer desires creates incentives for innovation in distribution and other areas that RP Act restrictions unintentionally may stifle. Firms that best meet consumers’ desires in the most cost-effective way will succeed, while those that do not may fail. The competitive process can often be seen as unfair to those who lose. Nonetheless, it is competition itself—not the presence of a particular competitor—that best serves consumer welfare.

The Supreme Court has refused to give weight to arguments that harm could arise from vigorous competition in certain contexts, holding that such arguments are “nothing less than a frontal assault on the basic policy of the Sherman Act.”¹¹² The Court has emphasized that the Sherman Act “reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”¹¹³ “[T]he policy unequivocally laid down by the Act is competition.”¹¹⁴

To limit price competition is not a sensible way to protect small businesses. As Judge Richard A. Posner has noted, “even if it were deemed desirable to protect small business, to do so by trying to limit price cuts given to competing big businesses would be an oblique, very costly, and probably ineffective method.”¹¹⁵ He argues that there are other, more direct, means of accomplishing this objective.¹¹⁶ As small businesses have struggled to compete with larger chains over the past several decades, and many have gone out of business, it appears that the Robinson-Patman Act has been ineffective in truly protecting these small businesses.

G. The Potential Complexity of Future Enforcement of State Versions of the Robinson-Patman Act Is Not a Valid Justification for Continued Consumer Harm

Supporters of the Robinson-Patman Act argue that, even if the Act is repealed, state laws prohibiting price discrimination and other sector-specific restrictions will remain on the books.¹¹⁷ They point out the potential for plaintiffs to respond to any repeal of the Robinson-Patman Act by bringing claims under currently underutilized state price discrimination laws.¹¹⁸ They also note there could be expansions of such state laws.¹¹⁹ Currently, state enforcers and state courts look to the case law developed under the Robinson-Patman Act for guidance in interpreting and applying state price discrimination laws. If the federal law is no longer available as an option for plaintiffs and a guidepost for state law, supporters argue, price discrimination will be governed by divergent state laws, thus increasing compliance costs and potentially creating a “mess.”¹²⁰ Therefore, supporters argue, there could be significant costs to repealing the Robinson-Patman Act.

It is uncertain that the repeal of the Robinson-Patman Act will result in this “mess.” It is possible that states will recognize that their anti-price discrimination statutes also harm their consumers and repeal those statutes. Alternatively, state courts could interpret such statutes in a manner that is less inconsistent with the antitrust laws by requiring proof of injury to competition. If states choose to continue to enforce such statutes, Congress could address that issue at that future date, and possibly consider preemption of such state statutes.

Notes

¹ 15 U.S.C. §§ 13–13a.

² *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948). The Court declared that “the more immediately important concern is in injury to the competitor victimized by the discrimination,” although it also indicated that this would protect competition by “catch[ing] the weed in the seed.” *Id.* at 49 n.18 (citing S. REP. NO. 74-1502, at 4 (1936)).

³ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 14.6a1 (3d ed. 2005) [hereinafter HOVENKAMP, *FEDERAL ANTITRUST POLICY*].

⁴ DEP’T OF JUSTICE, *REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 132 (1955) [hereinafter 1955 ATTORNEY GENERAL’S REPORT].

⁵ Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, reprinted in 2 ANTITRUST L. & ECON. REV. 11, 41 (1968–69) [hereinafter NEAL REPORT].

⁶ DEP’T OF JUSTICE, *DEP’T OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT* 260 (1977) [hereinafter 1977 DOJ REPORT].

⁷ NEAL REPORT, at 39–41; 1977 DOJ REPORT, at 260–63.

⁸ 1977 DOJ REPORT, at 260–63.

⁹ *Id.* at 261–62, 272–93.

¹⁰ ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 756–57 (2002) [hereinafter GAVIL, *ANTITRUST LAW IN PERSPECTIVE*].

¹¹ See *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929).

¹² GAVIL, *ANTITRUST LAW IN PERSPECTIVE*, at 757.

¹³ See generally *Morton Salt*, 334 U.S. at 43–44 (providing description of the Act’s legislative history); *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir. 1939).

¹⁴ See, e.g., H.R. REP. NO. 74-2287, at 7 (1936) (stating that the provision of the Clayton Act permitting volume discounts so weakened Section 2 “as to render it inadequate, if not almost a nullity”).

¹⁵ GAVIL, *ANTITRUST LAW*, at 757 (emphasis omitted).

¹⁶ Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)) (emphasis added).

¹⁷ *Morton Salt*, 334 U.S. at 49.

¹⁸ W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 284 (3d ed. 2000) [hereinafter VISCUSI, *ECONOMICS OF REGULATION AND ANTITRUST*].

¹⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).

- ²⁰ 15 U.S.C. § 13(a). For an overview of the Robinson-Patman Act, see *generally* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, A PRIMER ON THE FEDERAL PRICE DISCRIMINATION LAWS: A GENERAL REVIEW OF THE ROBINSON-PATMAN ACT FOR BUSINESS MANAGERS (3d ed. 2005) [hereinafter ROBINSON-PATMAN PRIMER].
- ²¹ *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 870 (2006); see also 15 U.S.C. § 13(a).
- ²² *Volvo*, 126 S. Ct. at 870.
- ²³ See 15 U.S.C. § 13(c); see also AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 524–30 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS]; ROBINSON-PATMAN PRIMER, at 17–18.
- ²⁴ See 15 U.S.C. § 13(d)–(e); see also ANTITRUST LAW DEVELOPMENTS, at 530–34; ROBINSON-PATMAN PRIMER, at 14–15. These prohibitions do not require a showing of competitive injury and do not permit defenses, such as cost-justified price discrimination, which is described below. ANTITRUST LAW DEVELOPMENTS, at 524, 530. Unlike Section 2(a) claims, where competitive injury is required but generally inferred, no inference is required because these types of claims do not require any showing of competitive injury.
- ²⁵ 15 U.S.C. § 13(f).
- ²⁶ H.R. REP. NO. 94-1738, at 25 (1976) (“This section was aimed at curbing the power which had been utilized by chains and other large buyers to pressure suppliers into granting them unjustified price concessions . . .”).
- ²⁷ See, e.g., Robinson-Patman Transcript at 12 (Hovenkamp) (July 28, 2005) (arguing that the Supreme Court’s interpretation of Section 2(f) has made buyer liability “almost impossible to prove”); HOVENKAMP, FEDERAL ANTITRUST POLICY, § 14.6e; see also American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding the Robinson-Patman Act, at 11 (Apr. 10, 2006) [hereinafter ABA Comments re Robinson-Patman] (supporters of the Act also contend that buyer liability is “virtually impossible to prove”).
- ²⁸ See *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 75–76 (1979).
- ²⁹ The Act also extends to third- and fourth-line injury, or even beyond. See, e.g., *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).
- ³⁰ *Brooke Group*, 509 U.S. at 221–22.
- ³¹ *Id.*
- ³² 15 U.S.C. § 13a; see also ANTITRUST LAW DEVELOPMENTS, at 547–48.
- ³³ See, e.g., Meredith E. B. Bell & Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 357 n.2 (1999); Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 775 (1990).
- ³⁴ 15 U.S.C. § 13(a).
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.* § 13(b); see also *Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951).
- ³⁸ See, e.g., *Comcoa, Inc. v. NEC Tels., Inc.*, 931 F.2d 655, 664–65 (10th Cir. 1991); see also ROBINSON-PATMAN PRIMER, at 11–12.
- ³⁹ See ANTITRUST LAW DEVELOPMENTS, at 515; see also *Morton Salt*, 334 U.S. at 48.
- ⁴⁰ *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 447–51 (1983); see also *id.* at 445 (stating that “[t]he very purpose of the defense is to permit a seller to treat different competitive situations differently”).
- ⁴¹ See ROBINSON-PATMAN PRIMER, at 19; ANTITRUST LAW DEVELOPMENTS, at 484.

- ⁴² ANTITRUST LAW DEVELOPMENTS, at 484, 547–48; see, e.g., William Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 410 n.108 (2003) [hereinafter Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*].
- ⁴³ AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW, VOLUME I, at 3 (1980) [hereinafter ABA MONOGRAPH ON ROBINSON-PATMAN].
- ⁴⁴ *Id.* at 41; Business Roundtable, Public Comments Submitted to AMC, at 17–18 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]; ABA Comments re Robinson-Patman, at 12.
- ⁴⁵ ABA MONOGRAPH ON ROBINSON-PATMAN, at 41 n.158; see also H.R. REP. NO. 94-1738, at 127.
- ⁴⁶ ABA MONOGRAPH ON ROBINSON-PATMAN, at 41 n.158; see also H.R. REP. NO. 94-1738, at 127.
- ⁴⁷ See Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*, at 410, tbl.1 (citing CCH Trade Regulation Reporter looseleaf service and transfer binders on FTC Complaints, Orders, Stipulations for 1961 through 2000).
- ⁴⁸ The three jury verdicts affirmed on appeal were *Schwartz v. Sun Co.*, 276 F.3d 900, 905 (6th Cir. 2002), *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir. 1997), and *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), *rev'd sub. nom. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006). The cases were found through a search for every RP Act court opinion in the Westlaw database for a ten-year period (Sept. 20, 1996–Sept. 20, 2006).
- ⁴⁹ *Volvo*, 126 S. Ct. 860.
- ⁵⁰ Robinson-Patman Trans. at 11–12 (Hovenkamp).
- ⁵¹ *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981).
- ⁵² ANTITRUST LAW DEVELOPMENTS, at 545.
- ⁵³ See, e.g., Thomas W. Ross, *The Costs of Regulating Price Differences*, 59 J. BUS. 143 (1986) (prohibitions on discrimination may cause firm to adopt policies that do not minimize costs); John L. Peterman, *The Morton and International Salt Cases: Discounts on Sales of Table Salt*, 21 RES. L. & ECON. 127 (2004) (studying two leading RP Act cases and questioning the utility of those enforcement actions).
- ⁵⁴ ABA Comments re Robinson-Patman, at 4; see also Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 143–44 (2000) [hereinafter Hovenkamp, *Robinson-Patman Act and Competition*]; 1955 ATTORNEY GENERAL'S REPORT, at 131–32.
- ⁵⁵ See 1977 DOJ REPORT, at 100.
- ⁵⁶ VISCUSI, ECONOMICS OF REGULATION AND ANTITRUST, at 284–89; Marius Schwartz, *Third-Degree Price Discrimination and Output: Generalizing a Welfare Result*, 80 AM. ECON. REV. 1259 (1990); Hal R. Varian, *Price Discrimination*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 617–23 (Richard Schmalensee & Robert D. Willig eds., 1989). However, the application of this analysis is more complex in assessing the impact of price discrimination practices when the discriminations at issue are directed towards intermediate suppliers like the wholesalers and retailers in those special cases where it is likely that, to avoid the discriminations, these intermediate suppliers may inefficiently integrate backward into manufacturing. See Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 AM. ECON. REV. 154 (1987).
- ⁵⁷ See ABA Comments re Robinson-Patman, at 4; see also Hovenkamp, *Robinson-Patman Act and Competition*, at 143–44; 1955 ATTORNEY GENERAL'S REPORT, at 131–32.
- ⁵⁸ VISCUSI, ECONOMICS OF REGULATION AND ANTITRUST, at 290; see also RICHARD A. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES 12–15 (1976) [hereinafter POSNER, ROBINSON-PATMAN ACT] (although the ability persistently to charge discriminatory prices has been taken as a possible sign of market power, sporadic or temporary price discrimination generally has procompetitive benefits; it is often difficult to distinguish between these two forms of price discrimination).
- ⁵⁹ NEAL REPORT, at 13; see also *id.* at 17, 39–44.

- ⁶⁰ See *Symposium on Competitive Price Discrimination*, 70 ANTITRUST L.J. 593 (2003); James D. Dana, Jr., *Advance-Purchase Discounts and Price Discrimination in Competitive Markets*, 106 J. POL. ECON. 395 (1998); Mark Armstrong & John Vickers, *Competitive Price Discrimination*, 32 RAND J. ECON. 579 (2001); Severin Borenstein & Nancy L. Rose, *Competition and Price Dispersion in the U.S. Airline Industry*, 102 J. POL. ECON. 653 (1994); Severin Borenstein, *Price Discrimination in Free-Entry Markets*, 16 RAND J. ECON. 380 (1985); James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005).
- ⁶¹ *Vanco Beverage*, 460 U.S. at 445.
- ⁶² See *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 561 n.18; *Morton Salt*, 334 U.S. at 48. See generally ANTITRUST LAW DEVELOPMENTS, at 512–17.
- ⁶³ ABA Comments re Robinson-Patman, at 6; Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Herbert Hovenkamp, Statement at AMC Robinson-Patman Act Hearing, at 8–9 (July 28, 2005) [hereinafter Hovenkamp Statement].
- ⁶⁴ Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Hovenkamp Statement at 8–9.
- ⁶⁵ See Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Hovenkamp Statement, at 8–9.
- ⁶⁶ See Part 3.E of this Section (discussing bargaining power in more detail).
- ⁶⁷ Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices*, 58 J. URBAN ECON. 203 (2005); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart* (Nat'l Bureau of Econ. Research Working Paper No. 11,809, 2005).
- ⁶⁸ See Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. ECON. & ORG. 296 (1994) (finding that “forbidding discriminatory discounts renders retailer bargaining power useless in mitigating manufacturer market power” so that “all retail prices rise” and welfare losses can be “substantial”).
- ⁶⁹ See Robinson-Patman Trans. at 12 (Hovenkamp); HOVENKAMP, FEDERAL ANTITRUST POLICY, § 14.6e; see also ABA Comments re Robinson-Patman, at 11 (supporters of the Act also contend that buyer liability is “virtually impossible to prove”).
- ⁷⁰ See 1977 DOJ REPORT, at 47–58; ABA Comments re Robinson-Patman, at 7–8.
- ⁷¹ See, e.g., NEAL REPORT, at 40; ABA MONOGRAPH ON ROBINSON-PATMAN, at 30–31; 1977 DOJ REPORT, at 70–74; ABA Comments re Robinson-Patman, at 8.
- ⁷² See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).
- ⁷³ Indeed, in some circumstances, competitors may wish for their rivals to undertake anticompetitive conduct because they may be able to charge higher prices as a result of rivals' tacit collusion, for example.
- ⁷⁴ Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)) (emphasis added).
- ⁷⁵ See, e.g., *George Haug Co. v. Rolls Royce Motor Cars Inc.*, 148 F.3d 136, 140 (2d Cir. 1998) (“It is horn-book law . . . that anti-competitive injury need not be alleged to sustain a claim for violation of the Robinson-Patman Act; a price differential, direct or indirect, between secondary-line competitors is enough.”).
- ⁷⁶ *Morton Salt*, 334 U.S. at 49 (emphasis added; citations and quotations omitted).
- ⁷⁷ *Id.* at 49–51.
- ⁷⁸ *Id.* at 46–47.
- ⁷⁹ *Volvo*, 126 S. Ct. at 870. However, the Supreme Court has held that in alleging damages under Section 4 of the Clayton Act, the plaintiff “must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.” *J. Truett Payne*, 451 U.S. at 562. Some believe that *J. Truett Payne* has had a major impact on private litigation, because it held that a plaintiff must “prove actual

lost sales, actual injury.” Robinson-Patman Trans. at 37–38 (Saferstein). Thus, a Robinson-Patman plaintiff is not entitled to “automatic damages” equal to the amount of the discrimination, but rather “ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale prices or otherwise to solicit business.” ANTITRUST LAW DEVELOPMENTS, at 545.

- ⁸⁰ For example, the Third Circuit has held that “evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act.” J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990); see also *Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).
- ⁸¹ *Chroma Lighting*, 111 F.3d at 658; see also *George Haug*, 148 F.3d at 143–44; *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir. 1996).
- ⁸² *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); see also *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 395 (10th Cir. 1985) (holding that “[t]he naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination ‘may’ substantially lessen competition; the test must always focus on injury to competition”) (internal citations omitted).
- ⁸³ *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988).
- ⁸⁴ Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony & Mozelle W. Thompson, *In re McCormick & Co.*, FTC File No. 961-0050 (Mar. 8, 2000), available at <http://www.ftc.gov/os/2000/05/mccormickpitofskystmt.htm>. The three-Commissioner majority stated that “[t]here may be . . . market settings in which it makes sense for . . . the Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition.” *Id.* Based on such an inquiry, they found McCormick’s conduct resulted in injury “not just to the disfavored buyers, but to secondary-line competition generally.” *Id.* The majority did not define the “market settings” in which it would look past the *Morton Salt* inference. The dissent complained that, among other things, the majority’s analysis still left RP Act violations too easy to prove. Dissenting Statement of Commissioners Orson Swindle & Thomas B. Leary, *In re McCormick & Co.*, FTC File No. 961-0050 (Mar. 8, 2000), available at <http://www.ftc.gov/os/2000/05/mccormickswindlelearystmt.htm>.
- ⁸⁵ *Volvo*, 126 S. Ct. 860.
- ⁸⁶ *Id.* at 870 (citing *FTC v. Sun Oil Co.*, 371 U.S. 505, 518–19 (1963); *Morton Salt*, 334 U.S. at 49–51).
- ⁸⁷ *Id.* at 872.
- ⁸⁸ ABA Comments re Robinson-Patman, at 8.
- ⁸⁹ *Id.*
- ⁹⁰ F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 516 (3d ed. 1990) (difficulty of determining what behavior would be in the absence of the Act); 1977 DOJ REPORT, at 37–40 (describing difficulties of measuring Act’s impact).
- ⁹¹ Robinson-Patman Trans. at 17–18 (Saferstein) (explaining that he “tends to believe anecdotally” that the Act has negative effects, but wondering “how . . . it really work[s] in practice” and expressing concern that we may not “know enough to take major action”); *id.* at 54 (Spiva) (“We really have no idea what types of costs [the Act] imposes, if any, on sellers.”); *Federal Antitrust Policy: Implications for Small Business, Hearing Before the S. Comm. on Small Business*, 97th Cong. 68 (1981) (assessments of the Act “do[] not come from a clear body of empirical evidence—in fact, the true net effects of Robinson-Patman have not, as far as I am aware, been the subject of much solid empirical work”) (statement of FTC Chairman James C. Miller III); see also 1977 DOJ REPORT, at 37–38 (describing the lack of empirical studies and difficulty of obtaining data to assess the Act’s impact).
- ⁹² U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 24 (Nov. 8, 2005) (noting “reports that entire departments have been established simply to track and process the information necessary to document compliance with the [meeting-competition] defense”); Business Roundtable Comments, at

17 (the Act results in “substantial costs on businesses as they educate employees in R-P Act compliance”).

- ⁹³ The Robinson-Patman Act portion of the Practicing Law Institute’s major antitrust programs is “typically attended by a high number of in-house counsel,” and “interest in [the Robinson-Patman] course is high.” Harvey I. Saferstein, Statement at AMC Robinson-Patman Act Hearing, at 4 (July 28, 2005) [hereinafter Saferstein Statement]. Nevertheless, systematic information about RP Act compliance costs is generally lacking, and supporters of the Act further point out that the compliance burdens may be exaggerated. ABA Comments re Robinson-Patman, at 11–12 (observing that some argue that paperwork costs might be incurred in any event, and might be reduced due to the introduction of computers and the Internet).
- ⁹⁴ See ABA MONOGRAPH ON ROBINSON-PATMAN, at 32–33; 1977 DOJ REPORT, at 75–79; ABA Comments re Robinson-Patman, at 8–9. Mr. Saferstein argued that firms change the manner in which they market in order to comply with the Act, for example, using bulk packaging. Robinson-Patman Trans. at 31–32 (Saferstein).
- ⁹⁵ This may be challenging to accomplish, however, due to the fact that courts consistently have held that differences in packaging or warranties alone do not avoid the “of like grade and quality” element of the Robinson-Patman Act. See ANTITRUST LAW DEVELOPMENTS, at 497–99.
- ⁹⁶ See Part 3.A.1 of this Section.
- ⁹⁷ See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1075 (2007).
- ⁹⁸ See Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust*, 36 ANTITRUST BULL. 1 (1991); PHILLIP E. AREEDA & HERBERT HOVENKAMP, XII ANTITRUST LAW ¶ 2011 & nn.1, 17 (2d ed. 2005).
- ⁹⁹ See HOVENKAMP FEDERAL ANTITRUST POLICY, § 1.2b; ERNEST GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 79–80 (5th ed. 2004).
- ¹⁰⁰ Hovenkamp Statement, at 14 (if price discrimination resulting from buyer power truly resulted in competitive injury, it “would almost certainly fall within the restraint of trade language of §1 of the Sherman Act or, in a few cases, the monopolization language of §2”); Robinson-Patman Trans. at 23–24 (Hovenkamp); ABA MONOGRAPH ON ROBINSON-PATMAN, at 33–35.
- ¹⁰¹ See Part 3.A.1 of this Section.
- ¹⁰² See 1977 DOJ REPORT, at 145–48 (collecting authorities).
- ¹⁰³ American Antitrust Institute, Public Comments Regarding the Robinson-Patman Act, at 13–14 (July 1, 2005) [hereinafter AAI Comments re Robinson-Patman Act]; see also J.H. Campbell, Jr., Statement at AMC Robinson-Patman Act Hearing, at 4 (July 28, 2005) [hereinafter Campbell Statement].
- ¹⁰⁴ See Robinson-Patman Trans. at 42–46 (Spiva; Campbell).
- ¹⁰⁵ See *Brooke Group*, 509 U.S. at 222–23.
- ¹⁰⁶ See *Recent Efforts to Amend or Repeal the Robinson-Patman Act, Pt. 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Business*, 94th Cong. 1 (1975–76) (statement of Chairman Gonzales) (stating that the Robinson-Patman Act “is properly described as the Magna Carta of Small Business”).
- ¹⁰⁷ See AAI Comments re Robinson-Patman Act, at 12–13; ABA Comments re Robinson-Patman, at 10; ABA MONOGRAPH ON ROBINSON-PATMAN, at 22–24.
- ¹⁰⁸ Campbell Statement, at 8, 12 (“The Robinson-Patman Act is the only significant restraint in our antitrust laws on the ability of power buyers to obtain preferential treatment . . .”).
- ¹⁰⁹ AAI Comments re Robinson-Patman Act, at 13; see also Campbell Statement, at 11–12.
- ¹¹⁰ ABA MONOGRAPH ON ROBINSON-PATMAN, at 24.
- ¹¹¹ Robinson-Patman Trans. at 22 (Spiva).

¹¹² *National Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (defendants argued unsuccessfully that competitive bidding for engineering projects might threaten such things as “public safety and the ethics of [the engineering] profession”).

¹¹³ *Id.* at 695.

¹¹⁴ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

¹¹⁵ POSNER, ROBINSON-PATMAN ACT, at 16.

¹¹⁶ *Id.* (suggesting that a lower tax rate on small firms may be a more direct means of achieving this objective).

¹¹⁷ ANTITRUST LAW DEVELOPMENTS, at 624 (a number of states have counterparts to the Robinson-Patman Act).

¹¹⁸ At the Robinson-Patman Committee Breakfast during the 2005 American Bar Association, Section of Antitrust Law Spring Meetings, several panelists, including Professor Stephen Ross, raised this concern. Similarly, the 2006 Spring Meeting Robinson-Patman Committee Breakfast featured a panel on state laws, described as “Sleeping Giants.” See also ABA Comments re Robinson-Patman, at 13 (noting concerns and predicting that Congress would be unlikely to enact preemptive legislation).

¹¹⁹ AAI Comments re Robinson-Patman Act, at 16–17.

¹²⁰ Robinson-Patman Trans. at 49–50 (Saferstein) (observing that state courts might be “unleashed” by repeal, resulting in “a bigger mess than you counted on”); see also Saferstein Statement, at 2; AAI Comments re Robinson-Patman Act, at 16–17 (repeal could “spur a populist backlash”).

Chapter IV.B

Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

1. INTRODUCTION

Free-market competition is the fundamental economic policy of the United States.¹ Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—spurs businesses to develop and sell as efficiently as possible the kinds and quality of goods and services that consumers desire.² Competitive markets also drive an economy’s resources toward their fullest and most efficient uses, thereby providing a basis for economic development.³ The U.S. economy is an example of how free markets can lead to the creation of wealth, making possible improved living standards and greater prosperity.⁴ In recent decades, policymakers in many developing countries also have been persuaded that free-market competition yields productivity and other benefits far superior to the results produced by government control of the economy.⁵

Despite this record of success, a few sectors of the U.S. economy remain subject to government limitations on competition. This Section of the Report discusses three of the ways in which federal law or judicial standards currently prevent or restrain competition. They are: (1) statutory immunities or exemptions from some or all of the antitrust laws; (2) limitations on the full application of antitrust law as a consequence of continued economic regulation of certain industries; and (3) an overly broad interpretation of the state action doctrine that permits private anticompetitive conduct not authorized or supervised by state regulatory programs. Just as private restraints on competition can harm consumer welfare, so can these government restraints on competition.

Empirical studies of what happened when market forces were unleashed in previously regulated industries provide the best evidence of the harm that governmental restraints on competition can create. During the early part of the twentieth century, a belief that certain industries were either “natural” monopolies (that is, that the most efficient market structure included only one firm) or were at risk for “excessive competition” led to government regulation of prices, costs, and entry in those industries.⁶ The industries tended to involve core services, such as electricity, natural gas, telecommunications, and transportation. Beginning in the 1960s and 1970s, however, attitudes changed. In some industries, such as electricity generation, technological progress made competition possible.⁷ More generally, significant criticisms of the costs and market distortions that accompanied regulation prompted serious review of regulatory regimes. These two factors in particular combined to persuade policymakers to move toward deregulation in almost all regulated markets.⁸

Numerous studies of sectoral deregulation in the United States show that the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare. One comprehensive survey of empirical evidence on the U.S. deregulation experience concluded that the U.S. economy has gained at least \$36 to \$46 billion *annually* (in 1990 dollars) from deregulation, primarily in the transportation industries.⁹ On a more specific level, an econometric analysis of trucking rates in states that continued to regulate trucking found that in the less-than-truckload (LTL) segment, regulation of entry increased rates by more than 20 percent, rate regulation increased those rates by 5 percent, and antitrust immunity for certain conduct increased rates by about 12 percent above what they would be absent regulation.¹⁰

These data give a sense of the order of magnitude of the costs imposed on U.S. consumers and the U.S. economy by government restraints on competition. By comparison, government restraints of the types discussed in this Section typically benefit only relatively small special interest groups. The Commission therefore makes the following general recommendation, as well as additional recommendations described below.

56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.

A. Statutory Exemptions from the Antitrust Laws

1. Competitive Effects and Claimed Justifications

The antitrust laws stand as a bulwark to protect free-market competition. They prohibit anticompetitive restraints that harm consumer welfare. “[V]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy.”¹¹

Through legislation, however, Congress can exempt certain types of conduct by particular actors from some or all of the antitrust laws.¹² Currently, a wide variety of immunities, both partial and whole, exists in federal law. Congress, of course, is entitled to make judgments about the extent to which competition is in the public interest or other substantial and significant societal values trump the goal of consumer welfare.¹³

Nonetheless, antitrust exemptions can impose significant costs, which must be weighed against any benefits of an exemption. To the extent the antitrust laws do not apply, firms may take anticompetitive actions with impunity. As a practical matter, an exemption from all

or part of the antitrust laws means firms can avoid the tough discipline of competition, at least to some extent. While the beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces.

Typically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.¹⁴ The concentrated benefits provide incentives for interested parties to seek immunities from Congress, but the diffuse costs often have sufficiently minimal impact on individual consumers that they are unlikely to oppose the creation of immunities. Congress therefore is unlikely to hear from those who would be adversely affected by a proposed antitrust exemption.

The Commission focused on three immunities in particular. It held hearings on the McCarran-Ferguson Act, the Export Trading Company Act, and the Shipping Act. It held hearings on these three immunities because Congress is reexamining the McCarran-Ferguson Act;¹⁵ the European Union recently eliminated its antitrust exemption for ocean carriers, leaving the United States as the only major country that still immunizes fixing shipping rates;¹⁶ and the Commission received extensive comments regarding the Export Trading Company Act, which many observers overseas view as tarnishing the United States' reputation for free markets. The Commission discusses its assessment of the evidence gathered on these immunities and exemptions in Part 2 of this Section.

Antitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions. As noted above, competition drives firms to find ways to operate more efficiently and compete more effectively. "Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry."¹⁷ Statutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy.

2. Summary of Recommendations

For the reasons articulated above and discussed in more detail in Part 2 of this Section, the Commission makes the following recommendations.

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- 57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.**
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A wide variety of statutory antitrust exemptions currently exists, as set forth in Annex A. Rather than performing detailed assessments of each of these individual existing immunities, the Commission concluded it could best contribute to Congress’s evaluation of immunities by articulating relevant general principles that Congress may wish to use in considering whether to adopt, renew, or abolish any particular immunity. This work builds off of the analytical framework recommended by the National Commission for the Review of Antitrust Law and Procedures in its 1979 Report to the President and the Attorney General. That commission recommended that exemptions should be made only where “compelling evidence of the unworkability of competition or a clearly paramount social purpose” exists, and any exemptions should use the “least anticompetitive method of achieving the regulatory objective.”¹⁸ This Commission agrees, and the general principles that the Commission recommends follow. A more detailed discussion of these recommendations appears in Part 2 of this Section.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

- Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
- The likely adverse impact of the existing or proposed immunity on consumer welfare; and
- Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.

59. The following steps are important to assist Congress in its consideration of those factors:

- Create a full public record on any existing or proposed immunity under consideration by Congress.
- Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.
- Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.

- 60.** If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:
- Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).
 - Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.
 - Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.
- 61.** Courts should construe all immunities and exemptions from the antitrust laws narrowly.

B. Regulated Industries, the Transition to Deregulation, and Antitrust Law

1. The Benefits of Deregulation

For many years, a wide variety of industries was subject to economic regulation—that is, the regulation of prices, costs, and entry. In recent decades, public policy in the United States has moved toward deregulation in most of those industries.¹⁹ Various factors have driven the movement toward deregulation. Technological progress has facilitated the growth of competition in industries previously considered natural monopolies.²⁰ In addition, critiques of regulation have pointed out that federal regulatory agencies were sometimes “captured” by firms they regulated, to the detriment of the public interest, and that the costs of regulation were significantly more than anticipated.²¹ The general conclusion is that, in many instances, “regulation reflects successful rent-seeking by private economic interests and generally reduces consumer welfare by restricting output.”²²

2. Summary of Recommendations

Congress’s decision broadly to deregulate has brought substantial benefits to U.S. consumers and the U.S. economy.²³ The trend toward deregulation should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits con-

sumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than economic regulation. For the reasons set forth above and discussed in more detail of Part 3 of this Section, the Commission makes the following recommendation.

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

a. The Application of Antitrust Law in the Context of Regulation and Deregulation

The relationship between antitrust law, regulation, and deregulation warrants careful scrutiny. In general, regulation is a substitute for competition, an alternative means by which policymakers hope to achieve the consumer welfare benefits associated with competition.²⁴ If competition has been entirely replaced with regulation, then the antitrust laws are generally unnecessary, because there is no competition to protect.

Given the problems arising from regulation, policymakers have searched for circumstances where competition, rather than regulation, can be relied on to benefit consumer welfare. When policymakers decide that regulation can be reduced or eliminated, because competition is feasible in particular markets, then antitrust law becomes necessary to ensure that competition flourishes.²⁵ In light of this, the Commission makes the following recommendation.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

(i) Savings Clauses and Implied Immunities

Antitrust savings clauses appear in legislation to clarify the extent to which Congress intends to preserve the role of antitrust enforcement in a regulatory environment.²⁶ In legislation involving regulatory regimes, Congress should articulate clearly to what extent it intends the regulatory regime to displace the antitrust laws, if at all. Specific language directed to this issue can eliminate costly litigation about whether an immunity from antitrust law should be implied from the regulatory scheme. In the absence of a savings clause, courts may imply an immunity, resulting in outcomes not intended by Congress. Accordingly, the Commission makes the following recommendations.

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.*

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.†

In the absence of a savings clause, courts will determine whether the nature of the regulatory scheme necessarily implies that firms subject to that regime should be immune from antitrust law. Courts generally are reluctant to recognize implied immunities to the antitrust laws. For example, as the Supreme Court explained in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, “implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.”²⁷ This issue is before the Supreme Court this term in *Billing v. Credit Suisse First Boston Ltd.*²⁸

The Commission agrees that *National Gerimedical* provides the proper standard for determining whether the existence of a regulatory regime implies an immunity from antitrust law and therefore makes the following recommendation.

* Commissioner Warden does not join this recommendation.

† Commissioners Garza and Warden do not join this recommendation.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.*

The Supreme Court recently issued an opinion that has raised questions whether the Court gave sufficient deference to the savings clause that Congress adopted when it enacted the Telecommunications Act of 1996 (1996 Act), or whether it in effect implied an immunity from the antitrust laws despite that savings clause. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* Trinko, alleged that Verizon had violated Section 2 of the Sherman Act by breaching certain network interconnection duties under the 1996 Act.²⁹ After deciding that the plaintiff's claim did not state a cause of action under traditional antitrust principles, the Court concluded that the specific, regulatory duties to deal established under the 1996 Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.³⁰ Based on this, the Commission makes the following recommendation.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

(ii) Filed-Rate Doctrine

The filed-rate doctrine, also known as the *Keogh* doctrine, prohibits a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.³¹ At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were “fair and reasonable.” In creating the doctrine in *Keogh*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price-fixing conspiracy.³²

* Commissioner Delrahim does not join this recommendation.

Since deregulation, however, few industry members must file their rates with regulators, and fewer still have those rates formally reviewed for reasonableness. Nonetheless, courts have continued to apply the filed-rate doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency, regardless of whether the agency has actually reviewed and approved the rate.³³ In 1986 the Supreme Court reviewed the filed-rate doctrine and explained that a variety of factors “seem[ed] to undermine” the continuing validity of the *Keogh* doctrine.³⁴ Nonetheless, the Court concluded, it was for Congress to determine whether to abolish the filed-rate doctrine.³⁵ The Commission believes the time has come for Congress to address that issue and accordingly makes the following recommendation.

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

b. Merger Review in Regulated Industries

The antitrust agencies examine mergers and acquisitions notified to the agencies pursuant to the Hart-Scott-Rodino Act (HSR Act) to determine whether a proposed transaction may substantially lessen competition in violation of the Clayton Act.³⁶ The antitrust agencies apply the same merger standards to all industries, including those that formerly were regulated.

Four industries remain, however, in which a regulatory agency also has merger review authority.³⁷ In those industries the regulatory authority typically reviews a proposed transaction under its statutory “public interest” standard, which varies by industry. The regulatory authority can allow a transaction to proceed if it determines that the “public interest” benefits offered by the proposed transaction outweigh its likely anticompetitive effects.

Merger review by two federal agencies can impose significant and duplicative costs on both the merging parties and the agencies.³⁸ In addition, it can lead to conflicts between the antitrust agencies and the regulatory agency. The Commission has considered how to structure merger review in industries still subject to some degree of regulation. The Commission makes the following recommendations.

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.*

* Commissioner Kempf does not join this recommendation.

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- 70.** For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.
 - 71.** The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.
 - 72.** The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.
 - 73.** Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.*
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The Commission is not convinced that the public interest factors the regulatory agencies may take into account cannot be provided by competition, or should ever outweigh the substantial negative impact on consumer welfare that may result from the approval of an anti-competitive merger. If competition can provide the public interest benefits identified in the statute, or if those public interest benefits could never outweigh likely anticompetitive effects, then merger review by a regulatory agency would be unnecessary. Accordingly, the Commission makes the following recommendation.

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- 74.** Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.
 - In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers' interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.
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* Commissioner Kempf does not join this recommendation.

C. The State Action Doctrine

1. The Origin and Contours of the State Action Doctrine

The states, like the federal government, generally rely on competition in the marketplace to produce lower prices, higher quality, and incentive to innovate. Nonetheless, also like the federal government, sovereign states can and do enact economic regulations to displace competition in particular situations. Over sixty years ago, in *Parker v. Brown*, the Supreme Court created the “state action” doctrine to identify circumstances in which a state’s decision to displace competition with regulation trumps the general federal policy in favor of free markets and, therefore, overrides the application of federal antitrust law.³⁹ In upholding the legality of a California regulatory program that limited raisin output and thereby raised raisin prices, the Court concluded that Congress did not intend the Sherman Act expressly to preempt state economic regulation.⁴⁰ The Court explained, “In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”⁴¹

Under the state action doctrine, courts can thus immunize from potential federal antitrust liability certain activity undertaken pursuant to a state regulatory regime or other state law.⁴² State sovereignty and federalism were, and still are, the underpinnings of Supreme Court state action jurisprudence.⁴³

The state action doctrine applies not only to state governmental actors themselves, but also, in certain circumstances, to quasi-governmental entities and private actors. The actions of state governmental actors are generally immune from antitrust liability without further inquiry.⁴⁴ This is because “[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise.”⁴⁵ What constitutes the “state,” however, has given rise to extensive litigation. For example, cities and other municipalities, public service commissions, and state regulatory boards are not the “state” for purposes of the state action doctrine.⁴⁶

The actions of private economic actors, as well as of governmental or quasi-governmental entities not considered to be the “state,” are immune from antitrust liability only if they pass a two-part test. The Supreme Court set forth that test in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be “‘one clearly articulated and affirmatively expressed as state policy,’” and (2) “the policy must be ‘actively supervised’ by the State itself.”⁴⁷ The first requirement, “clear articulation,” serves to ensure that the state has affirmatively authorized departures from free-market competition.⁴⁸ The second requirement, “active supervision,” is intended to ensure that state action immunity “will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.”⁴⁹ The Supreme Court’s state

action jurisprudence has thus recognized the importance of not immunizing conduct intended to benefit private, not governmental, purposes.

Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defendants to obtain antitrust immunity in situations where a state did not intend to displace competition. Others question whether courts have properly taken into account the potential for one state's endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. And there is also a serious question whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants.

The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) believes that “[s]tate action immunity drives a large hole in the framework of the nation’s competition laws.”⁵⁰ In 2003 the Federal Trade Commission (FTC) issued a staff report (FTC State Action Report) recommending “clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers.”⁵¹

2. Summary of Recommendations

The Commission agrees that the federal lower courts in some cases have misinterpreted or misapplied the state action doctrine to override the federal policy in favor of free-market competition in ways inconsistent with Supreme Court rulings. The best method to resolve concerns with the state action doctrine is through the continued development of case law in the courts. The Supreme Court’s articulation of core standards for the state action doctrine will lead to its correct application if applied more rigorously by the lower courts. There is no need at this time to codify those standards. Rather, the lower courts need to apply the Supreme Court’s precedents with increased precision. The courts should do this with the understanding that failure to do so could result in significant consumer harm from anticompetitive conduct that has been immunized from antitrust scrutiny.

Based on its study, the Commission makes the following recommendations, which are explained more extensively in Part 4 of this Section.

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

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- 76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.**
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The lower courts have not always properly implemented Supreme Court precedents outlining what is required to satisfy the clear articulation prong. In *Town of Hallie v. City of Eau Claire* the Supreme Court held the clear articulation standard was satisfied where the allegedly anticompetitive conduct was a “foreseeable result” of a state law.⁵² Following *Town of Hallie*, however, some courts have applied a standard of “foreseeability” (and thus immunity) wherever a state authorizes conduct that does not necessarily, but might, have an anticompetitive effect.⁵³ To say that anticompetitive effects are a possible result of a statute, however, is not the same as finding “a deliberate and intended state policy” to replace competition with regulation, as the Court subsequently required in *FTC v. Ticor Title Insurance Co.*⁵⁴

Another issue that demands rigorous attention is whether the relevant statute reveals a state’s intent to displace competition *in the manner at issue* in the case. The Seventh Circuit’s reasoning in *Hardy v. City Optical, Inc.* exemplifies the type of careful analysis that courts should use.⁵⁵ In that case, a statute required optometrists to provide patients with some, but not all, of the information needed to purchase contact lenses, which left patients unable to purchase their lenses through cheaper, mail-order sources. The court held that “Indiana has not sought to supplant . . . competition *from mail-order houses*,” and therefore the clear articulation standard was not met.⁵⁶ This approach ensures that the courts do not loosely allow exceptions to competition. The Commission therefore makes the following recommendation.

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- 77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.**
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The active supervision requirement ensures that “‘the [private] actor is engaging in the challenged conduct pursuant to state policy,’ rather than in pursuit of private interests.”⁵⁷ Because the active supervision test applies only when there is a risk that the challenged

conduct may be the product of parties' pursuing interests other than state policy, its application turns in part on whether the relevant actor is public or private.⁵⁸ The Supreme Court's one opinion in this area, *Ticor*, dealt with a situation in which state supervision of the conduct at issue was virtually nonexistent.⁵⁹ Thus, the Court has not yet provided extensive guidance on how to address more complex situations.

To focus the active supervision inquiry, courts should use a flexible, "tiered" approach that requires a different level of active supervision depending on the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors.⁶⁰ A flexible analysis would recognize that, to the extent the actor or the challenged conduct suggests an appreciable risk that the challenged conduct results from private actors pursuing their private interests, rather than state policy, courts should require a greater degree of active supervision than if that risk is lower. The Commission therefore makes the following recommendation.

78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.*

The state action doctrine has been criticized for its failure to consider interstate spillovers.⁶¹ When one state regulates activities in a manner that overwhelmingly imposes the cost of regulation on citizens of other states, both economic efficiency and the political participation goals of the federal system suffer. State regulations producing spillover costs to consumers in other states do not deserve deference.⁶² Out-of-state citizens adversely affected by spillovers typically have no political participation rights and effectively are disenfranchised on whether the conduct at issue should be authorized by the neighboring state.⁶³ Moreover, economics teaches that where decision-makers reap the benefits without bearing the costs of an activity, they have incentives to engage in more of that activity than is socially desirable.⁶⁴ To address the significant consumer harm and political representation concerns, the Commission makes the following recommendation.

79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.†

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

† Commissioners Burchfield, Cannon, Delrahim, Garza, and Kempf do not join this recommendation.

A government entity's participation in a market as a competitor is likely to have market-distorting effects if that entity is not subject to the same rules of competition as private competitors. A "market participant" exception to the state action doctrine would require application of both prongs of the *Midcal* test to a government entity participating in the market. This would ensure that the government entity's behavior is consistent with state policy and the state action doctrine is applied consonant with its original purposes and goals. The possibility of such an exception was recognized by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, where the majority stated in dictum that the *Parker* doctrine "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."⁶⁵ The Commission therefore makes the following recommendation.

80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.*

2. STATUTORY EXEMPTIONS FROM THE ANTITRUST LAWS

A. Introduction

As discussed in Part 1.A, above, statutory antitrust exemptions should be disfavored as likely to harm both U.S. consumers and the U.S. economy.⁶⁶ A wide variety of antitrust exemptions, both partial and whole, currently exists in federal law, as listed in Annex A. Rather than examine each antitrust exemption individually, the Commission concluded that articulating relevant general principles that Congress may wish to use in determining whether to abolish, renew, or adopt particular antitrust exemptions would be its best contribution. The Commission's recommendations are discussed in more detail below.

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

B. Background

1. History of and Justifications for Antitrust Exemptions

“[V]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy.”⁶⁷ Nonetheless, in response to concerns about particular societal values, Congress has at times exempted certain groups or activities from the full or partial application of the antitrust laws.⁶⁸ Exemptions from the antitrust laws have existed since the passage of the Clayton Act in 1914.⁶⁹ Most recently, Congress passed the medical resident matching program exemption in 2004, which immunizes sponsoring, conducting, or participating in a graduate medical education residency matching program.⁷⁰ Congress, of course, is entitled to make judgments about the extent to which competition is in the public interest and when other societal values trump the aims of antitrust law.⁷¹

The creation of antitrust exemptions is made easier by the disparity in the nature of the benefits they create and the costs they impose.⁷² While the benefits of exemptions generally flow to small, concentrated interest groups, the costs are typically passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.⁷³ The concentrated benefits provide incentives for interested parties to seek immunities from Congress, while the diffuse costs often have sufficiently minimal impact on individual consumers that those consumers are unlikely to oppose the creation of immunities.⁷⁴

2. Examples of Different Kinds of Antitrust Exemptions

Congress has adopted varying types of antitrust exemptions; most are unique. Among other things, these exemptions differ in terms of the scope of conduct exempted from antitrust law and whether some degree of potential antitrust liability remains (for example, single damages or the possibility of injunctive relief). Attempts at categorizing them are difficult and often unhelpful. Indeed, regardless of their nature, exemptions are harmful. Nonetheless, to describe the problem of exemptions without a description of specific immunities would fail to convey their pernicious nature.

