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FINDINGS AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION

HEARING

BEFORE THE

ANTITRUST TASK FORCE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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FINDINGS AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION

TUESDAY, MAY 8, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Task Force met, pursuant to notice, at 2:19 p.m., in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Task Force) presiding.

Present: Representatives Conyers, Berman, Jackson Lee, Chabot, Smith, Keller, and Issa.

Staff present: Stacey Dansky, Majority Counsel; Stewart Jeffries, Minority Counsel; and Brandon Johns, Staff Assistant.

Mr. CONYERS. Good afternoon. The hearing on the Antitrust Task Force will come to order.

We are now examining the findings and recommendations of the Antitrust Modernization Commission.

And I yield first to the Ranking Member of the full Committee, Lamar Smith.

Mr. SMITH. Mr. Chairman, I thank you very much for yielding. All I want to do is thank you for convening this very first hearing of the Antitrust Task Force and for your initiative on creating one.

I unfortunately have to be over at the Capitol in 10 minutes, so I am not going to be able to stay, so I would like to ask unanimous consent that my particularly articulate and persuasive opening statement be made a part of the record.

I thank you, Mr. Chairman.

Mr. CONYERS. Without objection, so ordered.

I apologize for my lateness. President Preval of Haiti has just arrived in the Capitol, and I was detained longer than I thought I would be.

We are delighted to welcome both the chair and vice chair of the Antitrust Modernization Commission and appreciate both of you being here to report on the Commission's findings and recommendations: Ms. Deborah Garza and, of course, John Yarowsky, the vice chair.

For the past 3 years, our witnesses, along with 10 other commissioners, have been analyzing the antitrust laws to determine whether they are fully effective as is or if they could benefit from refinement to reflect changes in technology and the marketplace.

For over a century now, antitrust laws have served as our economic bill of rights, providing the ground rules for fair competition. The antitrust laws are our chief bulwark against schemes by cartels and monopolists to deprive consumers and our economy of the

benefits of competition and innovation—that is lower prices, better products, and greater efficiency.

The AMC's report is an ambitious one with over 300 pages of analysis and recommendations. The AMC covered a lot of ground. Some of their recommendations are particularly useful; for example, its recommendation that immunities from antitrust laws should be disfavored and only created when the heavy burden is met of clearly demonstrating that the exemption is necessary to satisfy a specific societal goal that trumps the benefits of a free market.

It is a good starting point for Congress as it moves forward with various proposals.

Other recommendations do not receive such glowing reports. I lower my head to mention the Robinson-Patman Act. That provides a set of guidelines for marketplace behavior by guaranteeing that everyone competing in any given marketplace has a level playing field. It does this by prohibiting sellers from offering different prices to different purchasers of commodities where there is no pro-competitive justification.

Robinson-Patman helps ensure that small businesses and mom-and-pop stores have the ability to compete with big power retailers like Wal-Mart. In its recommendations, the AMC suggests repeal of Robinson-Patman, claiming it is not performing its intended function and that it conflicts with the goals of modern antitrust law.

Admittedly, the Act has flaws, is structurally complex and very hard to administer, and it is not used often as an enforcement tool. But these problems should not mean we should repeal the law altogether. Instead of repealing the act, it is my hope that we can find a way to make it work better.

I also have concerns about the Commission's ambiguous recommendation on the repeal of Illinois Brick and Hanover Shoe Supreme Court cases. In these two cases, the Supreme Court ruled that only direct purchasers, not indirect purchasers, may sue for damages from price fixing and that antitrust defendants in these cases cannot use the defense that the direct purchaser passed on the over-charge to the indirect purchaser or the consumer.

Illinois Brick has been controversial since it was adopted, but many States have adopted policies that allow indirect purchasers to sue. I applaud the Commission for attempting to resolve this issue and I agree that allowing indirect purchasers to sue will enhance consumer welfare.

I am more skeptical, however, of the Commission's proposal because of the potentially adverse effect it could have on direct purchaser actions. If each direct purchaser must determine how much of the over-charge was passed on downstream, it might be very difficult for them to pursue these actions. The result could be an overall decrease in holding price-fixers and monopolists accountable. This is an issue we shall continue to study carefully.