Some exemptions provide a limited immunity for specific conduct. Examples include the Health Care Quality Improvement Act, which provides limited immunity from antitrust damages (but not from equitable relief) for physicians participating in professional peer review bodies in which they review other physicians’ conduct;⁷⁵ and the Standards Development Organization Advancement Act, which provides for rule of reason assessment and limits antitrust damages to actual damages for certain kinds of standards development organizations that form joint ventures or engage in standards development activities.⁷⁶ Another example is Title III of the Export Trading Company Act of 1982, which allows any person engaged in export trade to request a Certificate of Review from the Department of Commerce, conferring immunity from criminal antitrust actions as well as treble damages in civil antitrust

actions for activities specified in the Certificate, so long as the applicant establishes that its export trade and methods of operation will not adversely affect competition in the United States.⁷⁷ The Webb-Pomerene Act similarly provides an exemption to Sherman Act provisions for associations formed solely to engage in export trade, on the condition that the association is not adversely affecting competition in the United States.⁷⁸

Other exemptions apply to narrow areas but provide a broader immunity—often complete immunity from the antitrust laws. Examples include antitrust immunity for marketing alliances between domestic and foreign airlines that are approved by the Department of Transportation;⁷⁹ the Charitable Donation Antitrust Immunity Act, which gives antitrust immunity to charitable institutions that set the annuity rate for gift annuities or charitable remainder trust agreements;⁸⁰ the Defense Production Act, which provides antitrust immunity for conduct undertaken in developing or carrying out a voluntary agreement or plan of action for the President that is necessary for the defense of the United States;⁸¹ the Need-Based Educational Aid Act, which provides an antitrust exemption to certain joint actions taken by institutions of higher education regarding awards of financial aid to students;⁸² and the Soft Drink Interbrand Competition Act, which provides an antitrust exemption for the grant of exclusive territories to soft-drink bottlers by soft-drink trademark holders in trademark licensing agreements.⁸³

Exemptions may instead apply broadly, but provide only limited immunity (from multiple damages, for example). Examples include the Local Government Antitrust Act (LGAA), which precludes treble damages actions against local governments, their officers and employees acting in an official capacity, or private persons whose conduct is directed by a local government;⁸⁴ and the National Cooperative Research and Production Act (NCRPA), which provides for rule of reason assessment and limits antitrust damages to actual damages for joint ventures for the purpose(s) of research, development, or production (except for certain specified conduct), if the joint venture has first been notified to the Antitrust Division of the Department of Justice (DOJ) and the FTC.⁸⁵

Finally, some exemptions create a broad immunity for entire areas or types of commerce. For example, the Capper-Volstead Act provides antitrust immunity for persons engaged in the production of agricultural products acting together in associations to process, prepare, handle, or market such products, unless the conduct would violate Section 2 of the Sherman Act or “unduly enhance” prices of agricultural products.⁸⁶ The McCarran-Ferguson Act grants an exemption to “the business of insurance” to the extent it is regulated by state law, unless the conduct involves an agreement or act to “boycott, coerce, [or] intimidat[e].”⁸⁷ The statutory labor exemption “enables workers to organize to eliminate competition among themselves, and to pursue their legitimate labor interests, so long as they do not combine with a nonlabor group.”⁸⁸ The Shipping Act exempts a wide variety of agreements filed with the Federal Maritime Commission, including those in which shipping “conferences”—that is, groups of competing ocean liner shipping companies—formally agree to specific terms of service, including fixing rates.⁸⁹

C. Recommendations and Findings

- 57.** Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.
- 58.** In evaluating the need for existing or new immunities, Congress should consider the following:
- Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
 - The likely adverse impact of the existing or proposed immunity on consumer welfare; and
 - Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.

Congress should first determine whether the conduct covered, or to be covered, by an antitrust exemption could in fact violate the antitrust laws. If not, immunity from the antitrust laws is unnecessary. This step is especially important given the changes in the antitrust laws over the past thirty to forty years. As discussed in Chapter I.A, the substantive application of the antitrust laws has become more economically sophisticated and flexible. Conduct that may have been at risk for the application of per se rules of automatic illegality at the time an antitrust exemption was adopted may now be far more likely to be evaluated under the rule of reason, which examines likely procompetitive, as well as anticompetitive, effects.

Congress should also carefully weigh the harms of an antitrust exemption to consumer welfare.⁹⁰ Any decision to allow an exemption should “be made reluctantly and only after thorough consideration of each particular situation.”⁹¹ A proposed exemption should be recognized as a decision to sacrifice competition and consumer welfare, and should be allowed only if Congress determines that a substantial and significant countervailing societal value outweighs the presumption in favor of competition and the widespread benefits it provides.⁹²

Congress, of course, is entitled to make judgments regarding what societal values may trump the goals of antitrust law. The Commission finds two arguments in favor of antitrust exemptions particularly unpersuasive, however. First, no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk.⁹³ Antitrust compliance and litigation risks are costs of doing business that hundreds of thou-

sands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid those costs; if these costs are unreasonable, broader reform applicable to all businesses is the proper remedy.* Second, no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency.⁹⁴ This too is a benefit that all industries would appreciate, but that none should be singled out to receive. The costs of price “stability” typically flow to consumers and result in inflexibility that undermines economic growth. Indeed, these were two of the justifications offered in support of the three exemptions on which the Commission held hearings.

For example, some proponents of the McCarran-Ferguson Act’s antitrust exemption for the business of insurance maintain the exemption is necessary to allow insurers, among other things, to collect, aggregate, and review data on losses (both historical and projected) so they can better set their rates to cover their likely costs.⁹⁵ They argue that the sharing of such historical and trending data is needed especially by smaller insurers that otherwise would be unable reasonably to assess risk and compete effectively.⁹⁶ Like all potentially beneficial competitor collaboration generally, however, such data sharing would be assessed by antitrust enforcers and the courts under a rule of reason analysis that would fully consider the potential procompetitive effects of such conduct and condemn it only if, on balance, it was anticompetitive.⁹⁷ Insurance companies would bear no greater risk than companies in other industries engaged in data sharing and other collaborative undertakings. To the extent that insurance companies engage in anticompetitive collusion, however, then they appropriately would be subject to antitrust liability.

A related and equally questionable justification appears in support of the antitrust exemption under the Shipping Act. Although Congress substantially modified the Shipping Act in 1998 to allow individually negotiated rates, which has sharply reduced ocean carriers’ use of jointly set “conference rates,”⁹⁸ proponents assert that an antitrust exemption remains necessary for other purposes. They maintain that carriers need an antitrust exemption to adopt more efficient practices jointly, such as agreements that allow ocean carriers to share certain equipment at ports in order to reduce congestion.⁹⁹ Acknowledging the possibility that such agreements could withstand antitrust scrutiny, one witness maintained that the ocean carriers nevertheless would not attempt them absent the certainty that no antitrust liability would result.¹⁰⁰ The witness emphasized the enormous investments of ocean carriers and the need to eliminate even the potential for antitrust liability.¹⁰¹

However, this reasoning reduces to an argument that ocean carriers should not be subject to the same costs of doing business as other industries. These costs of doing business

* Although Commissioner Burchfield agrees that increased certainty and freedom from litigation risk are not justifications for antitrust immunity, he believes that programs by federal and state governments to review business practices in advance of their implementation to confirm the legality of those practices under existing antitrust standards are useful, but currently underused, and should be encouraged.

include managing firms' conduct to comply with antitrust, and many other, laws. All kinds of businesses across the United States—including firms that make investments comparable to or greater than those of ocean carriers—comply with the antitrust laws as they plan their activities, including joint activities with competitors. This is not hypothetical economic theory;¹⁰² it is how hundreds of thousands of firms do business every day. Because they must comply with the antitrust laws, these firms structure their activities to avoid anti-competitive effects.¹⁰³ This promotes consumer welfare. There does not appear to be anything unique about ocean carriers that would merit holding them to a lesser standard.

Indeed, contrary to the asserted need for an immunity, ocean shipping provides a good example of an industry that now operates more efficiently with competition than without. An exhaustive survey of ocean shipping has found that:

[t]he steepest declines in observed freight rates have coincided with a generalised decrease in conference power in the face of competition from strong independent operators and the implementation of competition-enhancing legislation in the United States trades . . . Carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price fixing, but, rather, has accompanied a decline in conference power and an increase in competition.¹⁰⁴

These justifications are similarly wanting with respect to the Export Trading Company Act (ETC Act).¹⁰⁵ Title III of the ETC Act creates a limited antitrust exemption for U.S. companies that jointly export goods or services, provided there is no substantial lessening of competition within the United States. Such joint export-oriented activities are not subject to criminal antitrust liability or treble damages.¹⁰⁶ The ETC Act creates a rebuttable presumption that U.S. antitrust laws are not violated by a covered company's joint conduct to export with other firms as long as it complies with an Export Trade Certificate of Review issued by the Commerce Department (and reviewed by the DOJ).¹⁰⁷

Proponents of the ETC Act claim that it promotes exports, especially by small and medium-sized companies that “would not be able to export, or not be able to export on a sustained basis” without an antitrust exemption for their joint conduct.¹⁰⁸ Small and medium-sized enterprises constitute the vast majority of companies covered by Certificates of Review.¹⁰⁹ Proponents argue that the ETC Act exemption is necessary for these companies because it provides assurance that specified conduct does not violate the U.S. antitrust laws and will not result in a government antitrust action against the exporters.¹¹⁰

The Commission sees no reason, however, why these companies should be held to a lesser standard of antitrust compliance than any other companies doing business. The Department of Commerce explained that the ETC Act does not actually exempt conduct from the antitrust laws because a Certificate would not issue covering conduct that would violate those laws.¹¹¹ In that case no antitrust exemption should be necessary.

The ETC Act raises a particularly acute concern insofar as it can be characterized as granting a limited immunity to U.S. companies engaging in cartel behavior in foreign markets. It is inconsistent for U.S. antitrust enforcers to emphasize to foreign antitrust enforcers the importance of cartel enforcement at the same time that U.S. law immunizes what some consider to constitute overseas cartel behavior by American firms.*

These are only three of more than thirty antitrust exemptions. The Commission does not mean to imply that these three are the only antitrust exemptions that warrant scrutiny, however. Although the Commission was not in a position to study all antitrust exemptions in depth, it heard no compelling justification for any of the exemptions on which it held hearings.¹¹² Such justifications, as discussed above, seemed to overestimate the potential for antitrust liability for the immunized conduct or seek a special exception from the same costs of legal compliance as are borne by other firms in the United States. Claimed justifications for antitrust exemptions require careful scrutiny and testing against legal and marketplace realities.

59. The following steps are important to assist Congress in its consideration of those factors:

- **Create a full public record on any existing or proposed immunity under consideration by Congress.**
- **Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.**
- **Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.**

* Commissioners Burchfield and Garza do not join the Commission's conclusions with respect to the ETC Act.

Commissioner Burchfield believes that the certainty provided to small exporters by the ETC Act is worthwhile. Furthermore, he would not suggest that the ETC Act is deserving of special criticism among all the other exemptions.

In Commissioner Garza's view, the ETC Act has not been shown to have had anticompetitive effects. It is also consistent with a proposal she favors to limit treble damage exposure for overt conduct subject to the rule of reason. It is also erroneous, in her view, to equate joint export activity by small and medium-sized companies with criminal "cartels," especially given that a Certificate of Review will not be issued over the objection of the Justice Department.

Congress should develop a complete public record when it considers whether to abolish, renew, or enact antitrust exemptions.¹¹³ Gathering information from a broad range of sources and through various means, including public hearings, is vital for sound policy and well-reasoned decision-making.¹¹⁴ Ensuring that the information gathered is available to all interested persons enables identification of any errors or omissions in the record, facilitates more input to Congress, and provides context regarding the purpose and scope of the immunity at issue.¹¹⁵ Moreover, providing a substantial legislative history that explains the reasons for a particular exemption can provide a baseline against which to compare assumptions and conditions at the time of passage with data obtained at a later time when the immunity may once again be under consideration.¹¹⁶

Congress should consult with the antitrust agencies on whether the conduct at issue could subject the actors to antitrust liability and the competitive effects of the immunity.¹¹⁷ The agencies already informally provide their views on proposed immunities and do so formally when called upon.¹¹⁸

Further, Congress should require proponents of an immunity to submit evidence demonstrating that the benefits of competition are less important than the societal value promoted by the immunity under consideration, and that the proposed immunity is the least restrictive means to achieve that value.¹¹⁹ The proponent of an antitrust exemption should explain why conduct within the scope of a proposed immunity is both in the public interest and unlawful under the antitrust laws; estimate the ancillary effects of the proposed immunity; and demonstrate that the immunity is essential to achieve the desired policy outcome.¹²⁰ This would require the proponent to show there is no less restrictive alternative to achieve the benefits of the exemption.¹²¹

The burden of justifying any immunity should fall on the proponents of that immunity, because they “are in an inherently unique position to provide that information as to the relative merits of the immunity.”¹²² Exemptions from the antitrust laws should require ongoing proof of their justification and necessity.¹²³

60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:

- **Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).**
 - **Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.**
-

- **Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.**

Limited Form of Immunity. If Congress decides an antitrust exemption may be an appropriate course of action, it first should consider precisely what conduct may require an antitrust exemption. The scope of conduct to be immunized should be as limited as possible. In addition, Congress should consider whether full immunity from antitrust liability is necessary to achieve the societal value at issue. It may be sufficient instead to limit potential civil antitrust remedies.¹²⁴ An antitrust exemption that reduces treble damages to single damages is preferable to a broader exemption that would more significantly restrict the ability of the antitrust laws to combat anticompetitive behavior.¹²⁵ Two examples of such an approach are the NCRPA and the Standards Development Organization Advancement Act, both of which restrict monetary remedies to actual damages for conduct taken in accordance with the acts' terms.¹²⁶

Sunset Provision. Congress also should consider a "sunset" provision for any antitrust exemption it adopts or reconsiders. Sunset provisions would allow Congress to take into account changed circumstances that may make an immunity socially harmful.¹²⁷ They help ensure that immunity-granting legislation is interpreted in accordance with congressional intent.¹²⁸ Sunset provisions allow Congress to restudy an issue regularly, leading to more frequent input from interested groups.¹²⁹ To date, sunset provisions have been used only very rarely for antitrust exemptions.¹³⁰ Once an exemption is adopted, it is rarely revisited. Especially when vested interests are at stake, it is often difficult to get renewed consideration of the need for an antitrust exemption, even if it proves ineffective or harmful.

Periodic consideration of exemptions is important. Statutory exemptions can cement the economic understanding of market circumstances at a particular point in time. The justifications claimed for statutory exemptions from the antitrust laws warrant a great deal of skepticism, particularly if the exemption was originally created decades ago. Changes in technology, competitive forces, or economic learning can render an exemption completely obsolete.¹³¹ Many were enacted at a time when the U.S. economy was very different from today. Moreover, revolutions in communications, transportation, and business methods have lowered transactions costs and substantially changed the ways in which firms and industries operate.¹³² International competition now affects many more industries than previously was the case. Antitrust analysis itself has changed substantially in recent decades. Thus, even if one assumes there may have been valid economic justifications for specific industry exemptions in the past, it is highly questionable whether those justifications remain valid.¹³³

To prevent the retention of antitrust exemptions for decades after their reasons for being have disappeared, Congress should impose a sunset provision on all immunities it enacts.¹³⁴ The Commission does not intend this recommendation to encourage the adoption of antitrust exemptions on the rationale that they can be reconsidered at a later time.¹³⁵ Rather, if Congress goes so far as to adopt or renew an antitrust exemption, it is important to ensure it does not become set in stone, but rather must be justified on a recurring basis. Existing immunities also should be amended to include sunset provisions and should be reviewed using the framework proposed by this Commission.

The mechanics of this approach would require all statutorily created antitrust immunities to terminate after a set period of time, unless specifically renewed by an affirmative act of Congress after thorough reconsideration of the justification for and the evaluation of the actual operation of the exemption.¹³⁶ Congress can then determine whether to initiate a renewal process. Prior to the expiration of the sunset period, policymakers should hold public hearings regarding possible renewal of the immunity.¹³⁷ In addition to examining the historical record of an immunity, policymakers should collect new information that was not available previously but could be relevant to their current analysis of that immunity. Key issues would include: (1) whether economic or legal conditions have changed such that an immunity no longer is necessary; (2) whether alternatives could remedy the alleged problem with less impact on competition; and (3) what effects the immunity has had since its passage or last renewal.¹³⁸

Report from FTC. Congress should require that, before any vote on renewal of an exemption, the FTC, in consultation with the DOJ, report to Congress on whether the conduct at issue could subject the actors to antitrust liability, and the competitive effects of the immunity proposed for renewal. FTC Chairman Deborah Platt Majoras testified that such studies of competitive effects are very resource-intensive, but that the FTC would consider undertaking such studies if given sufficient resources.¹³⁹ Another way to implement this recommendation could be to direct the FTC to sponsor studies undertaken by academics or others as appropriate.

61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.

Congress should grant only those immunities that are narrowly drafted, so that competition is reduced only to the minimum extent necessary to achieve the intended goal.¹⁴⁰ Congress commonly puts limits on its exemptions,¹⁴¹ and has at least once explicitly directed that a statutory exemption be construed narrowly.¹⁴²

Further, courts should construe all immunities narrowly and against the beneficiary.¹⁴³ Doing so would restrict their more expansive interpretation and emphasize the importance of Congress's enacting clear statutory language.¹⁴⁴

3. REGULATED INDUSTRIES, THE TRANSITION TO DEREGULATION, AND ANTITRUST LAW

A. Introduction

During the early part of the twentieth century, a variety of industries were considered subject to market failures, such as natural monopoly or an inability to survive “excessive competition.” In such industries, Congress typically created administrative agencies to oversee economic functioning, particularly prices, costs, and entry (known as “economic regulation”).¹⁴⁵ Regulation was intended to limit the exercise of monopoly power and advance the objective of reliable service, provided on non-discriminatory terms, through rate and service regulation.¹⁴⁶ Under such regulation, there is only a limited role for antitrust law.¹⁴⁷ Indeed, economic regulation ultimately can be the “antithesis” of competition, tending to preserve monopolies and other non-competitive market structures by restricting entry, controlling price, skewing investment, and limiting or delaying innovation.¹⁴⁸

A movement toward deregulation, however, now has taken place in almost all regulated industries.¹⁴⁹ Various factors have moved public policy in the United States toward deregulation of formerly regulated industries.¹⁵⁰ Technological progress has facilitated the growth of competition in industries previously considered natural monopolies.¹⁵¹ In addition, critiques of regulation began to emerge as early as 1960, when a significant report concluded that “most federal regulatory agencies ha[ve] taken sides with the regulated firms at the expense of the public interest,” and that the costs of regulation were significantly more than anticipated.¹⁵² Others expanded on these critiques, pointing out that regulation often distorts firms’ incentives and rewards inefficiency rather than reduced costs and innovation.¹⁵³ Some conclude that, in many instances, “regulation reflects successful rent-seeking by private economic interests and generally reduces consumer welfare by restricting output.”¹⁵⁴

B. Recommendations and Findings

Congress’s decision broadly to deregulate has brought substantial benefits to U.S. consumers and the U.S. economy.¹⁵⁵ The trend toward deregulation should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits consumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than is economic regulation. The Commission therefore makes the following general recommendation, and several others set forth below.

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

1. The Application of Antitrust Law in Regulated and Deregulated Industries

When and how to apply antitrust law in the context of regulated industries and industries undergoing deregulation has prompted confusion from time to time. Even in industries governed predominantly by regulation, antitrust can still play a limited role.¹⁵⁶ At the other end of the spectrum, once deregulation has been completed and the public relies solely on competition and market forces, the antitrust laws should apply fully to deter or challenge anti-competitive conduct.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

The precise point at which an industry passes from regulation to competition requiring antitrust enforcement typically is not easy to discern. The deregulation of entire industries cannot always be instantaneous, of course, so transition mechanisms may be necessary.¹⁵⁷ In addition, certain segments of industries may require ongoing regulation if natural monopoly characteristics remain that hinder effective competition there.¹⁵⁸ Thus, questions have arisen about whether antitrust law should apply to regulated industries, particularly those undergoing transition from regulation to deregulation.

In many industries that have undergone deregulation, policymakers have found particular circumstances in which monopolistic market structures and residual areas of potential monopoly power, often called “bottlenecks,” continue to require some form of regulation.¹⁵⁹ In these circumstances, it is crucial to apply sound economic principles so that regulated and unregulated portions of industry do not work at cross-purposes and thereby harm consumer welfare.¹⁶⁰ One authority on deregulation stated:

Where competition is not feasible throughout an industry or market, as in the traditional public utilities, entry of unregulated competition can introduce distortions so severe as to make the mixed system the worst of both possible worlds. The preferable remedy is not to suppress the competition, but to make the residual regulation as consistent as possible with it.¹⁶¹

As Congress continues to assess ongoing regulation and deregulation in particular industries, it is important to keep in mind that the application of antitrust law is a necessary component of a reliance on competition. Antitrust law generally has a more significant role to play as an industry moves toward less direct regulation.¹⁶² “In essence, [the antitrust laws] promote competition so that competition itself can bring us its economic benefits.”¹⁶³

This general principle has a number of applications, two of which are explained below.

a. Savings Clauses and Implied Immunities

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.*

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.†

Congress can specify the extent to which antitrust law should apply to regulated industries by including savings clauses in legislation involving those industries. Antitrust savings clauses clarify the extent to which Congress intends to preserve the role of antitrust enforcement in a regulatory environment.¹⁶⁴ They make clear that Congress did not intend the courts to imply immunity from the antitrust laws for conduct covered by a regulatory regime.¹⁶⁵ Where a savings clause does not exist, the courts must “discern the intent behind complex statutes and regulatory schemes, and fill in the gaps” of such legislation.¹⁶⁶ This may result in outcomes not intended by Congress.

Congress should articulate clearly the extent to which it intends a regulatory regime to displace the antitrust laws, if at all. A savings clause that addresses this issue can help courts determine whether an immunity from antitrust law should be implied from the regulatory scheme, which can reduce uncertainty and litigation costs. The use of savings claus-

* Commissioner Warden does not join this recommendation. In his view, this and the following recommendation do not recognize the myriad of conflicts between regulatory and antitrust regimes that arise in the real world and are unforeseen when regulatory statutes are enacted.

† Commissioners Garza and Warden do not join this recommendation.

Commissioner Warden does not join this recommendation for the reason stated in the previous note.

es can help avoid results that conflict with Congress's intent in creating the regulatory scheme.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.*

In the absence of a savings clause, courts will determine whether the regulatory scheme is so pervasive that Congress is “assumed to have foresworn the paradigm of competition.”¹⁶⁷ The analysis of implied immunities begins with the “cardinal principle of construction that repeals by implication are not favored.”¹⁶⁸ This principle reflects a presumption that Congress does not intend to limit the scope of the antitrust laws except where it expressly says so.

As the Supreme Court explained in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, “[i]mplied antitrust immunity . . . can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.”¹⁶⁹ The Court further stated that “[r]epeal is to be regarded as implied only if necessary to make the [subsequent regulatory scheme] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the [antitrust and regulatory] statutory schemes.”¹⁷⁰ In fact, “[e]ven when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry.”¹⁷¹ An implied immunity is limited to the particular activity challenged and does not extend to other conduct regulated by the same agency.”¹⁷² Although the Supreme Court is likely to address this standard in *Billing v. Credit Suisse First Boston Ltd.* this term,¹⁷³ the Commission agrees that *National Gerimedical* provides the proper standard for determining whether to imply an immunity from antitrust law.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

* Commissioner Delrahim does not join this recommendation.

The appropriate application of antitrust savings clauses and when to imply an immunity from the antitrust laws was most recently raised by the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, involving the Telecommunications Act of 1996 (1996 Act).¹⁷⁴ In that case Trinko alleged that Verizon violated Section 2 of the Sherman Act by breaching certain interconnection duties under the 1996 Act.¹⁷⁵ Trinko was a customer of AT&T's local telephone service and allegedly suffered antitrust injury when he received "poor local phone service" due to Verizon's failure to fulfill its statutory duty to provide certain services to AT&T.¹⁷⁶

When Congress enacted the 1996 Act, it permitted companies providing local telephone service to provide long-distance service as well, if they fulfilled certain duties to enable competitors to enter the local telephone service market.¹⁷⁷ To facilitate this new competition in the local telephone service market, local telephone companies (such as Verizon) were required to provide competitors (such as long-distance companies like AT&T) non-discriminatory access to certain network elements necessary to provide local telecommunication service.¹⁷⁸ Verizon agreed to abide by these new duties in order to enter the long-distance telephone service market.¹⁷⁹ When Verizon allegedly did not comply with its statutory duties under the 1996 Act, federal and state regulators penalized Verizon.¹⁸⁰ The New York state regulator issued orders requiring Verizon to pay \$10 million to its injured competitors, and pursuant to a Federal Communications Commission (FCC) consent decree, Verizon agreed to pay \$3 million to the U.S. Treasury.¹⁸¹

The question before the Supreme Court was "whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act."¹⁸² The Court held that the Act's antitrust savings clause precluded the courts from implying immunity from the antitrust laws.¹⁸³ In applying the antitrust laws, however, the Court concluded that Verizon's alleged violations of the 1996 Act did not constitute a violation of the Sherman Act.¹⁸⁴ The Court concluded that "traditional antitrust principles" do not justify adding "insufficient assistance in the provision of service to rivals" under the 1996 Act to "the few existing exceptions from the proposition that there is no duty to aid competitors."¹⁸⁵ Thus, the Court's statements indicate that its holding simply confirms the limits on the circumstances that can give rise to a duty to deal under Section 2.

To be sure, there is language in the case that some have construed as suggesting that the Court failed to apply the antitrust laws fully because the alleged refusal to deal arose in the context of the regulatory regime established by the 1996 Act. Thus, they suggest, despite the savings clause, the Court created an implied immunity. For example, in part four of its decision, the Court opined that it must consider the importance of the "existence of a regulatory structure designed to deter and remedy anticompetitive harm" when evaluating antitrust claims.¹⁸⁶ This language must be read in the proper context, however. After deciding that Trinko's claim did not state a cause of action under traditional antitrust law, the Court then examined whether the regulatory regime established by the 1996 Act pro-

vided a reason to *expand* the contours of antitrust doctrine beyond the usual limits. The Court concluded it did not. The Court simply held that the specific, regulatory duties to deal established under the 1996 Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.¹⁸⁷ *Trinko* is thus best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act. It should not be read to displace the role of the antitrust laws in regulated industries as an implied immunity, nor should it be taken as a judicial rejection of a savings clause.

b. Filed-Rate Doctrine (Keogh Doctrine)

The filed-rate doctrine, also known as the *Keogh* doctrine,¹⁸⁸ prohibits a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.¹⁸⁹ At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were “fair and reasonable.” In creating the “filed rate” doctrine in *Keogh v. Chicago & Northwestern Railway*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price-fixing conspiracy.¹⁹⁰

Since deregulation, however, many industry members are no longer required to file their rates with regulators. For example, rail and motor carriers are generally no longer required to file rates with the Surface Transportation Board (STB).¹⁹¹ Similarly, in the electricity industry many rates are market-based and, although filed with a regulatory agency after they go into effect, are not reviewed for reasonableness.¹⁹² Nonetheless, courts have continued to apply the filed-rate doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency, regardless of whether the agency has actually reviewed and approved the rate.¹⁹³

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

Some commentators have questioned in recent years whether courts should continue to apply the filed-rate doctrine to market-based rates that are merely submitted to regulatory agencies as a formality and are not substantively reviewed.¹⁹⁴ In 1986 the Supreme Court reviewed the filed-rate doctrine and conceded that a variety of developments had cast the original reasoning for the *Keogh* doctrine “in a different light.”¹⁹⁵ Nonetheless, the Court concluded, it was for Congress, not the Court, to determine whether to abolish the filed-rate doctrine.¹⁹⁶ The Commission believes the time has come for Congress to address the issue,

especially since the movement to deregulation has continued, and even grown, since the Court's 1986 decision.

2. Merger Review in Regulated Industries

As discussed in Chapter I.B, the antitrust agencies examine mergers and acquisitions notified to the agencies pursuant to the HSR Act to determine whether a proposed transaction may substantially lessen competition.¹⁹⁷ The antitrust agencies apply the same merger analysis to all industries, including those that formerly were regulated.

Four industries remain in which a regulatory agency also has merger review authority: certain aspects of electricity (regulated by the Federal Energy Regulatory Commission (FERC)); telecommunications/media (regulated by the FCC); banking (regulated by various banking agencies); and railroads (regulated by the STB).¹⁹⁸ In those industries the regulatory authority typically reviews a proposed transaction under its statutory public interest standard. The "public interest" standard, which varies by industry, usually requires the agency to review both likely competitive effects and likely public interest effects. For example, in reviewing a proposed transaction, the FCC takes into account possible effects on the diversity of views available and the obligation to provide universal service, as well as likely effects on competition.¹⁹⁹ Thus, the regulatory authority could allow a transaction if it determines that the public interest benefits offered by the proposed transaction outweigh its likely anticompetitive effects.

In the first two of those four industries—electricity and telecommunications—the DOJ has full enforcement authority to investigate and challenge a proposed merger under the Clayton Act, regardless of the regulatory agency's authority pursuant to its regulatory statute.²⁰⁰ In both instances, the regulatory agencies also consider competition as one part of their broader public interest review.²⁰¹

A slightly different approach controls in the area of banking. There, the federal banking agency considers likely competitive effects, along with financial soundness and other banking-specific concerns.²⁰² The DOJ provides its competitive analysis to the banking agency, and, in practice, the banking agency and the DOJ usually work closely together to agree on the proposed transaction's likely competitive effects.²⁰³ The banking agency has authority to depart from the DOJ's competition-based recommendations, however, and this has occurred a few times, although not in the recent past.²⁰⁴ If the banking agency approves the merger over the DOJ's objections, the DOJ has full independent authority to challenge the banking agency's decision in court.²⁰⁵ Pursuant to the Bank Merger Act, the court applies a standard that differs slightly from Section 7 of the Clayton Act: a merger can overcome an otherwise successful challenge on competition grounds if the merging parties demonstrate the anticompetitive effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."²⁰⁶

The fourth industry is railroads, where Congress, in abolishing the Interstate Commerce Commission (ICC) in 1995, transferred the ICC's historical railroad merger review authority to the STB.²⁰⁷ The STB reviews mergers under a public interest standard that incorporates several considerations, including whether the proposed transaction would have an "adverse effect on competition."²⁰⁸ By statute, the STB must give "substantial weight" to the DOJ's views on whether the transaction will adversely affect competition, but the STB makes the final decision on whether to allow the merger.²⁰⁹ In 1996 the STB approved the merger between Union Pacific and Southern Pacific, despite the DOJ's objections that the merger was anticompetitive.²¹⁰ Unlike under the Bank Merger Act, the DOJ does not have independent authority to challenge a transaction in this industry.²¹¹

a. Statutory Authority to Review Mergers in Regulated Industries

- 69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.***
- 70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.**
- 71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.**
- 72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.**
- 73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.**

Merger review in industries still subject to some degree of regulation should place responsibility for the analysis of particular issues with the agency with the relevant expertise and should aim to make this dual review as efficient as possible. Merger review by two federal agencies can impose significant and duplicative costs on both the merging parties

* Commissioner Kempf does not join this recommendation.

While joining this recommendation, Commissioner Warden sees no reason to alter the present regime for review of bank mergers.

and the agencies. In addition, conflicts have sometimes arisen, for example as explained above when the STB approved a railroad merger despite a conclusion by the DOJ that it would substantially lessen competition.

The antitrust agencies have unique expertise in evaluating the likely competitive effects of mergers. Therefore, the antitrust agencies should be responsible for analysis of the likely competitive effects of mergers in regulated industries. The regulatory agencies have expert understanding of the regulated industry, as well as knowledge of the particular “public interest” factors important to the regulated industry, which can be valuable to the analysis. The antitrust agencies would draw on the expertise of the industry regulator in conducting its competition analysis, much as they do today in defense industry mergers and others. The recommended approach would ensure competition policy and enforcement consistency, limit inefficiencies and delays associated with overlapping enforcement, align competition policy assessments across industries regardless of the existence of different regulatory agencies, facilitate transparency in decision-making, and allow the antitrust agencies to act where they have a comparative advantage.²¹² It would also limit duplicative expenditure of resources and an inefficient allocation of scarce government resources, particularly where an industry regulator disregards the antitrust agency’s analysis.²¹³ Moreover, because the continued transition to deregulation may result in additional proposals to consolidate firms in regulated industries, it is important to conduct proper competitive analyses to ensure such industries continue to become, or remain, competitive.²¹⁴

This recommendation is consistent with recommendations reached by other organizations studying the interrelationship between regulatory and antitrust review of mergers. The International Competition Policy Advisory Committee (ICPAC), which reviewed this issue in 2000, recommended giving federal antitrust agencies exclusive jurisdiction to review mergers in regulated industries, as well as further study of issues relating to overlapping agency review.²¹⁵ In offering this recommendation, the ICPAC majority explained that overlapping sectoral and generalized agency authority threatens (1) efficient review; (2) substantive international convergence; (3) case-by-case cooperation; and (4) consistency and transparency.²¹⁶ The Organisation for Economic Co-operation and Development (OECD) has also addressed the issue of the relationship between antitrust and sectoral agencies, most recently during its February 2005 Global Forum on Competition. The OECD concluded that competition agencies are best suited for competition oversight and that sectoral agencies are best suited for technical regulation.²¹⁷ This view was also supported by the Business and Industry Advisory Committee to the OECD.²¹⁸

Finally, to ensure the ability of the antitrust agencies to perform proper competitive analyses, regulated industries should be subject to HSR Act requirements. This will ensure that the antitrust agency reviewing the transaction has appropriate information with which to perform its competitive analysis. Where there is an equivalent mechanism by which the antitrust agencies are provided with information, as is the case with banking mergers, such

that requiring pre-merger notification under the HSR Act would be redundant, the Commission sees no need for duplicative filing requirements.

b. Ongoing Evaluation of the Need for Regulatory Review of Mergers

74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency’s “public interest” standard to determine whether in fact such regulatory review is necessary.

- In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency’s review of the proposed transaction’s likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such “particular, identified interests” would be interests other than those consumers interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.

Congress should periodically revisit statutes providing for merger review by regulatory agencies to determine whether such review remains necessary. Economic theory and recent experience have shown that free-market competition will protect consumer interests such as price, quality, and choice of products. The Commission believes that competition can in many cases provide the same benefits to consumers that regulatory agencies’ public interest review also seeks to ensure. Furthermore, the Commission is not convinced that an anti-competitive merger can ever be in the “public interest.” Because of this, merger review by regulatory agencies may not be beneficial to consumer welfare.

4. THE STATE ACTION DOCTRINE

A. Introduction

The states, like the federal government, generally rely on competition in the marketplace to produce lower prices, higher quality, and innovation. Nonetheless, also like the federal government, sovereign states can enact economic regulations to replace competition in particular situations, and individual states have done so. Courts developed the “state action” doctrine to identify situations in which a state’s decision to displace competition with regulation trumps the general federal policy in favor of free markets and, therefore, overrides the application of federal antitrust law. Under the state action doctrine, courts can immunize from potential federal antitrust liability certain activity undertaken pursuant to a state regulatory regime or other state law.²¹⁹

The Supreme Court created the state action doctrine more than sixty years ago in *Parker v. Brown*.²²⁰ There, the Supreme Court upheld the legality of a California program regulating the marketing of raisins, concluding that Congress did not intend the Sherman Act expressly to preempt state economic regulation.²²¹ Absent such an express statement, the Court was reluctant to assume Congress had implicitly preempted state law. The Court explained, “In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”²²² State sovereignty and federalism were, and still are, the underpinnings of Supreme Court state action jurisprudence.²²³

The state action doctrine applies not only to state governmental actors themselves, but also, in certain circumstances, to quasi-governmental entities and private actors. The actions of state governmental actors are generally immune from antitrust liability without further inquiry.²²⁴ This is because “[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise.”²²⁵ What constitutes the state, however, has given rise to extensive litigation. For example, cities and other municipalities, public service commissions, and state regulatory boards are not the “state” for purposes of the state action doctrine.²²⁶

The actions of private economic actors, as well as of governmental or quasi-governmental entities not considered to be the “state,” are immune from antitrust liability only if they pass the two-part test set forth in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be “‘one clearly articulated and affirmatively expressed as state policy,’” and (2) “the policy must be ‘actively supervised’ by the State itself.”²²⁷ The first requirement, that of clear articulation, serves to ensure that the state has affirmatively authorized departures from free-market competition.²²⁸ The second requirement, that of active supervision, is intended to ensure that state action immunity “will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.”²²⁹ In its most recent ruling on the state action doctrine, *FTC v. Ticor Title Insurance Co.*, the Supreme Court further explained the purpose of the active supervision inquiry is “not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices,” but rather “to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.”²³⁰ Local governments can obtain full or partial antitrust immunity. To obtain full state action immunity, conduct by local governments must meet the “clear articulation,” but not the “active supervision,” portion of the *Midcal* test.²³¹

The Supreme Court’s state action jurisprudence has demonstrated a desire to avoid immunizing conduct intended to benefit private, not governmental, purposes. Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defen-

dants to obtain antitrust immunity and thereby trump competition in situations where a state did not intend to displace competition. The ABA Antitrust Section believes that “[s]tate action immunity drives a large hole in the framework of the nation’s competition laws.”²³² In 2003 the FTC staff issued a report (the FTC State Action Report) recommending “clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers.”²³³

Critics raise other troubling issues as well. Some question whether courts have properly taken into account the potential for one state’s endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. Questions also have arisen about whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants. The Commission’s recommendations are discussed below.

B. Background

1. The Midcal Test for Activities of Non-Sovereign State Entities

a. Clear Articulation

The clear articulation requirement is “directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.”²³⁴ As one leading treatise explains:

Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting non-competitive policies with the strong national policy favoring competition . . . [I]t ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.²³⁵

The Supreme Court has established certain parameters for the “clear articulation” test. On one end of the spectrum, “clear articulation” does not require that the state *compel* the anticompetitive conduct at issue.²³⁶ The state also need not explicitly authorize specific conduct to satisfy this prong, as long as the state legislature’s intent to establish a regulatory program displacing competition is “clear.”²³⁷ At the other end, a general grant of authority that is competition-neutral, such as the authority to operate a hospital or contract for taxi service, does not suffice to show “clear articulation.”²³⁸ In *Community Communications Co. v. City of Boulder* the Supreme Court declined to accept the argument that “the general grant of power to enact ordinances necessarily implies state authorization to enact specific anti-

competitive ordinances” because to do so “would wholly eviscerate the concepts of ‘clear articulation and affirmative expression’ that our precedents require.”²³⁹

The question is whether “the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure.”²⁴⁰ In *Southern Motor Carriers Rate Conference, Inc. v. United States* the Supreme Court reasoned that a state legislature’s decision to set rates through a public service commission, rather than through market forces, clearly demonstrated its intention to displace competition in motor carrier ratemaking and thus satisfied the clear articulation requirement.²⁴¹ The Court also has used a “foreseeability” analysis to evaluate whether a state clearly intended to replace competition with a regulatory structure.²⁴² In *Town of Hallie v. City of Eau Claire*, where the relevant statutes gave cities the authority to decide where to provide sewage services, the Court reasoned that potentially anticompetitive conduct—refusing to serve or imposing conditions on agreeing to serve—was a foreseeable result of allowing the cities to determine the areas to be served.²⁴³ Accordingly, the Court concluded the statutes evidenced “a state policy to displace competition.”²⁴⁴

b. Active Supervision

(i) The Purpose of the Active Supervision Requirement

The active supervision prong of the state action doctrine requires that the state has and exercises independent power to review the challenged conduct, and exercises ultimate control.²⁴⁵ The state must supervise both the general regulatory scheme and the particular conduct at issue.²⁴⁶ As the Supreme Court stated in *Town of Hallie*, the active supervision prong serves to ensure that the actor is engaging in the challenged conduct pursuant to state policy.²⁴⁷ It applies to private actors because when they engage in anticompetitive behavior there is “a real danger” that they are acting to further their own interests, rather than those of the state.²⁴⁸ The “active supervision” requirement addresses the “practical problems inherent in delegating regulatory power: a private party could carry out an initially authorized scheme in a manner inconsistent with state policy.”²⁴⁹

The active supervision requirement serves other purposes as well, ensuring that the state’s regulatory program “actually implements a positive regulatory policy.”²⁵⁰ As the Court explained in *Midcal*, a state may not circumvent the Sherman Act’s proscriptions “by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”²⁵¹ In addition, the active supervision requirement assigns political responsibility for actions:

States must accept political responsibility for actions they intend to undertake . . . For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price-fixing it has sanctioned and undertaken to control.²⁵²

Finally, the “active supervision” requirement promotes the “citizen participation” value of federalism.²⁵³ Private parties on their own might not offer the public an opportunity to participate in the decision-making process, but the governmental authority that supervises them can ensure that the public has a voice in the regulatory activity.

(ii) Entities to Which the Active Supervision Requirement Applies

The active supervision test applies only when there is a risk that the challenged conduct may be the product of the parties’ pursuit of interests other than state policy, and thus its application turns on whether the relevant actor is public or private.²⁵⁴ Purely private actors are subject to the active supervision test;²⁵⁵ cities are not. When an entity has a combination of public and private attributes, courts ask “whether the nexus between the State and the [entity in question] is sufficiently strong that there is little real danger that the [entity] is involved in a *private . . .* arrangement.”²⁵⁶

(iii) Evidence of Active Supervision

To satisfy the active supervision requirement, a defendant must show the state exercises “sufficient independent judgment and control,” and that “the details of the [restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties.”²⁵⁷ Active supervision requires the actual involvement of the state, not just a state’s authority to exercise supervisory power. A “negative option” form of supervision (state authority to veto) is not sufficient unless the state has informed itself of the details of the proposed action.²⁵⁸ For example, in *Midcal* active supervision sufficient to invoke the immunity did not exist because the state authorized and enforced prices established by private parties but did not review the reasonableness of the price schedules or review the terms of fair trade contracts.²⁵⁹ Active supervision also is not present where the defendants’ actions preclude meaningful review. In *Ticor* active supervision was not found where rate filings became effective despite the failure of the rate bureau to provide additional requested information.²⁶⁰

C. Recommendations and Findings

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

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- 76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.**
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Concerns with the state action doctrine should be addressed through continued development of case law in the courts. The Supreme Court's articulation of core state action doctrine standards will, if applied more rigorously, lead to the correct application of the doctrine. There is no need at this time to cement those standards into a statute. Instead, the lower courts ought to apply the Supreme Court's standards with greater precision and to recognize that immunizing anticompetitive conduct through the state action doctrine can cause significant consumer harm. Such harm should not be permitted absent authorization and supervision from the state, as required under Supreme Court precedents. Specific recommendations for how courts can best apply the Supreme Court's teachings and how the doctrine should be refined to address additional issues follow.

1. Clear Articulation

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- 77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.**
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The FTC State Action Report concluded that “[s]ome lower courts have implemented the clear articulation standard in a manner not consistent with its underlying goal.”²⁶¹ To address this concern, that report recommended that courts ask two questions to flesh out the clear articulation requirement: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue. Together, these requirements would refocus the inquiry on the existence of deliberate and intended state policies to displace competition that can justify setting aside national competition goals. The Commission agrees. The lower courts have not always properly implemented Supreme Court teachings on what is required to show a clearly articulated state policy to displace competition.

In *Town of Hallie* the Supreme Court held that the clear articulation standard was met where the alleged anticompetitive conduct—refusing to provide, or imposing conditions on

agreeing to provide, sewage service outside the areas a city had chosen to serve—was a foreseeable result of a state law authorizing cities to determine which areas to serve.²⁶² Following *Town of Hallie*, some courts have applied a low standard for “foreseeability,” reasoning that once a state authorizes certain conduct, anticompetitive forms of that conduct may occur and therefore are “foreseeable.”²⁶³

To say that anticompetitive types of conduct are “foreseeable” in this way, however, is not the same as finding “a deliberate and intended state policy” to replace competition with regulation.²⁶⁴ In *City of Boulder* the Supreme Court emphasized that a general grant of authority does not equate with authority to engage in specific anticompetitive conduct.²⁶⁵ In *City of Columbia v. Omni Outdoor Advertising Inc.* the Court explained that the relevant statutory authority must include the authority to suppress competition, not just to regulate.²⁶⁶

A more appropriate foreseeability analysis appears in *Surgical Care Center of Hammond v. Hospital Service District No. 1*. In that case the Court of Appeals for the Fifth Circuit, sitting en banc, distinguished “a statute that in empowering a municipality *necessarily contemplates the anticompetitive activity* from [a statute] that *merely allows* a municipality to do what other businesses can do.”²⁶⁷ It explained that to infer a policy to displace competition from the mere authority to enter joint ventures would “stand federalism on its head.”²⁶⁸

As the FTC State Action Report pointed out, “‘foreseeability’ is a matter of degree.”²⁶⁹ The foreseeability test can work well if “the displacement of competition is inherent in the nature of the legislation itself.”²⁷⁰ If the grant of authority is “competition-neutral,” however, the mere possibility of anticompetitive conduct is not sufficient to support a finding of a clearly articulated state policy to displace competition.²⁷¹

Another issue that demands rigorous attention is whether the relevant statute reveals a state’s intent to displace competition *in the manner at issue* in the case. The Seventh Circuit’s reasoning in *Hardy v. City Optical, Inc.* exemplifies the type of careful analysis that courts should use. In that case, a statute required optometrists to provide patients with some, but not all, of the information needed to purchase contact lenses. An optometry chain denied its patients access to the complete prescriptions, leaving them unable to purchase their lenses through cheaper, mail-order sources. The court held that “Indiana has not sought to supplant the form of competition—competition from mail-order houses . . . that the complaint charges the defendants with attempting to suppress.”²⁷² Therefore, the clear articulation standard was not met. Other courts should apply the state action doctrine with similar rigor.

To be sure, a state does not need to articulate a policy displacing competition in the *precise* manner at issue. Nonetheless, courts should carefully examine the relevant statute, any clear legislative history, and the nature of the authorized conduct to determine whether a state has clearly articulated a deliberate and intended state policy to immunize the particular conduct at issue.²⁷³

2. Active Supervision

78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on different situations.*

The active supervision requirement ensures that “‘the [private] actor is engaging in the challenged conduct pursuant to state policy,’ rather than in pursuit of private interests.”²⁷⁴ Because the active supervision test applies only when there is a risk that the challenged conduct may be the product of parties’ pursuing interests other than state policy, its application turns in part on whether the relevant actor is public or private.²⁷⁵

As discussed in the FTC State Action Report, the Supreme Court has not yet “provided much specific guidance on the kind of state review of private actions that would constitute ‘active’ supervision.”²⁷⁶ The Supreme Court’s main opinion in this area, *Ticor*, dealt with a situation in which state supervision of the conduct at issue was virtually nonexistent.²⁷⁷ Especially because the potential antitrust violation was horizontal price-fixing, a violation most “pernicious,” the Court was reluctant to formulate a rule that would too easily find active supervision.²⁷⁸ These factual circumstances did not afford the Court an opportunity to explain how lower courts should address more complex situations.

To focus the active supervision inquiry, courts should use a flexible, “tiered” approach that requires a different level of active supervision depending on the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors.²⁷⁹ “[W]hat is sufficiently ‘active’ for active supervision will vary based on the conduct, industry, regulatory scheme, as well as other factors.”²⁸⁰

For example, if the conduct at issue were price-fixing, the affirmatively articulated state policy would need to be more detailed and specific than if the conduct entailed less clearly anticompetitive activity.²⁸¹ Similarly, whether an entity is more or less governmental in nature should influence the degree of active supervision that courts require. This case-by-case analysis of the entity should consider factors such as the entity’s structure, membership, decision-making apparatus, and openness to the public.²⁸² As one leading treatise points out in discussing whether to apply the active supervision requirement, “[w]ithout reasonable assurance that the [entity undertaking the challenged conduct] is far more broadly based than the very persons who are to be regulated, outside supervision seems required.”²⁸³ Similarly, such circumstances should require more active supervision than if the entity were constituted substantially of government, not private, actors. The analysis also

* Commissioners Garza, Kempf, and Warden do not join this recommendation. They believe that the proposed “flexible approach” provides no guidance to those subject to the law and invites the courts to decide each case based on its facts alone rather than legal norms.

should examine the degree of discretion private actors had to undertake the challenged conduct,²⁸⁴ with greater active supervision required to the extent that private actors had a larger degree of discretion. In sum, a flexible analysis would recognize that, to the extent the actor or the challenged conduct suggests an appreciable risk that the challenged conduct results from private actors' pursuing their private interests, rather than state policy, courts should require a greater degree of active supervision than if that risk is lower.

3. Other Refinements to the State Action Doctrine

79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.*

The state action doctrine has been criticized for its failure to consider interstate spillovers.²⁸⁵ A state's regulation of activities in a manner that overwhelmingly imposes the cost of regulation on citizens of other states impairs both economic efficiency and the political participation goal of the federal system. Accordingly, when the effects of potentially immunized conduct are not predominantly intrastate, the state action doctrine should not create immunity. Those effects can be measured by determining where the costs and benefits of the regulation are borne.

Parker v. Brown, the case that was the genesis of the state action doctrine, is a prime example of the courts' failure to consider interstate spillovers. *Parker* involved a California agricultural marketing program with mechanisms to prorate raisin production within California and thus limit the amount offered for sale. By reducing output, the program raised raisin prices. The vast majority of consumers that paid higher prices for raisins because of California's regulatory scheme were outside the state: between 90 and 95 percent of the California raisins were shipped out of state.²⁸⁶ Thus, the benefits of the program (more money to the raisin producers) were largely concentrated in California, but the costs (higher prices for consumers) spilled largely into other states.

Such state regulations producing spillover costs to consumers in other states do not deserve deference.²⁸⁷ Out-of-state citizens adversely affected by spillovers typically have no political participation rights and effectively are disenfranchised on whether the conduct at

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

Commissioners Burchfield and Garza believe that, so long as a state acts in a way that does not offend the "dormant Commerce Clause," the state action doctrine should cover actions taken by private actors pursuant to that state mandate. Private companies and individuals should, in virtually every instance, be able to comply with the mandate of a state without assessing whether its effect is "predominantly" intrastate, but if the state operates in violation of the United States Constitution by improperly trying to extend its power beyond its own borders, the action would be void and the state action doctrine should not apply.

issue should be authorized by the neighboring state.²⁸⁸ This is directly contrary to the principles of federalism that form the basis for state action doctrine.

Moreover, economics teaches that where decision-makers reap the benefits without bearing the costs of an activity, they have incentives to engage in more of that activity than is socially desirable.²⁸⁹ Therefore, when anticompetitive state regulations tend to produce in-state benefits but out-of-state harms, states have incentives to over-regulate. As a consequence, “[t]he resulting economic inefficiencies go unameliorated” and “nonresidents . . . remain exposed to any resulting monopoly spillovers.”²⁹⁰

The Supreme Court has shown awareness of possible spillover concerns,²⁹¹ but has not yet considered whether to reject application of the state action doctrine if the effects of the conduct at issue are not primarily intrastate.²⁹² To address the significant consumer harm and political representation concerns discussed above, the Supreme Court and lower courts should not apply the state action doctrine when the effects of a regulation are not predominantly intrastate.

80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.*

A government entity’s participation in a market as a competitor is likely to have market-distorting effects if that entity is not subject to the same rules of competition as private competitors. A “market participant” exception to the state action doctrine that would require application of both prongs of the *Midcal* test would ensure that the government entity’s behavior is consistent with state policy, and the state action doctrine is applied consonant with its original purposes and goals.²⁹³

The possibility of such an exception was recognized by the Supreme Court in *Omni* and was urged by Chief Justice Burger’s concurrence in *City of Lafayette v. Louisiana Power & Light*

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

Commissioners Burchfield and Garza believe that creating an exclusion from the state action doctrine when the state entity acts as a market participant would raise at least the following serious issues. First, when the plaintiff is not a resident of the state, a federal court may well lack jurisdiction over an antitrust action against a state entity under the Eleventh Amendment. Second, such an exclusion would require states in the first instance, and eventually courts, to determine when the action is sovereign and regulatory as opposed to commercial, an extremely difficult determination that will likely lead to inconsistencies, and imposition of liability eventually on taxpayers. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 433–34 (1978) (Stewart, J., dissenting) (referring to distinction between governmental and proprietary functions as a “quagmire”). Finally, the Commission heard no evidence that states are engaging in an amount of anticompetitive behavior in clearly commercial (as opposed to sovereign) functions that would make such an exclusion necessary or appropriate.

Co. In *Omni* the majority stated in dictum that the *Parker* doctrine “does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”²⁹⁴ The Court in *Omni* stated that “with the possible market participant exception, any action that qualifies as state action is ‘ipso facto . . . exempt from the operation of the antitrust laws.’”²⁹⁵

Chief Justice Burger’s concurrence in *City of Lafayette* also suggested a market participant exception.²⁹⁶ The Chief Justice would have limited the Court’s holding in that case to cities acting in a proprietary capacity, and he would have imposed a stricter standard to qualify for the state action defense. He reasoned that the same Congress that “meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade” would not have intended the courts to allow local governments to engage in such anticompetitive conduct without being subject to the Sherman Act.²⁹⁷ As Burger argued, the case should turn on the conclusion that the plaintiff cities are engaging in “business activit[ies]; activit[ies] in which a profit is realized.”²⁹⁸ He found nothing in the state action jurisprudence to suggest that “a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality.”²⁹⁹

The Federal Circuit, Third Circuit, and Ninth Circuit have appeared willing to entertain the possibility of a market participant exception.³⁰⁰ For example, the Third Circuit, in dictum, wrote that there may be a market participant exception to *Parker* immunity.³⁰¹ The court relied on *Omni* to note that the state does not forfeit immunity by acting with a private party, but rather “[i]mmunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”³⁰² It pointed out, however, that there is little guidance as to what constitutes acting as a market participant.³⁰³ The Ninth Circuit noted that a market participant exception did not apply in the case at issue because the state entity was not “in competition with” the plaintiffs,³⁰⁴ but observed that guidance in the state action doctrine jurisprudence is extremely limited. The Eighth Circuit has declined to take the lead in adopting such an exception,³⁰⁵ and the Tenth and Eleventh Circuits have been hostile to the idea.³⁰⁶ Those courts noted that the distinction between “governmental” and “proprietary” functions has been abandoned in other contexts.³⁰⁷

There is not always a clear distinction between a government entity’s activities as a regulator and a market participant,³⁰⁸ but this hurdle is not insurmountable. Horizontal situations where the government competes with private firms are clear examples of circumstances in which a market participant exception would be warranted.³⁰⁹ In addition, courts might reason by analogy to the market participant exception to the dormant Commerce Clause. There, the market participant exception is appropriate where the state action “constituted direct state participation in the market.”³¹⁰ In the case law, this includes a state program to pay people who remove abandoned cars from streets and junkyards, because the payment was interpreted as entry into the market for abandoned cars,³¹¹ and a program to

sell output from a state-owned-and-operated cement plant.³¹² Clearer guidance regarding closer cases could be provided through case-by-case adjudication. This type of incremental line-drawing is a task to which the federal common law system is both well-accustomed and well-suited.

ANNEX A

Exemptions from the Antitrust Laws

Statutory Exemptions from the Antitrust Laws

Agricultural Marketing Agreement Act, 7 U.S.C. §§ 608b–608c
 Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 7 U.S.C. § 852
 Capper-Volstead Act, 7 U.S.C. §§ 291–92
 Charitable Donation Antitrust Immunity Act, 15 U.S.C. §§ 37–37a
 Defense Production Act exemption, 50 U.S.C. app. § 2158
 Export Trading Company Act, 15 U.S.C. §§ 4001–21
 Fishermen’s Collective Marketing Act, 15 U.S.C. §§ 521–22
 Health Care Quality Improvement Act, 42 U.S.C. §§ 11101–52
 Labor exemptions (statutory and non-statutory), 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101–15, 151–69; (and common law)
 Local Government Antitrust Act, 15 U.S.C. §§ 34–36
 Medical resident matching program exemption, 15 U.S.C. § 37b
 National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–06
 Need-Based Educational Aid Act, 15 U.S.C. § 1 note
 Newspaper Preservation Act, 15 U.S.C. §§ 1801–04
 Non-profit agricultural cooperatives exemption, 15 U.S.C. § 17
 Small Business Act exemption, 15 U.S.C. §§ 638(d), 640
 Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–03
 Sports Broadcasting Act, 15 U.S.C. §§ 1291–95
 Standard Setting Development Organization Advancement Act, 15 U.S.C. §§ 4301–05, 4301 note
 Webb-Pomerene Export Act, 15 U.S.C. §§ 61–66

Statutory Exemptions Created as Part of a Regulatory Regime

Air transportation exemption, 49 U.S.C. §§ 41308–09, 42111
 McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15
 Motor transportation exemption, 49 U.S.C. §§ 13703, 14302–03
 Natural Gas Policy Act exemption, 15 U.S.C. § 3364(e)
 Railroad transportation exemption, 49 U.S.C. §§ 10706, 11321(a)
 Shipping Act, 46 U.S.C. app. §§ 1701–19

Judicially Created Exemptions

Baseball exemption
 Filed-rate/*Keogh* doctrine
Noerr-Pennington Immunity
 State Action Doctrine
 Various implied immunities created in specific regulatory settings

Notes

- ¹ See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 177 (1979) [hereinafter SHENEFIELD REPORT] (“[F]ree market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy.”).
- ² See, e.g., Terry Calvani, *What Is the Objective of Antitrust?* in ECONOMIC ANALYSIS AND ANTITRUST LAW 12 (Terry Calvani & John Siegfried eds., 2d ed. 1988) (“In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.”).
- ³ WILLIAM W. LEWIS, THE POWER OF PRODUCTIVITY, WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY 91 (2004).
- ⁴ Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference, at 2 (Jan. 26, 2004).
- ⁵ *Id.*
- ⁶ See Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1008–09 (1987) [hereinafter Breyer, *Antitrust, Deregulation*]. Then-Judge Breyer explains that concerns about “excessive competition” prompted regulation in the airline industry, for example. *Id.* at 1007–08.
- ⁷ See, e.g., Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 327 (1990) [hereinafter Kahn, *Deregulation: Looking Backward and Looking Forward*]; Michael O. Wise, *Overview: Deregulation and Antitrust in the Electric Power Industry*, 64 ANTITRUST L.J. 267, 267–68 (1996).
- ⁸ HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 237–38 (2005) [hereinafter HOVENKAMP, ANTITRUST ENTERPRISE].
- ⁹ Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263, 1284 (1993); see also Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 98–102 (1998) (each industry studied—airlines, trucking, railroads, banking, and natural gas—substantially improved its productivity and achieved real operating cost reductions ranging from 25 percent to 75 percent, and consumers have been the principal beneficiaries); Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The U.S. Experience*, 96 ECON. J. 1, 15 (1986).
- ¹⁰ Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation*, at 38–39 (John M. Olin Law & Economics Working Paper No. 312, Oct. 2006), available at http://ssrn.com/abstract_id=937020 [hereinafter Carlton & Picker, *Antitrust and Regulation*] (citing Timothy P. Daniel & Andrew N. Kleit, *Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates*, 8 J. REG. ECON. 267 (1995)).
- ¹¹ Alden F. Abbott, Statement at AMC Statutory Immunities and Exemptions Hearing, at 1–2 (Dec. 1, 2005) [hereinafter Abbott Statement]. See generally Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT’L L.J. 7 (2000) [hereinafter Posner, *Effects of Deregulation on Competition*]; Statutory Immunities and Exemptions Transcript at 80 (Abbott) (Dec. 1, 2005).
- ¹² See GELLHORN ET AL., ANTITRUST LAW AND ECONOMICS 568–69 (5th ed. 2004) [hereinafter GELLHORN, ANTITRUST LAW AND ECONOMICS] (only Congress can expressly exempt conduct from antitrust law).
- ¹³ See Paul G. Cassell, *Exemption of International Shipping Conferences from American Antitrust Laws: An Economic Analysis*, 20 NEW ENG. L. REV. 1, 11–16 (1984) [hereinafter Cassell, *Exemption of International Shipping Conferences*]; AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1273 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS]; see also American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Immunities and Exemptions, at 10 (Nov. 30, 2005) [hereinafter ABA Comments re Immunities and Exemptions]; Darren Bush, Gregory K. Leonard & Stephen F. Ross, A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions, at 8–15 (Oct. 24, 2005) [hereinafter Bush, Leonard & Ross, Framework for Antitrust Immunities].

- ¹⁴ See ABA Comments re Immunities and Exemptions, at 4–6.
- ¹⁵ H.R. 1081, 110th Cong. (2007); S. 618, 110th Cong. (2007).
- ¹⁶ Council Regulation (EC) No. 1419/2006 (Sept. 25, 2006) (repealing Regulation (EEC) No. 4056/86, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and putting an end to the possibility for liner carriers to meet in conferences, fix prices, and regulate capacities on trade to and from the European Union).
- ¹⁷ MICHAEL PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662–63 (1990). Porter also observes that industries sheltered from international competition are less vigorous and successful than industries subject to such competition. *Id.* at 117–20, 225–38, 416, 708.
- ¹⁸ SHENEFIELD REPORT, at 177.
- ¹⁹ HOVENKAMP, *ANTITRUST ENTERPRISE*, at 237–38; see also Kahn, *Deregulation: Looking Backward and Looking Forward*, at 325–30; Breyer, *Antitrust, Deregulation*, at 1007–11.
- ²⁰ See HOVENKAMP, *ANTITRUST ENTERPRISE*, at 238.
- ²¹ *Id.* at 239 (citing JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960)). Landis was a member of the Federal Trade Commission from 1933 to 1934, Chair of the Securities and Exchange Commission from 1935 to 1937, and Dean of Harvard Law School from 1937 to 1946. See HOVENKAMP, *ANTITRUST ENTERPRISE*, at 349–50 n.24.
- ²² GELLHORN, *ANTITRUST LAW AND ECONOMICS*, at 567; see also HOVENKAMP, *ANTITRUST ENTERPRISE*, at 239 (“[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins.”) (footnote omitted); Carlton & Picker, *Antitrust and Regulation*, at 39 (after deregulation of various industries, “[c]onsumers benefit, [while] special interests are harmed”).
- ²³ See, e.g., Posner, *Effects of Deregulation on Competition*, at 15–19.
- ²⁴ See Breyer, *Antitrust, Deregulation*, at 1006–07.
- ²⁵ See *id.*
- ²⁶ See J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 9 (Dec. 5, 2005) [hereinafter McDonald Statement]; American Antitrust Institute, Public Comments Submitted to AMC Regarding Regulated Industries, at 20 (July 15, 2005) [hereinafter AAI Comments re Regulated Industries].
- ²⁷ *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 388 (1981) (quoting *United States v. National Ass’n of Secs. Dealers, Inc.* 422 U.S. 694, 719–20 (1975)).
- ²⁸ *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006).
- ²⁹ *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 401–03 (2004).
- ³⁰ *Trinko*, 540 U.S. at 415–16.
- ³¹ The doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922); see also *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986); Rob McKenna, Statement at AMC Regulated Industries Hearing, at 8 (Dec. 5, 2005) [hereinafter McKenna Statement]; Western Coal Traffic League, Public Comments Submitted to AMC, at 7 (July 15, 2005) [hereinafter Western Coal Comments].
- ³² See *Keogh*, 260 U.S. at 162; see also *Square D*, 476 U.S. at 422.
- ³³ See, e.g., *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852–53 (9th Cir. 2004) (state law claims of unfair competition in electric power industry barred by filed-rate doctrine); *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004) (“Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.”).
- ³⁴ *Square D*, 476 U.S. at 423.

- ³⁵ *Id.* at 423–24.
- ³⁶ See Chapters I.B and II.B of this Report regarding substantive merger law and the Hart-Scott-Rodino Act pre-merger review process.
- ³⁷ Those industries are banking (regulated by various banking agencies); certain aspects of electricity (regulated by the Federal Energy Regulatory Commission); telecommunications/media (regulated by the Federal Communications Commission); and railroads (regulated by the Surface Transportation Board). Industries in which regulatory agencies previously had, but not longer have, authority to review mergers include trucking and airlines.
- ³⁸ See, e.g., Milton A. Marquis, *DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 *LOY. U. CHI. L.J.* 783, 783–84 (2002).
- ³⁹ *Parker v. Brown*, 317 U.S. 341 (1943).
- ⁴⁰ *Id.* at 350–52.
- ⁴¹ *Id.* at 351.
- ⁴² See ANTITRUST LAW DEVELOPMENTS, at 1273.
- ⁴³ See, e.g., *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992); see also Carlton A. Varner, Statement at AMC State Action Doctrine Hearing, at 2, 5 (Sept. 29, 2005) [hereinafter Varner Statement]; FEDERAL TRADE COMMISSION STAFF, REPORT OF THE STATE ACTION TASK FORCE 5 (Sept. 2003) [hereinafter FTC STATE ACTION REPORT].
- ⁴⁴ See *Parker*, 317 U.S. at 350–52; *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); FTC STATE ACTION REPORT, at 6.
- ⁴⁵ *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).
- ⁴⁶ See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978); FTC STATE ACTION REPORT, at 7. Local governments may obtain partial antitrust immunity under the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34–36).
- ⁴⁷ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).
- ⁴⁸ See ANTITRUST LAW DEVELOPMENTS, at 1274; Varner Statement, at 18; FTC STATE ACTION REPORT, at 8, 52.
- ⁴⁹ *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988).
- ⁵⁰ American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001), available at http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.
- ⁵¹ FTC STATE ACTION REPORT, at 1.
- ⁵² See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41–42 (1985).
- ⁵³ See, e.g., *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996).
- ⁵⁴ *Ticor*, 504 U.S. at 636; see also Varner Statement, at 13–14 (discussing cases misusing the foreseeability test).
- ⁵⁵ *Hardy v. City Optical Inc.*, 39 F.3d 765 (7th Cir. 1994) (Posner, J.).
- ⁵⁶ *Id.* at 770 (emphasis added).
- ⁵⁷ FTC STATE ACTION REPORT, at 12 (citing *Town of Hallie*, 471 U.S. at 46).
- ⁵⁸ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *IA ANTITRUST LAW* ¶ 227a (3d ed. 2006) [hereinafter AREEDA & HOVENKAMP, ANTITRUST LAW].
- ⁵⁹ See *Ticor*, 504 U.S. at 639–40.
- ⁶⁰ See Comments of the American Bar Association, Section of Antitrust Law on FTC Report Re State Action Doctrine, at 17–18 (May 6, 2005), available at <http://www.abanet.org/antitrust/at-comments/2005/05-05/at-state-action-05.pdf> [hereinafter ABA Comments re FTC Report]; FTC STATE ACTION REPORT, at 12.

- ⁶¹ See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1271 (1997) [hereinafter Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*]; Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 767 (1985) [hereinafter Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*]; see also ABA Comments re FTC Report, at 2, 20; FTC STATE ACTION REPORT, at 40; Varner Statement, at 4, 19; *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (statement of Todd Zywicki, Director, FTC Office of Policy Planning); FEDERAL TRADE COMMISSION STAFF, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 2004) [hereinafter FTC STAFF, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES].
- ⁶² Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 256 (1987) [hereinafter Jorde, *Antitrust and the New State Action Doctrine*].
- ⁶³ See Jorde, *Antitrust and the New State Action Doctrine*, at 253; Varner Statement, at 19; State Action Doctrine Transcript at 25–26 (Varner) (Sept. 29, 2005).
- ⁶⁴ See, e.g., EDWIN MANSFIELD, MICROECONOMICS, THEORY AND APPLICATIONS 458 (3d ed. 1979).
- ⁶⁵ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374–75 (1991).
- ⁶⁶ This conclusion is not novel. In its 1979 Report, the National Commission for the Review of Antitrust Laws and Procedures expressed a skeptical attitude toward exemptions and immunities in general, notwithstanding the fact that, of its twenty-two members, fully ten were sitting members of Congress. See generally SHENEFIELD REPORT, at 177–89.
- ⁶⁷ Abbott Statement, at 1–2. See generally Posner, *Effects of Deregulation on Competition*, at 7; Statutory Immunities and Exemptions Trans. at 72 (Abbott).
- ⁶⁸ This Section uses the terms “exemption” and “immunity” interchangeably to mean any statutory provision that makes liability or damages under the antitrust laws less than fully applicable.
- This Section considers only statutory immunities, not those created by courts. The state action doctrine, a judicially created immunity, is discussed in Part 4 of this Section. Part 3 of this Section discusses judicially created “implied” immunities in regulated industries.
- ⁶⁹ See 15 U.S.C. § 17 (creating statutory labor exemption and non-profit agricultural cooperatives exemption).
- ⁷⁰ See 15 U.S.C. § 37b.
- ⁷¹ See Cassell, *Exemption of International Shipping Conferences*, at 11–16; see also ABA Comments re Immunities and Exemptions, at 10; Bush, Leonard & Ross, *Framework for Antitrust Immunities*, at 8–15; ANTITRUST LAW DEVELOPMENTS, at 1273.
- ⁷² See, e.g., ABA Comments re Immunities and Exemptions, at 4–6.
- ⁷³ See *id.* at 4.
- ⁷⁴ Some scholars have contended that antitrust immunities are typically the byproduct of special interest regulations spawned by well-organized groups. See, e.g., Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) (“One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests.”). “Public choice” theory seeks to explain, among other things, how such laws can arise. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 285, 285–89 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); see also ABA Comments re Immunities and Exemptions, at 5–6; American Antitrust Institute, Public Comments Submitted Regarding Immunities and Exemptions, at 3 (July 15, 2005).
- ⁷⁵ 42 U.S.C. §§ 11101–52.
- ⁷⁶ 15 U.S.C. §§ 4301–05, 4301 note.

⁷⁷ See *generally* ANTITRUST LAW DEVELOPMENTS, at 1213–15.

⁷⁸ See *generally id.* at 1211–13.

⁷⁹ 49 U.S.C. §§ 41308–09, 42111. This immunity covers a variety of agreements, including those between foreign and domestic airlines that allow individual airlines to provide tickets that include legs served only by other airlines.

⁸⁰ 15 U.S.C. §§ 37–37a.

⁸¹ 50 U.S.C. app. § 2158.

⁸² 15 U.S.C. § 1 note.

⁸³ 15 U.S.C. §§ 3501–03.

⁸⁴ 15 U.S.C. §§ 34–36.

⁸⁵ 15 U.S.C. §§ 4301–06.

⁸⁶ 7 U.S.C. § 291. See *generally* ANTITRUST LAW DEVELOPMENTS, at 1306–10.

⁸⁷ 15 U.S.C. §§ 1012(b), 1013(b). See *generally* ANTITRUST LAW DEVELOPMENTS, at 1438–44.

⁸⁸ ANTITRUST LAW DEVELOPMENTS, at 1445–47.

⁸⁹ See *generally id.* at 1497–1500. This Act was amended in 1998 to provide, among other things, the opportunity for individual shipping companies to compete with conferences. See Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998).

⁹⁰ See ABA Comments re Immunities and Exemptions, at 7–10.

⁹¹ See *id.* at 1.

⁹² See *id.* at 1–2. Antitrust exemptions can limit price competition, restrict entry, produce an economically inefficient level of output, or foster cartels—all of which are contrary to the antitrust system. See, e.g., Abbott Statement, at 3; ABA Comments re Immunities and Exemptions, at 2–3.

⁹³ For arguments that this reason justifies an immunity, see John J. Sullivan, Statement at AMC Statutory Immunities and Exemption Hearing, at 1, 3 (Dec. 5, 2005) [hereinafter Sullivan Statement]; American Natural Soda Ash Corp., Public Comments Submitted to AMC, at 3 (June 28, 2005); Statutory Immunities and Exemptions Trans. at 43 (Sullivan).

⁹⁴ For arguments that this reason justifies an immunity, see McCarran-Ferguson Act Transcript at 9–10, 51, 59 (McRaith) (Oct. 18, 2006); *id.* at 19, 78–79 (Gackebach); *id.* at 25–26, 33, 73 (Zielezienski); Julie L. Gackebach, Statement at AMC McCarran-Ferguson Hearing, at 4–5 (Oct. 18, 2006) [hereinafter Gackebach Statement]; Stephen Zielezienski, Statement at AMC McCarran-Ferguson Hearing, at 3–4 (Oct. 18, 2006) [hereinafter Zielezienski Statement].

⁹⁵ See, e.g., Gackebach Statement, at 1–3 (McCarran-Ferguson Act protects collection of loss data that would not be permitted under antitrust law); Michael T. McRaith, Statement at AMC McCarran-Ferguson Hearing, at 3, 9 (Oct. 18, 2006) [hereinafter McRaith Statement]; Zielezienski Statement, at 6–9.

⁹⁶ Gackebach Statement, at 1; McCarran-Ferguson Act Trans. at 15–17, 45–46 (Gackebach); see *also id.* at 91 (McRaith) (allows small and medium-size insurers to participate).

⁹⁷ Joint conduct to collect and use loss data might be immune from federal antitrust challenge under the state action doctrine in any case, if the state regulates such conduct. See McRaith Statement, at 12–14.

⁹⁸ See Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998); Stanley Sher, Statement at AMC Shipping Act Hearing, at 2–3 (Oct. 18, 2006) [hereinafter Sher Statement]; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Shipping Act, at 101–02 (Mar. 17, 2006, revised Oct. 24, 2006). Sher stated that almost 95 percent of ocean liner traffic occurs pursuant to individually negotiated rates, not conference rates. Sher Statement, at 2.

- ⁹⁹ Sher Statement, at 3–4, 12–19; Jean Godwin, Statement at AMC Shipping Act Hearing, at 6 (Oct. 18, 2006).
- ¹⁰⁰ Sher Statement, at 13–14.
- ¹⁰¹ *Id.*
- ¹⁰² *Cf. id.* at 4–5 (stating that those who oppose Shipping Act exemption should ask whether it is worth jeopardizing current benefits from the exemption merely on the basis of academic theories).
- ¹⁰³ The DOJ offers “business review letters” and the FTC offers “advisory opinions,” which allow firms to learn the present enforcement intentions of the agencies with respect to planned conduct that may raise antitrust issues. See 28 C.F.R. § 50.6 (2006) (outlining DOJ business review procedure); 16 C.F.R. § 1.1–1.4 (2006) (outlining FTC advisory opinion procedure).
- ¹⁰⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMPETITION POLICY IN LINER SHIPPING FINAL REPORT 50, 69 (April 16, 2002), available at <http://www.oecd.org/dataoecd/13/46/2553902.pdf>.
- ¹⁰⁵ 15 U.S.C. §§ 4001–21. The Webb-Pomerene Act, 15 U.S.C. §§ 61–65, is similar to the ETC Act, although more limited in scope (it covers goods, not services) and application (only six companies are registered under Webb-Pomerene, in contrast with more than eighty registered Export Trade Certificate of Review Holders). The discussion of the Export Trading Company Act applies as well to the Webb-Pomerene Act.
- ¹⁰⁶ 15 U.S.C. § 4016(a); *id.* at § 4016(b)(1).
- ¹⁰⁷ *Id.* § 4016(b)(3).
- ¹⁰⁸ Sullivan Statement, at 1. The Commission received thirty-five comments supportive of the Export Trading Act or the Webb-Pomerene Act. See Appendix C to this Report (listing comments received).
- ¹⁰⁹ There are approximately eighty Certificates of Review currently in effect, covering thousands of companies that export over \$10 billion per year. Sullivan Statement, at 1; Statutory Immunities and Exemption Trans. at 12 (Sullivan). \$10 billion represents approximately 1.3 percent of total U.S. exports. See John J. Sullivan, Supplemental Statement at AMC Statutory Immunities and Exemption Hearing, at enclosure 2 (Mar. 13, 2006) [hereinafter Sullivan Supplemental Statement]; Sullivan Supplemental Statement, at enclosure 3.
- ¹¹⁰ Sullivan Statement, at 7.
- ¹¹¹ Statutory Immunities and Exemptions Trans. at 14 (Sullivan).
- ¹¹² This Commission identified thirty exemptions created by statute or judicial rulings, which are listed in Annex A to this Section.
- ¹¹³ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6–8.
- ¹¹⁴ Congress has routinely required transparency in the promotion of sound decision-making. See 5 U.S.C. § 553 (notice and comment rulemaking); see also KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 113–14 (1971) (arguing that public scrutiny protects against arbitrary decision-making by administrative agencies). In the realm of antitrust law, Congress has provided mechanisms to ensure sound decision-making and openness. See 15 U.S.C. § 16(b)–(h) (The Tunney Act provides for public comment and public interest review by a court regarding consent decrees.); see also Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4, 6–7.
- ¹¹⁵ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4; ABA Comments re Immunities and Exemptions, at 3–4; Statutory Immunities and Exemptions Trans. at 101–02 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen).
- ¹¹⁶ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6.
- ¹¹⁷ See ABA Comments re Immunities and Exemptions, at 11; Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6.
- ¹¹⁸ See Barnett/Majoras Transcript at 64 (Majoras) (Mar. 21, 2006) (discussing both agencies).

- ¹¹⁹ See ABA Comments re Immunities and Exemptions, at 8–11.
- ¹²⁰ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4–5, 32; Cassell, *Exemption of International Shipping Conferences*, at 13; ABA Comments re Immunities and Exemptions, at 8–11.
- ¹²¹ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5; Statutory Immunities and Exemptions Trans. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen); ABA Comments re Immunities and Exemptions, at 8–10; Cassell, *Exemption of International Shipping Conferences*, at 13.
- ¹²² Statutory Immunities and Exemptions Trans. at 63 (Bush); see also Bush, Leonard & Ross, Framework for Antitrust Immunities Hearing, at 4–5; Prof. Peter C. Carstensen, Statement at AMC Statutory Immunities and Exemptions, at 2 (Dec. 1, 2005) [hereinafter Carstensen Statement]; Abbott Statement, at 6; Statutory Immunities and Exemptions Trans. at 85, 104 (Carstensen); *id.* at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); Vehicle Information Service, Inc., Public Comments Submitted to AMC, at 1 (July 13, 2005) [hereinafter VIS Comments]; ABA Comments re Immunities and Exemptions, at 11, 15–17.
- ¹²³ In other countries, such a burden of proof is imposed as a matter of law. See Treaty Establishing the European Economic Community, Art. 85(3) 298 U.N.T.S. 11 (Mar. 25, 1957) (laying out four quite restrictive conditions any exemption must meet, on a continuing basis, in order to derogate from the basic principle of free competition); European Commission, White Paper on the Review of Regulation 4056/86, Applying the EC Competition Rules to Maritime Transport ¶ 14 (Comm. Prog. 2003/COMP/18, Oct. 13, 2004) (noting that an exemption’s “justification” must remain “valid in light of . . . present market circumstances. If not, there would no longer be a legal justification for the . . . exemption, which consequently would have to be either abolished or revised.”).
- ¹²⁴ See ABA Comments re Immunities and Exemptions, at 9–10.
- ¹²⁵ See *id.* A generally less desirable alternative would be to allow only declaratory judgments and government injunctive challenges to the conduct in question. See *id.* Because the conduct at issue would remain subject to antitrust scrutiny, however, this approach would be preferable to entirely eliminating the potential for antitrust liability.
- ¹²⁶ 15 U.S.C. §§ 4301–06; *id.* § 4301 note.
- ¹²⁷ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 35–38; Statutory Immunities and Exemptions Trans. at 69–70 (Bush); ABA Comments Re Immunities and Exemptions, at 14–15; see also Abbott Statement, at 6; Statutory Immunities and Exemptions Trans. at 92 (Miller).
- ¹²⁸ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 36.
- ¹²⁹ See Statutory Immunities and Exemptions Trans. at 107 (Ross).
- ¹³⁰ The Need-Based Educational Aid Act, which permits some collaboration among some universities as to financial aid policies, was adopted with a sunset. Congress has extended the expiration date twice, and the statute is currently set to expire in 2008. Pub. L. No. 103-382, 108 Stat. 4060 (1994), amended by Pub. L. No. 105-43, 111 Stat. 1140 (1997); Pub. L. No. 107-72, 115 Stat. 648 (2001).
- ¹³¹ See ABA Comments Re Immunities and Exemptions, at 14–15; Abbott Statement, at 6.
- ¹³² For example, one study finds that technological advances in transportation and storage have changed the nature of competition in the dairy industry and “bolstered the market power enhancing effects of regulation.” See David L. Baumer & Robert T. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 210 (1986).
- ¹³³ See James C. Miller III, Statement at AMC Statutory Immunities and Exemptions Hearing, at 3–4 (Dec. 1, 2005); Abbott Statement, at 6.
- ¹³⁴ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5, 36; Carstensen Statement, at 10; Statutory Immunities and Exemptions Trans. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen); VIS Comments, at 1; Office of the Attorney General of New York State, Public Comments Submitted to AMC, at 4 (July 15, 2005); ABA Comments re Immunities and Exemptions, at 14–15.

- ¹³⁵ See Carstensen Statement, at 10 (explaining counterarguments).
- ¹³⁶ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5–6, 35–38; ABA Comments re Immunities and Exemptions, at 14–15.
- ¹³⁷ See Bush, Leonard & Ross, Framework for Antitrust Immunities, at 36–38.
- ¹³⁸ See *id.* at 37.
- ¹³⁹ See Barnett/Majoras Trans. at 64 (Majoras).
- ¹⁴⁰ See ABA Comments re Immunities and Exemptions, at 8–10.
- ¹⁴¹ See, e.g., 15 U.S.C. § 1803(c) (provision of Newspaper Preservation Act providing that antitrust exemption does not reach “any . . . conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity”); 15 U.S.C. § 35(a) (barring money damages in antitrust actions against local governments or against their officials or employees, but only when such defendants act in their “official capacity”).
- ¹⁴² Specifically, Congress did so in Section 5(d) of the Year 2000 Information and Readiness Disclosure Act, Pub. L. No. 105-271, 112 Stat. 2386 (1998), amended by Pub. L. 107-273, Div. C, Title IV, § 14102(e), 116 Stat. 1922 (2002) (codified as amended at 15 U.S.C. § 1 note).
- ¹⁴³ Courts generally construe antitrust immunities narrowly and in favor of application of the antitrust laws. See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005); *Shaw v. Dallas Cowboys Football Club, Ltd.*, 172 F.3d 299, 301 (3d Cir. 1999).
- ¹⁴⁴ See Carstensen Statement, at 13; ABA Comments re Immunities and Exemptions, at 8.
- ¹⁴⁵ See AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 240a; see also Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 339 (2004) [hereinafter Hovenkamp, *Antitrust and the Regulatory Enterprise*].
- ¹⁴⁶ Hovenkamp, *Antitrust and the Regulatory Enterprise*, at 338–40.
- ¹⁴⁷ *Id.* at 341 (“When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside.”).
- ¹⁴⁸ See John Thorne, Statement at AMC Regulated Industries Hearing, at 4 (Dec. 5, 2005); SHENEFIELD REPORT, at 180–81.
- ¹⁴⁹ HOVENKAMP, ANTITRUST ENTERPRISE, at 337–38; see also Kahn, *Deregulation: Looking Backward and Looking Forward*, at 325–30; Stephen Breyer, *Antitrust, Deregulation*, at 1005 (discussing deregulation in telecommunication and airline industries).
- ¹⁵⁰ See HOVENKAMP, ANTITRUST ENTERPRISE, at 238.
- ¹⁵¹ See *id.*
- ¹⁵² *Id.* at 239 (citing JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960)).
- ¹⁵³ HOVENKAMP, ANTITRUST ENTERPRISE, at 241 (citing W. VISCUSI, J. VERNON, & J. HARRINGTON, ECONOMICS OF REGULATION AND ANTITRUST, chs. 10–12 (4th ed. 2005)).
- ¹⁵⁴ GELLHORN, ANTITRUST LAW AND ECONOMICS, at 567; see also HOVENKAMP, ANTITRUST ENTERPRISE, at 239 (“[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins.”) (footnote omitted); Carlton & Picker, *Antitrust and Regulation*, at 39 (after deregulation of various industries, “[c]onsumers benefit [while] special interests are harmed”).
- ¹⁵⁵ See, e.g., Posner, *Effects of Deregulation on Competition*, at 18.
- ¹⁵⁶ See, e.g., *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) (“In so holding, we are not saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere.”).

- ¹⁵⁷ AAI Comments re Regulated Industries, at 1–3.
- ¹⁵⁸ An example is the regulation of access to transmission lines for electricity, which continue to have natural monopoly characteristics. AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ENERGY ANTITRUST HANDBOOK: A GUIDE TO THE ELECTRIC AND GAS INDUSTRIES 36 (2002) [hereinafter ABA, ENERGY ANTITRUST HANDBOOK] (“[T]ransmission facilities are still generally considered essential, monopoly-owned facilities.”).
- ¹⁵⁹ See generally Breyer, *Antitrust, Deregulation*, at 1006–07; Lee A. Rau, *Open Access in the Power Industry: Competition, Cooperation, and Policy Dilemmas*, 64 ANTITRUST L.J. 279, 286–87 (1996); Kahn, *Deregulation: Looking Backward and Looking Forward*, at 327–30.
- ¹⁶⁰ See generally Breyer, *Antitrust, Deregulation*, at 1006–07, 1032–44.
- ¹⁶¹ Kahn, *Deregulation: Looking Backward and Looking Forward*, at 329.
- ¹⁶² See AAI Comments re Regulated Industries, at 2–3; Hovenkamp, *Antitrust and the Regulatory Enterprise*, at 341; Regulated Industries Transcript at 5 (McKenna) (Dec. 5, 2005).
- ¹⁶³ Breyer, *Antitrust, Deregulation*, at 1006.
- ¹⁶⁴ See McDonald Statement, at 9; AAI Comments re Regulated Industries, at 20.
- ¹⁶⁵ Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 406 (2004) (explaining that antitrust-specific savings clause “bars a finding of implied immunity”).
- ¹⁶⁶ See McKenna Statement, at 3 (arguing that “antitrust enforcers and regulators should have complementary, seamless enforcement authority”).
- ¹⁶⁷ *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 147 (2d Cir. 2003) (quoting *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir. 1981)); see also *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682–84 (1975).
- ¹⁶⁸ *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).
- ¹⁶⁹ *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 388 (1981) (quoting *United States v. National Ass’n of Secs. Dealers*, 422 U.S. 694, 719–20 (1975)).
- ¹⁷⁰ *Id.* at 389 (quoting *Silver*, 373 U.S. at 357).
- ¹⁷¹ *Id.* (explaining that “[i]ntent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge”) (citing, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372–75 (1973); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959)).
- ¹⁷² See ANTITRUST LAW DEVELOPMENTS, at 1239; *National Gerimedical*, 452 U.S. at 389.
- ¹⁷³ *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006) (granting certiorari to determine “[w]hether, in a private [antitrust] action . . . challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue.”); see also Brief for the United States as Amicus Curiae Supporting Vacatur, 2007 WL 173649 (Jan. 22, 2007) (supporting *National Gerimedical* as the appropriate test for implied immunity, but arguing that it was misapplied by the Second Circuit).
- ¹⁷⁴ *Trinko*, 540 U.S. at 401–03; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended throughout Title 47).
- ¹⁷⁵ *Trinko*, 540 U.S. at 401–05.
- ¹⁷⁶ *Law Offices of Curtis V. Trinko v. Bell Atl. Corp.*, 305 F.3d 89, 95 (2d Cir. 2002), *rev’d*, 540 U.S. 398 (2004); see also *Trinko*, 540 U.S. at 403–05.
- ¹⁷⁷ *Trinko*, 540 U.S. at 402–03.
- ¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 403–04.

¹⁸¹ *Id.*

¹⁸² *Id.* at 401.

¹⁸³ *Id.* at 406 (stating that “the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency’s regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws Congress, however, precluded this interpretation”) (internal quotations and citations omitted); see also United States Telecom Association, Public Comments Submitted to AMC, at 4–5 (July 15, 2005) [hereinafter USTA Comments].

¹⁸⁴ *Trinko*, 540 U.S. at 410.

¹⁸⁵ *Id.* at 411.

¹⁸⁶ *Id.* at 412.

¹⁸⁷ *Id.* at 415–16.

¹⁸⁸ The doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

¹⁸⁹ See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986); see also *Keogh*, 260 U.S. at 162; McKenna Statement, at 8; Western Coal Comments, at 7.

¹⁹⁰ See *Keogh*, 260 U.S. at 163–64.

¹⁹¹ See 49 U.S.C. §§ 10709(a)–(c), 13710(a)(1). There are, however, specific statutory immunities for certain agreements between rail carriers and between motor carriers. 49 U.S.C. §§ 10706(a)(2)(A), 13501, 13702, 14302(f).

¹⁹² See, e.g., Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization, FTC Staff Comment (Jan. 7, 2002), available at <http://www.ftc.gov/be/v020005.htm>.

¹⁹³ See, e.g., *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852–53 (9th Cir. 2003) (state law claims of unfair competition in electric power industry barred by filed-rate doctrine); *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004) (“Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.”) (citing *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251–52 (1951)).

¹⁹⁴ See, e.g., AAI Comments re Regulated Industries, at 14–15; McKenna Statement, at 7–9. See generally Gregory J. Werden, Open Access Revisited, Remarks Before American Antitrust Institute Fifth Annual Energy Roundtable Workshop, at 7–9 (Jan. 11, 2005).

¹⁹⁵ See *Square D*, 476 U.S. at 423.

¹⁹⁶ See *id.* at 423–24.

¹⁹⁷ See Chapters I.B and II.B of this Report.

¹⁹⁸ Industries in which regulatory agencies previously had, but not longer have, authority to review mergers include trucking and airlines. FERC also has concurrent jurisdiction with the antitrust agencies to review asset acquisitions of natural gas companies. ABA, ENERGY ANTITRUST HANDBOOK, at 77 n.263; 15 U.S.C. § 717(c).

¹⁹⁹ See, e.g., *In re Application of General Motors Corp., Hughes Elec. Corp. & News Corp. Ltd.*, 19 F.C.C.R. 473, 483 (2004) (stating that “the public interest evaluation . . . includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services”). See generally AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, TELECOM ANTITRUST HANDBOOK 70–80 (2005) [hereinafter ABA, TELECOM ANTITRUST HANDBOOK].

²⁰⁰ ABA, TELECOM ANTITRUST HANDBOOK, at 58–70; ABA, ENERGY ANTITRUST HANDBOOK, at 84.

- ²⁰¹ ABA, TELECOM ANTITRUST HANDBOOK, at 70–80; ABA, ENERGY ANTITRUST HANDBOOK, at 84–90.
- ²⁰² See, e.g., 12 U.S.C. § 1828(c)(5).
- ²⁰³ See Scott G. Alvarez, Statement at AMC Regulated Industries Hearing, at 14–15 (Dec. 5, 2005).
- ²⁰⁴ *Id.* at 15.
- ²⁰⁵ See 18 U.S.C. § 1828(c)(6)–(7).
- ²⁰⁶ 12 U.S.C. § 1828(c); see *United States v. First City Nat’l Bank of Houston*, 386 U.S. 361, 366 (1967). It appears that no court has ever found that a bank merger challenged by the DOJ was anticompetitive under Section 7 of the Clayton Act, but permissible nonetheless on the basis of the convenience and needs defense—although in *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969), the court found the merger did not violate Section 7 of the Clayton Act, but that even if it had, the defendants had met the convenience and needs defense.
- ²⁰⁷ See Interstate Commerce Commission Termination Act of 1995, Public Law No. 104-88, 109 Stat. 803, 838–41 (codified as amended at 49 U.S.C. §§ 11321–24).
- ²⁰⁸ 49 U.S.C. § 11324(b).
- ²⁰⁹ See *id.* § 11324(d); see also Regulated Industries Trans. at 11 (McDonald).
- ²¹⁰ See, e.g., Raymond Atkins, Statement at AMC Regulated Industries Hearing, at 9–10 (Dec. 5, 2005) (describing disagreements that arose between the STB and the DOJ during the STB’s review of the Union Pacific/Southern Pacific merger).
- ²¹¹ It remains unclear whether the DOJ could petition for review of an STB decision based on an argument that the STB failed to give “substantial weight” to DOJ’s competitive analysis of the proposed merger.
- ²¹² See Diana L. Moss, Statement at AMC Regulated Industries Hearing, at 9 (Dec. 5, 2005) (“[R]egulatory agencies should play a role in merger review, but their function should be limited to the analysis of non-competitive issues while the antitrust agency evaluates the effect of the merger on competition.”); INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 143, 150–51 (2000) [hereinafter ICPAC REPORT]; see also USTA Comments, at 10 (“The antitrust agencies have for more than 100 years demonstrated both experience and sound judgment in enforcement of the antitrust laws. No comparable record supports the intrusion of the regulatory agencies into the field of competition law.”).
- ²¹³ See ICPAC REPORT, at 145; Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 31 (2000).
- ²¹⁴ See Prof. Peter C. Carstensen, Public Comments Submitted to AMC, at 3 (July 15, 2005).
- ²¹⁵ See ICPAC REPORT, at 143, 153–54. The majority of ICPAC members recommended removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. See *id.* at 143. The ICPAC Report also contains an explanation of the relationship between the antitrust agencies’ authority and the regulatory agencies’ authority. *Id.* at 145–48. Finally, it contains a list of examples in which the antitrust agencies and the regulatory agencies reached different conclusions regarding the likely competitive effects of proposed mergers. *Id.* at 149–50.
- ²¹⁶ *Id.* at 145–47.
- ²¹⁷ Competition Committee of the OECD Directorate for Financial and Enterprise Affairs, *The Relationship Between Competition Authorities and Sectoral Regulators Issues Paper*, at 5–6 (Feb. 2, 2005) available at <http://www.oecd.org/dataoecd/58/7/34375749.pdf>.
- ²¹⁸ See Summary of Discussion Points Presented by the Business and Industry Advisory Committee to the OECD Global Forum on Competition, Session 2: Relationship Between Competition Authorities and Sectoral Regulators, at 3–6 (Feb. 17, 2005), available at http://www.biac.org/statements/comp/Fin_BIAC_CLP_GR_05_Session2.pdf.
- ²¹⁹ See ANTITRUST LAW DEVELOPMENTS, at 1273.

- ²²⁰ *Parker v. Brown*, 317 U.S. 341 (1943).
- ²²¹ *Id.* at 350–52 (states are sovereign save only as Congress may constitutionally subtract from their authority); see *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 632 (1976); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (“Our decision [in *Parker*] was grounded in principles of federalism.”).
- ²²² *Parker*, 317 U.S. at 351.
- ²²³ See, e.g., *Ticor*, 504 U.S. 621, 633; see also Varner Statement, at 2, 5; FTC STATE ACTION REPORT, at 5.
- ²²⁴ See *Parker*, 317 U.S. at 350–52; *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); FTC STATE ACTION REPORT, at 6.
- ²²⁵ *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).
- ²²⁶ See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985) (decisions by state executive departments, agencies, or special authorities do not automatically qualify as state action); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978) (“Cities are not themselves sovereign.”); FTC STATE ACTION REPORT, at 7.
- ²²⁷ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).
- ²²⁸ See ANTITRUST LAW DEVELOPMENTS, at 1274; Varner Statement, at 18; FTC STATE ACTION REPORT, at 8, 52.
- ²²⁹ *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988).
- ²³⁰ *Ticor*, 504 U.S. at 634–35.
- ²³¹ *City of Lafayette*, 435 U.S. at 414. To obtain immunity from antitrust damages (but not from injunctive relief), local governments can rely on the Local Government Antitrust Act of 1984 (LGAA). Local Government Antitrust Act of 1984, Pub. L. No. 98-544, § 2, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34–36). The Act defines local governments as “a city, county, parish, town, township, village, or any other general function governmental unit established by State law or . . . a school district, sanitary district, or any other special function governmental unit established by State law in one or more States.” 15 U.S.C. § 34(1). The LGAA bars antitrust damage actions against a local government and precludes the recovery of antitrust damages from any local government official or employee “acting in an official capacity,” *id.* § 35(a), and from any private party “based on any official action directed by a local government.” *Id.* § 36(a).
- The LGAA does not require the actions of a local government to meet either of the prongs of the *Midcal* test. Congress enacted this statute in response to *Community Communications Co. v. City of Boulder*, in which the Supreme Court held that certain conduct by the city of Boulder, Colorado, did not qualify for state action immunity. *Community Commc’ns Co. v. City of Boulder*, 455 U.S. 40 (1982).
- ²³² American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001).
- ²³³ FTC STATE ACTION REPORT, at 1.
- ²³⁴ *Ticor*, 504 U.S. at 636; see also ANTITRUST LAW DEVELOPMENTS, at 1278; Varner Statement, at 2, 16–18; FTC STATE ACTION REPORT, at 8, 50, 52.
- ²³⁵ AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 221d8; see also Jorde, *Antitrust and the New State Action Doctrine*, at 248; C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1109 (2000).
- ²³⁶ *Southern Motor Carriers*, 471 U.S. at 60; *Town of Hallie*, 471 U.S. at 41–44, 64–65.
- ²³⁷ *Southern Motor Carriers*, 471 U.S. at 61.
- ²³⁸ See, e.g., *City of Boulder*, 455 U.S. at 56.
- ²³⁹ *Id.*
- ²⁴⁰ *Southern Motor Carriers*, 471 U.S. at 64.

- ²⁴¹ See *id.* at 65 n.25.
- ²⁴² *Town of Hallie*, 471 U.S. at 42–43.
- ²⁴³ See *id.* at 41–42.
- ²⁴⁴ *Id.* at 41.
- ²⁴⁵ See FTC STATE ACTION REPORT, at 20; *Patrick*, 486 U.S. at 100–01; *Ticor*, 504 U.S. at 634–35.
- ²⁴⁶ See FTC STATE ACTION REPORT, at 20–21.
- ²⁴⁷ *Town of Hallie*, 471 U.S. at 46.
- ²⁴⁸ *Id.* at 47.
- ²⁴⁹ Mark A. Perry, *Municipal Supervision and State Action Antitrust Immunity*, 57 U. CHI. L. REV. 1413, 1417–18 (1990).
- ²⁵⁰ William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 SUP. CT. ECON. REV. 189, 210 (1993); see also *Patrick*, 486 U.S. at 100–01.
- ²⁵¹ *Midcal*, 445 U.S. at 106 (1980); see also *Town of Hallie*, 471 U.S. at 46–47 (quoting *Midcal*).
- ²⁵² *Ticor*, 504 U.S. at 636.
- ²⁵³ Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271; Jorde, *Antitrust and the New State Action Doctrine*, at 249.
- ²⁵⁴ AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 227a.
- ²⁵⁵ See *Town of Hallie*, 471 U.S. at 46–47; see also Hillary Greene, *Articulating Trade-offs: The Political Economy of State Action Immunity*, 2006 UTAH L. REV. 815, 817 (2006).
- ²⁵⁶ *Crosby v. Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996).
- ²⁵⁷ *Ticor*, 504 U.S. at 634–35.
- ²⁵⁸ *Id.* at 638.
- ²⁵⁹ *Midcal*, 445 U.S. at 105–06.
- ²⁶⁰ *Ticor*, 504 U.S. at 638.
- ²⁶¹ FTC STATE ACTION REPORT, at 25.
- ²⁶² See *Town of Hallie*, 471 U.S. at 41–42.
- ²⁶³ See, e.g., *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). There, a physician challenged a hospital's contract with a physician exclusively to operate the hospital's kidney dialysis facilities. The court reasoned the alleged anticompetitive conduct—the exclusive contract—was foreseeable, because the legislature had authorized the hospital to contract (and terminate contracts) with any individual for the provision of services. *Id.* at 1400. The court also relied on a statute requiring a certificate of need to establish, expand, or relocate kidney dialysis facilities, but the exclusive contract did not raise any issue relating to the establishment of those facilities. See *id.*
- ²⁶⁴ *Ticor*, 504 U.S. at 636; see also Varner Statement, at 13–14 (discussing cases misusing the foreseeability test).
- ²⁶⁵ *City of Boulder*, 455 U.S. at 56.
- ²⁶⁶ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 372 (1991).
- ²⁶⁷ *Surgical Care Ctr. of Hammond v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 235 (1999) (emphasis added).
- ²⁶⁸ *Id.* at 235–36 (holding that statutes authorizing a hospital district to enter contracts and to participate in joint ventures failed to evidence an intent to displace competition by shielding exclusive contracts that prohibited managed care plans from using a competitor for outpatient surgical care).
- ²⁶⁹ FTC STATE ACTION REPORT, at 33.
- ²⁷⁰ ABA Comments re FTC Report, at 9.

²⁷¹ See *id.*

²⁷² *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir. 1994) (Posner, J.).

²⁷³ See Varner Statement, at 6, 16–17.

²⁷⁴ FTC STATE ACTION REPORT, at 12 (citing *Town of Hallie*, 471 U.S. at 46).

²⁷⁵ AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 227a.

²⁷⁶ FTC STATE ACTION REPORT, at 52–53.

²⁷⁷ See *Ticor*, 504 U.S. at 639–40; FTC STATE ACTION REPORT, at 53.

²⁷⁸ See *Ticor*, 504 U.S. at 639.

²⁷⁹ See ABA Comments re FTC Report, at 17–18; FTC STATE ACTION REPORT, at 12.

²⁸⁰ ABA Comments re FTC Report, at 17.

²⁸¹ See FTC STATE ACTION REPORT, at 12.

²⁸² See *id.* at 37.

²⁸³ AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 227a.

²⁸⁴ See FTC STATE ACTION REPORT, at 56; see also AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 227a.

²⁸⁵ See, e.g., Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271; Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, at 767; see also FTC STATE ACTION REPORT, at 40; Varner Statement, at 4, 19; *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (statement of Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission); FTC STAFF, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: CONTACT LENSES.

²⁸⁶ *Parker*, 317 U.S. at 345.

²⁸⁷ Jorde, *Antitrust and the New State Action Doctrine*, at 256. It is counter to the legislative process in general, and specifically as it is applied in the antitrust context. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 343–47 (1904); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 231–33 (1899).

²⁸⁸ See Jorde, *Antitrust and the New State Action Doctrine*, at 253; Varner Statement, at 19; State Action Doctrine Trans. at 25–26 (Varner).

²⁸⁹ See, e.g., EDWIN MANSFIELD, *MICROECONOMICS, THEORY AND APPLICATIONS* 458 (3d ed. 1979).

²⁹⁰ Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271, 1276.

²⁹¹ The Court recognized intrastate spillovers in *City of Lafayette*, noting that decisions of a municipal electric utility may favor the municipality at the expense of “extraterritorial impact and regional efficiency” and could burden consumers living outside the municipality without providing them “meaningful” political recourse. *City of Lafayette*, 435 U.S. at 404–06.

²⁹² None of the Court’s recent cases involved fact patterns that would have raised interstate spillover issues. *Ticor* affected transactions on in-state property. *Ticor*, 504 U.S. at 627–28. *Omni* involved zoning within a single city. *Omni*, 499 U.S. at 367–69. *Patrick* involved peer review proceedings at a single hospital. *Patrick*, 486 U.S. at 97–99. 324 *Liquor* involved mechanisms for raising in-state retail liquor prices. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 340 (1987). *Southern Motor Carriers* involved regulation of intrastate trucking rates. *Southern Motor Carriers*, 471 U.S. at 50–53. *Town of Hallie* involved sewage treatment for areas surrounding a single city within a single state. *Town of Hallie*, 471 U.S. at 36–37. *Hoover* involved admission to the practice of law in Arizona. *Hoover*, 466 U.S. at 560–65. *City of Boulder* involved cable television regulation governing a single city. *City of Boulder*, 455 U.S. at 45–47. *Midcal* involved mechanisms for raising in-state retail wine prices. *Midcal*, 445 U.S. at 99–100.

- ²⁹³ The Supreme Court has expressly rejected a market participant exception to the Eleventh Amendment's divestiture of federal courts of jurisdiction to hear certain claims against states. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). However, some commentators have argued that the Court's reasoning is not readily transferable to the antitrust context. See, e.g., Robert M. Langer & Peter A. Barile III, *Can the King's Physician (Also) Do No Wrong?: Health Care Providers and a Market Participant Exception to the State Action Immunity Doctrine*, in MATTHEW BENDER'S ANTITRUST REPORT 26 (1999); see also Robert M. Langer, Statement at AMC State Action Doctrine Hearing, at 3 (Sept. 29, 2005).
- ²⁹⁴ *Omni*, 499 U.S. at 374–75. The Court explained that the language from *Parker* suggested only that the state action doctrine might not apply when a state acts in a commercial capacity rather than as a sovereign. *Id.*
- ²⁹⁵ *Id.* at 379.
- ²⁹⁶ *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring). Justice Stewart (joined by Justices White, Blackmun, and Rehnquist), dissenting in *Lafayette*, disagreed with the Chief Justice, arguing that the Sherman Act simply was not intended to cover the acts of governmental bodies and that “it is senseless to require a showing of state compulsion when the State itself acts through one of its governmental subdivisions.” *Id.* at 428, 432. Justice Stewart also noted that the distinction between “proprietary” and “governmental” activities has been described as a “quagmire” and that a proprietary activity of government is nonetheless governmental. *Id.* at 433–34.
- ²⁹⁷ *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring).
- ²⁹⁸ *Id.*
- ²⁹⁹ *Id.* at 418.
- ³⁰⁰ See *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) (“To warrant *Parker* immunity the anticompetitive acts must be taken in the state's ‘sovereign capacity’, and not as a market participant in competition with commercial enterprise.”); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001) (“There is also a market participant exception to actions which might otherwise be entitled to *Parker* immunity”); *Hedgecock v. Blackwell Land Co.*, 1995 WL 161649, at *2 (9th Cir., Apr. 7, 1995) (No. 93-16604) (“While a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors . . . such is not the case here.”).
- ³⁰¹ See *A.D. Bedell*, 263 F.3d at 265 n.55.
- ³⁰² *Id.* (quoting *Parker*, 317 U.S. at 352) (emphasis added).
- ³⁰³ *Id.*
- ³⁰⁴ *Hedgecock*, 1995 WL 161649, at *2.
- ³⁰⁵ See *Paragould Cablevision v. City of Paragould*, 930 F.2d 1310, 1313 (8th Cir. 1991) (“[T]he market participant exception is merely a suggestion [in *Omni*] and is not a rule of law.”).
- ³⁰⁶ See *Allright Colo., Inc. v. City of Denver*, 937 F.2d 1502, 1510 n.11 (10th Cir. 1991); *McCallum v. City of Athens*, 976 F.2d 649, 653 n.7 (11th Cir. 1992).
- ³⁰⁷ *Allright*, 937 F.2d at 1510 n.11; *McCallum*, 976 F.2d at 653 n.7.
- ³⁰⁸ See Varner Statement, at 4, 19, 21; ABA Comments re FTC Report, at 20–22; FTC STATE ACTION REPORT, at 49; State Action Doctrine Trans. at 46–47 (Varner). Professors Areeda and Hovenkamp likewise note that Chief Justice Burger's proposed distinction between proprietary and non-proprietary municipal activities “is widely thought to have proved unworkable in identifying appropriate areas of municipal tort liability.” AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 224e3. See generally James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a “State Supervision” Screen for Municipal Market Participant Conduct*, 48 SMU L. REV. 1783 (1995).
- ³⁰⁹ See, e.g., AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 224e3.

³¹⁰ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 593 (1997).

³¹¹ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

³¹² *Reeves, Inc. v. Stake*, 447 U.S. 429, 431–32 (1980).

Statement of Commissioners Burchfield, Delrahim, Jacobson, Kempf, Litvack, Valentine, and Warden

Congress created this Commission in 2002 for the purpose of examining “whether the need exists to modernize the antitrust laws and to identify and study related issues.” Although federal commissions to evaluate the functioning of the antitrust laws are not new, this is the first such commission formed by Act of Congress in 65 years, and the first charged with a full scale review of the antitrust laws since the late 1970s.

Much has changed in the intervening decades. For example, international trade is less restricted and more prevalent, economic analysis of markets and marketplace behavior has become more sophisticated, American public policy has tended to be more firmly pro-competitive and anti-regulatory, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission have become more rigorous in analyzing allegations of anticompetitive behavior, state attorneys general have become more active in enforcing both federal antitrust laws and state competition laws, and courts have begun to eschew simplistic rules in favor of careful analysis. Formation of this Commission was timely and appropriate to assess the impact of these events on the administration of the nation’s antitrust laws.

Against this background, the Commission came to its task with no set preconceptions. Drawn from varied political and professional backgrounds, the Commission has invited and heard testimony, and received written submissions, from distinguished academicians, practitioners, and government officials representing a variety of viewpoints on a broad array of controversial subjects. We believe that the Commission has heard and read these submissions with an open mind and, with the invaluable assistance of its outstanding staff, has carefully evaluated the diverse viewpoints.

Although the Commission has not been unanimous in all its findings, we believe it has achieved a remarkable degree of consensus, especially considering the difficult issues it has considered. We do not agree with every recommendation in the report, nor do we uniformly agree with each other, but we hope and believe the report, taken as a whole, should serve as an influential text for Congress, the President, judges, antitrust enforcers, and practicing lawyers.

Overall, the Commission’s findings indicate that the antitrust laws are working reasonably well. This is due in large measure to the willingness and ability of courts in our common law system and of antitrust enforcers to revisit incumbent approaches to antitrust issues in light of advances in economic thinking and globalization. We applaud this receptiveness to new thinking by both courts and enforcers, and have every reason to believe that it will continue. If it does, the antitrust laws will continue to fit well with the ever-evolving United States

and international economies. And the competition laws of the United States will continue to influence those of other nations.

The Commission did find some notable problems in particular aspects of antitrust law, however, and is therefore recommending a number of carefully considered changes. Some of the recommendations in the report, such as repeal of the Robinson-Patman Act, are not new. The Commission heard persuasive testimony and examined literature that convinced it that the Robinson-Patman Act has failed to serve its intended purpose of protecting small retailers from large chains, whereas its effect, if any, is to dampen vigorous price competition. The Justice Department ceased active enforcement of the Robinson-Patman Act decades ago, and the Federal Trade Commission has rarely enforced it in recent years. Even though it has had a formidable political constituency in the past, we believe a consensus against it has formed and the time has come for outright repeal.

In contrast to the frequent examinations of the Robinson-Patman Act, this is the first Commission to examine the practical effects of *Hanover Shoe* and *Illinois Brick*. Unquestionably, the Supreme Court's desire to save federal courts the difficult and complex task of tracing overcharges due to antitrust violations through the chain of distribution was well-intended. Nevertheless, these decisions have failed to achieve that aim and their practical consequences have proved much too costly. To begin with, under *Illinois Brick*, a direct purchaser who has succeeded in passing on all or a large part of the overcharge will realize an unjustifiable windfall. This windfall would be preserved by proposals to preempt state indirect purchaser statutes, proposals we believe are also politically unachievable. Under *Hanover Shoe*, the windfall is preserved even if federal direct purchaser actions are somehow consolidated for trial with state indirect purchaser actions. This result occurs because *Hanover Shoe* prevents a defendant from asserting or benefiting from the pass on defense against direct purchasers even if (hypothetically) the indirect purchasers were in the same courtroom in the same trial, and allowed to prove the same facts regarding pass on that *Hanover Shoe* prevents the defendant from proving.

A further unintended consequence of the *Illinois Brick* rule has been the advent of indirect purchaser lawsuits in state courts. Removal of these cases to federal court pursuant to the Class Action Fairness Act or otherwise has eviscerated the Supreme Court's desire to protect federal courts from the complexities of tracing overcharges through the chain of distribution. Indirect purchaser actions have unquestionably imposed an administrative burden on both state and federal courts. Even in those rare instances in which all state actions can be removed to federal court and then consolidated with all federal actions by the Judicial Panel on Multidistrict Litigation, current law requires that the cases be returned for trial to the federal district courts from which they were transferred.

The time has come, we believe, to overrule both *Illinois Brick* and *Hanover Shoe*, so that victims of antitrust violations receive just compensation, trebled, in a judicial environment that is efficient and fair to all concerned. We believe the Commission's recommendations

regarding *Illinois Brick* and *Hanover Shoe*, though perhaps not perfect, would produce a major improvement over the current situation.

The Commission's ability to analyze these and other topics in a dispassionate way, with the benefit of considerable assistance from witnesses, public commenters, and a highly capable staff, will, we hope, contribute to the continuing reasoned evolution of the antitrust laws.

Separate Statement of Commissioner Carlton

I submit this statement in order to elaborate on certain topics covered and not covered in the report.¹ I appreciate the difficulty of writing a report reflecting the views of many and compliment the Chair, Vice-Chairman, the other Commissioners, the Executive Director & General Counsel, and the staff for their work. Although differences in wording and tone undoubtedly exist from what I would have chosen, I restrict my comments here to a few select topics. I have tried to keep my comments brief and make reference to some of my articles and textbook for the reader interested in the details of my reasoning.

Tests for Exclusionary Conduct: Exclusionary conduct cases are highly varied and therefore one should not expect that a test that works well in one type of case will necessarily work well in another. Safe harbors for predation have little bearing on safe harbors for exclusive dealing. Developing different safe harbors for different types of conduct should be a priority. Proposed tests (e.g., profit sacrifice or no economic sense) that require one to specify the logic or profit of an act, but for the exclusion, can require a complex calculation subject to error. These proposed short cuts will work in only some exclusionary conduct cases. See Carlton (2007b).

Bundling: Although I vote in favor of the suggested safe harbors on bundling, I emphasize that they may fail to protect unobjectionable conduct. The justification for the first of the three pronged test (incremental revenues exceed incremental costs) seems to be based on an analogy to the Areeda-Turner (A-T) predation test that a safe harbor exists if price exceeds marginal cost. The analogy of bundling to price predation is faulty. In the predation model of A-T, there is one price. In the standard competitive model, it is odd for price to be below marginal cost in the absence of a predatory goal and, therefore, if one does observe this peculiar fact, one can go on to ask whether predation is likely by examining the possibility of recoupement. In the context of bundling, it is *not* odd to have the firm fail the first prong of the AMC test in the absence of a predatory goal. The reason is that bundling can be used as a method of price discrimination and it can be optimal for a firm, with no predation motivation, to set prices that fail the first prong. For example, if a razor manufacturer bundles a razor and razor blades together in a package and the bundle price is less than the price of blades plus the cost of the razor, then the pricing fails the first prong, even though this is a profitable strategy when one considers the future sales of razor blades. This type of pricing is well known to economists and not uncommon. See Carlton and Perloff (2005, ch.10).

* This statement, as well as my votes and opinions in the report and in deliberations, does not necessarily reflect the views of the Antitrust Division of the Department of Justice where I am currently serving as Deputy Assistant Attorney General for Economic Analysis.

By offering product A separately from the bundle consisting of (A, B), a monopolist can separate consumers into different groups and charge different prices. See Carlton and Perloff (2005, p.324–30). The first prong of the AMC recommendation ignores the revenue benefit from this separation. Moreover, adoption of the first prong could cause some firms to offer only the bundle and therefore make it impossible to apply the first prong of the test. If the first prong is adopted by courts, they must understand that a defense for the pricing based on legitimate business reasons unrelated to predation should be allowed so there should not be a presumption (as there is in the A-T price-marginal cost test) that failing the first prong should suggest that something odd is occurring. Moreover, a defense showing the challenged pricing was used either for many years (so predation is unlikely) or during a time with no possibility of predation should allow a firm to escape liability.

Tying: The laws of tying need clarification. There is no escaping that tying is ubiquitous, can be efficient, yet can also harm competition. Therefore, the per se treatment of tying makes no sense while the rule of reason as articulated in *Microsoft* does. The logic of the leading case on tying, *Jefferson Parish*, is often non-economic. “Forcing” in particular is a peculiar concept. Courts should distinguish between tying that is price discrimination (which may help or harm consumers, but which is generally legal), and tying that can alter the competitive structure even for consumers not interested in buying the tying product. Only the latter should be subject to antitrust liability. See Carlton and Waldman (2002, 2005, 2006, forthcoming), Carlton (2001, 2007a).

Indirect Purchasers and Illinois Brick: I oppose the recommendation to overrule *Illinois Brick*, a decision that eloquently spells out the difficulties of allowing indirect purchasers to sue. I recognize that in certain cases direct purchasers may not have an incentive to sue. I therefore would allow minor exceptions to a ban on allowing indirect purchasers to sue. I would recognize the exceptions described in *Illinois Brick*. I would also consider allowing an exception when an insufficient percent (by volume of sales) of direct purchasers sue within a certain time period, as can occur when direct purchasers fear suing their major supplier. Further study is needed to determine what is an appropriate time period and to define “insufficient”. I would preempt state laws regarding indirect purchasers.

I oppose the AMC recommendation to allow the removal of state claims on behalf of indirect purchasers to federal court. Although I oppose the recommendation, it would be improved if instead of removal, state claims were preempted and replaced by a limited federal right allowing indirect purchasers to sue.

Treble Damages: One purpose of damages is to deter undesirable conduct. A multiple of damages is needed when detection is not certain or when some parties are unable to sue to collect damages. I favor a reduction in the multiple to single damages when the actions are overt (e.g., exclusive dealing), and an increase in the multiple when there are some parties affected by the act who are unable to sue (e.g., foreign consumers in an international price fixing case). See Carlton (2007a). There are already limited instances in which only

single damages are available (for example in the case of research joint ventures) in recognition of the principle that treble damages can under certain circumstances deter efficient behavior.

Contribution: I do not favor allowing non-settling parties to sue each other for claims for contribution because it involves a use of court resources and I am not convinced that it leads to more efficient deterrence.

Attempts to Conspire: If person A asks person B to fix prices, and person B refuses, it is unclear whether person A faces antitrust liability. I would alter the relevant laws including civil or criminal fine authority to allow antitrust liability and penalties on person A.

Robinson-Patman (RP): If repeal of RP does not occur, I would recommend that courts impose a requirement of antitrust injury in order to trigger antitrust liability under RP.

States' Merger and Non-Merger Authority: I would confine the states' antitrust authority to local matters and to those involving price fixing, boycotts, bid rigging, and market allocation. I would eliminate the states' authority to sue in cases involving mergers or other non-merger matters. I would preserve the right of states to sue in their *parens patriae* capacity for the exceptions I discuss above regarding suits by indirect purchasers. Based on evidence presented to the Commission, I fear that some states are understaffed in the area of antitrust and that there can be differences between the objectives of state antitrust enforcers and federal antitrust enforcers where this difference could lead states to pursue antitrust actions in which there is no antitrust injury. Moreover, because the actions of one state can affect other states when matters are not local, I favor confining states' antitrust activities to those involving only local matters. I would further confine their activities to hard-core antitrust offenses because that is where they already devote a considerable amount of effort and because that is where antitrust doctrine is clearest.

Study of Antitrust: Empirical studies of antitrust policy are needed to ensure that antitrust policy is appropriate. Retrospective studies of past policies can be useful. For example, studies of allowed mergers can confirm whether prices rose or fell after particular mergers. A finding of a systematic increase in price after mergers could indicate that merger policy is too lax. A more difficult, though perhaps more important issue, is the effect of antitrust policy on the economy. For example, a decision to forbid a particular merger may dissuade other firms from merging despite the fact that the merger involving those firms may enhance efficiency. Similarly, a decision such as that in *LePage's* that cast doubt on the legality of common pricing practices could impose costs on the economy as many firms readjust their pricing to conform to the particular decision.

Clearance Disputes: The report discusses the need to assign a merger case quickly to either the FTC or DOJ when a dispute arises between the two agencies as to which agency has the better expertise to handle the merger. Resolution of this issue is related to the much broader issue of how in the long run, industries should be assigned to either the FTC or DOJ. As some industries develop and others decline, there should be some mechanism to make

sure that the industries be assigned to agencies with a sense of keeping the agencies in some balance.

Consumer versus Total Surplus: There continues to be a debate as to whether the antitrust laws should focus on only consumers (consumer surplus) or on both consumers and producers (total surplus). Aside from doubting the practical significance for most cases of resolving this issue, I note that I favor total surplus and that total surplus is what is used routinely in cost-benefit analysis, a tool of widespread use in public policy. I also note that there is a gaping logical inconsistency between favoring a consumer only objective and at the same time opposing a cartel to monopsonize. A cartel to monopsonize lowers total surplus but does not affect consumers in the standard models of monopsony. This logical inconsistency is one illustration that the focus on only consumers is undesirable. See Carlton (2007a).

Market Definition: The misuse of market definition cases is common especially in Section 2 cases when the analyst attempts to apply the market definition procedures of the Merger Guidelines. The arbitrariness in how markets are defined undoubtedly leads to significant error. I regret that the report is silent on the topic of market definition. See Carlton (2007b).

Market Power: The courts and economists are often unclear what the term “market power” means. Pricing above the competitive level, which is often taken to be marginal cost, is one common definition. If the market cannot be competitive, what should be used as “the competitive level”? Should one focus on rates of return and see whether the return is above the competitive levels? What is the difference between “market power” and “monopoly power”? How much market power is significant? How durable should the power be? The AMC is silent on these issues, which are in need of clarification. See Carlton (2007b).

Reports on Regulatory and Legislative Actions: The agencies should have a free hand to investigate and report to the American public the consequences on competition and on American consumers of various federal, state, and regulatory actions without fear of retaliation. Once they are aware of the costs their actions impose, the relevant government bodies can then decide whether their interference in the competitive process is justified by non-economic or political goals. Aside from examining various exemptions, the effect of International Trade Commission decisions would be a useful subject to study. By making transparent the costs of interfering in the competitive process, the public might be better informed and better served than they would otherwise be.

Competition Advocacy: The FTC and DOJ have a large concentration of economists and lawyers knowledgeable about the benefits of competition. They should be, but are not always, used effectively as a resource by other federal and local government agencies for structuring regulations in a way so as to not interfere too much with the competitive process.

Foreign Training: A desirable and recent phenomenon is the development of antitrust agencies around the world. An investment in the training of foreign enforcers is a good one for the U.S. Such training should receive high priority.

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Separate Statement of Commissioner Makan Delrahim

It has been a true pleasure and honor for me to have had the opportunity to serve on this Commission with such a distinguished and dedicated group of professionals that despite different political affiliations all recognized the value of competition in advancing the marketplace and ultimately consumer welfare.

As the Commission's work progressed over its three year mandated life, I grew increasingly pleased with the recommendations and the general consensus the Commission was able to reach on most issues. My time serving in the legislative and executive branches in the government taught me that the best way to advance policy is to have as broad consensus on issues as possible. This is often possible if the position advocated is principled and those determining the policy approach the issue in a principled and serious manner. That was the result of the Commission's work and in large part due to the thoughtful approach and process implemented by the Chairman and the Vice-Chairman, Deb Garza and Jon Yarowsky, respectively, who deserve great credit for instilling a sense of unity to the group. In addition, the professionalism and dedication to competition of each of the Commissioners made the implementation of the goals of Commissioners Garza and Yarowsky possible.

Even with the largely consensus recommendations presented here, there were, of course, differences. These differences were generally few, and Commissioners were content to have had their votes recorded accordingly. We all abided by the process whereby the majority view prevailed. In fact, we worked hard where possible, even in those situations where we found ourselves in the minority, to make suggestions so the ultimate recommendation would enjoy as close to consensus support as possible.

Antitrust and Patents:

In all aspects of the Commission's study, except for one, the Chapter on Antitrust and Patents, I believe the consensus process was followed and whether I agreed with the majority or not, I was comfortable that the Commission, through its adopted process, selected an issue for study, sought public input from those involved, fairly deliberated the issues, voted on them, debated the issue after the vote and discussed the recommendations it would make. It is the recommendations contained in the very critical chapter on Antitrust and Patents that, in my view, unfortunately the Commission does not have the benefit of the full and fair record and deliberation they warrant.

It is because of this that I feel compelled to write a separate statement to present a full background of the very complex and important issues presented for the benefit of my fellow Commissioners as well as the public and the policy makers who will consider the recommendation of this report.

In my view, without taking anything away from all of the other critical issues that the Commission studied and I participated in, the most lasting impact of the Commission's work is the effect of its commentary in two areas: (1) international; and (2) antitrust and intellectual property, and particularly as these two areas intersect.¹

I hold these two areas for several reasons. One is the globalization of antitrust laws, with approximately 90 international trading partners with antitrust regimes without an international agreement or common standard of what the laws should be. Another is the fact that intellectual property-based exports—whether copyrighted music, movies or software, or patent-protected goods such as pharmaceuticals or electronic products—have become this country's number one export. As such, their creation and protection is critical to maintaining a vibrant economy. But, with the rapid pace of globalization, intellectual property rights are increasingly crucial to all sectors of the global economy as well. Moreover, as firms innovate, manufacture and market their products globally, licensing of the intellectual property rights they hold or need often proceeds on a global scale, and differences among nations' licensing rules have the potential to disrupt cross-border commerce. As a result, I think this Commission has an important and justified interest in the choices the U.S. Government and other jurisdictions make about how their antitrust authorities will analyze the restrictions that appear in intellectual property licensing agreements.

My colleagues on the Commission are well familiar with my passion for this area for the creative and innovation community. I am heartened that we now live in an era in which the benefits of intellectual property rights are recognized around the world and the protection of these rights, once they have been recognized in any one country or region, is often made global through a patchwork of bilateral and multilateral agreements. These agreements have played a vitally important role in creating a bundle of rights and obligations that in effect globalize the protections for intellectual property.

That is why I feel so deeply about any issues this Commission studied or recommendations it now suggests. In my view, antitrust law and policy must be careful not to constrain the legitimate exercise of intellectual property rights. The application of antitrust laws must not illegitimately stifle creators or innovation by condemning pro-competitive activities that would maximize incentives for investments or efficiency-maximizing business arrangements. Antitrust enforcers should also strive to eliminate as much as possible the unnecessary

¹ As I have disclosed to my fellow Commissioners, over the past year, I have represented many technology companies who may or may not fully support the statements that I make here. My views and passion on the topic here are a matter of public record from my speeches and articles while at the Department of Justice or while I was a staff member of the Senate Judiciary Committee. For the purposes of full disclosure, these companies have included Oracle, Microsoft, Micron, Qualcomm, Intel and Apple. I also represent other companies who might be interested in my comments here, including Johnson and Johnson, sanofi-aventis and the Medical Device Manufacturers Association. I do not and have not represented any of these companies before this Commission. I have represented Qualcomm before the US and foreign antitrust agencies on some of the topics I discuss here.

uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce the incentives for innovation. Only when the holders of intellectual property rights go beyond the legitimate exercise of these rights should antitrust law be used to constrain their activities, and only then in a manner that is based on sound economic policies.

There were many issues I wish we had the resources to study, as did a number of my fellow Commissioners. We all recognized early on and respected that to do a thoughtful job, we must restrain our desires and study a limited number of issues in accordance to a process adopted by the Chair and the Vice-Chair at the outset. It was within that process that a subcommittee voted on a set of issues to recommend to the full Commission and the Commission voted on those issues that a majority thought worthy of further full study to include public comment and full deliberation.

Unfortunately, the very important, yet very complex issue of the antitrust treatment of standard-setting was not one of those issues selected for study. As such, this Commission did not receive nor debate in its regular course full testimony on the topic for all Commissioners to be fully informed of all the issues at play and the policies at stake. I therefore do not support the Commission's recommendations in this chapter, nor believe it is worthy of this Commission's support given the amount of thought and deliberations other topics of study rightfully and thoughtfully received. It is in that spirit that I provide the following background so the public and my fellow Commissioners have the benefit of at least this Commissioner's thoughts on this critical issue. Moreover, I withheld my support for a whole-sale endorsement of the FTC and NAS patent reform recommendations, not because I disagree with them, but as I stated during the deliberations, I believe that this Commission did not spend nor have the resources to spend to review each of the recommendations for it to put its credibility behind all recommendations the ramifications of which it did not fully consider or deliberate.

I now turn to the issue of standard-setting and antitrust and the Commission's inadequate background and debate behind its recommendations in this area.

This is undoubtedly one of the most interesting and important areas of debate in antitrust and innovation policy today. It is interesting because it challenges some of the basic concepts of intellectual property rights (IPR) and antitrust policy, and because it is an unsettled and evolving area of the law. This issue is critically important because the legal and regulatory framework for standard setting has—and will continue to have—a profound effect on the way innovative ideas get to market and innovators get compensated, and hence affects the whole innovation policy debate.

With true humility and recognition of my lack of economic training, I suggest—and I believe economists have universally recognized—that there are two types of efficiency in the context of this discussion. The first is called static efficiency, and it occurs when two or more companies are competing within a particular technology. The competition among those firms

will lead to a streamlining of production and other cost-saving steps in order to reduce manufacturing costs and, ultimately, the price consumers pay. Although the benefits of static efficiency are very important, they are incremental gains. In contrast, the other type of efficiency, dynamic efficiency, results when an entirely new technology is developed and made available to consumers. Dynamic efficiency has much more dramatic effects on consumer well-being, and therefore is an appropriate focus of attention for policymakers.

Standard-setting should be viewed as a potential means for bringing about dynamic efficiency. In the words of current Deputy Assistant Attorney General Gerald Masoudi, my friend and successor at the U.S. Department of Justice Antitrust Division, “The goal of standard setting, generally speaking, is to find the best combination of technical success, cost, and time-to-market, while also delivering enough economic surplus that all parties (inventors, producers, and consumers) can share, so that the product is commercially viable.”²

The setting of industry standards has proven useful and important to many sectors of the economy. By allowing products produced by different firms to function together, the setting of standards has made many products more valuable to consumers and often increased their utility. The setting of a standard for telephone cords and plugs, for example, has enabled the proliferation of devices and components that consumers purchase, knowing that they will plug into the phone or phone jack they have at home. As the global economy is increasingly characterized by information technology and intellectual property, the setting of industry standards has become both more critical and more complicated. Companies in high-technology industries understand the value of interoperability, which produces a strong incentive for companies within an industry to agree on a standard. Most often, standards are set in a reasonable and productive way that benefits both the companies that produce items utilizing that standard, as well as the consumers who buy them.

Standard setting is becoming a more prevalent practice particularly in the new digital marketplace. Standards for data transmission, for digital content protection, and for authentication are all becoming necessary elements for a robust and interconnected digital economy.

Industry standards can be created through de facto consumer preferences won through competition in the marketplace (e.g., Microsoft’s Windows Operating System) or through collaboration on de jure standards in formal standard setting organizations. The standards, created for the operation of 3G Wireless technology, for example, were a result of a global effort by governments and private industry participants. Another example is the collaboration of industry participants in the DVD Forum to approve a format for high definition digital versatile discs (HD-DVD), using its open standards process. Standards can also be developed through

² Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, High-Level Workshop on Standardization, IP Licensing, and Antitrust, Tilburg Law & Economic Center, Tilburg University, Chateau du Lac, Brussels, Belgium (January 18, 2007), at 5.

government-sponsored initiatives (the FCC's V-Chip regulation is one example) or through efforts by smaller groups of private industry participants (such as those efforts by the Blu-ray Disc Association (BDA) to create independently a format for "next generation" optical disk technology).

Standards are often procompetitive because they are designed to curb modern-day problems associated with network markets and interoperability requirements. Standards can also facilitate competition among competitors who are vying to have their technology selected as the "winning" standard. A good example is the "standards war" for the next generation DVD format between members of BDA (led by Sony) and supporters of Toshiba's and NEC's HD-DVD format. Although technical aspects of the Blu-ray and HD-DVD formats differ, next generation optical discs are generally attractive because they promise significantly enhanced piracy protection, more interactive features, and greater storage capacity.

The war between Blu-ray and HD-DVD may remind many of us of the Betamax/VHS struggle to become the standard technology for video cassette recorders. We know that in the end, the market could not sustain the competing formats and VHS prevailed. Perhaps history will repeat itself, and vigorous competition will create a *de facto* standard, achieved by operation of the market. Or perhaps market forces will drive these competitors to agree on one standard, possibly incorporating the most attractive aspects of each format. In either case, it appears this battle will be fought and won in the marketplace, where it belongs.

De jure standards that are established through collaboration raise different competition concerns, for example, when the standard setting process is used to exclude industry participants from having their technology considered by the group. Collaborative standard setting, some say, can foster collusion on the terms at which the winning intellectual property can be licensed. Some also claim that winning intellectual property owners can hold-up the implementation of the standard by imposing onerous licensing terms. I wish the Commission could have studied this claim. There doesn't seem to be much empirical evidence of this.

Problems further arise when standard setting organizations adopt uncertain disclosure rules, setting the stage for what has become known as "disclosure hold-up," the intentional failure to disclose intellectual property rights that would be infringed by complying with the standard after the standard is adopted.

The answer for the so-called patent holdup suggested by some has been *ex ante* negotiations between the patent holder and the standards participants. This is what the Commission seems to endorse, but the issue is not that simple. My concern is that without more guidance, the Commission's recommendation will have a potential to be misinterpreted and ultimately result in reduced innovation.

Let me provide some background on different approaches for competition policies in standard setting organizations. Standard-setting organizations have tried three main mechanisms to address competitive hold-up issues through their organic policies: reasonable and nondiscriminatory licensing (RAND) commitments; mandatory predisclosure; and *ex ante* licensing.

The first approach, RAND, has succeeded for the most part. Sometimes, it is the “reasonableness” of licensing prices that leads to trouble. Parties to such an agreement understandably see things much differently before a standard is set than afterward, or *ex post*. And the party whose technology is chosen as the standard may very well have a different view of what price is reasonable for the others to pay.

Mandatory disclosure, the second mechanism, relies upon the parties not only to fully disclose all of their relevant technology, but also to fully understand each other’s technology prior to standard setting. Both are high burdens, particularly in light of the fact that standard setting can take unpredictable paths and can therefore encroach on technology that parties did not foresee as relevant. Predisclosure thus can suffer unintentional under-disclosure—but also can suffer from intentional under-disclosure and even over-disclosure. Either situation highlights the weakness of predisclosure agreements, even though it is probably the most effective mechanism with appropriate enforcement by private or public authorities for any fraudulent activity by the standards participant.

The third mechanism, *ex ante* licensing, the supposed subject of the recommendation of the Commission, has become the most controversial. The idea behind *ex ante* licensing is that, prior to standard setting discussions, the participants will agree on the prices to be paid for the intellectual property that may govern the selected standard. One theory behind this approach is that it eliminates so-called patent hold-up because the party whose technology is chosen as the standard is bound to license that technology at a pre-bargained or pre-disclosed maximum price.

The problem with *ex ante* licensing, however, is that it could facilitate horizontal price fixing because it is done in a group of potential horizontal competitors who are sharing prices and other terms. In addition, any joint discussions, negotiations, and setting of royalty and other licensing terms may reduce any procompetitive benefits of the standards process and raise risks of collusive exercise of monopsony or oligopoly power. For example, such collective conduct directed at establishing licensing terms may drive the value of IPR contributed for standardization below its optimal prices and toward its marginal cost—that is, zero. The Antitrust Division and Federal Trade Commission recognize the adverse competitive effects of such conduct. The DOJ/FTC *Horizontal Merger Guidelines* explain that “[m]arket power also encompasses the ability of a single buyer (a ‘monopsonist’), a coordinating group of buyers, or a single buyer not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers (‘monopsony power’) has adverse effects comparable to those associated with the exercise of market power by sellers.”³ Agency joint venture policy also includes express recognition of the serious competitive risks associated with the exercise of buyer-side mar-

³ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (issued April 2, 1992, revised April 8, 1997), at § 0.1.

ket power. A buyer collaboration—which is what would exist if royalty and other license terms were collectively established in the standards setting context by a group comprised primarily of prospective licensees—can “create or increase market power . . . or facilitate its exercise by increasing the ability or incentive to drive [down] the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement.”⁴

In fact, there are circumstances in which case law would support the continued application of a *per se* rule to ensure that there will not be a collusive buyers’ cartels.⁵

Let me now mention two items that underscore the very live and active issue that the Commission, in my view, is addressing without fully appreciating the impact. These two items are the VITA Business Review Letter and the IEEE Request for Business Review Letter.

In October 2006, the Antitrust Division rendered a favorable business review letter to the VMEbus International Trade Association (VITA), a group that develops standards for certain computer bus architecture.⁶ The VITA *ex ante* licensing policy included, among other things, these five provisions: (1) Disclosure of all patents or patent applications that believes may become essential to implementation of the future standard. Members must do this before a working group is formed, sixty days after the working group is formed, and then fifteen days after the draft standard is published. (2) Disclosure of maximum royalty rates and terms they will demand for essential rights. These rates and terms are binding. (3) Agreement that the commitments apply only to the particular standard being developed and not to other uses of the technology. (4) Commitment not to negotiate licensing terms among working group members or with third parties. (5) Agreement to arbitrate any disputes over members’ compliance with the agreement. The policy lists some consequences for non-compliance, including that the penalty for failure to disclose an essential patent is a free license of patent rights related to the standard.

The DOJ’s response letter concludes that this specific VITA policy was not likely to harm competition. It found that the prohibition on joint negotiation of licensing terms protected against unfairly low royalties due to anticompetitive acts. The patent holder is free to nego-

⁴ U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, at § 3.31(a).

⁵ See *Mandeville Farms v. Am. Crystal Sugar*, 334 U.S. 219 (1948) (finding *per se* unlawful an agreement among local sugar refiners to set the purchase price for sugar beets); *National Macaroni Mfrs. Ass’n v. FTC*, 345 F.2d 421 (7th Cir. 1965) (finding *per se* unlawful a trade association rule that fixed the percentage of durum wheat included in macaroni products produced by trade association members in order to depress market demand and price during a crop shortage).

⁶ Letter from Thomas O. Barnett, Assistant Att’y Gen., U.S. Dep’t of Justice, to Robert A. Skitol (Oct. 30, 2006), <http://www.usdoj.gov/atr/public/busreview/219380.pdf>; see also Press Release, U.S. Dep’t of Justice, Justice Department Will Not Oppose Proposal by Standard-Setting Organization on Disclosure and Licensing of Patents (Oct. 30, 2006), http://www.usdoj.gov/atr/public/press_releases/2006/219379.pdf.

tiate after the standard is set, but will continue to be bound to the maximum terms it set forth earlier.

One month after the DOJ issued the VITA Business Review Letter, the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and its Standards Association (IEEE-SA), requested a Business Review Letter concerning proposed changes to the IEEE-SA's Patent Policy. That request is still pending. The IEEE-SA request apparently would apply to more than 1300 standards in a wide array of fields. Like the VITA policy, the IEEE-SA policy would compel patent owners to disclose their rates and terms in order to avoid the possibility that their technology will be excluded from consideration in the standard setting. But unlike the VITA policy, the IEEE-SA policy, as I understand it, appears to contemplate that the rates and terms of prospective licenses will be discussed within the organization as part of its consideration of the relative costs of the competing technologies, and outside the organization as well. The IEEE-SA maintains that these provisions are reasonably necessary to prevent the imposition of "unexpected" royalties *ex post*. What are these when we deal with patented technology? The goal of any antitrust policy cannot be that the ultimate price of intellectual property inputs is or should be zero.

The VITA and IEEE-SA policies are not only changing the way standard-setting organizations operate, but also may be tilting of the process in favor of IPR users at the expense of IPR owners, and perhaps to innovation itself. After all, these policies are essentially "reverse auctions" held by a coordinated group of horizontal actors whose goal is to reduce royalties to as low a level as possible. And with the DOJ's favorable letter(s), standard-setters' fears of buy-side antitrust liability based on the district court decisions in *Sony v. Soundview*⁷ and *Golden Bridge v. Nokia*⁸ will be limited at best. The result could be a classic "buyers' cartel" exercising *per se* unlawful market power with the effect of: (1) reducing the incentive to innovate both in core technologies and complimentary applications; (2) depriving consumers of products based upon superior technology; (3) artificially lowering return on investment to IPR owners below market rates; and (4) ultimately increasing costs to consumers of products resulting from standardization efforts. The reason that all of this could result is that the VITA and IEEE-SA policies drive down the cost too fast. As Deputy Assistant Attorney General Masoudi said:

The same forces that yield the benefits of static efficiency—conditions that encourage rivals quickly to adopt a new business method and drive their production toward marginal cost—can discourage innovation (and thus dynamic efficiency) if the drive toward marginal cost occurs at such an early stage that it pre-

⁷ *Sony Elecs., Inc. v. Soundview Techs., Inc.*, 157 F. Supp. 2d 180 (D. Conn. 2001).

⁸ *Golden Bridge Tech., Inc. v. Nokia, Inc.*, 416 F. Supp. 2d 525 (E.D. Tex. 2006).

vents recoupment of development expenditures, and makes innovation uneconomical.⁹

It would be a tragedy for IPR and antitrust policy if the law were to become a hindrance to innovation rather than an incentive to efficiency.

The legality of joint discussion and negotiation of royalties and whether it is evaluated according to the “rule of reason” rather than the *per se* treatment is under serious debate in the United States and abroad. There still is not enough economic research to support the statements in the Commission report, let alone the statements by the US agencies so far.

In different contexts, the *ex ante* discussion and negotiations could have either pro- or anti-competitive effects. As explained by the Agencies in their *Collaboration Guidelines*:

Agreements not challenged as *per se* illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered *per se* illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.¹⁰

This balancing approach appears to be reasonable and is essentially reflected in FTC Chairman Majoras’s remarks at Stanford University in 2005, where she explained that “joint *ex ante* royalty discussions that are *reasonably necessary to avoid hold up* do not warrant *per se* condemnation. Rather, they merit the balancing undertaken in a rule of reason review.”¹¹ A proper balancing must take into consideration the rights of the IPR owners as well as IPR users, and must comport with the goal of efficiency, both static and dynamic.

I again thank my fellow Commissioners for their work and indulgence and hope they find this more detailed background useful.

⁹ Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, High-Level Workshop on Standardization, IP Licensing, and Antitrust, Tilburg Law & Economic Center, Tilburg University, Chateau du Lac, Brussels, Belgium (January 18, 2007), at 3.

¹⁰ U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, at § 1.2.

¹¹ Deborah Platt Majoras, Chairman Federal Trade Commission, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, remarks prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Stanford University (Sept. 23, 2005), at 7 (emphasis added).

**Separate Statement of Commissioner Jacobson,
Joined by Commissioners Valentine (Except as to Part III)
and Warden (Except as to Parts I.B and II.B)**

It is difficult to overstate the importance of the antitrust laws. By pursuing antitrust, we have established competition as the means of determining market outcomes in the United States. This reliance on the free market has enabled us to avoid the far more intrusive governmental control that has characterized (and often stunted) the economies of other nations. As a result, the United States has developed an economy that is universally admired and respected—with levels of output, price, quality, and variety envied across the globe. Our choice of “antitrust” in 1890 and 1914 has thus proven to be among the best political decisions any country has made. It is a choice now being replicated in substantial part by country after country around the world.

Congress created the Antitrust Modernization Commission against this background. Our assignment has been to study, reexamine, and analyze our existing antitrust regime and to determine whether, and if so to what extent, changes are necessary or desirable. The Commission’s Report, which I join enthusiastically in major part, correctly reaffirms the fundamental soundness of the antitrust laws themselves and the procedures for enforcing them. The Commission wisely proposes no changes to any of the most important substantive statutory provisions—sections 1 and 2 of the Sherman Act, sections 3 and 7 of the Clayton Act, and section 5 of the FTC Act. The Commission similarly proposes no radical change to the key mechanisms of enforcement—criminal proceedings; civil proceedings by the DOJ or FTC; private actions for treble damages and injunctive relief; and actions by the various state attorneys general. The changes the Commission recommends are instead designed to enhance, not overturn, the existing structure of antitrust enforcement.

The Commission’s key reform proposals warrant the most careful attention by the Congress and the enforcement agencies. Adopting them will improve the quality and character of antitrust enforcement. Particular heed should be paid to the following recommendations:

- Repeal of the anti-consumer Robinson-Patman Act;
- Reform of indirect purchaser litigation;
- Repeal of existing judicial rules forbidding claim reduction and contribution among antitrust defendants;
- Reforming merger clearance and the process for issuing “second requests” under the Hart-Scott-Rodino Act; and
- Narrowing the number and scope of antitrust exemptions and immunities.

I write separately for three reasons: *first*, to underscore my endorsement of the Commission's most significant recommendations; *second*, to address a few important opportunities that the Commission missed; and *third*, to express my specific disagreement on one matter—the Commission's recommendation on criminal sentencing. For the most part, where I have parted company with my colleagues, I have simply noted my disagreement in footnotes to the main Report. The issues addressed here are limited to those warranting more extended comment.

I. Important Facets of the Commission Report

a. No change to the key substantive antitrust laws

The antitrust laws generate enormous benefits for U.S. consumers every day. By stopping cartels, preventing mergers that would create or enhance market power, and forbidding significant restraints of trade and exclusionary practices, the antitrust laws provide for an “unrestrained interaction of competitive forces [that] yield[s] the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.” *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). That famous statement, by Justice Black speaking for the Court almost fifty years ago, remains equally valid today.

If there is any key message to be distilled from the Commission's Report, it is simply that the antitrust laws—both substantively and procedurally—are working well and need not be displaced, rolled back, or overhauled. The Commission had the opportunity to review every aspect of our antitrust system and, in fact, did review major portions. Yet after three years of hard work and analysis, the Commission's proposals for reform, while quite important, are comparatively modest and incremental. That this is such a strong consensus conclusion of the Commission—a Commission incorrectly feared by some, at the time of the Commissioners' appointments, to be antagonistic to antitrust enforcement—is a point of great significance. The Commission's reaffirmation of the basic principles of the antitrust laws and the basic structure of its institutions may well be the single most important aspect of our Report.

Could the Commission have undertaken to comment on additional issues of substantive antitrust law? Certainly, it *could* have. Notwithstanding the general widespread acceptance of antitrust doctrine as a whole, there are many particular court decisions and other interpretations of the antitrust laws that are at least controversial if not outright wrong. In my personal view, the *per se* rule for tying is an example of a legal doctrine that has long outlived its usefulness. And, to me, the courts should long ago have stricken from the books the holding of *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), which held that a patent acquisition could not violate the antitrust laws if made prior to the time the relevant

market for the patented product had emerged. Any list of similar examples would be lengthy.

The temptation for this Commission to address these and other perceived errors of substantive law was substantial. Our decision not to do so, however, was the correct one. A key element of what has made antitrust so successful for so long is its flexibility, its ability to adapt to changes in industrial structure and to changes in legal and economic thought. The statutes themselves establish only broad and simple principles—prohibiting “restraints of trade,” “monopolization,” and acquisitions that “may lessen competition substantially.” These principles have gained real meaning only through the many court decisions, agency actions and guidelines, and economic analyses accumulated over a course of 117 years. As experience in antitrust has demonstrated time and again, however, the received wisdom at any given moment often proves to be quite wrong later on.¹ Any effort to change the substance of antitrust in any kind of permanent way is therefore both perilous and futile.

Antitrust tends to correct its mistakes over time. The *per se* rule for tying, for example, was sent nearly to its demise just last year. *Illinois Tool Works v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). The doctrine of *SCM v. Xerox* is one that, in merger enforcement at least, the federal agencies ignore. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 586–88 & n.202 (6th ed. 2007). As this Report is being prepared, the Supreme Court is reexamining one of the most controversial legal rules, the *per se* rule for resale maintenance. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 763 (2006). In antitrust, there is little to commend any effort to freeze legal precepts in one place. Had the Commission undertaken to devote its attention to the correction of errors in substantive antitrust doctrine, we at best would have provided temporary solutions—and we would have diverted our attention from the many other areas where we have the potential to do real good. Our decision to focus on other matters was the right one.

b. Retention of multiple enforcement

The Commission’s recommendations against changing private remedies or the rules that allow federal antitrust suits to be filed by state attorneys general are also important.

The federal antitrust laws are enforced in several ways: (1) proceedings for injunctive relief by the DOJ or FTC; (2) private party actions for injunctive relief and/or damages; (3) actions by state attorneys general for injunctive relief or damages; (4), in appropriate cases, crim-

¹ Compare *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); compare *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) with *State Oil Co. v. Khan*, 522 U.S. 3 (1997); compare *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); compare *United States v. United States Steel Corp.*, 251 U.S. 85 (1920) with *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945) and *LePage’s v. 3M*, 324 F.3d 141 (3d Cir. 2003); compare *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945) with *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); compare *International Salt Co. v. United States*, 332 U.S. 392 (1947) with *Illinois Tool Works v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). This list could be expanded exponentially.

inal proceedings by the Justice Department; and (5), perhaps most importantly, by voluntary counseling. It is a fair question to ask whether a system with so many enforcement mechanisms is necessary. History tells us, however, that multiple enforcers are of great importance to the preservation of antitrust, and the free market, as the means for governing our economy.

Multiple enforcement ensures that the administration of the antitrust laws will be not only vigorous but insulated, to a degree, from the vagaries of the electoral process. If antitrust is a priority of a presidential administration, we can be confident of appointees to the Justice Department and Federal Trade Commission who will pursue robust enforcement. But, as we have seen at times over the past 30 years, antitrust is not always an executive branch priority. In some instances, the executive branch may seek to curtail antitrust significantly or, more commonly, to sit on the sidelines while cases are not brought. Multiple enforcers operate as a critical check and balance on the executive branch. In any given case, the federal enforcement agencies may not elect to proceed, but injured parties and the states have the ability to fill in the gap.

It is important to remember that multiple enforcement itself is subject to a critical check and balance: the federal courts. The Justice Department or FTC, in the limited context of pre-merger notification, can prevent consummation of an acquisition for a while—until the parties have complied with the agency’s second request—but every other aspect of antitrust enforcement requires judicial intervention. Neither agency can block a merger; only a court can do so. Similarly, the Justice Department can obtain civil or criminal relief only through the courts. The FTC can proceed through its administrative proceedings, but parties can always appeal to a circuit court of appeals. The states and private parties, of course, can proceed only through the courts. The upshot is that, notwithstanding multiple enforcers of the antitrust laws, only the courts can determine whether a violation of law has been established. Having multiple enforcers simply provides greater assurance that the courts have that chance.

Preservation of multiple enforcement is the principal reason why I join the Commission in urging no curtailment of the ability of the state attorneys general to sue under the antitrust laws. The record before the Commission demonstrates convincingly, in my view, that the states can effectively supplement the federal agencies by bringing cases the agencies do not; can team effectively with the federal agencies in bringing important cases; and, by their very presence, provide an important check against federal under-enforcement. See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003). The Commission was presented with no evidence demonstrating that state enforcement has resulted in harmful inconsistencies in legal obligations, deterrence of procompetitive conduct, or excessive costs. There was evidence, and I agree, that the *quality* of state enforcement could be improved. But there was simply no case presented to justify curtailing the states’ *ability* to enforce the laws.

The Commission's decision to recommend retention of private rights of action for treble damages and injunctive relief is also welcome. There was no serious proposal to eliminate private rights of action entirely, and certainly no evidence to support any such radical change to the basic system of antitrust remedies that has served us well for so long. But a number of thoughtful observers, including some of my fellow Commissioners, have expressed concern about the tripling of damages, at least for non-cartel offenses, in contexts where the defendant's legal obligations are not entirely clear. I remain very sympathetic with those concerns in the abstract. But, nevertheless, I believe that the arguments for change are decisively outweighed by other considerations.

We have had a treble damage remedy for 117 years. It started as section 7 of the Sherman Act; in 1914, it was made section 4 of the Clayton Act. For a statute that has been a cornerstone of antitrust enforcement for that length of time, the burden to show a need for change is a particularly heavy one. The Commission had extensive hearings on the subject. There is extensive literature on the subject, which the Commission reviewed. No commenter identified a single example of a serious injustice occasioned by an actual award of improvident treble damages. That alone is compelling evidence that radical change is unwarranted.

The temptation to limit trebling to particular types of cases is understandable, but ultimately fruitless. To begin with, defining the scope of the limitation is difficult. Limiting trebling to per se (or "hard core") cases is not helpful because the line between per se and rule of reason (or hard core versus non-hard core) is ever-changing and often imperceptible. See *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). Perhaps more importantly, some of the most serious antitrust violations of all have involved conduct that was neither covert nor per se unlawful. *E.g.*, *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1107 (7th Cir. 1983). Since the only relief available to the government in these cases is prospective, damages remain the only deterrent. Firms will have no incentive to avoid even the most egregious restraints if the maximum penalty is limited to an injunction and single damages. Given the uncertainties within, and the length of time of, litigation, the present expected value of a single damages award will almost always be less than the profits expected to be retained as a result of the violation. Preserving the incentive of injured parties to sue in these cases is therefore of great importance. Moreover, in the litigation process as it exists today, actual recovery of treble damages is something of a myth. With the time lag between injury and recovery, and the general unavailability of prejudgment interest, damage recoveries cannot be expected to exceed the party's actual damages, including cost of capital and associated opportunity costs, even after trebling.

The hurdles today to private recoveries are very steep. The standing and antitrust injury rules have become increasingly strict since *Brunswick* was decided in 1977. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 817–28 (6th ed. 2007). Defense summary judgment motions are (correctly) granted vastly more frequently in antitrust cases than in other areas of the law. *E.g.*, *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d

Cir. 2002) (summary judgment “particularly favored” in antitrust litigation). And the cost of launching an antitrust case can be prohibitive. Expert witness costs are unrecoverable, and considerable capital will be tied up in attorneys’ fees for years until any recovery is had. As noted, prejudgment interest is unavailable as a practical matter. Given all those factors, trebling, in my judgment, is essential to induce parties to bring cases with merit.

Importantly, moreover, reversing treble damages today would send a terrible public message. We are in an era of diminished federal enforcement of the antitrust laws. The states too have been relatively inactive over the last few years. The key enforcement mechanism today and at other periods in our history has been the private action. We send a very troubling message about our faith in the antitrust laws as the means for guiding our economy if we say we are going to cut back on the treble damages action, the foundation of private enforcement. The Modernization Commission soundly declines to do so.

c. Robinson-Patman Act repeal

The Commission does well to recommend repeal of the Robinson-Patman Act. This statute imposes significant compliance costs on U.S. businesses and, where applicable, operates as a deterrent to price competition. The harm it inflicts on U.S. consumers is great.

The statute today serves little, if any, of the purposes for which it was intended. Although designed to preserve an equal playing field among resellers, the Act is applicable only to commodities. It does not apply, thankfully, to services, and yet services represent a large and growing portion of the economy. Even as to commodities, the statute is easily avoided in ways that harm its intended constituency. So while it is a violation to charge small customer *S* more than huge customer *H* for the same good, it is not a violation to refuse to sell to *S* altogether. The effect, then, is to cause many sellers to refuse to deal with smaller sellers outright, rather than charge them the potentially higher prices that may result from normal competitive interaction in the marketplace. Most small resellers would be better off by having *some* access to the product, albeit at a higher price, than being cut out altogether.

Given the extremely rare nature of proceedings under the statute by enforcement officials; the serious difficulties of enforcing it in private proceedings; the perverse incentives for suppliers it creates; its tendency to inhibit aggressive price competition; and the significant compliance costs it imposes, the Robinson-Patman Act adds no positive value even to its own constituency. The country will benefit if it is repealed.

d. Endorsement of contribution and claim reduction

That a company with, say, 2% of the sales or 1% of the culpability might be responsible for all or substantially all of the damages in a given antitrust case has never made any sense. Yet it is the law of the land. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). That is not because of any Supreme Court analysis demonstrating that a ban on contribution is the correct policy choice. It is because of the Court’s determination (1) that

any policy determination should be made by Congress, and (2) that the outcome of congressional silence should be the purported common law rule, developed ages ago for other contexts, barring contribution among intentional wrongdoers. The combination of these determinations has meant that the no contribution rule exists, not by choice or analysis, but by default. I have long opposed the rule against contribution.² The Commission's strong recommendation to propose legislation that will eliminate that rule for cases filed in the future is most welcome.

Predictably, the Commission's recommendation has already generated some opposition. The criticism is that a system of contribution and claim reduction will provide a disincentive to plaintiffs to offer attractive settlements to the "first in" and, in that way, make settlement more difficult generally.

The criticism is easily rejected. To begin with, contribution and claim reduction are the norm in American jurisprudence. Virtually every state permits contribution among joint tortfeasors. See, e.g., UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955); RESTATEMENT (THIRD) TORTS: APPORTIONMENT OF LIABILITY (2000); Annot., *Contribution Between Tortfeasors*, 17 A.L.R.6th 1 (2006). Contribution is available for many federal causes of actions as well. See 15 U.S.C. § 78-u4(f) (securities cases); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (10b-5 cases); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (admiralty). The types of cases in which no right of contribution exists are rare. Yet the majority of cases settle, and largely at the same rate of frequency that antitrust cases do. Settlements continue to occur—as they will under the Commission proposal—because claims for contribution against defendants who have settled are precluded. See, e.g., UNIFORM ACT § 5; 15 U.S.C. § 78u4(f)(7).

Under the Commission's proposed statute, the only settlements that may be discouraged are those which *should* be discouraged. The problem is at its most acute in massive class action cases, where the potential exposure is already great. In many of these cases, plaintiffs offer settlements early on to one defendant—sometimes the one most culpable or with the greatest sales—that bear little or no relationship to that defendant's actual responsibility. The plaintiffs lose nothing by doing so; the settling defendant's responsibility becomes the problem of those not offered the sweetheart deal. The non-settling defendants may have little or no actual culpability. But they nevertheless are forced into settling by the effect of the enormous exposure they face because the earlier sweetheart settlement arrangements have effectively multiplied their potential liability. This is the kind of process that is unfair on its face and, at the extremes, even gives antitrust enforcement a bad name. Businesses comply with laws they understand and respect; and they tend not to respect laws that appear to be fundamentally unfair. Counseling compliance in the context of a regime that endorses

² See Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217 (1980).

es this kind of process can therefore be quite difficult. There is no reason that plaintiffs cannot settle early on with defendants for amounts more closely approximating the defendant's portion of the total liability. That is what the Commission proposal will encourage, and it will generate broader respect for (and compliance with) the law.

The reality is that, as has happened in all the many other areas of the law in which contribution and claim reduction have been adopted, plaintiffs and defendants will adapt quickly to the new system and cases will settle as frequently as they did before. The only difference will be that settlements will more closely reflect the responsibility of the settling defendants. That can only be a good thing.

e. Indirect purchaser reform

The burdens imposed by the inconsistency between federal and most states' laws relating to indirect purchaser litigation are considerable. But, as the Commission's Report demonstrates, there is no simple fix to the problems.

The Commission's recommended solution is not perfect. None is. But the Commission solution is one that gives due regard to all of the many constituencies affected. It allows indirect purchasers to sue, but directs them to a forum where the opportunities for inconsistent determinations and excessive or duplicative damages awards are minimized. It avoids preemption of state laws. It maintains consistency with current practice in terms of class certification. It does all this while preventing, as effectively as anyone can, the costly multiplication of proceedings that has characterized indirect purchaser practice over the past twenty years.

The Commission's suggested *Illinois Brick* reform will undoubtedly attract opposition from those with vested interests in the current regime. Indeed, one opposition, by the American Antitrust Institute, has already been posted. The attack is premised on the idea that the Commission proposal would (a) decrease incentives for both direct and indirect purchaser plaintiffs, by reducing overall recoveries to "substantially less than treble," and (b) make class certification more difficult. The first of these criticisms is unfounded. The second is frivolous.³

Incentives. Combining direct and indirect purchaser recoveries into a single, consolidated proceeding should not, by itself, reduce incentives for anyone to sue. Nor will consolidation reduce aggregate recoveries. Instead of reducing overall recoveries, the only effect of the Commission proposal should be to *increase* them. There are two reasons why. First, the Commission proposal will expand the universe of potential plaintiffs. Several states today

³ American Antitrust Institute, Public Comments Submitted to AMC Regarding Indirect Purchaser Recommendation (Mar. 2, 2007). AAI goes so far as to claim that the proposed *Illinois Brick* reform "would in all likelihood eviscerate . . . private enforcement of the antitrust laws." *Id.* at 3. This, and similar statements made throughout, drain the comments of whatever credibility they might otherwise have had.

prohibit any indirect purchaser recovery. The Commission proposal will make recovery available for indirect purchasers throughout the country. Second, many state laws do not provide for trebling or make trebling discretionary. By applying section 4 of the Clayton Act, the Commission proposal, however, will make trebling mandatory.⁴

Increasing recoveries, as a general matter, should equally increase incentives to sue. The concern articulated by AAI, however, seems to be that the lack of certainty as to the amount of pass through would create a disincentive for direct purchasers to sue. I agree that this possibility exists theoretically, but it seems clear that, in the real world, the degree of reduced incentive will be trivial. If direct purchasers are overcharged, the well-organized plaintiffs' bar can still file in every case they do today. Competition to get the "lead counsel" or "executive committee" roles will be as persistent as ever and will encourage cases to be filed. I cannot imagine a single case under the current regime that would not be filed under the Commission's proposed system.

Conversely, the incentives for plaintiffs' lawyers representing indirect purchasers to sue—and to compete for lead counsel and executive committee positions—will only increase. As mentioned, indirect purchaser recoveries will be available throughout the country, rather than state by state, and will be trebled automatically. To the extent there is any diminution of the incentives affecting direct purchaser lawyers, the increase on the indirect purchaser side will more than offset it.

So what will change? Procedurally, of course, there would be a major change in that all proceedings would be consolidated before a single court—reducing litigation costs, and reducing in particular the incentives for some plaintiffs' lawyers to use procedural cost and complexity as a device for inducing settlements that would otherwise be unavailable. In addition, if the Commission's solution is adopted, then, in most cases, the proceedings that do not settle quickly should resemble an interpleader case; the aggregate overcharge would be determined first, with the allocation between direct and indirect purchasers to follow. That would allow the plaintiffs' groups to work together in the first phase of the case to maximize the total recovery. If they are as successful as I suspect they will be, then total damages recovered should be roughly the same as they are today. However, the ability of plaintiffs' lawyers to use the uncertainty in some states' laws to suggest that duplicative damages can be achieved will be eliminated. And the system we see today, with a different

⁴ AAI seems to be under the impression that the system today permits multiple and duplicative recoveries, and that these would be eliminated under the Commission proposal. Apart from the basic point that duplicative recoveries are something to be avoided, not encouraged, even the underlying premise appears to be wrong. Those states to address the issue have concluded—some by express statutory provision—that multiple recoveries should be avoided, thus limiting damages overall to the specified multiple of the overcharge in issue. See *In re Vitamins Antitrust Litigation*, 259 F. Supp. 1, 3 & n.1 (D.D.C. 2003) ("First, of the twenty repealer jurisdictions, the majority (twelve) either allow a pass through defense or prohibit double recovery Of the [remaining] eight jurisdictions . . . no jurisdiction expressly prohibits a pass through defense.") (emphasis added).

set of plaintiffs' lawyers in each indirect purchaser state tacking their name onto a pleading and then seeking fees, will disappear. Direct plaintiffs' lawyers will have to reach settlements on the basis of their clients' actual treble damages, and indirect plaintiffs' lawyers will have to do the same. If their assessments vary enough from the defendants', the cases may have to be tried—something that never happens today because of the undue leverage that the procedural complexity provides. Outcomes based on the merits of a case are ones the law should encourage.

Class certification. The class certification objection to the Commission's proposal is nonsense. The proposal clearly states that class certification standards and procedures will remain as they are today, and that the introduction of pass-on—already an issue today in indirect purchaser class certification—will have *no effect* on the certification of direct purchaser classes.

Summary. Direct and indirect purchaser litigation today all too closely resembles both a roulette wheel and a “protection” scheme. The criticisms the AAI levels at the Commission proposal would perpetuate that impropriety. Reform is essential to place purchaser litigation on a footing where the merits count.

If enacted by Congress, the Commission's indirect purchaser recommendation will stand as a major accomplishment. There will undoubtedly be some sincere opposition to parts of the recommendation as the legislative process moves forward. I strongly urge Congress to view the recommendation as a whole, and to weigh it against the many alternatives—including the option of doing nothing. With careful review and consideration, I believe the Congress will see that this is a most elegant and practical solution to a very difficult problem.

II. Missed Opportunities

There are some opportunities for improvement in the law that the Commission unfortunately missed. The most important of these from my perspective are (1) our failure to advance recommendations for the immediate repeal of specific exemptions, and (2) our failure to endorse consumer (versus total) welfare as the touchstone for analysis of efficiency claims.

a. Exemptions

Our economy has moved significantly away from regulation and towards competition over the past 30 years, and consumers have reaped substantial benefits. Yet the economy remains riddled with exemptions allowing cartel behavior in many markets without any corresponding economic justification. The Commission's Report explains this point effectively.

The Commission, however, does not make any specific recommendations for the repeal of particular exemptions. This is in large part attributable to lack of time. The Commission elected to review 30 separate issues of law and policy (see Commission Memorandum, *Issues Selected for Study* (Jan. 2005), available at www.amc.gov/pdf/meetings/study_issues.pdf),

many of which standing alone were extraordinarily broad. I believed then, and believe now, that we could and should have selected a much narrower set of issues than we did. Had we done so, we could have focused more time and energy on discrete and identifiable problems warranting legislative correction—including specific exemptions—than we in fact were able to do.

The Commission did hold some specific hearings on exemptions, addressing the McCarran-Ferguson insurance exemption, the Shipping Act, the Export Trading Act, and the Webb-Pomerene Act. Sufficient evidence was presented at those hearings, in my view, and sufficient independent analysis strongly confirms, that these exemptions have outlived any utility they may have had and should be repealed. At each hearing, the Commission was presented with substantial evidence of anticompetitive activities the exemptions do or can permit. And, in each case, the response was basically the same—that “our industry does many good things, does not restrain competition, and needs the exemption to avoid potential treble damage litigation.” This litany provides no basis for an exemption. Virtually every industry does good things. Conduct that does not restrain competition is *not* prohibited, with or without an exemption. And freedom from private litigation is something, again, that every industry would like. If these were valid bases for an exemption, there would be immunities from the antitrust laws everywhere. The real question in each case is whether the application of normal antitrust rules will impair some important public goal, and whether an exemption is truly necessary to ensure that this goal is served. None of the industries we examined came close to meeting that standard of proof.

In my view, the Commission would have better served the country through a more focused review of these four and other widely applicable exemptions (such as the Capper-Volstead Act) than by relying purely on the generalist overview reflected in our official recommendations.

b. Consumer versus total welfare

The history of antitrust law demonstrates a longstanding commitment to a legal standard that promotes the welfare of consumers as antitrust law’s primary goal. The Supreme Court’s antitrust jurisprudence of the modern era has been consistent with the consumer welfare approach.⁵

The Commission correctly chose not to revisit the settled primacy of the consumer welfare standard generally. We did, however, by a divided vote, choose to evaluate the standard in the narrow context of merger efficiencies. Specifically, we asked, should efficiencies that benefit only the parties, with no prospect of being passed along to consumers, be counted

⁵ See Robert H. Lande, *Proving the Obvious: the Antitrust Laws Were Passed to Protect Consumers (not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959 (1999) (citing authorities); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, 34 HASTINGS L.J. 65 (1982).

in favor of a merger? Or, as the *Merger Guidelines* say, should efficiencies matter only in circumstances where consumers are likely to benefit from the cost savings the parties achieve? See U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, REVISION TO SECTION 4 OF HORIZONTAL MERGER GUIDELINES (Apr. 10, 1997); see also Steven C. Salop, *What is the Real and Proper Antitrust Welfare Standard?*, Comments Submitted to AMC, Nov. 4, 2005, at 1.⁶

The Commission, surprisingly, was unable to reach a consensus on this issue. Although several Commissioners supported the consumer welfare standard reflected in the *Guidelines*, a majority to support that view in the Report could not be mustered. That is another missed opportunity. Any doubts that a consumer welfare standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in the future.

The fundamental problem with the total welfare standard is that, by definition, it gives equal weight to the impacts of the conduct on all constituencies, including producers and competitors. By declining to focus on the effects on consumers, as the consumer welfare approach does, the total welfare standard encourages practices that transfer wealth from consumers to producers, as well as practices that benefit competitors at consumers' expense. Application of the total welfare standard, for example, would permit "a merger to monopoly that permits the merged firm to reduce costs significantly but also endows the selling firm with the ability and incentive to raise its price above the pre-merger level." *Id.* at 2. The gains to the merging firms would have to be balanced against the losses to consumers from post-merger monopoly prices and, if the benefits to the merging firms are larger, the merger would have to be allowed. Worse, because the total welfare standard protects the interests of competitors with equal vigor as the interests of consumers, a faithful application of the standard would forbid a merger that yielded cost savings that were passed onto consumers but that also harmed rivals of the merging firms by some greater amount. The net total welfare effect of such a merger would be negative because of the harm to the rivals, and a merger beneficial to consumers would have to be condemned.

Proponents of the total welfare standard do so either by ignoring these points or by making ad hoc exceptions to avoid the perverse results the standard generates. But a standard that is applied with exceptions to its basic structure is no standard at all. It is the equivalent of allowing decisions to be based on little more than the decisionmaker's whim.

The concern of at least some of the Commissioners who declined to support the consumer welfare standard appears to have been that a consumer welfare standard does not

⁶ As Professor Salop explains: "The aggregate economic welfare standard would condemn conduct if it decreases the aggregate welfare of consumers (i.e., buyers) plus producers (i.e., sellers plus competitors), without regard to any wealth transfers. In contrast, the true consumer welfare standard would condemn conduct if it actually reduces the welfare of buyers, irrespective of its impact on sellers. Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits would be passed-through to consumers so that consumers (i.e., the buyers) would benefit from the conduct."

credit fixed cost savings that do not immediately reduce marginal or variable costs. That is a valid concern but, in this case, misdirected. The agencies have made clear that fixed cost savings will be considered under appropriate circumstances:

[U]nder certain market or sales circumstances, fixed-cost savings may result in lower prices in the short term. Selling prices that are determined on a “cost-plus basis” (e.g., cost-based contracts) can be influenced by changes in fixed costs. Contractual arrangements also may allow fixed-cost savings to be passed through.

The Agencies consider merger-specific, cognizable reductions in fixed costs, even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately.

U.S. DEP’T OF JUSTICE AND FEDERAL TRADE COMMISSION, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 57–59 (2006). Thus, if a market is competitive, fixed cost savings will reduce the merged firm’s total costs and will tend to be passed along to consumers. If the savings are likely to be passed along within a reasonable period of time, sound application of the consumer welfare standard will count them. If, however, it will take years for consumers to see any benefit from particular fixed cost savings, or if the merger makes the market significantly less competitive, it is fair to conclude that the claimed benefit is sufficiently speculative and doubtful to warrant exclusion or minimization in the final analysis. The enforcement agencies recognize this point and, in practice, are applying a standard that accommodates legitimate efficiency concerns.

The total welfare standard has nothing to commend it. No sound antitrust policy would forbid a merger that benefits consumers because it also harms rivals. Nor would any sound policy permit a merger to monopoly that yields benefits only to the merging parties. Having undertaken to address this issue, the Commission should have endorsed the consumer welfare standard for evaluating efficiency claims in clear and unmistakable terms.

III. One Unfortunate Error: The Continued Use of § 3571(d) for Corporate Fines

The Commission has erred, I believe, in failing to recommend changes to our regime of corporate fines in criminal cases.

Few would disagree with the basic proposition that effective criminal enforcement is central to the administration of the antitrust laws, and that a system of formidable corporate fines is essential to the accomplishment of that objective. And few would disagree that the Justice Department has assembled a marvelous track record in criminal enforcement over the last several decades, especially in recent years following the Antitrust Division’s revision of its corporate and individual leniency policies. Dozens of individuals have served time in prison for their crimes, and dozens of cartels, including several significant international cartels, have been shut down through the Division’s efforts.

One of the most reported measures of the Division's success has been the level of corporate fines. In fiscal 2004 through fiscal 2006, the Division obtained in fines, respectively, \$350 million, \$338 million, and \$473 million. See *Criminal Antitrust Fines*, available at www.usdoj.gov/atr/public/press_releases/2006/220465a.pdf. Over the past dozen years, corporate fines exceeding \$100 million to single companies have been obtained in at least seven instances, including the \$500 million fine assessed against Hoffmann-LaRoche in the *Vitamins* case. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 785 & n.332 (6th ed. 2007). This is a particularly impressive record given that the applicable maximum fine in each of these cases under section 1 of the Sherman Act was just \$10 million. (The 2004 amendment increasing the fine to \$100 million was inapplicable in these cases; it applies only to conduct occurring after its effective date.) These fines have been assessed through guilty pleas, reached by applying *Sentencing Guidelines* methodology using the alternative fines statute, 18 U.S.C. § 3571(d), which allows for fines up to double the gain or loss from a given offense.

The difficulty with the current regime is that it violates the Due Process Clause of the Fifth Amendment. Due process requires that all elements of a crime that affect the level of sentence be proven beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Any fine greater than \$100 million (formerly \$10 million) must therefore be supported by proof, beyond a reasonable doubt, of a gain or loss sufficient to justify the fine. But proof of the amount of gain or loss—in most cases, the amount of overcharge—is extremely difficult in *any* antitrust case. Typically, the proof involves dueling experts reaching reasoned but diametrically opposite conclusions. That is problem enough in civil cases, where damages must be proven by a preponderance of the evidence. In criminal cases—absent the most extraordinary circumstances—proving gain or loss *beyond a reasonable doubt* is essentially impossible, at least without reducing the fine sought to an extremely low number.

So how is the Justice Department routinely getting companies willing to pay fines in excess of \$10 million (now \$100 million) without apparent difficulty? The answer is that companies have no real choice but to agree. The Antitrust Division has made very clear that it “will not engage in plea negotiations with a defendant that desires to litigate gain or loss.” Scott D. Hammond, *Antitrust Sentencing in the Post-Booker Era* 10 (Mar. 30, 2005). The Division says: “If a defendant wants to contest gain or loss, it ‘will have to wait until the end of the investigation for its day in court. . . . Not only will the company go to the end of the line, but so will its executives, unless they desire to approach the Division on their own and negotiate separately with the Division, which will obviously strengthen the Division’s case against the company.’” *Id.* The Division recognizes the impact of this policy in actual practice: “[M]any companies are likely to continue to forgo the litigation of gain or loss because of the many positive consequences resulting from early cooperation, such as fine reductions, non-prosecution coverage for some executives and favorable plea agreements for others,

and possible limitations in the scope of the charged offense or attributable commerce.” *Id.*⁷

It appears, in fact, that every company faced with a Justice Department demand for a fine in excess of the Sherman Act § 1 amount based on the double the gain or loss provision of section 3571(d) has given up and paid the fine. Given the leverage that the Justice Department wields in these matters, a litigated legal challenge to a 3571(d) antitrust fine by anyone could be many years away. The issue, therefore, is not one that the Commission should wait for the courts to resolve. If there is a problem—and there is—it should be addressed now. The Commission may be the only practical forum to recommend correction.

There can be little doubt that the continued routine insistence of fines based on double the gain or loss violates the Due Process Clause. In the vast majority of the past cases, perhaps all, there was no plausible expectation that gain or loss at any level close to the relevant fine amount could be proven beyond a reasonable doubt. To continue to support a regime of this sort is to express contempt for Due Process or, just as bad, knowingly to look the other way.

The fix, moreover, is easy. Fines calculated by a judge under the *Sentencing Guidelines* (on an advisory basis) are entirely constitutional provided that the fine amount is within the range established by the underlying statute. The problem, therefore, can be solved simply by raising the maximum fine under Sherman Act § 1 substantially, say to \$500 million. The only objection advanced for not making that recommendation is that Congress just raised the amount in 2004 and it is therefore “too soon” to ask again. Nonsense. The current fines administration routinely violates the Constitution. Placing it on a footing that assure compliance with the Due Process Clause will only breed greater respect for the law—and is well worthy of congressional time.

We should recommend repeal of section 3571(d) insofar as it relates to antitrust crimes and, simultaneously, seek to amend section 1 of the Sherman Act to permit fines of up to \$500 million.

Conclusion

The Antitrust Modernization Commission has now responded, in this Report, to the congressional request for counsel on the administration of the antitrust laws. The overwhelming majority of the Report expresses recommendations and conclusions with which I agree wholeheartedly.

⁷ Others put it more starkly, saying that “the Division’s enforcement approach appears to be a willingness to trade people (particularly senior executives) for money.” Tefft W. Smith, Statement at AMC Criminal Remedies Hearing, at 5 (Nov. 3, 2005). I personally doubt that the Division is intentionally trading senior executive jail time for companies’ concessions to a higher fine, but it is indisputable that any company faced with a large and likely unconstitutional fine amount must weigh the negative of agreeing to that fine against the positive of keeping key executives out of jail.

It has been a great personal honor to have participated in the Commission's work over the past three years and to have done so with such an impressive array of distinguished fellow Commissioners. Considerable thanks go to our Chair, Deborah Garza, for her tireless efforts in leading the Commission's efforts.

I also want to thank our staff: Andrew Heimert, Susan DeSanti, Bill Adkinson, Nadine Jones, Marni Karlin, and former staffer Todd Anderson; advisors Andy Gavil, Michael Klass, and Alan Meese, and former advisor (now FTC Commissioner) Bill Kovacic; and Hiram Andrews, Kristen Gorzelany, Christopher Bryan, and Sylvia Boone. You have been a wonderful team.

Separate Statement of Commissioner Kempf

I join—enthusiastically—in the vast majority of the Commission’s recommendations. I write this separate statement to discuss those few areas where I do not join in recommendations and to expand on my views as to a few other matters. In so commenting, I do not wish to distract from or diminish the significance of the Commission’s principal recommendations. They were fashioned on the anvil of rigorous discussion and debate—a process in which all of the Commissioners fully participated. In my view, a number of the recommendations are quite exciting and truly momentous. These include, for example, (1) repeal of the Robinson-Patman Act that is so harmful to consumers, (2) a rational and sensible approach to direct and indirect purchaser claims in price-fixing cases, and (3) some excellent suggestions to the agencies as to steps they should consider—both domestically and around the globe—to simplify the merger reporting process and to speed up coming to a decision on whether to clear or challenge a proposed merger.

Before turning to a discussion of the Commission’s recommendations and report, I want to emphasize at the outset that serving on the Commission turned out to be a genuine pleasure for me. Before we began to meet, I wasn’t so sure that that would be the case. I was concerned that, with six Republican appointees and six Democrat appointees, the Commission’s proceedings might mirror the partisanship that Americans have come to see on TV regularly in certain other government activities. That never happened. Quite the contrary, the Commissioners—all of them—worked together cooperatively and collegially to try to do the best individual and collective jobs they could. Thus, I was able to work to fashion sensible consensus positions on difficult issues not only with Commissioners Garza, Burchfield and other fellow Republican appointees, but also with Commissioners Jacobson, Yarowsky and other Democrat appointees.

There were substantive differences among members of the Commission from time to time, to be sure, and some of those are discussed in what follows. During our three years working together, however, all of our proceedings took place in a spirit of good fellowship. At every turn, Commissioners listened to each other carefully and respectfully in an effort to come up with the best possible recommendations to the President and Congress that we possibly could. I came away from the experience with the greatest respect possible for my fellow Commissioners.

Below, after first addressing the two areas where my views may vary significantly from those of some of my fellow Commissioners (mergers and exemptions/immunities), I will discuss briefly several other matters on which I want to comment beyond what appears with respect to my individual views in the footnotes to the recommendations.

Mergers. I agree with and join most of the Commission's recommendations in the merger field—both substantive and procedural. Nonetheless, it is in the merger area that I depart the most and the most seriously from my fellow Commissioners. According to them, when it comes to antitrust and mergers, almost everything is hunky dory. As they see it, for example, “the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.” I don't think so—at least as to the agencies.

The Merger Guidelines. To me, the “basic framework” used by the agencies—as articulated by them in their *Merger Guidelines*—is fundamentally flawed. Forty years after their initial appearance in 1968, the *Merger Guidelines* remain bottomed on a “basic framework” that is analytically bankrupt. They lack intellectual respectability, and they have for a long time. See, for example, H. Goldschmid, et al., eds., *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Little Brown & Co. 1974).

The bedrock for today's version of the *Merger Guidelines*, as it was for the original version back in 1968, is concentration data. From the outset—and today—the *Merger Guidelines* have rested on the erroneous notion that increasing concentration leads to decreasing competition. That may be true when two firms merge to monopoly. Short of that, however, most increases in concentration lead to an increase in competition, not a decrease. The reason for that, of course, is that the concentration-increasing mergers result in cost-saving efficiencies that enable the combined firms to lower prices, increase quality and improve service. That is why opposition to such mergers usually comes from the combining firms' competitors, not from their customers.

When all this was discussed at Commission hearings and meetings, my colleagues on the Commission didn't disagree with me so much as they said, in effect, that the agencies don't really follow their *Guidelines* and that experienced legal and economic practitioners in the merger area know this and can so advise their clients. Those “in the know,” for example, can tell their clients that a merger that increases the HHI by 150 points and results in an industry HHI of 2000, far from being likely to create or enhance market power or facilitate its exercise, is likely in a safe harbor with no real prospect of attack. And so on.

Maybe I'm just too old fashioned, but I've always thought that *Guidelines* should give guidance, not disinformation. In any field. For anyone who is not a schooled aficionado of antitrust, the *Merger Guidelines* are a misleading trap for the unwary. Were plain old business people to read them and take them at face value, they would be deterred from pursuing pro-competitive transactions that would benefit consumers. That is a sad state of affairs. The mitigating circumstance is that, in fact, most business people, instead of looking to the *Guidelines* for guidance, are forced to hire an army of advisors (a regiment of lawyers, a battalion of economists, a squad of psychics and so forth) who can tell them that the *Merger Guidelines* are not to be taken seriously when it comes to concentration data. These advisors will comfort their clients by telling them of combinations that resulted in astronomical increases in concentration and yet were accomplished without antitrust challenge—as was

true, for example, in the case of Whirlpool's acquisition of Maytag (where some said post-merger HHIs were close to 6000 and jumped by more than 2000 points as a result of the merger—see D. Moss, *Antitrust Analysis of the Whirlpool's Proposed Acquisition of Maytag* (January 17, 2006); <http://www.antitrustinstitute.org/archives/files/477.pdf>). They will tell their clients that a host of “other factors” that relate to the real world will always trump the concentration data benchmarks set forth in the *Guidelines*, if those factors demonstrate that the transaction will increase rather than decrease competition (as they did in the case of Whirlpool-Maytag—see DOJ Press Release, “Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag” (March 29, 2006); http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm).

The development of sound merger policy, in my view, has not been led by the agencies, but rather by the courts. The Supreme Court's landmark decision in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), completely recast the “basic framework” for analyzing mergers—despite opposition from the agencies. See generally, D. Kempf, *Merger Litigation: From the Birth of General Dynamics to the Death of Section 7*, 65 ANTITRUST L.J. 564 (1997). Before that, at the urging of the agencies, efficiencies were ignored (or worse) and wrong-headed concentration data ruled the day. Since then, the courts have been in the vanguard of constructive further development of the law—mainly in court decisions rejecting agency challenges to competitively beneficial (or benign) mergers. As a result, there has been continual and substantial progress toward an ever more sound merger policy. One thing that has helped in this regard is that the courts, early on, recognized that the *Merger Guidelines* aren't law and aren't binding on the courts. So the courts ignore the *Guidelines* when they are at odds with the court's own analysis or cite the *Guidelines* when they support it. Thanks to the courts, merger policy today is better than it has been in 100 years. In this context, to paraphrase the line from *The Treasure of the Sierra Madre*, “We don't need no stinking *Guidelines*.”

For one thing, as discussed above, the *Merger Guidelines* decidedly do not provide useful guidance. No one really disputes this. Instead, antitrust practitioners say things like “Well, maybe not, but the *Guidelines*, taken together with speeches by agency personnel, enforcement actions, economic studies and the advice of economic experts and experienced antitrust practitioners does provide useful guidance.” That may be true, but it is no real answer to the deficiencies of the *Guidelines* themselves when it comes to giving guidance. It does not reflect well on the agencies when the first thing an experienced practitioner will tell his client is that the client *should not* look to the *Guidelines* for guidance. The *Merger Guidelines* should be withdrawn or substantially revised. I favor the former—in part because I fear further efforts to tinker with the *Guidelines* are more likely to make them worse than better. And the army of advisors that is now *de rigueur* doesn't need them.

Efficiencies. Even though there has already been a genuine sea-change in the role efficiencies play in merger analysis, much room remains for further improvement. In the “bad

old days,” efficiencies were viewed as a reason to attack a merger under Section 7. Indeed, the then-prevailing view was that the greater the efficiencies the greater the need to attack the merger. The merged firms, with their increased efficiencies, could charge lower prices that other competitors could not meet and, because of that, the other competitors would be driven out of business. This approach elevates the façade of competition over the reality of competition. It preserves the “appearance” of vigorous competition that purportedly results from having a whole bunch of small competitors scurrying about in the marketplace. Never mind that they are inefficient and can survive only by charging high prices to consumers. This is the mind-set of those who equate the number of competitors (and, thus, level of concentration) with the intensity of competition. It is the thinking behind the original merger guidelines published in 1968: more competitors equals more competition. That’s the *façade of competition*. *Real competition*—and increased competition—results from this: mergers that lead to fewer, but more efficient, competitors that charge consumers lower prices. You need a sufficient number of competitors, of course, to ensure there won’t be monopoly pricing. But that number is not very large.

The good news is that the agencies no longer view efficiencies negatively. But embracing efficiencies as a positive rather than negative competitive factor has come slowly—and begrudgingly at times. And agency analysis is still not totally sound. The agencies, for example, require that the gains from efficiencies be “passed on” to consumers before the agencies will “count” them as a positive factor. That sounds noble and egalitarian, of course: “Why should the fat-cats get to keep the gains; pass them on to the little guy.” But it makes no sense. Efficiency gains eliminate dead-weight loss and are always a plus for society—whatever is done with them. And the management of the merged firm will know far better than a bunch of bureaucrats what best to do with the efficiency gains. Management could decide that, instead of passing them on in the form of lower prices in the short run, it will invest the gains in de-bottlenecking production facilities or perhaps even building a completely new, more efficient plant—in either case leading to even lower prices in the long run than would result from a pass-on. Or they might decide to go into a new line of products, resulting in increased competition there as well. Suppose, for example, that management had a project that gave real promise of developing a cure for cancer. Do we really want to tell management that it can’t pursue that project because we want the money passed on to widget consumers instead? I don’t think so. Let’s take the most extreme example. Suppose management says, “Hey, we just want to give the gains to our shareholders in the form of increased dividends.” Does it make sense for antitrust enforcers to say “No can do.”? Again, I think not. Shareholders also go by another name: consumers. Hello. Should that set of consumers—the consumers who, incidentally invested their capital to own the company—be told that they can’t have the money because the government insists that another set of consumers get it instead?

In terms of antitrust lingo, the issue is framed as one of “consumer welfare” versus “total welfare.” In reality, of course, total welfare always translates into consumer welfare in the long run. To the extent that “consumer welfare” is a proxy for things like “pass on,” it should be rejected as counterproductive and anticompetitive officious intermeddling.

Notwithstanding my criticisms, the fact is that (as I said at the outset) much progress has been made in moving toward a proper analytical approach to analyzing efficiencies in the merger context. I am hopeful that, before too much more time goes by, efficiencies will be—as they should be—fully and properly taken into account in merger analysis

Publishing enforcement statistics. The reason I don’t join in the recommendation that the agencies publish more statistics on merger enforcement is that I fear that doing so will create an irresistible temptation for agencies to bring ill-considered enforcement actions in order to “improve” their statistical score-card. Such data has been misused in the past with some frequency to complain of “under enforcement” or to trumpet “rigorous enforcement.” During Bill Baxter’s time at the Antitrust Division, for example, there was a significant increase in cases under Section 1 challenging price-fixing. At the same time, Baxter put an end to the steady stream of improvident merger and monopolization cases that had characterized prior enforcement activities. He was routinely lambasted by some for being “lax” in antitrust enforcement. One of his successors, with an eye to the numbers, brought lots of cases that were routinely settled with a consent decree. At the time, I characterized this as “the McDonald’s approach to vigorous antitrust enforcement”—“the government wants its quarter-pound of flesh.” D. Kempf, *Antitrust Law Developments*, 33rd Annual Northwestern Corporate Counsel Institute (October 13, 1994). I told the business group to whom I was speaking that this approach had good news and bad news for them. The bad news was that many mergers that were competitively benign still would likely require a consent decree to close—another notch in the antitrust enforcement gun. The good news was that mergers with serious anticompetitive implications would also be permitted to close—so long as the closing was accompanied by an acceptable consent decree—and ever more robust (albeit nonsensical) enforcement statistics.

Updating the Merger Guidelines to cover innovation and non-horizontal mergers. This strikes me as a bad idea. The most likely outcome would be “innovation” in fuzzy merger-enforcement theories. The role of innovation will develop better if it is done in the context of actual cases—with the assistance of the courts if need be. As for non-horizontal mergers, those are almost never challenged. For good reason. An effort to “explain” this carries with it the temptation to fashion “creative” new theories as to when such mergers can be anticompetitive and should be challenged. Again, it would be better to leave well enough alone and let “guidance,” to the extent it is needed at all, develop in the context of actual proposed transactions and, also again, with the assistance of the courts if need be.

The HSR Act. The sky was not falling before the HSR Act became law, and HSR was not, as the report seems to suggest, the greatest thing since sliced bread. To the contrary, the

HSR Act, at least at the time it was passed, was viewed as simply something that would make it a little easier for the agencies to get a preliminary injunction blocking a prospective anticompetitive merger. Thus, as noted in the report, the stated purpose of the HSR Act at the time it was passed was just “to provide advance notification . . . of very large mergers” and “to improve procedures to facilitate enjoining illegal mergers before they [were] consummated.”

As things have turned out, however, HSR has had a quite different effect on merger enforcement. To begin, it appears to have made it *harder* for the agencies to get a PI in merger cases. Before the passage of HSR, the government sought to enjoin mergers far more than it does today. Not only that, but the government almost always got a PI blocking a merger when it sought one. Indeed, as Justice Stewart observed in *Von's*, “The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins.” *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966). That's not true anymore. Now the government loses merger cases with a fair degree of regularity. In my view, the way that HSR proceedings have evolved over time is one of the reasons for that.

As originally envisioned, there was to be a three-step HSR process—(1) a 30-day waiting period after notification of the proposed merger was provided to give to the enforcement agencies time to review it; (2) if an agency wanted any additional information to help it decide whether or not seek a PI blocking the merger during the pendency of a case it would bring on the merits, it could make a “second request” for more information; and (3) there would be a very short second waiting period (20 days) after substantial compliance with the second request during which the agency could decide whether or not to bring a PI action seeking to block the proposed merger. That dream has long since vanished.

As the report notes, second requests have become draconian in nature (compliance with a second request now “typically takes six months and costs \$5 million”), and “the reviews in more complex investigations can take eighteen months and cost the merging parties up to \$20 million.” Moreover, the HSR phase, instead of merely a way to assist in the PI process, has become the whole ball game when it comes to merger enforcement. The agency doesn't seek *limited* information to assist it in deciding whether or not to seek a PI but rather *comprehensive* information that, absent clearance, it can use either in a consent decree negotiation or in a full-scale assault on the transaction. And one of the Commission's recommendations (in which I did not join) urges Congress to drive the nail in the coffin by precluding the FTC from even pursuing a Section 7 case against a merger once the agency has failed in an effort to get a PI.

Given the changes that have occurred under HSR compared to what was originally envisioned, I have mixed feelings about the Commission's recommendation that the FTC be barred from bringing an administrative complaint challenging a merger where it has sought to get a PI blocking the transaction but failed in that effort. As the system now operates, I favor the recommendation. But I don't like the way the system now operates. I would pre-

fer that the focus of the HSR proceedings return to being a relatively quick and simple exercise by the agency to decide whether or not it will seek a PI to block the transaction during the pendency of a case on the merits—with the FTC using its authority to combine the PI proceeding with its case on the merits in appropriate cases (as the DOJ routinely does). As now-Justice Ginsburg emphasized in *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981), the district court’s ruling in a PI case “must be made under time pressure and on incomplete evidence” and “the risk of an erroneous assessment is therefore higher than it is after a full evidentiary presentation.” In that context, a subsequent FTC administrative proceeding should not be barred. (Indeed, the *Weyerhaeuser* case itself came to reflect the wisdom of this approach. There, the district court thought the transaction was likely anti-competitive, but let it close and proceed to an administrative trial on the merits because of powerful “equities” considerations. At that trial, an FTC ALJ determined that the merger was not anticompetitive—a decision that was affirmed on appeal by the full Commission.)

In short, what I would prefer to a one-bite-at-the-apple rule for the FTC or DOJ is a return to fast-track HSR review, followed by an expeditious PI proceeding and, if needed, a full trial on the merits. I find it disgraceful that HSR proceedings currently drag on as long as they do. My hunch is that, under a fast-track regime, just as many consent decrees would be entered into as is now the case. It would just be done faster, cheaper and better. If I had my druthers, I would urge Congress to take steps to get the HSR procedure back to what was originally intended. No more calls from agencies to parties wishing to merge saying “We can make a decision now if you force us to do so, but it may not be in your interest for us to do that. How about, instead, extending the waiting period so that we can continue our review of the transaction?” Usually (though not always), the temptation to do so proves irresistible to the business people. Then, unfortunately (and increasingly), things just seem to drag on forever.

Exemptions and immunities. The antitrust laws suffer from Rodney Dangerfield Syndrome: they get “no respect.” Or at least they don’t get the respect they should.

There is a reason for this, of course. Citizens don’t think that something is truly “evil” when lots of people are expressly authorized to do it. People see massive price-fixing every day by their friends and neighbors—all perfectly legal, because it is done pursuant to some immunity or exemption that excludes those particular price-fixing activities from the reach of the antitrust laws. So when people learn that yet another friend or neighbor has also engaged in price-fixing (but without the benefit of an exemption or immunity), they don’t seem to think it is so “bad.” After all, every one else does it, and they don’t get into trouble. So why should Joe?

I sometimes tell the story of two brothers who successfully engage in price-fixing—one of dairy-farm products and the other of dairy-farm implements. When it all comes to light, one brother is named Farmer-of-the-Year, has his picture on the cover of *Iowa Gazette* and goes to a big dinner in his honor in a black tux, while the other brother is named Felon-of-

the-Year, has his picture on the cover of *Police Gazette* and goes to the big house in an orange prison suit. (See addendum, *A Tale of Two Guys*)

What I take from this unfortunate state of affairs is that exemptions and immunities from the antitrust laws have a double-barreled adverse effect. First, they countenance anticompetitive activity that adversely affects consumers. Second, they breed disrespect for laws generally and for the antitrust laws in particular.

Nearly everyone—including the Antitrust Modernization Commission—waxes on about how antitrust exemptions and immunities are not a good idea, should seldom be granted and, when they are, should be reviewed frequently thereafter to see if the time is ripe to get rid of them. I certainly join in the Commission's principal recommendations in this regard. But you have to wonder how serious it all is. If exemptions and immunities are such a bad idea, how come we have so many of them? And why do they seem to persist in perpetuity? Something doesn't quite square.

Perhaps most revealing is the shape of the discussion when it turns to the subject of which particular antitrust exemptions and immunities should be eliminated. There is a lot of support for eliminating those that are inconsequential, but there is little support for eliminating those whose adverse competitive impact is greatest. In fact, there is little appetite even to discuss the subject.

And so it was with the Commission. Early on, there was talk at Commission meetings/hearings about how maybe we should consider recommending to Congress that it get rid of things like the baseball exemption and the Webb-Pomerene Act. But the impact of those exemptions on the average American doesn't amount to a hill of beans. Baseball is so afraid of losing its antitrust exemption that it conducts its affairs as if it didn't have one to start with. Thus, in baseball, as in other sports, there is free-agency for players, mobility for teams, etc. As for Webb-Pomerene, it authorizes American firms to do business abroad jointly under certain circumstances. Thus, for example, two widget manufacturers might be able to sell their widgets to consumers in Bolivia and Bulgaria at jointly-determined prices—hardly a big event for your average American consumer.

The big exemptions and immunities—the ones that count—are the ones for labor and agriculture. They impact much of what the average American eats and drinks and uses to do things. And they do it every day. All day. These exemptions cost American consumers billions of dollars a year. Every year. As things turned out, there wasn't much interest in facing up to those exemptions and immunities. Too much of a political football, I suppose. The thinking—probably correct—ran something like this: No Democrat from an industrial state can support repeal of labor antitrust exemptions and no Republican from an agricultural state can support repeal of food and dairy antitrust exemptions; so you get a bipartisan stand-off: "I'll let you keep your exemption, if you'll let me keep mine."

The Commission's recommendations do state that "immunities from the antitrust laws should be disfavored." The recommendations go on to urge narrow construction, periodic

review, sunseting and other positive reforms. Some of my fellow Commissioners bemoan the fact that the Commission did not take the next step and recommend the elimination of specific exemptions and immunities. Maybe we should have. After all, the arguments for specific exemptions and immunities, as others have noted, are all pretty much the same and not convincing. And any exemption or immunity that becomes an ex-exemption or an ex-immunity is perhaps a step in the right direction. Still, I think we would have looked silly—probably even cowardly—had we recommended the elimination of third-string exemptions and immunities that don’t have much impact and ducked addressing those exemptions and immunities that have widespread reach and do serious harm to hundreds of millions of Americans every day. I don’t see much glory or accomplishment from swatting an irritating gnat to death while ignoring an 800-pound gorilla that is wreaking havoc in the room. If we’re serious about our opposition to exemptions and immunities from the antitrust laws, then let’s approach it in a serious manner. Let’s start with the mortal sins, not the venial sins. Let’s start with those that cause major harm, not with those that are minor irritants.

Regulated industries. The antitrust analysis of regulated industries is a close cousin to the antitrust analysis of exemptions and immunities. In both cases, the workings of free markets are displaced. In the case of exemptions and immunities, they are replaced with sanctioned price-fixing; in the case of regulation, they are replaced with government regulation. For the most part, government regulation hasn’t worked out very well. It leads to a host of problems—not the least of which is “regulatory capture.” Over time, instead of the regulators protecting the public from those being regulated, the regulators end up protecting those being regulated from the public.

Over the past several decades these realities and the other inadequacies of regulation have become increasingly apparent and there has been a commendable movement toward deregulation. As the Commission recommendations state: “In recent decades, public policy in the United States has moved towards partial or full deregulation in industries formerly subject to economic regulation—that is, regulation of prices, costs, and entry. The trend toward deregulation has benefited consumers and the economy and should be furthered where practicable.” I wholeheartedly concur with this view. The only reason I did not join in some of the specific recommendations that follow with respect to what Congress should or shouldn’t do when they decide to go in the opposite direction is that those recommendations strike me as a bit presumptuous. Once Congress has decided that there are good and sufficient reasons for regulation of some sort, then I think that those reasons—and not antitrust considerations—should guide Congress as to what is the best course. I would likely disagree with the starting premise in almost all cases, but that is beside the point. Once Congress concludes that there are sound reasons to regulate, then it is those sound reasons that should drive what follows.

Does antitrust matter? I’d like to believe it does, and I do believe it does—at least when it comes to price-fixing and other naked restraints that clearly violate Section 1 of the

Sherman Act. To me at least, the economic theory is rock solid and the evidence with which I am familiar is wholly persuasive. But there is a lack of empirical studies to back up these beliefs. More importantly, some recent work by distinguished scholars calls the question into issue. (See, for example, R. Crandall and C. Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. OF ECON. PERSPECTIVE 2 (2003).)

In a thoughtful early written submission to the Commission, the then-sitting Assistant Attorney General for the Antitrust Division, R. Hewitt Pate, suggested that the Commission undertake to study this question in depth. As he put it:

Some antitrust commentators contend that there is no empirical foundation for the conviction that antitrust enforcement benefits consumers and the economy. It seems plain to me that combating cartels and forestalling perceived needs for regulation have alone provided great benefits, but more empirical evaluation of the effects of antitrust enforcement would certainly be desirable. The Commission should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement. Data could be collected and evaluated, with case selection criteria and evaluation standards objectively designed in advance. Such a study might run for several years. Bolstering empirical evaluation of antitrust enforcement could be an important and lasting achievement of the Commission. (Letter to D. Garza from R. H. Pate, January 5, 2005; <http://www.amc.gov/comments/pate.pdf>).

Unfortunately, in my view, the Commission decided not to do follow this suggestion. At our hearings, several of those who testified endorsed Hew Pate's suggestion, including another former head of the Antitrust Division and a former Chairman of the Federal Trade Commission. As one outgrowth of such testimony and other considerations, our Commission did recommend that such studies be undertaken in the merger area (and that consideration be given to commissioning outsiders to do them). I certainly hope both that that will be done and that, over time, the undertaking will be expanded to include the kind of more fundamental study recommended by Mr. Pate.

Patents and antitrust. The first antitrust statute, the Sherman Act, was enacted in 1890. The patent laws predate that by more than a century. Indeed, the framers of the Constitution thought patent laws were so important that they expressly provided for them in the Article I, Section 8. Patent and antitrust are complementary in some respects, but there are also some tensions between them. After all, antitrust condemns monopolies and patents grant them. An effort to harmonize the two is all to the good, of course, and I join in the thrust of the Commissions recommendations in this regard.

I do have some concern, however, that some who labor in the antitrust vineyard give the antitrust laws a primacy over other fields that is not always warranted. This is understand-

able; those who spend all day, every day in a particular field can be expected to view the importance of that field as paramount. It is such concern that leads me not to join in the Commission's unqualified recommendation that Congress give consideration to the suggestions of the FTC with regard to possible changes in the patent laws. The FTC's report pays lip service to the importance of the patent laws, but some of its suggestions strike me as betraying a deeper hostility to the patent laws and a desire to have antitrust considerations improperly trump the patent laws. Let me give an example of to what I'm referring.

The FTC's first recommendation is that there be an administrative procedure at the PTO "for post-grant review and opposition that allows for meaningful challenges to patent validity short of federal court litigation." This sounds fine; after all, the PTO is where the "experts" reside. When there is some controversy as to the validity of a just-issued patent, let's let these experts take a fresh look, and let's do it in a proceeding that allows both sides of the story to be told—and tested on cross-examination. In its second recommendation, however, the FTC appears to do an about-face. It says that, should a patent then be attacked in court, the deference traditionally awarded to the validity of the patent because of the review by the experts at the PTO—now even involving a second review—should be thrown out the window. The FTC proposes that this be accomplished by replacing the "clear and convincing" evidentiary test for rebutting the presumption that a patent is valid with the "preponderance of the evidence" test. To me at least, some of the FTC's suggestions come across more as efforts to torpedo patents so that there will be more competition than efforts aimed at making the patent system work better so that only truly deserving patents are issued.

Direct/Indirect purchaser claims. I've always thought that the strange twin rulings in *Hanover Shoe* and *Illinois Brick* are explainable mainly by the order in which they arrived at the Supreme Court. Had *Illinois Brick* been the first case, I can't imagine that the Court would have held that persons clearly injured by an antitrust violation could not recover. Quite the contrary, I think that argument would have been rejected out of hand. And for good reason. Then, when *Hanover Shoe* came along next, the Court likely would have said that defendants can, of course, assert a "pass-on" defense to ensure that those who weren't damaged don't get windfall recoveries.

But it didn't happen that way. Instead, *Hanover Shoe* was the first of the two cases to come before the Court. The rest, as they say, is history. Fearful that antitrust violators would escape without consequence were a "pass-on" defense countenanced, the Court said defendants could not assert such a defense. Then, when *Illinois Brick* reached the Court, it stated, in a burst of deference to symmetry, that indirect purchasers could not sue. So there we were: people who weren't injured (because they had passed on the overcharges to their customers—sometimes with a mark-up that meant they actually made a profit on their supplier's price-fixing) could not only get windfall recoveries, but huge windfall recoveries—three times the damages they didn't suffer. To make matters worse, their customers, who were the

ultimate target of the price-fixing activities to start with, couldn't recover bubbles.

Various States looked at this and—understandably—said “Hey, this makes no sense.” So they passed state laws that said, in effect, of course indirect purchasers can sue and recover for price-fixing that causes them (as it was intended to do) actual injury and damages. What has followed has been a nightmare—both substantively and procedurally. We have the spectacle of massive recoveries by people who didn't suffer the loss of a dime (and in some cases actually made money) and the denial of recovery (at least at the federal level and many States) to many of those who suffered substantial damages. The situation cries out for corrective action.

The Commission thoughtfully considered a wide range of possible recommendations, including federal preemption, an overturning of only *Illinois Brick* and others. In the end, the Commission decided—wisely, in my view—to make a recommendation that would serve to conform antitrust to the way things generally work in other areas. Specifically, we fashioned a recommendation whose aim, as it expressly states, is to prevent “duplicative recoveries, denial of recoveries to persons who suffered injury or windfall recoveries to persons who did not suffer injury”—all three of which can occur under the present regime. I believe we succeeded, and I hope Congress will implement our recommendation.

One last observation on this subject. The Commission's final recommendations with regard to the subject of direct and indirect purchaser claims were not settled upon until our February 22, 2007 meeting, and our ultimate recommendation differed from the draft pending as we began that meeting. The drafting of that section of the report, however, had been substantially completed before the February meeting. While there was tinkering after the meeting to get that section of the report to conform to the final recommendation, I fear that the report may not capture adequately the spirit of the final recommendation. These recommendations were not about procedural convenience and ease of administration. While they may contain some useful suggestions on that front, the recommendations were driven primarily by the desire to achieve fairness and a just result.

Some thoughts about the Commission and its work. I suspect that all of the Commissioners have reflected on their experiences serving on the Antitrust Modernization Commission—certainly I have. Let me close with some observations on that subject.

The AMC leadership and staff. The Commissioners were fortunate to have Deb Garza and Jon Yarowsky at the helm as our Chair and Vice-Chair, respectively. Together, they provided a steady hand on the rudder and quiet, but effective, leadership. All of the Commissioners are indebted to them for all they did for the rest of us. In addition, the work of the Commissioners, both individually and collectively, was made easier by the assistance of an able staff—from our Executive Director and Senior Counsel to our clerical personnel. Not only did they do an outstanding job, but they did it under tight deadlines, often having to integrate a great deal of input (sometimes conflicting) from various Commissioners. Throughout, they did their jobs with a positive and cheerful disposition.

The “inside baseball” perspective. Looking back, there are some things that might have been done differently. One is the composition of the Commission. Many of the Commissioners are “experts” in the antitrust field and have spent most of their professional careers laboring in the antitrust field. That proved valuable in many ways. Still, the Commission might have benefited had its membership included more individuals who were not part of the antitrust “inside baseball” establishment. Among other things, such individuals generally have a balanced perspective of all relevant considerations and do not elevate antitrust to an unwarranted primacy as a consideration that should be taken into account more than other important considerations.

The same can be said of the witnesses who appeared before us. They too came from the antitrust establishment for the most part. No one was excluded, of course, and the Commission extended a broad invitation for testimony and written submissions that was published in the *Federal Register*. But not a lot of people sit around reading the *Federal Register* to see what they want to do next week. Fortunately, some individuals from the business world or otherwise outside the antitrust arena did provide the Commission with their views by way of valuable testimony or written submissions. Some others were also invited, but declined to participate—perhaps not wanting to raise their antitrust profile. Whatever the circumstance, however, in retrospect, the Commission should have done more to get the views of “real” people from the commercial world who have to live out their business lives under the rules of the antitrust laws day-in and day-out.

The recommendations and the report. The fingerprints of the Commissioners—all twelve of them—are all over each and every one of the recommendations made to the President and Congress. That is not true as to the report that accompanies the recommendations. In short, the recommendations are decidedly the work product of the Commissioners, while the report is primarily the work product of the staff. Each Commissioner had an opportunity to read and comment on the report, of course, but the Commissioners did not do the same kind of intense scrutiny, study and discussion and debate that was done in the case of the recommendations. I say this not so much as a criticism of the report but rather so that those who review the work of the Commission will understand that the Commissioners’ individual, collective and collaborative efforts were directed to the recommendations far more than to the report.

Miscellaneous. There are many issues the Commission didn’t address. We had to pick and choose among many possible topics and attempt to use our limited time most effectively. Looking back, there are some things we didn’t address that I wish we had. Specifically, for example, I wish we had taken a closer look at whether it makes sense to have two antitrust enforcement agencies whose responsibilities often overlap. The FTC seems to have gotten away from what was envisioned as one of its primary ongoing activities at the time of its creation, scholarly studies of matters of importance to sound antitrust policy. Perhaps if its enforcement responsibilities were limited to areas that did not overlap with those of

the DOJ, its efforts could be more productively redirected to an area it has largely abandoned. We should also have examined Section 5 of the FTC Act and whether it plays a positive or negative role in the ongoing effort to achieve sound antitrust enforcement. Finally, the Commission's examination of the topics on which we chose to focus was done within the construct of the existing antitrust framework. Some suggested that we take a more bottoms-up approach, starting with a blank sheet of paper and trying to fashion a "better" framework from scratch. Some of the submissions we received in this regard were quite exciting; I wish we had had the time to give the consideration to them that they warranted.

Addendum: A Tale of Two Guys

It was the best of times; it was the worst of times. The best of times for John Doe, and the worst of times for James Doe. Here's how it all happened.

John and Jim Doe were brothers, twin brothers, in fact—the only two children of Frank and Mary Doe. They were born and raised on the Doe family farm, just outside of Smallville, Iowa.

Frank Doe ran a very successful dairy farm. In the early 1950s, he decided to expand by opening a dairy-farm equipment dealership in Smallville. With the post-war boom in farm mechanization, it too was a big success. When John and Jim returned home from their stint in the Army during the Korean War, they went into the family businesses with their dad, John running the dairy farm and Jim running the dairy-farm equipment dealership. And when Frank died in the mid-1970s, he left the farm to John and the dealership to Jim.

John and Jim Doe became successful businessmen. Over time, they also became industry leaders. John eventually became head of the local dairy-farm coop, and Jim the head of the local association of dairy-farm implement dealers. One of the things that both John and Jim did as heads of their respective organizations, was lead the effort to establish fair prices for their respective industries to charge customers. They were good at this too.

When people realized what an outstanding job John had done in setting prices for dairy-farm products, he was named Farmer-of-the-Year, there was picture of him on the cover of *Iowa Gazette* and he went to a big dinner honoring him in a black tux. When people realized what an outstanding job Jim had done in setting prices for dairy-farm implements, however, he was named Felon-of-the-Year, there was a picture of him on the cover of *Police Gazette* and he went to a big jail in an orange prison suit.

Fixing prices, you see, is legal for certain dairy farm products but illegal for dairy-farm implements. Dairy farm coops persuaded Congress to pass laws making it okay for them to fix prices—one of the many so-called "exemptions and immunities" from the antitrust laws. Those selling dairy-farm implements, however, failed in their efforts to secure such legislation making it okay for them to fix prices.

And so our story ends. John Doe is a hero, and Jim Doe is a villain. And yet they both did exactly the same thing.

Separate Statement of Commissioner Shenefield

I write separately to address the Commission's views on antitrust exemptions and immunities, and also on the Robinson-Patman Act.

Exemptions and Immunities

The central organizing principle of the U.S. economy is competition, which will spur productivity and enhance innovation. Notwithstanding the prominence of the free market model, the economy nevertheless tolerates some notable exceptions to the rule of competitive markets. Frequently, those exceptions are marked by statutory exemptions and immunities from the full application of the antitrust laws. The Commission's report ably describes the background and explains the continued persistence of these occasional deviations from the competitive principle.

The Commission's broad mandate and compressed schedule made it impossible to investigate any of the specific exemptions and immunities sufficiently to allow the Commission to feel comfortable in recommending the repeal of any of them, including some of the most ill-considered and egregious examples. Although understandable, that shortcoming in the Commission's work was an opportunity missed. Empirical data on sectoral deregulation suggest the magnitude of the missed opportunity, and counsel the way forward. I believe the President and Congress should create another commission of experts to undertake a broad-ranging evaluation of the antitrust exemptions and immunities now on the books. Although the repeal of some of the most unfortunate, including particularly the McCarran-Ferguson Act, the Shipping Act exemption and the Export Trading Company Act and Webb-Pomerene exemptions should not be delayed, the creation of such a commission would set the stage for a thorough and long-overdue policy review of all exemptions and immunities, thus going a long way to complete the deregulation work so well begun in the administrations of Presidents Ford and Carter.

Robinson-Patman Act

Notwithstanding its reticence with respect to the repeal of specific exemptions and immunities, the Commission recommends total repeal of the Robinson-Patman Act. Moreover it does so on a record composed more of academic opinion than of solid evidence. There is no serious disagreement that enforcement of the Act has on occasion had unnecessarily anticompetitive effects. The question for judgment is whether there is a rationale for conserving a kernel of the Act, amended to address the most serious criticisms. The Commission believes there is not, and accordingly recommends total repeal. I am unpersuaded by

the record before the Commission, and thus do not support the Commission's recommendation.

Instead, I believe reform is in order. Any such reform should import into the Robinson-Patman Act two fundamental concepts that would preserve the benefit of maintaining a law prohibiting anticompetitive discrimination but avoid the unnecessary disadvantages of the Act in its current form. First, I favor amending or reinterpreting the statute to make it clear that plaintiffs in secondary line cases under section 2(a) of the Act must prove competitive injury through the existence either of market power or buyer power (which would also affect liability under section 2(f) as well). I would also amend the statute to introduce a parallel competitive injury requirement into sections 2(d) and 2(e). Second, I would relax the cost justification standard by permitting a preferential price that was "reasonably related" to cost savings attributable to dealing with the favored buyer.

I join the Commission in recommending repeal of section 3 of the Act (the criminal provision). I would also repeal section 2(c).

My recommendation has the advantage over that proposed by the Commission of being politically feasible. I opt for sensible and incremental reform that has at least a chance of making important progress.

Separate Statement of Commissioner Warden

My views depart from those of a majority of Commissioners as to three significant issues: (1) the role of state law; (2) state “enforcement” of federal law; and (3) the rules as to costs and damages in private actions.*

The Role of State Law

I believe that state law—whether called antitrust law, consumer protection law or unfair competition law—that regulates the same business activity with the same purported objectives as the federal antitrust laws should be preempted except in its application to strictly local activities affecting a particular State.

While the Commission has found no compelling factual case for preemption, the potential for the development of inconsistent standards to serve parochial, idiosyncratic or even private interests is clearly present. Business today is increasingly global in scope, and firms are subject to the laws of the United States, the European Union and an increasing number of developed and developing nations and to scrutiny by the enforcement authorities of all those jurisdictions. The exercise of legislative and enforcement jurisdiction by 50 plus additional entities within the United States is a burden on interstate and foreign commerce in terms of merger review and monopolization cases and provides little, if any, countervailing benefit.

Legitimate interests of the States and their citizens regarding multistate and multinational conduct are fully protected by their respective ability, appropriately circumscribed by standing and antitrust injury requirements, to assert claims under the federal antitrust laws. I am not persuaded by arguments for preserving state law based on historical legal developments during the 19th century. Our notions of the federal commerce power, of the States’ ability to exercise their police powers against claims of freedom of contract and of many other matters are far different today, as, of course, is the nature and scope of economic activity. And, as our Report notes, even in 1890, when urging the adoption of what became the Sherman Act, Senator Sherman stated: “Each state can deal with a combination within the State, but only the General Government can deal with combinations reaching to not only the several States, but the commercial world.”

Nor am I persuaded by a supposed need for the States to act when federal enforcement is “lax” in the eye of some beholder. The development and enforcement of a coherent, effective and balanced national competition policy by the federal enforcement authorities includes

* Commissioner Garza joins this statement with respect to the role of state law and state “enforcement” of federal law.

decisions on what not to pursue as fully as it does decisions on what to pursue. A national competition policy must be just that—national. As discussed in the next section, both the Supreme Court and Congress have at least implicitly recognized this obvious reality.

State “Enforcement” of Federal Law

I have no quarrel with Congress’s decision to grant the States standing to sue under the federal antitrust laws in their capacity as *parens patriae* to recover damages for injured consumers in their respective jurisdictions. As our Report notes, such actions may be preferable in terms of cost and efficiency to consumer class actions. Likewise, the States’ right to sue for damages in their proprietary capacity raises no issue.

Nor do I question the Supreme Court’s long line of decisions allowing the States suing *parens patriae* to seek equitable relief for state-specific injury in federal courts pursuant to Section 16 of the Clayton Act, which governs actions by all private parties. As is further discussed below, the Supreme Court has not, however, conferred on the States general “law enforcement” authority under the federal antitrust laws. Rather, its decisions, which do not distinguish between state actions under Section 16 and other state *parens patriae* actions, clearly require a State to allege and prove injury particularized to its economy and not common to all or a large part of the nation. See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 443, 447–49 (1945); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 270–71 (1972); see generally *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602–07 (1982).

Permitting the States to seek equitable relief on the same footing as the federal enforcement authorities would pose the same problems as permitting state law to govern national and global activities, as Congress has recognized. When the Clayton Act was enacted in 1914, the Senate rejected an amendment that would have given the States power to enforce the antitrust laws in the name of the United States. 51 Cong. Rec. S14, 526 (daily ed. Sept. 1, 1914).¹ Among the reasons advanced for rejection were “the great danger of having a diversity of conclusions” (Senator Gallinger, 51 Cong. Rec. S14,477, daily ed. Aug. 31, 1914); the prevention of “the carrying out of any uniform policy in the enforcement of the antitrust law” (Senator Colt, 51 Cong. Rec. S14,518, daily ed. Sept. 1, 1914); and the fear that state attorneys general would “desert their own duties for another field that, for one reason or another, they might find to be more attractive” (Senator Pomerene, *id.*, at 14,519.)²

The Clayton Act as enacted makes no provision for actions in equity specifically by the States. Given the Supreme Court’s earlier rejection of state standing to enforce the Sherman

¹ The portions of the Congressional Record here cited are reprinted in 3 KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978).

² Recent experience has shown Senator Pomerene to have been more prescient than Nostradamus and with no inkling of the magnetism of television cameras.

Act, *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70–71 (1904) (those “acting under the direction of the Attorney General” are to enforce the Sherman Act, “according to some uniform plan, operative throughout the entire country”); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (“the vindication of the freedom of interstate commerce is not committed to the State of Louisiana”), and the Senate’s affirmation of that rejection, any claim of state standing to “enforce” the antitrust laws broader than that enjoyed by any private party or that conferred by the Supreme Court’s general *parens patriae* decisions discussed above, is not sustainable.

Because I am convinced that the Supreme Court will reject a claim by one or more States that they may sue as *parens patriae* in equity under the federal antitrust laws for other than state-specific injury if such a claim is squarely presented to it, I see no need for legislative action in this respect. I emphasize the point in this statement because the Commission’s Report assumes the States are “enforcement authorities” and because it has a clear impact on the nature of the relief to which a State might conceivably be entitled as a private party suing under Section 16—in contrast to the scope of relief available to the federal enforcement authorities—in any future action that like, for example, *Microsoft*, involves conduct global or national in scope.

Predominantly local matters have in fact been the principal focus of state enforcement, and the States have played a useful and effective role in protecting competition through such enforcement. Their Section 16 actions, as their legislation, should be directed solely to such local matters in the global economy of the 21st century.

Private Damage Actions

Government injunctive actions, with limited exceptions, seek prospective relief barring conduct claimed to be illegal.³ These actions have served to develop the law and, in my judgment, have thereby saved the Sherman Act from constitutional vagueness challenges. See generally *United States v. United States Gypsum Co.*, 438 U.S. 422, 440–42 (1978); compare *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). At the other end of the enforcement spectrum lie criminal prosecutions, which the Department of Justice has, properly, brought only in cases involving “hard core” cartel activity and which, of course, require proof beyond a reasonable doubt. Without endorsing every enforcement decision or the result reached in every case, I join the vast majority of observers in concluding that both of these enforcement mechanisms are working well.

The same cannot be said, in my judgment, of private treble damage actions. Such actions are brought not by enforcement agencies exercising discretion and concerned not to do more harm than good, but by private parties seeking only their own self-interest. The “enforce-

³ The limited exceptions are cases seeking dissolution or divestiture or what might be termed regulatory relief. Dissolution and divestiture cases have been rare since *AT&T*; the obvious recent example of regulatory relief is *Microsoft*.

ment” aspect of these actions—lauded by many—is purely incidental to their self-seeking motivation. Moreover, the statutory provision for trebling of damages renders relief in these cases punitive, as has been universally recognized. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 599 (1976); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945). When that provision is joined with joint and several liability, as it now is, the punitive sanction visited upon a defendant that goes to trial and loses can be truly draconian—indeed, far greater than the maximum criminal fine. See generally, II AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 303 (2d ed. 2000); II AREEDA & TURNER, ANTITRUST LAW 32–36 (1978).

The Commission’s recommendations for legislation providing for claim reduction and contribution are a solid start toward redressing the Kafkaesque dilemma of a defendant confronted with charges it believes unfounded and wishes to contest. Those who oppose this, and indeed any alleviation of the dilemma, invoke a single mantra—“cartel.” To favor cartels is, of course, in a league with opposing motherhood and apple pie. But the issue is hardly so simple and, I hasten to add, neither the problem nor its resolution has anything to do with cartel cases. Indeed, criminal prosecutions are better suited to deterring and punishing cartel behavior than are private civil actions, whose purpose should be to compensate, not to sanction.

The Supreme Court has recognized the dangers of chilling competitive behavior by the threat of punishment in the context of criminal prosecutions, *Gypsum, supra*, and Professor Areeda has observed the obvious fact that the same dangers are presented by treble-damage penalties, AREEDA & HOVENKAMP, *supra*; AREEDA & TURNER, *supra*. But while “over deterrence” is clearly at stake, so are other interests, including fundamental fairness in the judicial process.

First, fundamental fairness requires that before the punitive sanction of trebling is invoked, there be proof by clear and convincing evidence of clearly unlawful conduct.⁴ This should pose no problem for those seeking to recover overcharges from cartels, and it at least reduces the likelihood of punishing the innocent through what the academics call “false positives” and I call miscarriages of justice. Single damages seem entirely fair to an antitrust tort plaintiff who can prove its case only by a preponderance of the evidence and cannot demonstrate that the conduct so proven was clearly unlawful, the latter determination to be made taking into consideration both prior legal precedent and whether the conduct was overt and unchallenged for some years.

Second, actions brought by competitors have the potential for themselves being anti-competitive. It is sad, but true, that some firms take the view—to paraphrase General von Clausewitz—that litigation is an extension of business rivalry by means other than competition. All types of antitrust actions can impose on the parties huge costs (often running into

⁴ Professor Areeda appears to have endorsed such an approach in the 1978 edition of ANTITRUST LAW, and that endorsement has been continued by his successors in the 2000 edition.

eight figures) from discovery and motion practice, even if ultimately resolved on summary judgment. A prevailing plaintiff, in addition to damages, recovers its attorneys' fees, while a prevailing defendant recovers nothing but narrowly defined "costs." This imbalance probably cannot practicably be redressed in consumer class actions, but it can be in competitor cases where the plaintiff is a substantial firm. Accordingly, I urge that Congress provide for the award of attorneys' fees to prevailing defendants in such cases absent a determination by the court that an award would be manifestly unjust in a particular case. This would not only provide a measure of fairness to the defendant but would discourage rivals from bringing cases that are merely tactical, and would thereby serve the public goal of fostering competition on the merits.

Third, I would award full prejudgment interest to a prevailing plaintiff in any case where treble damages are not awarded. Where damages are trebled, I would make no change in existing law as to the award of interest, since prejudgment interest is not necessary to secure full compensation.

Final Comments

I offer additional comments on three other topics: patents, regulated industries and civil process.

Patents. The Constitution allows patents to be issued only for "inventions." See Article I, § 8. That requirement—termed "nonobviousness" in the implementing statute, 35 U.S.C. § 103—"may not be ignored." *Graham v. John Deere Co.*, 383 U.S.1, 6, 13–17 (1966). Despite the Supreme Court's repeated admonitions, both the PTO and the Federal Circuit appear consistently to have ignored the constitutional mandate. It is simply not possible to believe that true "inventions" have reached the level of 174,000 a year, but that is the number of patents the PTO issued in fiscal 2006.

Patents on the obvious impede not only competition but commerce itself by subjecting investment to uncertainty and the expense of litigation. I have little direct experience in this area, but that little has convinced me that a radical rethinking of doctrine is required. The review of "prior art" may be too narrowly confined by looking only to the art of a very specific field. The fact that two—or three or four or more—putative inventors unaware of each other's work dispute which of them was first by a margin of weeks or months to complete an "invention" may itself be evidence of obviousness; it may be that the "invention" was simply the inevitable next step in the evolution of technology by those skilled in the art. The statutory presumption of validity and reinforcing subsidiary presumptions devised by the Federal Circuit may be unwarranted by reality.

I can carry this inquiry no further, but I think Congress should and should do so with the assistance of talented generalists in business, law and science, not just patent specialists. In urging this undertaking, I am not seeking to accord antitrust primacy over patents. There is no conflict between antitrust law and patent law, but there is a conflict between the pres-

ent administration of the patent laws and the Constitution—a conflict that would exist were there no antitrust laws.

Regulated Industries. While I subscribe in large measure to the section of our Report dealing with regulated industries, in my judgment its usefulness is limited by a failure to distinguish sufficiently between businesses traditionally treated as utilities and now partially or wholly “deregulated” and businesses, particularly those providing financial services, that were never viewed as utilities but have long been subject to economic regulation and are likely to remain so.

Civil Process. The Commission did not study process in civil antitrust litigation, but I would be remiss were I not to include in this statement an exhortation to the courts on that subject. I have made my entire career in the field of commercial litigation, but, as a citizen, it seems incontrovertible to me that such litigation is a social overhead cost that should be minimized to the fullest extent consistent with the objectives of law enforcement, dispute resolution and tort compensation.

Today, the process costs of antitrust cases, like other major commercial cases in the United States, can become truly outlandish. From my 40 years of experience, I am convinced beyond peradventure that this level of cost is orders of magnitude beyond that necessary to fair and reasoned adjudication. The only effective solution lies with the courts themselves; judges must begin to apply cost/benefit analysis to process, rather than the “no stone unturned” approach that often seems to be the order of the day despite the provisions of Rule 26(b)(2). The cost of justice should not, itself, be unjust.

Appendix A

Relevant Statutes

(Excerpts)

TABLE OF CONTENTS

Antitrust Modernization Commission Act	A.1
Sherman Act.....	A.5
Clayton Act.....	A.6
Hart-Scott-Rodino Antitrust Improvements Act	A.14
Robinson-Patman Act	A.21
Federal Trade Commission Act.....	A.23
Foreign Trade Antitrust Improvements Act.....	A.31
International Antitrust Enforcement Assistance Act	A.31
Alternative Fines Statute	A.39
Antitrust Criminal Penalty Enhancement and Reform Act of 2004	A.40

Antitrust Modernization Commission Act of 2002, as amended

Pub. L. No. 107-273, 116 Stat. 1856 (2002), as amended by the Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007)

Sec. 11051. Short Title.

This subtitle may be cited as the “Antitrust Modernization Commission Act of 2002.”

Sec. 11052. Establishment.

There is established the Antitrust Modernization Commission (in this subtitle referred to as the “Commission”).

Sec. 11053. Duties of the Commission.

The duties of the Commission are—

- (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
- (2) to solicit views of all parties concerned with the operation of the antitrust laws;
- (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
- (4) to prepare and to submit to Congress and the President a report in accordance with section 11058.

Sec. 11054. Membership.

- (a) Number and Appointment.—The Commission shall be composed of 12 members appointed as follows:
 - (1) Four members, no more than 2 of whom shall be of the same political party, shall be appointed by the President. The President shall appoint members of the opposing party only on the recommendation of the leaders of Congress from that party.
 - (2) Two members shall be appointed by the majority leader of the Senate.
 - (3) Two members shall be appointed by the minority leader of the Senate.
 - (4) Two members shall be appointed by the Speaker of the House of Representatives.
 - (5) Two members shall be appointed by the minority leader of the House of Representatives.
- (b) Ineligibility for Appointment.—Members of Congress shall be ineligible for appointment to the Commission.
- (c) Term of Appointment.—
 - (1) In general.—Subject to paragraph (2), members of the Commission shall be appointed for the life of the Commission.
 - (2) Early termination of appointment.—If a member of the Commission who is appointed to the Commission as—
 - (A) an officer or employee of a government ceases to be an officer or employee of such government; or
 - (B) an individual who is not an officer or employee of a government becomes an officer or employee of a government;
 then such member shall cease to be a member of the Commission on the expiration of the 90-day period beginning on the date such member ceases to be such officer or employee of such government, or becomes an officer or employee of a government, as the case may be.
- (d) Quorum.—Seven members of the Commission shall constitute a quorum, but a lesser number may conduct meetings.
- (e) Appointment Deadline.—Initial appointments under subsection (a) shall be made not later than 60 days after the date of enactment of this Act [Nov. 2, 2002].
- (f) Meetings.—The Commission shall meet at the call of the chairperson. The first meeting of the Commission shall be held not later than 30 days after the date on which all members of the Commission are first appointed under subsection (a) or funds are appropriated to carry out this subtitle, whichever occurs later.
- (g) Vacancy.—A vacancy on the Commission shall be filled in the same manner as the initial appointment is made.
- (h) Consultation Before Appointment.—Before appointing members of the Commission, the President, the majority and minority leaders of the Senate, the Speaker of the House of Representatives, and the minority leader of the House of Representatives shall consult with each other to ensure fair and equitable representation of various points of view in the Commission.

- (i) Chairperson; Vice Chairperson.—The President shall select the chairperson of the Commission from among its appointed members. The leaders of Congress from the opposing party of the President shall select the vice chairperson of the Commission from among its remaining members.

Sec. 11055. Compensation of the Commission.

- (a) Pay.—
 - (1) Nongovernment employees.—Each member of the Commission who is not otherwise employed by a government shall be entitled to receive the daily equivalent of the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5 United States Code, as in effect from time to time, for each day (including travel time) during which such member is engaged in the actual performance of duties of the Commission.
 - (2) Government employees.—A member of the Commission who is an officer or employee of a government shall serve without additional pay (or benefits in the nature of compensation) for service as a member of the Commission.
- (b) Travel Expenses.—Members of the Commission shall receive travel expenses, including per diem in lieu of subsistence, in accordance with subchapter I of chapter 57 of title 5, United States Code.

Sec. 11056. Staff of Commission; Experts and Consultants.

- (a) Staff.—
 - (1) Appointment.—The chairperson of the Commission may, without regard to the provisions of chapter 51 of title 5 of the United States Code (relating to appointments in the competitive service), appoint and terminate an executive director and such other staff as are necessary to enable the Commission to perform its duties. The appointment of an executive director shall be subject to approval by the Commission.
 - (2) Compensation.—The chairperson of the Commission may fix the compensation of the executive director and other staff without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5 of the United States Code (relating to classification of positions and General Schedule pay rates), except that the rate of pay for the executive director and other staff may not exceed the rate of basic pay payable for level V of the Executive Schedule under section 5315 of title 5 United States Code, as in effect from time to time.
- (b) Experts and Consultants.—The Commission may procure temporary and intermittent services of experts and consultants in accordance with section 3109 (b) of title 5, United States Code.

Sec. 11057. Powers of the Commission.

- (a) Hearings and Meetings.—The Commission, or a member of the Commission if authorized by the Commission, may hold such hearings, sit and act at such time and places, take such testimony, and receive such evidence, as the Commission considers to be appropriate. The Commission or a member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or such member.

- (b) **Official Data.**—The Commission may obtain directly from any executive agency (as defined in section 105 of title 5 of the United States Code) or court information necessary to enable it to carry out its duties under this subtitle. On the request of the chairperson of the Commission, and consistent with any other law, the head of an executive agency or of a Federal court shall provide such information to the Commission.
- (c) **Facilities and Support Services.**—The Administrator of General Services shall provide to the Commission on a reimbursable basis such facilities and support services as the Commission may request. On request of the Commission, the head of an executive agency may make any of the facilities or services of such agency available to the Commission, on a reimbursable or nonreimbursable basis, to assist the Commission in carrying out its duties under this subtitle.
- (d) **Expenditures and Contracts.**—The Commission or, on authorization of the Commission, a member of the Commission may make expenditures and enter into contracts for the procurement of such supplies, services, and property as the Commission or such member considers to be appropriate for the purpose of carrying out the duties of the Commission. Such expenditures and contracts may be made only to such extent or in such amounts as are provided in advance in appropriation Acts.
- (e) **Mails.**—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.
- (f) **Gifts, Bequests, and Devises.**—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the Treasury and shall be available for disbursement upon order of the Commission.

Sec. 11058. Report.

Not later than 3 years after the first meeting of the Commission, the Commission shall submit to Congress and the President a report containing a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate.

Sec. 11059. Termination of the Commission.

The Commission shall cease to exist 60 days after the date on which the report required by section 11058 is submitted.

Sec. 11060. Authorization of the Commission.

There is authorized to be appropriated \$4,000,000 to carry out this subtitle.

Sherman Act

15 U.S.C. § 1 (Section 1 of the Sherman Act)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (Section 2 of the Sherman Act)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Clayton Act

15 U.S.C. § 12 (Section 1 of the Clayton Act)

- (a) “Antitrust laws,” as used herein, includes the Act entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled “An Act to reduce taxation, to provide revenue for the Government, and for other purposes,” of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled “An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled ‘An Act to reduce taxation, to provide revenue for the Government, and for other purposes,’” approved February twelfth, nineteen hundred and thirteen; and also this Act.

“Commerce,” as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

The word “person” or “persons” wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

- (b) This Act may be cited as the “Clayton Act.”

15 U.S.C. § 13 (Section 2 of the Clayton Act)

[See Robinson-Patman Act, below]

15 U.S.C. § 15 (Section 4 of the Clayton Act)

- (a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person’s pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—
- (1) whether such person or the opposing party, or either party’s representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

- (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
 - (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.
- (b)
- (1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.
 - (2) Paragraph (1) shall not apply to a foreign state if—
 - (A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;
 - (B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;
 - (C) such foreign state engages primarily in commercial activities; and
 - (D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.
- (c) For purposes of this section—
- (1) the term “commercial activity” shall have the meaning given it in section 1603(d) of Title 28, and
 - (2) the term “foreign state” shall have the meaning given it in section 1603(a) of Title 28.

15 U.S.C. § 15a (Section 4A of the Clayton Act)

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

- (1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

- (2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;
- (3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and
- (4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

15 U.S.C. § 15b (Section 4B of the Clayton Act)

Any action to enforce any cause of action under sections [4, 4A, or 4C] of this [Act] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15c (Section 4C of the Clayton Act)

- (a) (1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief
 - (A) which duplicates amounts which have been awarded for the same injury, or
 - (B) which is properly allocable to
 - (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and
 - (ii) any business entity.
- (2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only—
 - (A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;
 - (B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b)

(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section [4 of this Act] by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

15 U.S.C. § 15d (Section 4D of the Clayton Act)

In any action under section [4C](a)(1) of this [Act], in which there has been a determination that a defendant agreed to fix prices in violation of [the Sherman Act], damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

15 U.S.C. § 15e (Section 4E of the Clayton Act)

Monetary relief recovered in an action under section [4C](a)(1) of this [Act] shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

15 U.S.C. § 15f (Section 4F of the Clayton Act)

- (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
- (b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

15 U.S.C. § 15g (Section 4G of the Clayton Act)

For the purposes of sections [4C, 4D, 4E, and 4F] of this [Act]:

- (1) The term “State attorney general” means the chief legal officer of a State, or any other person authorized by State law to bring actions under section [4C] of this [Act], and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—
 - (A) a contingency fee based on a percentage of the monetary relief awarded under this section; or
 - (B) any other contingency fee basis, unless the amount of the award of a reasonable attorney’s fee to a prevailing plaintiff is determined by the court under section [4C](d)(1) of this [Act].
- (2) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.
- (3) The term “natural persons” does not include proprietorships or partnerships.

15 U.S.C. § 15h (Section 4H of the Clayton Act)

Sections [4C, 4D, 4E, 4F, and 4G] of this [Act] shall apply in any State, unless such State provides by law for its nonapplicability in such State.

15 U.S.C. § 16 (Section 5 of the Clayton Act)

- (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section [5 of the Federal Trade Commission Act] which could give rise to a claim for relief under the antitrust laws.

- (b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—
- (1) the nature and purpose of the proceeding;
 - (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
 - (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
 - (4) the remedies available to potential private plaintiffs damaged by the alleged violations in the event that such proposal for the consent judgment is entered in such proceeding;
 - (5) a description of the procedures available for modification of such proposal; and
 - (6) a description and evaluation of alternatives to such proposal actually considered by the United States.
- (c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—
- (i) a summary of the terms of the proposal for consent judgment,
 - (ii) a summary of the competitive impact statement filed under subsection (b) of this section,
 - (iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.
- (d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that

- (1) extraordinary circumstances require such shortening and
 - (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.
- (e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
 - (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
 - (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.
- (f) In making its determination under subsection (e) of this section, the court may—
 - (1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;
 - (2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;
 - (3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;
 - (4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and
 - (5) take such other action in the public interest as the court may deem appropriate.
- (g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

- (h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section [4A] of this [Act] nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.
- (i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section [4A] of this [Act], the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section [4] or [4C] of this [Act] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 18 (Section 7 of the Clayton Act)

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the

main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section [10 of the Public Utility Holding Company Act of 1955], the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

15 U.S.C. § 18a (*Hart-Scott-Rodino Antitrust Improvements Act; Section 7A of the Clayton Act*)

- (a) Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if—
 - (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and
 - (2) as a result of such acquisition, the acquiring person would hold an aggregate amount of the voting securities and assets of the acquired person—
 - (A) in excess of \$200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 8(a)(5) [of the Act] to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or
 - (B)
 - (i) in excess of \$50,000,000 (as so adjusted and published) but not in excess of \$200,000,000 (as so adjusted and published); and
 - (ii)
 - (I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 (as so adjusted and published) or more;
 - (II) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 (as so adjusted and published) or more; or

- (III) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of \$10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

(b)

- (1) The waiting period required under subsection (a) of this section shall—
 - (A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the “Assistant Attorney General”) of—
 - (i) the completed notification required under subsection (a) of this section, or
 - (ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and
 - (B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2) of this section.
- (2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.
- (3) As used in this section—
 - (A) The term “voting securities” means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.
 - (B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.
- (c) The following classes of transactions are exempt from the requirements of this section—
 - (1) acquisitions of goods or realty transferred in the ordinary course of business;
 - (2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;
 - (3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;
 - (4) transfers to or from a Federal agency or a State or political subdivision thereof;
 - (5) transactions specifically exempted from the antitrust laws by Federal statute;
 - (6) transactions specifically exempted from the antitrust laws by Federal statute

- if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;
- (7) transactions which require agency approval under [§ 301 of the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. § 1467a(e), § 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c), or § 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842], except that a portion of such a transaction is not exempt under this paragraph if such portion of the transaction
 - (A) is subject to [§ 103(a) of the Gramm-Leach-Bliley Act, 12 U.S.C. § 1843(k)]; and
 - (B) does not require agency approval under [§ 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842];
 - (8) transactions which require agency approval under [§ 4 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843, or § 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464], if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction, except that a portion of such a transaction is not exempt under this paragraph if such portion of the transaction
 - (A) is subject to [§ 103(a) of the Gramm-Leach-Bliley Act, 12 U.S.C. § 1843(k)]; and
 - (B) does not require agency approval under [§ 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842];
 - (9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;
 - (10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;
 - (11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of
 - (A) voting securities pursuant to a plan of reorganization or dissolution; or
 - (B) assets in the ordinary course of its business; and
 - (12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.
- (d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of Title 5, consistent with the purposes of this section—
- (1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and
 - (2) may—
 - (A) define the terms used in this section;
 - (B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

- (C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

(e)

(1)

- (A) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(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 to determine—
 - (I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or
 - (II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person.
- (ii) Internal review procedures for petitions filed pursuant to clause (i) shall include reasonable deadlines for expedited review of such petitions, after reasonable negotiations with investigative staff, in order to avoid undue delay of the merger review process.
- (iii) Not later than 90 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.
- (iv) Not later than 120 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall issue or amend their respective industry guidance, regulations, operating manuals and relevant policy documents, to the extent appropriate, to implement each reform in this subparagraph.
- (v) Not later than 180 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall each report to Congress—
 - (I) which reforms each agency has adopted under this subparagraph;
 - (II) which steps each has taken to implement such internal reforms; and
 - (III) the effects of such reforms.

- (2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 30 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person,
 - (A) all the information and documentary material required to be submitted pursuant to such a request, or
 - (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.
- (f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates [§ 7] of this [Act], or [§ 5 of the Federal Trade Commission Act], or an action is filed by the United States, alleging that a proposed acquisition violates such [§ 7] of this [Act], or section 1 or 2 of this [Act], and the Federal Trade Commission or the Assistant Attorney General
 - (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and
 - (2) certifies the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.
- (g)
 - (1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.
 - (2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court—
 - (A) may order compliance;
 - (B) shall extend the waiting period specified in subsection (b)(1) of this section and as may have been extended under subsection (e)(2) of this section until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

- (C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.
- (h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.
- (i) (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.
- (2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act [15 U.S.C. §§ 1311 et seq.], the Federal Trade Commission Act [15 U.S.C. §§ 41 et seq.], or any other provision of law.
- (j) Reserved.
- (k) If the end of any period of time provided in this section falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103(a) of title 5), then such period shall be extended to the end of the next day that is not a Saturday, Sunday, or legal public holiday.

15 U.S.C. § 18a note

- (a) Five working days after enactment of this Act [Nov. 21, 1989] and thereafter, the Federal Trade Commission shall assess and collect filing fees established in subsection (b) which shall be paid by persons acquiring voting securities or assets who are required to file premerger notifications by the [sic] section 7A of the Clayton Act (15 U.S.C. 18a) and the regulations promulgated thereunder. For purposes of said Act, no notification shall be considered filed until payment of the fee required by this section. Fees collected pursuant to this section 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': Provided, That fees in excess of \$40,000,000 in fiscal year 1990 shall be deposited to the credit of the Treasury of the United States: Provided further, That fees made available to the Federal Trade Commission and the Antitrust Division herein shall remain available until expended.
- (b) The filing fees referred to in subsection (a) are—
- (1) \$45,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a (a)(2)) is less than \$100,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 8(a)(5) of the Clayton Act (15 U.S.C. 19 (a)(5)) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003);

- (2) \$125,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a (a)(2)) is not less than \$100,000,000 (as so adjusted and published) but less than \$500,000,000 (as so adjusted and published); and
- (3) \$280,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a (a)(2)) is not less than \$500,000,000 (as so adjusted and published).

15 U.S.C. § 25 (Section 15 of the Clayton Act)

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

15 U.S.C. § 26 (Section 16 of the Clayton Act)

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections [2, 3, 7, and 8] of this [Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Robinson-Patman Act

15 U.S.C. § 13 (Section 1 of the Robinson-Patman Act)

- (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.
- (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
- (c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

- (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
- (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.
- (f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. § 13a (Section 3 of the Robinson-Patman Act)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

Federal Trade Commission Act

15 U.S.C. § 41 (Section 1 of the Federal Trade Commission Act)

A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the Commission's membership. No Commissioner shall engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

The Commission shall have an official seal, which shall be judicially noticed.

15 U.S.C. § 45 (Section 5 of the Federal Trade Commission Act)

(a)

- (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
- (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 App. U.S.C. §§ 1301 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. §§ 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
- (3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—
 - (A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—
 - (i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or
 - (ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

- (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such persons, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice, and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that
- (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals in the United States, in the manner provided in subsection (c) of this section; and
 - (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

- (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28 [the U.S. Code]. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have the power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commending obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28 [of the U.S. Code].
- (d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.
- (e) No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.
- (f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either
- (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or
 - (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or

- (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt of said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.
- (g) An order of the Commission to cease and desist shall become final—
 - (1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section.
 - (2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—
 - (A) the Commission;
 - (B) an appropriate court of appeals of the United States, if
 - (i) a petition for review of such order is pending in such court, and
 - (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or
 - (C) the Supreme Court, if an applicable petition for certiorari is pending.
 - (3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—
 - (A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;
 - (B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or
 - (C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.
 - (4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—
 - (A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

- (B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or
 - (C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.
- (h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.
- (i) If the order of the Commission is modified or set aside by the court of appeals, and if
 - (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or
 - (2) the petition for certiorari has been denied, or
 - (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.
- (j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing; and if
 - (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or
 - (2) the petition for certiorari has been denied, or
 - (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.
- (k) As used in this section the term “mandate”, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.
- (l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m)

(1)

- (A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.
- (B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—
 - (1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
 - (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

- (C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraph (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.
- (2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.
- (3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by public statement of its reasons and is approved by the court.

- (n) The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. § 53 (Section 13 of the Federal Trade Commission Act)

- (a) Whenever the Commission has reason to believe—
- (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and
 - (2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.
- (b) Whenever the Commission has reason to believe—
- (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
 - (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
- the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further,

That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

- (c) Any process of the Commission under this section may be served by any person duly authorized by the Commission—
 - (1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;
 - (2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or
 - (3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.
- (d) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—
 - (1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and
 - (2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction.

Foreign Trade Antitrust Improvements Act of 1982

15 U.S.C. § 6a

[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 [the Sherman Act], other than this section.

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

International Antitrust Enforcement Assistance Act of 1994 (IAEAA)

15 U.S.C. § 6201 (Section 2 of the IAEAA)

In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204 of this title, the Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under this chapter, antitrust evidence to assist the foreign antitrust authority—

- (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or
- (2) in enforcing any of such foreign antitrust laws.

15 U.S.C. § 6202 (Section 3 of the IAEAA)

- (a) Request for investigative assistance

A request by a foreign antitrust authority for investigative assistance under this section shall be made to the Attorney General, who may deny the request in whole or in part. No further action shall be taken under this section with respect to any part of a request that has been denied by the Attorney General.

- (b) Authority to investigate

In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204 of this title, the Attorney General and the Commission may, using their respective authority to investigate possible violations of the Federal antitrust laws, conduct investigations to obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such

agreement is in effect under this chapter, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority—

- (1) in determining whether a person has violated or is about to violate any of such foreign antitrust laws, or
- (2) in enforcing any of such foreign antitrust laws.

(c) Special scope of authority

An investigation may be conducted under subsection (b) of this section, and antitrust evidence obtained through such investigation may be provided, without regard to whether the conduct investigated violates any of the Federal antitrust laws.

(d) Rights and privileges preserved

A person may not be compelled in connection with an investigation under this section to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

15 U.S.C. § 6203 (Section 4 of the IAEAA)

(a) Authority of district courts

On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect under this chapter, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist a foreign antitrust authority with respect to which such agreement is in effect under this chapter—

- (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or
- (2) in enforcing any of such foreign antitrust laws.

(b) Contents of order

(1) Use of appointee to receive evidence

- (A) An order issued under subsection (a) of this section may direct that testimony or a statement be given, or a document or other thing be produced, to a person who shall be recommended by the Attorney General and appointed by the court.
- (B) A person appointed under subparagraph (A) shall have power to administer any necessary oath and to take such testimony or such statement.

(2) Practice and procedure

- (A) An order issued under subsection (a) of this section may prescribe the practice and procedure for taking testimony and statements and for producing documents and other things.
- (B) Such practice and procedure may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the Attorney General requests such order.
- (C) To the extent such order does not prescribe otherwise, any testimony and statements required to be taken shall be taken, and any documents and other things required to be produced shall be produced, in accordance with the Federal Rules of Civil Procedure.

(c) Rights and privileges preserved

A person may not be compelled under an order issued under subsection (a) of this section to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

(d) Voluntary conduct

This section does not preclude a person in the United States from voluntarily giving testimony or a statement, or producing a document or other thing, in any manner acceptable to such person for use in an investigation by a foreign antitrust authority.

15 U.S.C. § 6204 (Section 5 of the IAEAA)

Sections 6201, 6202, and 6203 of this title shall not apply with respect to the following antitrust evidence:

- (1) Antitrust evidence that is received by the Attorney General or the Commission under section 18a of this title. Nothing in this paragraph shall affect the ability of the Attorney General or the Commission to disclose to a foreign antitrust authority antitrust evidence that is obtained otherwise than under section 18a of this title.
- (2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for the purpose of applying Rule 6(e)(3)(C)(iv) of the Federal Rules of Criminal Procedure with respect to this section—
 - (A) a foreign antitrust authority with respect to which a particularized need for such antitrust evidence is shown shall be considered to be an appropriate official of any of the several States, and
 - (B) a foreign antitrust law administered or enforced by the foreign antitrust authority shall be considered to be a State criminal law.
- (3) Antitrust evidence that is specifically authorized under criteria established by Executive Order 12356, or any successor to such order, to be kept secret in the interest of national defense or foreign policy, and—
 - (A) that is classified pursuant to such order or such successor, or
 - (B) with respect to which a determination of classification is pending under such order or such successor.
- (4) Antitrust evidence that is classified under section 2162 of title 42.

15 U.S.C. § 6205 (Section 6 of the IAEAA)

Section 1313 of this title, and sections 46 (f) and 57b-2 of this title, shall not apply to prevent the Attorney General or the Commission from providing to a foreign antitrust authority antitrust evidence in accordance with an antitrust mutual assistance agreement in effect under this chapter and in accordance with the other requirements of this chapter.

15 U.S.C. § 6206 (Section 7 of the IAEAA)**(a) Publication of proposed antitrust mutual assistance agreements**

Not less than 45 days before an antitrust mutual assistance agreement is entered into, the Attorney General, with the concurrence of the Commission, shall publish in the Federal Register—

- (1) the proposed text of such agreement and any modification to such proposed text, and
- (2) a request for public comment with respect to such text or such modification, as the case may be.

(b) Publication of proposed amendments to antitrust mutual assistance agreements in effect

Not less than 45 days before an agreement is entered into that makes an amendment to an antitrust mutual assistance agreement, the Attorney General, with the concurrence of the Commission, shall publish in the Federal Register—

- (1) the proposed text of such amendment, and
- (2) a request for public comment with respect to such amendment.

(c) Publication of antitrust mutual assistance agreements, amendments, and terminations

Not later than 45 days after an antitrust mutual assistance agreement is entered into or terminated, or an agreement that makes an amendment to an antitrust mutual assistance agreement is entered into, the Attorney General, with the concurrence of the Commission, shall publish in the Federal Register—

- (1) the text of the antitrust mutual assistance agreement or amendment, or the terms of the termination, as the case may be, and
- (2) in the case of an agreement that makes an amendment to an antitrust mutual assistance agreement, a notice containing—
 - (A) citations to the locations in the Federal Register at which the text of the antitrust mutual assistance agreement that is so amended, and of any previous amendments to such agreement, are published, and
 - (B) a description of the manner in which a copy of the antitrust mutual assistance agreement, as so amended, may be obtained from the Attorney General and the Commission.

(d) Condition for validity

An antitrust mutual assistance agreement, or an agreement that makes an amendment to an antitrust mutual assistance agreement, with respect to which publication does not occur in accordance with subsections (a), (b), and (c) of this section shall not be considered to be in effect under this chapter.

15 U.S.C. § 6207 (Section 8 of the IAEAA)**(a) Determinations**

Neither the Attorney General nor the Commission may conduct an investigation under section 6202 of this title, apply for an order under section 6203 of this title, or provide antitrust evidence to a foreign antitrust authority under an antitrust mutual assistance agreement, unless the Attorney General or the Commission, as the case may be, determines in the particular instance in which the investigation, application, or antitrust evidence is requested that—

- (1) the foreign antitrust authority—
 - (A) will satisfy the assurances, terms, and conditions described in subparagraphs (A), (B), and (E) of section 6211 (2) of this title, and
 - (B) is capable of complying with and will comply with the confidentiality requirements applicable under such agreement to the requested antitrust evidence,
- (2) providing the requested antitrust evidence will not violate section 6204 of this title, and
- (3) conducting such investigation, applying for such order, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States, taking into consideration, among other factors, whether the foreign state or regional economic integration organization represented by the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by such investigation, by the granting of such order, or by the provision of such antitrust evidence.

(b) Limitation on disclosure of certain antitrust evidence

Neither the Attorney General nor the Commission may disclose in violation of an antitrust mutual assistance agreement any antitrust evidence received under such agreement, except that such agreement may not prevent the disclosure of such antitrust evidence to a defendant in an action or proceeding brought by the Attorney General or the Commission for a violation of any of the Federal laws if such disclosure would otherwise be required by Federal law.

(c) Required disclosure of notice received

If the Attorney General or the Commission receives a notice described in section 6211 (2)(H) of this title, the Attorney General or the Commission, as the case may be, shall transmit such notice to the person that provided the evidence with respect to which such notice is received.

15 U.S.C. § 6208 (Section 9 of the IAEAA)

(a) Determinations

Determinations made under paragraphs (1) and (3) of section 6207 (a) of this title shall not be subject to judicial review.

(b) Citations to and descriptions of confidentiality laws

Whether an antitrust mutual assistance agreement satisfies section 6211 (2)(C) of this title shall not be subject to judicial review.

(c) Rules of construction

(1) Administrative Procedure Act

The requirements in section 6206 of this title with respect to publication and request for public comment shall not be construed to create any availability of judicial review under chapter 7 of title 5.

(2) Laws referenced in section 6204 of this title

Nothing in this section shall be construed to affect the availability of judicial review under laws referred to in section 6204 of this title.

15 U.S.C. § 6209 (Section 10 of the IAEAA)**(a) In general**

The authority provided by this chapter is in addition to, and not in lieu of, any other authority vested in the Attorney General, the Commission, or any other officer of the United States.

(b) Attorney General and Commission

This chapter shall not be construed to modify or affect the allocation of responsibility between the Attorney General and the Commission for the enforcement of the Federal antitrust laws.

15 U.S.C. § 6210 (Section 11 of the IAEAA)

In the 30-day period beginning 3 years after November 2, 1994, and with the concurrence of the Commission, the Attorney General shall submit, to the Speaker of the House of Representatives and the President pro tempore of the Senate, a report—

- (1) describing how the operation of this chapter has affected the enforcement of the Federal antitrust laws,
- (2) describing the extent to which foreign antitrust authorities have complied with the confidentiality requirements applicable under antitrust mutual assistance agreements in effect under this chapter,
- (3) specifying separately the identities of the foreign states, regional economic integration organizations, and foreign antitrust authorities that have entered into such agreements and the identities of the foreign antitrust authorities with respect to which such foreign states and such organizations have entered into such agreements,
- (4) specifying the identity of each foreign state, and each regional economic integration organization, that has in effect a law similar to this chapter,
- (5) giving the approximate number of requests made by the Attorney General and the Commission under such agreements to foreign antitrust authorities for antitrust investigations and for antitrust evidence,
- (6) giving the approximate number of requests made by foreign antitrust authorities under such agreements to the Attorney General and the Commission for investigations under section 6202 of this title, for orders under section 6203 of this title, and for antitrust evidence, and
- (7) describing any significant problems or concerns of which the Attorney General is aware with respect to the operation of this chapter.

15 U.S.C. § 6211 (Section 12 of the IAEAA)

For purposes of this chapter:

- (1) The term “antitrust evidence” means information, testimony, statements, documents, or other things that are obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws or any of the foreign antitrust laws.
- (2) The term “antitrust mutual assistance agreement” means a written agreement, or written memorandum of understanding, that is entered into by the United States and a foreign state or regional economic integration organization (with respect to the foreign antitrust authorities of such foreign state or such organization, and such other governmental

entities of such foreign state or such organization as the Attorney General and the Commission jointly determine may be necessary in order to provide the assistance described in subparagraph (A)), or jointly by the Attorney General and the Commission and a foreign antitrust authority, for the purpose of conducting investigations under section 6202 of this title, applying for orders under section 6203 of this title, or providing antitrust evidence, on a reciprocal basis and that includes the following:

- (A) An assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is comparable in scope to the assistance the Attorney General and the Commission provide under such agreement or such memorandum.
- (B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under section 6201, 6202, or 6203 of this title and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence.
- (C) Citations to and brief descriptions of the laws of the United States, and the laws of the foreign state or regional economic integration organization represented by the foreign antitrust authority, that protect the confidentiality of antitrust evidence that may be provided under such agreement or such memorandum. Such citations and such descriptions shall include the enforcement mechanisms and penalties applicable under such laws and, with respect to a regional economic integration organization, the applicability of such laws, enforcement mechanisms, and penalties to the foreign states composing such organization.
- (D) Citations to the Federal antitrust laws, and the foreign antitrust laws, with respect to which such agreement or such memorandum applies.
- (E) Terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only—
 - (i) for the purpose of administering or enforcing the foreign antitrust laws involved, or
 - (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after—
 - (I) determining that such antitrust evidence is not otherwise readily available with respect to such objective,
 - (II) making the determinations described in paragraphs (2) and (3) of section 6207 (a) of this title, with respect to such disclosure or use, and
 - (III) making the determinations applicable to a foreign antitrust authority under section 6207 (a)(1) of this title (other than the determination regarding the assurance described in subparagraph (A) of this paragraph), with respect to each additional governmental entity, if any, to be provided such antitrust evidence in the course of such disclosure or use, after having received adequate written assurances applicable to each such governmental entity.

- (F) An assurance that antitrust evidence received under section 6201, 6202, or 6203 of this title from the Attorney General or the Commission, and all copies of such evidence, in the possession or control of the foreign antitrust authority will be returned to the Attorney General or the Commission, respectively, at the conclusion of the foreign investigation or proceeding with respect to which such evidence was so received.
- (G) Terms and conditions that specifically provide that such agreement or such memorandum will be terminated if—
 - (i) the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, and
 - (ii) adequate action is not taken both to minimize any harm resulting from the violation and to ensure that the confidentiality required under such agreement or such memorandum is not violated again.
- (H) Terms and conditions that specifically provide that if the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, notice of the violation will be given—
 - (i) by the foreign antitrust authority promptly to the Attorney General or the Commission with respect to antitrust evidence provided by the Attorney General or the Commission, respectively, and
 - (ii) by the Attorney General or the Commission to the person (if any) that provided such evidence to the Attorney General or the Commission.
- (3) The term “Attorney General” means the Attorney General of the United States.
- (4) The term “Commission” means the Federal Trade Commission.
- (5) The term “Federal antitrust laws” has the meaning given the term “antitrust laws” in subsection (a) of section 12 of this title but also includes section 45 of this title to the extent that such section 45 applies to unfair methods of competition.
- (6) The term “foreign antitrust authority” means a governmental entity of a foreign state or of a regional economic integration organization that is vested by such state or such organization with authority to enforce the foreign antitrust laws of such state or such organization.
- (7) The term “foreign antitrust laws” means the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws.
- (8) The term “person” has the meaning given such term in subsection (a) of section 12 of this title.
- (9) The term “regional economic integration organization” means an organization that is constituted by, and composed of, foreign states, and on which such foreign states have conferred sovereign authority to make decisions that are binding on such foreign states, and that are directly applicable to and binding on persons within such foreign states, including the decisions with respect to—
 - (A) administering or enforcing the foreign antitrust laws of such organization, and
 - (B) prohibiting and regulating disclosure of information that is obtained by such organization in the course of administering or enforcing such laws.

15 U.S.C. § 6212 (Section 13 of the IAEAA)

The Attorney General and the Commission are authorized to receive from a foreign antitrust authority, or from the foreign state or regional economic integration organization represented by such foreign antitrust authority, reimbursement for the costs incurred by the Attorney General or the Commission, respectively, in conducting an investigation under section 6202 of this title requested by such foreign antitrust authority, applying for an order under section 6203 of this title to assist such foreign antitrust authority, or providing antitrust evidence to such foreign antitrust authority under an antitrust mutual assistance agreement in effect under this chapter with respect to such foreign antitrust authority.

Alternative Fines Statute**18 U.S.C. § 3571**

- (a) In General.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.
- (b) Fines for Individuals.—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—
 - (1) the amount specified in the law setting forth the offense;
 - (2) the applicable amount under subsection (d) of this section;
 - (3) for a felony, not more than \$250,000;
 - (4) for a misdemeanor resulting in death, not more than \$250,000;
 - (5) for a Class A misdemeanor that does not result in death, not more than \$100,000;
 - (6) for a Class B or C misdemeanor that does not result in death, not more than \$5,000;
 - or
 - (7) for an infraction, not more than \$5,000.
- (c) Fines for Organizations.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—
 - (1) the amount specified in the law setting forth the offense;
 - (2) the applicable amount under subsection (d) of this section;
 - (3) for a felony, not more than \$500,000;
 - (4) for a misdemeanor resulting in death, not more than \$500,000;
 - (5) for a Class A misdemeanor that does not result in death, not more than \$200,000;
 - (6) for a Class B or C misdemeanor that does not result in death, not more than \$10,000; and
 - (7) for an infraction, not more than \$10,000.

- (d) **Alternative Fine Based on Gain or Loss.**—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.
- (e) **Special Rule for Lower Fine Specified in Substantive Provision.**—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Subtitle A

15 U.S.C. § 1 note (Section 211 of the ACPERA)

- (a) **In General.**—Except as provided in subsection (b), the provisions of sections 211 through 214 shall cease to have effect 5 years after the date of enactment of this Act.
- (b) **Exception.**—With respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.

15 U.S.C. § 1 note (Section 212 of the ACPERA)

In this subtitle:

- (1) **Antitrust division.**—The term “Antitrust Division” means the United States Department of Justice Antitrust Division.
- (2) **Antitrust leniency agreement.**—The term “antitrust leniency agreement,” or “agreement,” means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.
- (3) **Antitrust leniency applicant.**—The term “antitrust leniency applicant,” or “applicant,” means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.
- (4) **Claimant.**—The term “claimant” means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision.
- (5) **Cooperating individual.**—The term “cooperating individual” means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.
- (6) **Person.**—The term “person” has the meaning given it in subsection (a) of the first section of the Clayton Act.

15 U.S.C. § 1 note (Section 213 of the ACPERA)

- (a) In General.—Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.
- (b) Requirements.—Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—
 - (1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;
 - (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and
 - (3)
 - (A) in the case of a cooperating individual—
 - (i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and
 - (ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or
 - (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).
- (c) Timeliness.—If the initial contact by the antitrust leniency applicant with the Antitrust Division regarding conduct covered by the antitrust leniency agreement occurs after a State, or subdivision of a State, has issued compulsory process in connection with an investigation of allegations of a violation of section 1 or 3 of the Sherman Act or any similar State law based on conduct covered by the antitrust leniency agreement or after a civil action described in subsection (a) has been filed, then the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's initial cooperation with the claimant.
- (d) Continuation.—Nothing in this section shall be construed to modify, impair, or supersede the provisions of sections 4, 4A, and 4C of the Clayton Act relating to the recovery of costs of suit, including a reasonable attorney's fee, and interest on damages, to the extent that such recovery is authorized by such sections.

15 U.S.C. § 1 note (Section 214 of the ACPERA)

Nothing in this subtitle shall be construed to—

- (1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement;
- (2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or
- (3) affect, in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title.

amending 15 U.S.C. § 1 (Section 215 of the ACPERA)

- (a) Restraint of Trade Among the States.—Section 1 of the Sherman Act (15 U.S.C. 1) is amended by—
 - (1) striking “\$10,000,000” and inserting “\$100,000,000”;
 - (2) striking “\$350,000” and inserting “\$1,000,000”; and
 - (3) striking “three” and inserting “10.”
- (b) Monopolizing Trade.—Section 2 of the Sherman Act (15 U.S.C. 2) is amended by—
 - (1) striking “\$10,000,000” and inserting “\$100,000,000”;
 - (2) striking “\$350,000” and inserting “\$1,000,000”; and
 - (3) striking “three” and inserting “10.”
- (c) Other Restraints of Trade.—Section 3 of the Sherman Act (15 U.S.C. 3) is amended by—
 - (1) striking “\$10,000,000” and inserting “\$100,000,000”;
 - (2) striking “\$350,000” and inserting “\$1,000,000”; and
 - (3) striking “three” and inserting “10.”

Appendix B

Antitrust Modernization Commission Hearings

By Hearing Topic

Merger Enforcement (November 17, 2005)

Panel I—Assessment of U.S. Merger Enforcement Policy

William Baer, Arnold & Porter LLP, Washington, D.C.

James F. Rill, Howrey LLP, Washington, D.C.

David T. Scheffman, LECG, LLC, Washington, D.C.

Prof. Robert D. Willig, Competition Policy Associates (COMPASS), Princeton, New Jersey

Panel II—Treatment of Efficiencies in Merger Enforcement

Prof. Jonathan Baker, Washington College of Law, American University, Washington, D.C.

George S. Cary, Cleary Gottlieb Steen & Hamilton LLP, Washington, D.C.

Kenneth Heyer, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Charles F. (Rick) Rule, Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C.

Michael Salinger, Federal Trade Commission, Bureau of Economics, Washington, D.C.

Panel III—Hart-Scott-Rodino Second Request Process

Wayne Dale Collins, Shearman & Sterling LLP, New York, New York & Washington, D.C.

Susan A. Creighton, Federal Trade Commission, Washington, D.C.

J. Robert Kramer, II, U.S. Department of Justice, Antitrust Division, Washington, D.C.

David P. Wales, Jr., Cadwalader, Wickersham & Taft, LLP, Washington, D.C.

Mark D. Whitener, General Electric Company, Washington, D.C.

Economists' Roundtable on Merger Enforcement (January 19, 2006)

Prof. Timothy F. Bresnahan, Stanford University, Stanford, California

Prof. Steven Neil Kaplan, University of Chicago Graduate School of Business, Chicago, Illinois

Prof. Peter C. Reiss, Graduate School of Business, Stanford University, Stanford, California

Prof. Daniel L. Rubinfeld, Boalt Hall School of Law, University of California at Berkeley,
Berkeley, California

Prof. Lawrence J. White, Leonard N. Stern School of Business, New York University,
New York, New York

Exclusionary Conduct (September 29, 2005)

Kenneth L. Glazer, Coca-Cola Co., Atlanta, Georgia
 Prof. Timothy J. Muris, O'Melveny & Myers LLP, Washington, D.C.
 R. Hewitt Pate, Hunton & Williams LLP, Washington, D.C.
 Prof. Robert Pitofsky, Georgetown University Law Center, Washington, D.C.
 M. Laurence Popofsky, Heller Ehrman LLP, San Francisco, California
 Charles F. (Rick) Rule, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C.
 Prof. Steven C. Salop, Georgetown University Law Center, Washington, D.C.
 Prof. Carl Shapiro, Haas School of Business, University of California at Berkeley,
 Berkeley, California
 Willard K. Tom, Morgan, Lewis & Bockius LLP, Washington, D.C.

New Economy (November 8, 2005)

Panel I—Antitrust and the New Economy

Daniel Cooperman, Oracle Corporation, Redwood Shores, California
 Prof. Richard J. Gilbert, University of California at Berkeley, Berkeley, California
 M. Howard Morse, Drinker Biddle & Reath LLP, Washington, D.C.
 James J. O'Connell, Jr., U.S. Department of Justice, Antitrust Division, Washington, D.C.
 John E. Osborn, Cephalon, Inc., Frazer, Pennsylvania
 Prof. Carl Shapiro, Haas School of Business, University of California at Berkeley,
 Berkeley, California

Panel II—Patent Law Reform

Susan DeSanti, Federal Trade Commission, Washington, D.C.
 Peter Detkin, Intellectual Ventures, Bellevue, Washington
 Prof. Mark A. Lemley, Stanford Law School, Stanford, California
 Stephen A. Merrill, National Academies' Board on Science, Technology and Economic Policy
 (STEP), Washington, D.C.
 Stephen M. Pinkos, United States Patent and Trademark Office, Alexandria, Virginia
 Stephen A. Stack, Jr., Dechert LLP, Philadelphia, Pennsylvania

Federal Enforcement Institutions (November 3, 2005)

Panel I—Harmonizing FTC and DOJ Injunction Procedures

William Blumenthal, Federal Trade Commission, Washington, D.C.
 Craig Conrath, U.S. Department of Justice, Antitrust Division, Washington, D.C.
 Joe Sims, Jones Day, Washington, D.C.
 Michael N. Sohn, Arnold & Porter LLP, Washington, D.C.

Panel II—The FTC-DOJ Clearance Process

Prof. Timothy J. Muris, O’Melveny & Myers LLP, Washington, D.C.
 John M. Nannes, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, D.C.
 Joe Sims, Jones Day, Washington, D.C.
 Michael N. Sohn, Arnold & Porter LLP, Washington, D.C.

State Enforcement Institutions (October 26, 2005)

Prof. Michael E. DeBow, Cumberland School of Law, Samford University,
 Birmingham, Alabama
 Prof. Harry First, New York University School of Law, New York, New York
 Phillip A. Proger, Jones Day, Washington, D.C.
 Hon. G. Steven Rowe, Attorney General, State of Maine, Augusta, Maine

International Antitrust (February 15, 2006)

James R. Atwood, Covington & Burling, San Francisco, California
 Michael D. Blechman, Kaye Scholer LLP, New York, New York
 Prof. Eleanor M. Fox, New York University School of Law, New York, New York
 Gerald F. Masoudi, U.S. Department of Justice, Washington, D.C.
 Randolph W. Tritell, Federal Trade Commission, Washington, D.C.

Civil Remedies (July 28, 2005)*Panel I—Damages Multiplier, Attorneys’ Fees, and Prejudgment Interest*

David Boies, Boies, Schiller & Flexner LLP, Armonk, New York
 Prof. Edward Cavanagh, St. John’s University School of Law, Jamaica, New York
 Prof. Robert H. Lande, University of Baltimore School of Law, Baltimore, Maryland
 Abbott (Tad) B. Lipsky, Latham & Watkins LLP, Washington, D.C.
 Stephen D. Susman, Susman Godfrey LLP, Houston, Texas

Panel II—Joint & Several Liability, Contribution, and Claim Reduction

Lloyd Constantine, Constantine Cannon, PC, New York, New York
 Hon. Frank H. Easterbrook, United States Court of Appeals for the Seventh Circuit,
 Chicago, Illinois
 Michael D. Hausfeld, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, D.C.
 Don T. Hibner, Jr., Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, California
 Harry M. Reasoner, Vinson & Elkins L.L.P., Houston, Texas

Indirect Purchaser Litigation (June 27, 2005)

Hon. Mark J. Bennett, Attorney General, State of Hawaii, Honolulu, Hawaii
 Ellen Cooper, Maryland Attorney General's Office, Antitrust Division, Baltimore, Maryland
 Jonathan W. Cuneo, Cuneo Waldman & Gilbert, LLP, Washington, D.C.
 Michael L. Denger, Gibson, Dunn & Crutcher LLP, Washington, D.C.
 Prof. Andrew I. Gavil, Howard University Law School, Washington, D.C.
 Daniel E. Gustafson, Gustafson Gluek PLLC, Minneapolis, Minnesota
 H. Laddie Montague, Jr., Berger & Montague, PC, Philadelphia, Pennsylvania
 Richard M. Steuer, Mayer, Brown, Rowe & Maw LLP, New York, New York
 David B. Tulchin, Sullivan & Cromwell LLP, New York, New York
 Margaret M. Zwisler, Latham & Watkins LLP, Washington, D.C.

Government Civil Remedies (December 1, 2005)

Kevin J. Arquit, Simpson Thatcher & Bartlett LLP, New York, New York
 Prof. Stephen Calkins, Wayne State University Law School, Detroit, Michigan
 John D. Graubert, Federal Trade Commission, Washington, D.C.
 Thomas B. Leary, Federal Trade Commission, Washington, D.C.

Criminal Remedies (November 3, 2005)

Scott D. Hammond, U.S. Department of Justice, Antitrust Division, Washington, D.C.
 Anthony V. Nanni, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C.
 Tefft W. Smith, Kirkland & Ellis LLP, Washington, D.C., Chicago, Illinois
 Charles R. Tetzlaff, U.S. Sentencing Commission, Washington, D.C.

Robinson-Patman Act (July 28, 2005)

J. H. Campbell, Jr., Associated Grocers, Inc., Baton Rouge, Louisiana
 Professor Herbert Hovenkamp, The University of Iowa College of Law, Iowa City, Iowa
 Harvey Saferstein, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C., Santa Monica, California
 Bruce V. Spiva, Tycko, Zavareei & Spiva LLP, Washington, D.C.

Statutory Immunities and Exemptions (December 1, 2005)

Alden F. Abbott, Federal Trade Commission, Washington, D.C.
 Prof. Darren Bush, University of Houston Law Center, Houston, Texas
 Prof. Peter C. Carstensen, University of Wisconsin Law School, Madison, Wisconsin
 Gregory K. Leonard, National Economic Research Associates, Inc., San Francisco, California
 James C. Miller III, CapAnalysis and Howrey LLP, Washington, D.C.
 Prof. Stephen F. Ross, University of Illinois College of Law, Champaign, Illinois
 John J. Sullivan, U.S. Department of Commerce, Washington, D.C.

McCarran-Ferguson Act (October 18, 2006)

Jay B. Angoff, Roger G. Brown & Associates, Jefferson City, Missouri

Julie L. Gackenbach, Confrere Strategies, Washington, D.C.

Michael T. McRaith, Illinois Department of Financial and Professional Regulation,
Division of Insurance, Chicago, Illinois

Theodore Voorhees, Jr., Covington & Burling LLP, Washington, D.C.

J. Stephen Zielezienski, American Insurance Association, Washington, D.C.

Shipping Act (October 18, 2006)

Fabrizia Benini, Directorate General for Competition of the European Commission,
Brussels, Belgium

Steven R. Blust, Federal Maritime Commission, Washington, D.C.

Jean Godwin, American Association of Port Authorities, Alexandria, Virginia

Edward Greenberg, Galland, Kharasch, Greenberg, Fellman & Swirsky, PC, Washington, D.C.

Prof. Chris Sagers, Cleveland-Marshall College of Law, Cleveland State University,
Cleveland, Ohio

Stanley Sher, Sher & Blackwell, Washington, D.C.

Greg P. Stefflre, Rail Delivery Services, Inc., Fontana, California

State Action Doctrine (September 29, 2005)

John C. Christie, Jr., Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.

Robert M. Langer, Wiggin and Dana, Hartford, Connecticut

Maureen K. Ohlhausen, Federal Trade Commission, Washington, D.C.

Carlton A. Varner, Sheppard Mullin Richter & Hampton, Los Angeles, California

Regulated Industries (December 5, 2005)

Scott G. Alvarez, Board of Governors of the Federal Reserve System, Washington, D.C.

Raymond A. Atkins, Surface Board of Transportation, Washington, D.C.

Mark Cooper, Consumer Federation of America, Washington, D.C.

Harold Furchtgott-Roth, Furchtgott-Roth Economic Enterprises, Washington, D.C.

J. Bruce McDonald, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Hon. Rob McKenna, Attorney General, State of Washington, Olympia, Washington

Diana L. Moss, American Antitrust Institute, Washington, D.C.

John Thorne, Verizon Communications, Arlington, Virginia

Barnett/Majoras (March 21, 2006)

Thomas O. Barnett, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Deborah Platt Majoras, Federal Trade Commission, Washington, D.C.

By Witness

Alden F. Abbott (Statutory Immunities and Exemptions)
 Scott G. Alvarez (Regulated Industries)
 Jay Angoff (McCarran-Ferguson Act)
 Kevin J. Arquit (Government Civil Remedies)
 Raymond A. Atkins (Regulated Industries)
 James R. Atwood (International Antitrust)
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 Prof. Jonathan Baker (Merger Enforcement)
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 James J. O'Connell, Jr. (New Economy)
 Maureen K. Ohlhausen (State Action Doctrine)
 John E. Osborn (New Economy)
 R. Hewitt Pate (Exclusionary Conduct)
 Stephen M. Pinkos (New Economy)
 Prof. Robert Pitofsky (Exclusionary Conduct)
 M. Laurence Popofsky (Exclusionary Conduct)
 Phillip A. Proger (State Enforcement Institutions)

Harry M. Reasoner (Civil Remedies)
 Prof. Peter C. Reiss (Economists' Roundtable on Merger Enforcement)
 James F. Rill (Merger Enforcement)
 Prof. Stephen F. Ross (Statutory Immunities and Exemptions)
 Hon. G. Steven Rowe (State Enforcement Institutions)
 Prof. Daniel L. Rubinfeld (Economists' Roundtable on Merger Enforcement)
 Charles F. (Rick) Rule (Merger Enforcement)
 Charles F. (Rick) Rule (Exclusionary Conduct)
 Harvey Saferstein (Robinson-Patman Act)
 Prof. Christopher Sagers (Shipping Act)
 Michael Salinger (Merger Enforcement)
 Prof. Steven C. Salop (Exclusionary Conduct)
 David T. Scheffman (Merger Enforcement)
 Prof. Carl Shapiro (Exclusionary Conduct)
 Prof. Carl Shapiro (New Economy)
 Stanley Sher (Shipping Act)
 Joe Sims (Federal Enforcement Institutions)
 Tefft W. Smith (Criminal Remedies)
 Michael N. Sohn (Federal Enforcement Institutions)
 Bruce V. Spiva (Robinson-Patman Act)
 Stephen A. Stack, Jr. (New Economy)
 Greg P. Stefflre (Shipping Act)
 Richard Steuer (Indirect Purchaser Litigation)
 John J. Sullivan (Statutory Immunities and Exemptions)
 David P. Wales, Jr. (Merger Enforcement)
 Stephen D. Susman (Civil Remedies)
 Charles R. Tetzlaff (Criminal Remedies)
 John Thorne (Regulated Industries)
 Willard K. Tom (Exclusionary Conduct)
 Randolph W. Tritell (International Antitrust)
 David Tulchin (Indirect Purchaser Litigation)
 Carlton A. Varner (State Action Doctrine)
 Theodore Voorhees, Jr. (McCarran-Ferguson Act)
 Prof. Lawrence White (Economists' Roundtable on Merger Enforcement)
 Mark D. Whitener (Merger Enforcement)
 Prof. Robert D. Willig (Merger Enforcement)
 J. Stephen Zielezienski (McCarran-Ferguson Act)
 Margaret Zwisler (Indirect Purchaser Litigation)

Appendix C

Comments Received by the Antitrust Modernization Commission

COMMENTS ON ISSUES SELECTED FOR STUDY *

By Submitter

Alliance for Rail Competition et al. (July 15, 2005)

American Antitrust Institute, re Alternative Fines Statute (June 30, 2006)

American Antitrust Institute, re Civil Remedies (June 17, 2005)

American Antitrust Institute, re Consumer Welfare Standard (May 22, 2006)

American Antitrust Institute, re Contribution and Claim Reduction (Feb. 19, 2007)

American Antitrust Institute, re Enforcement Institutions (July 15, 2005)

American Antitrust Institute, re Exclusionary Conduct (July 15, 2005)

American Antitrust Institute, re Immunities and Exemptions (July 15, 2005)

American Antitrust Institute, re Indirect Purchaser Litigation (July 10, 2006)

American Antitrust Institute, re Indirect Purchaser Recommendation (Mar. 2, 2007)

American Antitrust Institute, re International Antitrust (July 15, 2005)

American Antitrust Institute, re Merger Enforcement (July 15, 2005)

American Antitrust Institute, re New Economy (July 15, 2005)

American Antitrust Institute, re Regulated Industries (July 15, 2005)

American Antitrust Institute, re Robinson-Patman Act (July 1, 2005)

American Antitrust Institute, re Sentencing Guidelines (Sept. 30, 2005)

American Bar Association, Section of Antitrust Law, re Alternative Fines Statute (June 30, 2006)

American Bar Association, Section of Antitrust Law, re Contribution and Claim Reduction (Dec. 5, 2005)

American Bar Association, Section of Antitrust Law, re Differential Merger Enforcement Standards (Oct. 28, 2005)

American Bar Association, Section of Antitrust Law, re Dual Federal Merger Enforcement (Oct. 28, 2005)

American Bar Association, Section of Antitrust Law, re Efficiencies (Nov. 10, 2005)

American Bar Association, Section of Antitrust Law, re Exclusionary Conduct (Mar. 17, 2006)

* See 70 Fed. Reg. 28,902 (May 19, 2005); 70 Fed. Reg. 46,474 (Aug. 10, 2005); 70 Fed. Reg. 69,510 (Nov. 16, 2005); 71 Fed. Reg. 30,863 (May 31, 2006); 71 Fed. Reg. 34,590 (June 15, 2006).

American Bar Association, Section of Antitrust Law, re FTAIA (Feb. 8, 2006)

American Bar Association, Section of Antitrust Law, re Hart-Scott-Rodino Second Request Process (Dec. 7, 2005)

American Bar Association, Section of Antitrust Law, Data re HSR Act Burdens (Feb. 22, 2007)

American Bar Association, Section of Antitrust Law, re Horizontal Merger Guidelines (Nov. 10, 2005)

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American Bar Association, Section of Antitrust Law, re International Cooperation (Feb. 8, 2006)

American Bar Association, Section of Antitrust Law, re McCarran-Ferguson Act (Apr. 10, 2006)

American Bar Association, Section of Antitrust Law, re Regulated Industries (July 17, 2006)

American Bar Association, Section of Antitrust Law, re Robinson-Patman Act (Apr. 10, 2006)

American Bar Association, Section of Antitrust Law, re Sentencing Guidelines (Nov. 14, 2005)

American Bar Association, Section of Antitrust Law, re Shipping Act (Mar. 17, 2006; revised Oct. 24, 2006)

American Bar Association, Section of Antitrust Law, re State Antitrust Enforcement (Oct. 19, 2005)

American Bar Association, Section of Antitrust Law, re State Civil Nonmerger Enforcement (Oct. 19, 2005)

American Bar Association, Section of Antitrust Law, re Treble Damages (July 26, 2006)

American Bar Association, Sections of Antitrust Law and International Law (Apr. 10, 2006)

American Bar Association, Section of International Law (Sept. 1, 2005)

American Commodity Company (July 14, 2005)

American Cotton Exporters Association (July 11, 2005)

American Council of Life Insurers (Oct. 17, 2006)

American Farm Bureau Federation (July 15, 2005)

American Insurance Association (July 15, 2005)

American Intellectual Property Law Association (July 25, 2005)

American Natural Soda Ash Corp. (June 28, 2005)

American Pork Export Trading Company (July 15, 2005)

American Public Power Association, re Merger Enforcement (Jan. 27, 2006)

American Public Power Association, re Regulated Industries (Jan. 27, 2006)

Prof. Bruce Anderson (July 15, 2005)

Stephen W. Armstrong (July 10, 2006)

Association for Competitive Technology (Feb. 7, 2006)

Association for the Administration of Rice Quotas, Inc. (July 14, 2005)

Association of American Railroads (Aug. 30, 2005)

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 California Kiwifruit Commission and California Kiwifruit Exporters Association (July 7, 2005)
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 Prof. Peter C. Carstensen, re Immunities and Exemptions (July 15, 2005)
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 John Connor, re International Cartels (June 13, 2005)
 John Connor, re Optimal Deterrence (June 13, 2005)
 John Connor, re Price-Fixing Overcharges (June 13, 2005)
 John Connor, re Vitamins Conspiracy (Feb. 23, 2006)
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 Thomas Hoar (May 18, 2006)
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 Gary Hull (June 29, 2005)
 Illinois Tool Works, Inc. (Aug. 18, 2005)

Intel Corporation (March 16, 2007)
 Intermodal Association of North America, Inc. (Nov. 1, 2006)
 Intermodal Motor Carriers Conference (July 15, 2005)
 International Bar Association, re International Antitrust (Jan. 27, 2006)
 International Bar Association, re Merger Enforcement (Oct. 26, 2005)
 International Bar Association, Antitrust and Trade Law Section (Sept. 26, 2005)
 International Chamber of Commerce (Sept. 1, 2005)
 International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD (Feb. 15, 2006)
 Joint Export Trade Alliance, re Immunities and Exemptions (July 15, 2005)
 Joint Export Trade Alliance, re International Antitrust (Jan. 13, 2006)
 Eleanor Roberts Lewis and Jeffrey Anspacher (Feb. 15, 2005)
 Senators Trent Lott and Thad Cochran (July 12, 2006)
 Rep. Donald Manzullo (June 17, 2005)
 Philip Marsden (Dec. 13, 2005)
 Members of the West Coast MTO Agreement (Jan. 23, 2007)
 Merger Streamlining Group (Feb. 6, 2006)
 Hon. Rob McKenna (July 15, 2005)
 Motion Picture Association of America, Inc., re New Economy (July 15, 2005)
 Motion Picture Association of America, Inc., Supplemental Comments re New Economy (Aug. 9, 2005)
 Prof. Willard Mueller (July 5, 2005)
 Mutual Trade Services (July 15, 2005)
 National Association of Manufacturers (July 12, 2005)
 National Association of Waterfront Employees (Dec. 29, 2006)
 National Chicken Council (July 7, 2005)
 National Council of Farmer Cooperatives (July 15, 2005)
 National Council on Compensation Insurance, re McCarran-Ferguson (July 15, 2005)
 National Council on Compensation Insurance, Supplemental Comments re McCarran-Ferguson (Nov. 1, 2006)
 National Farmers Union (July 15, 2005)
 National Foreign Trade Council, Inc. (July 15, 2005)
 National Industrial Transportation League (Oct. 18, 2006)
 National Milk Producers Federation (July 15, 2005)
 National Motor Freight Traffic Association, Inc. (July 22, 2005)
 National Motor Freight Traffic Association, Inc. and the National Classification Committee (Aug. 28, 2006)
 National Small Shipments Traffic Conference, Inc. (July 15, 2005)
 Office of the Attorney General of New York State (July 15, 2005)
 Newspaper Association of America (July 13, 2005)

Northwest Fruit Exporters (June 21, 2005)
 Carl Olson (June 24, 2005)
 Outdoor Power Equipment Institute (July 15, 2005)
 Paperboard Export Association of the United States (July 15, 2005)
 Perennial Ryegrass Bargaining Association (July 15, 2005)
 Jennifer Pucci (May 18, 2006)
 Phosphate Chemicals Export Association (July 11, 2005)
 Property Casualty Insurers Association of America, re McCarran-Ferguson Act (July 15, 2005)
 Property Casualty Insurers Association of America, re State Action & *Noerr-Pennington* Doctrines (July 15, 2005)
 Qualcomm Inc. (March 1, 2007)
 Cecil Quillen (July 10, 2006)
 Red Hat, Inc. (July 15, 2005)
 Kristen Riemenschneider (May 18, 2006)
 Relpromax Antitrust, Inc., re Merger Enforcement (July 15, 2005)
 Relpromax Antitrust, Inc., re Civil Remedies (June 17, 2005)
 Rice Economics Group, LLC (July 13, 2005)
 Hon. G. Steven Rowe (July 15, 2005)
 Prof. Steven C. Salop, re Merger Enforcement (Nov. 4, 2005)
 Prof. Steven C. Salop, re Exclusionary Conduct (Nov. 4, 2005)
 Prof. F.M. Scherer (Mar. 1, 2006)
 Sheridan Scott (July 15, 2005)
 Southern Motor Carriers Rate Conference, Inc., re Immunities and Exemptions (July 23, 2005)
 Southern Motor Carriers Rate Conference, Inc., Supplemental Comments re Immunities and Exemptions (Aug. 30, 2006)
 46 State Attorneys General (July 20, 2006)
 Randal K. Stoker, re Immunities and Exemptions (July 14, 2005)
 Randal K. Stoker, Supplemental Comments re Immunities and Exemptions (July 14, 2006)
 Randal K. Stoker, re Regulated Industries (Oct. 10, 2006)
 Randal K. Stoker, re Constitutionality of Milk Pooling (Aug. 21, 2006)
 Student Book Exchange (July 12, 2006)
 Thirty Antitrust Practitioners (June 17, 2005)
 Senators Craig Thomas et al. (June 13, 2006)
 United Air Lines, Inc. (Mar. 8, 2006)
 Her Majesty's Government of the United Kingdom and Northern Ireland (Feb. 3, 2006)
 U.S. Apple Association (July 14, 2005)
 U.S. Chamber Institute for Legal Reform (Mar. 20, 2007)
 U.S. Chamber of Commerce (Nov. 8, 2005)
 United States Department of Agriculture, re Agriculture Exemptions (July 15, 2005)

United States Department of Agriculture, re Export Trading Company and Webb-Pomerene (May 19, 2005)

United States Department of Commerce (Mar. 10, 2005)

United States Department of Justice, Antitrust Division (July 24, 2006)

U.S.A. Poultry and Egg Council (July 8, 2005)

U.S. Rice Producers Association (July 15, 2005)

U.S. Shippers Association (June 20, 2005)

United States Surimi Commission (July 15, 2005)

United States Telecom Association, re Bundling, (July 15, 2005)

United States Telecom Association, re Refusals to Deal (July 15, 2005)

United States Telecom Association, re Immunities and Exemptions (July 15, 2005)

United States Telecom Association, re Regulated Industries (July 15, 2005)

John Vander Schaaf (June 15, 2005)

Vehicle Information Services, Inc. (July 13, 2005)

Michael Vita and Paul Yde (Mar. 16, 2006)

Water & Wastewater Equipment Manufacturers Association, Inc. (July 14, 2005)

Charles D. Weller, re New Economy (July 16, 2005)

Charles D. Weller, re Merger Enforcement (July 16, 2005)

Charles D. Weller, re International Antitrust (July 18, 2005)

Western Coal Traffic League (July 15, 2005)

Wood Machinery Manufacturers of America (July 10, 2005)

World Shipping Council, re Immunities and Exemptions and Regulated Industries (July 15, 2005)

World Shipping Council, Supplemental Comments re Immunities and Exemptions (Aug. 22, 2005)

Phillip C. Zane, re Criminal Remedies (Sept. 29, 2005)

Phillip C. Zane, re Alternative Fines Statute (June 30, 2006)

By Topic

Merger Enforcement

American Antitrust Institute, re Consumer Welfare Standard (May 22, 2006)

American Antitrust Institute, re Merger Enforcement (July 15, 2005)

American Bar Association, Section of Antitrust Law, re Efficiencies (Nov. 10, 2005)

American Bar Association, Section of Antitrust Law, re The Hart-Scott-Rodino Second Request Process (Dec. 7, 2005)

American Bar Association, Section of Antitrust Law, Data re HSR Act Burdens (Feb. 22, 2007)

American Bar Association, Section of Antitrust Law, re Horizontal Merger Guidelines (Nov. 10, 2005)

American Public Power Association, re Merger Enforcement (Jan. 27, 2006)
 Jason Beaton (May 18, 2006)
 Business Roundtable (Nov. 4, 2005)
 Thomas Hoar (May 18, 2006)
 International Bar Association, re Merger Enforcement (Oct. 26, 2005)
 International Chamber of Commerce (Sept. 1, 2005)
 Merger Streamlining Group (Feb. 6, 2006)
 Relpromax Antitrust, Inc, re Merger Enforcement (July 15, 2005)
 Prof. Steven C. Salop, re Merger Enforcement (Nov. 4, 2005)
 Prof. F.M. Scherer (Mar. 1, 2006)
 Sheridan Scott (July 15, 2005)
 United Air Lines, Inc. (Mar. 8, 2006)
 U.S. Chamber of Commerce (Nov. 8, 2005)
 Michael Vita and Paul Yde (Mar. 16, 2006)
 Charles D. Weller, re Merger Enforcement (July 16, 2005)

Exclusionary Conduct

American Antitrust Institute, re Exclusionary Conduct (July 15, 2005)
 American Bar Association, Section of Antitrust Law, re Exclusionary Conduct (Mar. 17, 2006)
 Robert E. Bloch (Feb. 2, 2006)
 Business Roundtable (Nov. 4, 2005)
 CompTel/ALTS, re Exclusionary Conduct (July 15, 2005)
 International Bar Association, Antitrust and Trade Law Section (Sept. 26, 2005)
 International Chamber of Commerce (Sept. 5, 2005)
 Prof. Steven C. Salop, re Exclusionary Conduct (Nov. 4, 2005)
 U.S. Chamber of Commerce (Nov. 8, 2005)
 United States Telecom Association, re Bundling (July 15, 2005)
 United States Telecom Association, re Refusals to Deal (July 15, 2005)
 Western Coal Traffic League (July 15, 2005)

New Economy

American Antitrust Institute, re New Economy (July 15, 2005)
 American Intellectual Property Law Association (July 25, 2005)
 Computer & Communications Industry Association, re NAS-STEP and FTC Reports
 (July 20, 2005)
 Computer & Communications Industry Association, re New Economy (July 20, 2005)
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Cecil Quillen (July 10, 2006)

Red Hat, Inc. (July 15, 2005)

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Enforcement Institutions

American Antitrust Institute, re Enforcement Institutions (July 15, 2005)

American Bar Association, Section of Antitrust Law, re Differential Merger Enforcement Standards (Oct. 28, 2005)

American Bar Association, Section of Antitrust Law, re Dual Federal Merger Enforcement (Oct. 28, 2005)

American Bar Association, Section of Antitrust Law, re State Antitrust Enforcement (Oct. 19, 2005)

American Bar Association, Section of Antitrust Law, re State Civil Nonmerger Enforcement (Oct. 19, 2005)

Attorneys General of Hawaii, Maine, and Oregon (July 23, 2006)

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Thomas Greene (July 15, 2005)

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U.S. Chamber Institute for Legal Reform (Mar. 20, 2007)

U.S. Chamber of Commerce (Nov. 8, 2005)

International Antitrust

American Antitrust Institute, re International Antitrust (July 15, 2005)

American Bar Association, Section of Antitrust Law, re International Cooperation (Feb. 8, 2006)

American Bar Association, Section of Antitrust Law, re FTAIA (Feb. 8, 2006)

American Bar Association, Section of Antitrust Law and International Law (Apr. 10, 2006)

American Bar Association, Section of International Law (Sept. 1, 2005)

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International Chamber of Commerce (Sept. 5, 2005)
 International Chamber of Commerce and the Business and Industry Advisory Committee
 to the OECD (Feb. 15, 2006)
 Joint Export Trade Alliance, re International Antitrust (Jan. 13, 2006)
 Philip Marsden (Dec. 13, 2005)
 Her Majesty's Government of the United Kingdom and Northern Ireland (Feb. 3, 2006)
 U.S. Chamber of Commerce (Nov. 8, 2005)
 Charles D. Weller, re International Antitrust (July 18, 2005)

Civil Remedies

American Antitrust Institute, re Civil Remedies (June 17, 2005)
 American Antitrust Institute, re Contribution and Claim Reduction (Feb. 19, 2007)
 American Antitrust Institute, re Indirect Purchaser Litigation (July 10, 2006)
 American Antitrust Institute, re Indirect Purchaser Recommendation (Mar. 2, 2007)
 American Bar Association, Section of Antitrust Law, re Contribution and Claim Reduction
 (Dec. 5, 2005)
 American Bar Association, Section of Antitrust Law, re Indirect Purchaser Litigation
 (July 19, 2006)
 American Bar Association, Section of Antitrust Law, re Treble Damages (July 26, 2006)
 Stephen W. Armstrong (July 10, 2006)
 Attorneys General of Hawaii, Maine, and Oregon (July 23, 2006)
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 John Connor, re International Cartels (June 13, 2005)
 John Connor, re Optimal Deterrence (June 13, 2005)
 John Connor, re Price-Fixing Overcharges (June 13, 2005)
 John Connor, re Vitamins Conspiracy (Feb. 23, 2006)
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 Thirty Antitrust Practitioners (June 17, 2005)
 U.S. Chamber of Commerce (Nov. 8, 2005)
 John Vander Schaaf (June 15, 2005)

Criminal Remedies

American Antitrust Institute, re Alternative Fines Statute (June 30, 2006)

American Antitrust Institute, re Sentencing Guidelines (Sept. 30, 2005)

American Bar Association, Section of Antitrust Law, re Alternative Fines Statute (June 30, 2006)

American Bar Association, Section of Antitrust Law, re Sentencing Guidelines (Nov. 14, 2005)

Phillip C. Zane, re Alternative Fines Statute (June 30, 2006)

Phillip C. Zane, re Criminal Remedies (Sept. 29, 2005)

United States Department of Justice, Antitrust Division (July 24, 2006)

Robinson-Patman Act

American Antitrust Institute, re Robinson-Patman Act (July 1, 2005)

American Bar Association, Section of Antitrust Law, re Robinson-Patman Act (Apr. 10, 2006)

Business Roundtable (Nov. 4, 2005)

Gary Hull (June 29, 2005)

U.S. Chamber of Commerce (Nov. 8, 2005)

Immunities and Exemptions

Alliance for Rail Competition et al. (July 15, 2005)

American Antitrust Institute, re Immunities and Exemptions (July 15, 2005)

American Bar Association, Section of Antitrust Law, re Immunities and Exemptions (Nov. 30, 2005)

American Bar Association, Section of Antitrust Law, re McCarran-Ferguson Act (Apr. 10, 2006)

American Bar Association, Section of Antitrust Law, re Shipping Act (Mar. 17, 2006; revised Oct. 24, 2006)

American Commodity Company (July 14, 2005)

American Cotton Exporters Association (July 11, 2005)

American Council of Life Insurers (Oct. 17, 2006)

American Farm Bureau Federation (July 15, 2005)

American Insurance Association (July 15, 2005)

American Natural Soda Ash Corp. (June 28, 2005)

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California Kiwifruit Commission and California Kiwifruit Exporters Association (July 7, 2005)

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Property Casualty Insurers Association of America, re State Action & Noerr-Pennington Doctrines (July 15, 2005)

Rice Economics Group, LLC (July 13, 2005)

Southern Motor Carriers Rate Conference, Inc., re Immunities and Exemptions (July 23, 2005)

Southern Motor Carriers Rate Conference, Inc., Supplemental Comments re Immunities and Exemptions (Aug. 30, 2006)

Randal K. Stoker, re Immunities and Exemptions (July 14, 2005)

Randall K. Stoker, Supplemental Comments re Immunities and Exemptions (July 14, 2006)

Randall K. Stoker, re Constitutionality of Milk Pooling (Aug. 21, 2006)

Student Book Exchange (July 12, 2006)

Senator Craig Thomas et al. (June 13, 2006)

U.S. Apple Association (July 14, 2005)

U.S. Chamber of Commerce (Nov. 8, 2005)

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United States Department of Commerce (Mar. 10, 2005)

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U.S. Shippers Association (June 20, 2005)

United States Surimi Commission (July 15, 2005)

United States Telecom Association, re Immunities and Exemptions (July 15, 2005)

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Western Coal Traffic League (July 15, 2005)

Wood Machinery Manufacturers of America (July 10, 2005)

World Shipping Council, re Immunities and Exemptions and Regulated Industries (July 15, 2005)

World Shipping Council, Supplemental Comments re Immunities and Exemptions (Aug. 22, 2005)

Regulated Industries

American Antitrust Institute, re Regulated Industries (July 15, 2005)

American Bar Association, Section of Antitrust Law, re Regulated Industries (July 17, 2006)

American Public Power Association, re Regulated Industries (Jan. 27, 2006)

Association of American Railroads (Aug. 30, 2005)

Business Roundtable (Nov. 4, 2005)

Prof. Peter C. Carstensen, re Regulated Industries (July 15, 2005)

CompTel/ALTS, re Regulated Industries (July 15, 2005)
 Hon. Rob McKenna (July 15, 2005)
 Jennifer Pucci (May 18, 2006)
 Randall K. Stoker, re Regulated Industries (Oct. 10, 2006)
 United States Telecom Association, re Regulated Industries (July 15, 2005)
 Western Coal Traffic League (July 15, 2005)
 World Shipping Council, re Immunities and Exemptions and Regulated Industries
 (July 15, 2005)

COMMENTS PROPOSING ISSUES FOR STUDY *

American Antitrust Institute (Jan. 3, 2005)
 American Antitrust Institute (Sept. 30, 2004)
 American Bar Association, Section of Antitrust Law (Sept. 30, 2004)
 American Bar Association, Section of International Law (Sept. 30, 2004)
 American Homeowners Grassroots Alliance (Sept. 30, 2004)
 Americans for Tax Reform (Sept. 9, 2004)
 Applied Medical Resources Corp. (Oct. 7, 2004)
 Association for Competitive Technology (Sept. 30, 2004)
 Attorneys General of 41 States and the District of Columbia (Oct. 1, 2004)
 Business Roundtable (Sept. 29, 2004)
 Hon. Robert H. Bork (Sept. 30, 2004)
 Senator Robert C. Byrd (Jan. 12, 2005)
 Canadian Bar Association, National Competition Law Section (Sept. 28, 2004)
 Matthew Cantor and Jeffrey Shinder (Sept. 30, 2004)
 Cato Institute (Sept. 29, 2004)
 Prof. Edward Cavanaugh (Oct. 1, 2004)
 Center for Corporate Policy (Oct. 12, 2004)
 Cisco Systems, Inc. (Jan. 7, 2005)
 Citizens Against Government Waste (Oct. 8, 2004)
 Committee to Support the Antitrust Laws (Sept. 30, 2004)
 Committee to Support U.S. Trade Laws (Jan. 12, 2005)
 Competitive Enterprise Institute (Sept. 30, 2004)
 Computing Technology Industry Association (Oct. 28, 2004)
 George Crispin (Jan. 14, 2005)
 Rep. Phil English (Jan. 12, 2005)

* See 69 Fed. Reg. 43,969 (July 23, 2004).

FreedomWorks Foundation (Sept. 27, 2004)
 Hewlett-Packard Company (Jan. 5, 2005)
 International Business-Government Counselors (Jan. 7, 2005)
 Profs. Robert H. Lande & Richard O. Zerbe (Dec. 14, 2004)
 LECG, Inc. (Sept. 29, 2004)
 Eugene Lipkowitz (Jan. 12, 2005)
 Masimo Corp. (Oct. 4, 2004)
 Prof. R. Preston McAfee (Sept. 28, 2004)
 Medical Devices Manufacturers Association (Oct. 4, 2004)
 Prof. Thomas D. Morgan (Sept. 28, 2004)
 National Association of Manufacturers (Oct. 14, 2004)
 National Energy Marketers Association (Sept. 28, 2004)
 R. Hewitt Pate (Jan. 5, 2005)
 Reps. Charles B. Rangel and John Conyers, Jr. (Jan. 12, 2005)
 Relpromax Antitrust, Inc. (Sept. 30, 2004)
 Relpromax Antitrust, Inc. (Jan. 11, 2005)
 Peter M. Rockwell (Sept. 30, 2004)
 Prof. Mark E. Roszkowski (Oct. 13, 2004)
 Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and
 Consumer Rights (Oct. 1, 2004)
 Senators Arlen Specter and Mike DeWine (Jan. 10, 2005)
 State Department Watch (Sept. 8, 2004)
 Sun Microsystems (Sept. 30, 2004)
 Sun Microsystems, Inc. (Jan. 4 2005)
 Erin Thoeny (Jan. 9, 2005)
 United Parcel Service (Dec. 17, 2004)
 U.S. Chamber of Commerce (Sept. 30, 2004)
 United States Telecom Association (Sept. 30, 2004)
 Charles D. Weller (Sept. 30, 2004)
 Charles D. Weller (Dec. 20, 2004)
 Prof. Todd Zywicki (Sept. 20, 2004)

Appendix D

Biographies

COMMISSIONERS

Deborah A. Garza, *Chair*

Deborah Garza is a partner in Fried, Frank, Harris, Shriver & Jacobson LLP's Washington, D.C., office. Previously, Ms. Garza was a partner at Covington & Burling, where she was an attorney from 1989 to 2001. Prior to that, she served in the Antitrust Division of the Department of Justice as Chief of Staff and Counselor, from 1988 to 1989, and as Special Assistant to the Assistant Attorney General for Antitrust from 1984 to 1985. Ms. Garza received her J.D. from the University of Chicago Law School in 1981. She received her B.S. from Northern Illinois University in 1978.

Jonathan R. Yarowsky, *Vice-Chair*

Jonathan Yarowsky is a partner in Patton Boggs LLP's Washington, D.C., office. Previously, Mr. Yarowsky served in a number of government positions. Most recently, he was Special Associate Counsel to President Clinton, responsible for advising the President on antitrust, telecommunications, and other matters, including judicial selection for the federal judiciary. Prior to that, he served for five years as General Counsel to the House Committee on the Judiciary, where he had supervisory responsibility for numerous subject matter areas. Mr. Yarowsky also served as Chief Counsel to the House Judiciary Subcommittee on Economic and Commercial Law, prior to assuming the position of General Counsel for the Full Committee. Mr. Yarowsky received his J.D. from U.C.L.A. Law School in 1977 and his A.B. from the University of Michigan in 1971. Mr. Yarowsky also holds an M.S. from Cornell University, which he received in 1974.

Bobby R. Burchfield, *Commissioner*

Bobby Burchfield is a partner at McDermott, Will & Emery in Washington, D.C., where he is co-partner-in-charge of the Washington office and Chair of the Complex Litigation Practice. Before joining McDermott in 2004, Burchfield was at Covington & Burling, where he was a partner since 1987 and the Co-Chair of the Litigation Umbrella Group. He previously served as General Counsel to the campaign of President George H.W. Bush in 1992. Mr. Burchfield received his J.D. from the George Washington University Law School in 1979 and his B.A. from the Wake Forest University in 1976.

W. Stephen Cannon, Commissioner

Steve Cannon is Chairman of Constantine Cannon, LLP. Prior to joining the firm in 2005, Mr. Cannon was Senior Vice President, General Counsel, and Secretary of Circuit City Stores, Inc., in Richmond, Virginia. Before joining Circuit City in 1994, Mr. Cannon had been a partner at Wunder, Diefenderfer, Cannon & Thelen, in Washington, D.C. Previously, he served as a Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice. Before that, Mr. Cannon served as Chief Antitrust Counsel to the Committee on the Judiciary of the Senate and as a trial attorney in the Antitrust Division. Mr. Cannon received his J.D. from the University of South Carolina Law School in 1976 and his B.A. from the University of South Carolina in 1973.

Dennis W. Carlton, Commissioner

Dennis Carlton is the Deputy Assistant Attorney General for Economic Analysis at the U.S. Department of Justice. Mr. Carlton is a professor of economics at the University of Chicago Graduate School of Business (currently on leave), a position that he has held since 1984. Previously, Mr. Carlton was a faculty member at the University of Chicago Law School and the department of economics. Prior to his appointment to the Department of Justice in October 2006, Mr. Carlton was also a Senior Managing Director of Lexecon, an economic consulting firm. Mr. Carlton's principal areas of study are industrial organization and theoretical and applied microeconomics. Mr. Carlton has served as the co-editor of the *Journal of Law and Economics* since 1980. Mr. Carlton was awarded his Ph.D. in Economics from the Massachusetts Institute of Technology in 1975, which also awarded him an M.S. in Operations Research in 1974. Mr. Carlton received his A.B. from Harvard College in 1972.

Makan Delrahim, Commissioner

Makan Delrahim is a partner at Brownstein Hyatt Farber Schreck, which he joined in 2005. Previously, he had been the Deputy Assistant Attorney General for International, Policy, and Appellate Matters in the Antitrust Division of the Department of Justice, a position he assumed in 2003. Before that, Mr. Delrahim was Chief Counsel and Staff Director to the Judiciary Committee of the Senate. From 1996 to 1998, he was an attorney at Patton Boggs LLP, in Washington, D.C. Mr. Delrahim received his J.D. from George Washington University Law School in 1996, and a B.S. from the University of California at Los Angeles in 1991. He was also awarded an M.S. in Biotechnology by Johns Hopkins University in 2001.

Jonathan M. Jacobson, Commissioner

Jonathan Jacobson is a partner at Wilson Sonsini Goodrich & Rosati in New York City. From 1993 through 2005, he was a partner at Akin, Gump, Strauss, Hauer & Feld LLP, where he was the co-chair of the firm's antitrust practice. He is the editorial chair of the Antitrust Section's sixth edition of *Antitrust Law Developments*, published in 2007 by the Antitrust Section of the American Bar Association, and previously served as co-chair of the Books and Treatises Committee of the Antitrust Section. Mr. Jacobson received his J.D. from Brooklyn Law School in 1976. He received his A.B. from Columbia College in 1973.

Donald G. Kempf, Jr., Commissioner

Donald Kempf is an AAA- and CPR-certified arbitrator and mediator, an adjunct professor of law, and a sole practitioner. He retired in 2005 from Morgan Stanley, where he was Executive Vice President, Chief Legal Officer, Secretary, and a member of the company's Management Committee. Before joining Morgan Stanley in 1999, Mr. Kempf was a partner at Kirkland & Ellis, where he had been a trial lawyer since his graduation from law school. Mr. Kempf received his LL.B. from Harvard Law School in 1965, and an A.B. from Villanova University in 1959. He also received an M.B.A. from the University of Chicago Graduate School of Business in 1989.

Sanford M. Litvack, Commissioner

Sanford Litvack is a partner in Hogan & Hartson LLP's New York and Los Angeles offices. He joined the firm in 2004, having previously been a partner at Quinn, Emanuel, Urquhart Oliver & Hedges LLP. Mr. Litvack has held several other positions, including recently as Senior Executive Vice President and Chief of Corporate Operations for The Walt Disney Company, where he also served briefly as Vice Chairman of the Board of Directors. Previously, he served as Assistant Attorney General in the Antitrust Division of the Department of Justice from 1979 to 1981. He received his LL.B. in 1959 from Georgetown University and a B.A. from the University of Connecticut in 1956.

John H. Shenefield, Commissioner

John Shenefield has been a partner at Morgan Lewis, in the firm's Washington, D.C., office, since 1986. Prior to joining Morgan Lewis, Mr. Shenefield was the Assistant Attorney General for the Antitrust Division of the Department of Justice from 1977 to 1979. He subsequently served as Associate Attorney General from 1979 to 1981. While at the Department of Justice, Mr. Shenefield served as the Chairman of the National Commission to Review Antitrust Laws and Procedures, which issued its report in 1979. He received his LL.B. from Harvard Law School in 1965 and an A.B. from Harvard College in 1960.

Debra A. Valentine, Commissioner

Debra Valentine is Vice President, Deputy General Counsel, and Secretary for United Technologies Corporation, headquartered in Hartford, Connecticut. She joined UTC in January 2004. Previously, Ms. Valentine had been a partner at O'Melveny & Myers LLP, in the firm's Washington, D.C., office, where she was an attorney for thirteen years. She interrupted her practice at O'Melveny & Myers to serve in several leadership positions at the Federal Trade Commission, including General Counsel, from 1995 to 2001. Ms. Valentine also was an attorney in the Office of Legal Counsel at the Department of Justice from 1981 to 1985. Ms. Valentine received her J.D. from Yale Law School in 1980. She received an A.B. from Princeton University in 1976.

John L. Warden, Commissioner

John Warden is a partner in the New York office of Sullivan & Cromwell LLP, where he has practiced since his graduation from law school. Mr. Warden received his LL.B. from the University of Virginia Law School in 1965. He received his A.B. from Harvard University in 1962. He is a fellow of the American College of Trial Lawyers and a member of the American Law Institute.

COMMISSION STAFF

Andrew J. Heimert, *Executive Director & General Counsel*

Andrew J. Heimert previously was an attorney in the Federal Trade Commission's Office of Policy and Coordination, where he worked on a variety of antitrust policy issues. Prior to that, Mr. Heimert was an attorney at Covington & Burling, from 1997 to 2001, where he practiced antitrust and litigation. Immediately following law school, Mr. Heimert clerked for Richard S. Arnold, Chief Judge for the United States Court of Appeals for the Eighth Circuit. Mr. Heimert received his J.D. from Yale Law School in 1996. He received his A.B. from Stanford University in 1993.

Susan S. DeSanti, *Senior Counsel*

Susan S. DeSanti was previously the Deputy General Counsel for Policy Studies at the Federal Trade Commission, a position she had held since 2001. From 1995 to 2001, Ms. DeSanti was the Director of the Office of Policy Planning. In those positions, she had responsibility for several FTC reports. She held several other positions at the FTC between 1991 and 1995. Before joining the Federal Trade Commission, Ms. DeSanti was a partner at Hogan & Hartson. She received a J.D. from Boston University School of Law, and a B.A. from Sarah Lawrence College.

William F. Adkinson, Jr., *Counsel*

William F. Adkinson, Jr. was previously an attorney in the antitrust group at Wilmer, Cutler & Pickering in Washington, D.C., where his practice covered a wide range of merger, counseling, and litigation matters. Mr. Adkinson served as Senior Policy Counsel at The Progress & Freedom Foundation directly before joining the Commission staff, where he addressed a variety of competition and regulatory issues. He is currently a Senior Editor of the Antitrust Law Journal and previously served as President of the National Economists Club. Mr. Adkinson graduated from Amherst College in 1978. He received his law degree from Yale Law School in 1987, where he also completed oral examinations in Industrial Organization and Public Finance in the Economics Department's Ph.D. program.

Nadine Jones, *Counsel*

Nadine Jones was an antitrust associate at Arnold & Porter LLP prior to joining the Commission. Her practice included a \$41 billion telecommunications merger in 2004, complex antitrust litigation involving the financial industry, and other matters involving both civil and criminal antitrust liability. Ms. Jones is a 2003 graduate of Howard University School of Law. While at Howard, she served as an Articles Editor for the Howard Law Journal, and as a research assistant for Professor Andrew I. Gavil.

Marni B. Karlin, *Counsel*

Marni B. Karlin was previously an antitrust associate at Axinn, Veltrop & Harkrider LLP, where her practice included a \$41 billion telecommunications merger in 2004 and complex antitrust litigation. Prior to that, Ms. Karlin was an associate in the antitrust and litigation groups at O'Melveny & Myers LLP. Immediately following law school, Ms. Karlin clerked for John M. Duhé, Jr., Judge on the United States Court of Appeals for the Fifth Circuit. Ms. Karlin received her J.D. from the University of Chicago Law School in 2001. She received her B.A. from George Washington University in 1998.

Hiram R. Andrews, *Law Clerk*

Hiram Andrews is currently attending Georgetown University Law Center's Evening Division. Mr. Andrews received his M.A. in German Literature from Yale University in 2000 and his A.B. from Bowdoin College in 1997. Mr. Andrews previously worked as a paralegal at the Federal Trade Commission's Bureau of Competition, and also served as a Fulbright Teaching Assistant in Austria.

Christopher N. Bryan, *Paralegal*

Christopher Bryan was previously an administrative assistant in the General Counsel's office at the Federal Trade Commission. Mr. Bryan received his B.A. in Political Science from the University of California at Santa Barbara in 2005.

Kristen M. Gorzelany, *Paralegal*

Kristen Gorzelany received a B.A. from Hamilton College in 2001, where she also worked as a writing tutor. Previously, Ms. Gorzelany was a paralegal at the Federal Trade Commission's Bureau of Competition. She also worked as a paralegal for two attorneys in private practice in northern California.

Sylvia Boone, *Administrative Officer*

Sylvia Boone was previously the administrative officer for the U.S. Commission on Ocean Policy. Before that, Ms. Boone worked for the Millennial Housing Commission and several other federal agencies.

Alan J. Meese, *Senior Advisor*

Alan Meese is the Ball Professor of Law at William and Mary, where he has taught since 1995. Meese received his A.B. from William and Mary and his J.D. from the University of Chicago Law School. After law school Professor Meese served as a law clerk, first to Judge Frank Easterbrook and then to Justice Antonin Scalia. He then practiced law at Skadden, Arps, Slate, Meagher & Flom in Washington, D.C., before joining the faculty at William and Mary.

Michael W. Klass, *Economics Advisor*

Michael W. Klass is an economist at the Antitrust Division of the Department of Justice, which he joined in 1998. Before joining the Division he worked for years as a consultant on antitrust, trade, and other issues. From 1977 to 1980, Mr. Klass directed antitrust economics at the Federal Trade Commission. Before that, he was Staff Economist for Regulatory Reform, for the Senate Governmental Affairs Committee, where he co-wrote a major study of regulatory reform. Mr. Klass received his Ph.D. in economics from the University of Wisconsin in 1970 and his B.A. from Carleton College in 1965. Mr. Klass also received a Certificate from Harvard's Program for Senior Managers in Government in 1979.

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