I also want to mention that no matter how current or modern the antitrust laws are, the positive effects of such laws cannot be felt without adequate enforcement by the agencies. The AMC says that the U.S. merger policy is fundamentally sound and that there does not appear to be a systematic bias toward either over-enforcement

or under-enforcement. Yet in the past few years with technological and marketing innovation occurring at breakneck speed, we have seen a wave of consolidation in some of our key industries.

According to Thomson Financial, this year was the fourth largest in history for mergers and acquisitions. The fact that the Department of Justice has failed to challenge any of these massive industry-consolidating mergers makes me worry about the AMC's conclusion here.

I look forward to hearing from the two senior commissioners and appreciate the incredible amount of work that has gone into this endeavor over the last 3 years. And I want to continue our dialogue about the importance of our antitrust laws. This Antitrust Task Force was created specifically to get us into the inquiring of how we can make this area of our law better.

I would now recognize Steve Chabot, our Ranking minority Member on this Task Force, for an opening statement.

Mr. CHABOT. Thank you. And I would like to thank the distinguished gentleman from Michigan, Chairman Conyers, for holding this important hearing.

I was privileged to speak a few weeks ago at the American Bar Association's Annual Spring Antitrust Conference, and I happened to be seated next to our witnesses. One of our colleagues, one of your colleagues, Commissioner Valentine, had the opportunity to discuss with some of the folks there the significance of the Antitrust Modernization Commission report.

And in particular, I acknowledged the importance of the Commission's report to Congress, specifically as it provides us with a backdrop against which this Task Force can better analyze the specific antitrust issues which we have identified for review over the next 6 months. This report is very timely for this Task Force.

At the very heart of the creation of the Commission and its directive to study our Nation's antitrust laws was Congress's concern that rapidly advancing technology was incompatible with competition and consumers. As we have all witnessed, technology has dramatically changed the marketplace and the nature of competition. Technology that we viewed as science fiction years ago has now become a part of our daily lives.

Our first hearing reviewing the XM and Sirius Satellite Radio merger held just a few months back highlighted the uncertainty that consumers, businesses, regulators and the courts face in the 21st century.

Most of the issues that the Commission examined and will report on today were not contemplated at the time of our Nation's antitrust laws upon their enactment almost 118 years ago and while the courts have done a good job in balancing innovation against competition within the antitrust framework, this new information-driven economy has forced us all to take a look at the effectiveness of our antitrust structure.

The good news is that the Commission, after a thorough review, found our Nation's antitrust laws to be "fundamentally sound." This finding of soundness is important because it reaffirms that competition and consumers continue to be adequately protected even in this new age of technology and innovation. It also alleviates concern that our laws are not flexible enough to respond to change.

Our challenge in the 110th Congress is to ensure that competition continues to flourish. However, we must be mindful that too much Government intervention and regulation can also be harmful. The Commission's report, findings and recommendations provide us with a much needed starting point to move forward.

Again, I thank our witnesses for being here.

And I want to thank the Chairman. I know we all look forward to hearing in more detail the findings and recommendations of the Commission.

And, Mr. Chairman, I might note that I have to appear before the Rules Committee at 3:00, so I will have to leave, but I will come right back as soon as I appear.

I yield back.

Mr. CONYERS. Thank you, Steve Chabot.

Our witnesses: Deborah Garza has been a member of the Antitrust Modernization Commission in Washington, where she served as chair. She was a member of the law firm where she was a partner at Fried, Frank, Harris, Shriver & Jacobson, handling antitrust counseling and litigation. She has also been a partner at Covington & Burling and was in the antitrust division of the Department of Justice as Chief of Staff and Counsel to the Assistant Attorney General through the years of 1987 and 1989.

In addition, of course, she is now the Deputy Assistant Attorney General for Regulatory Affairs at the Antitrust Division. We offer our congratulations, although she is not testifying here in that capacity, of course.

John Yarowsky, became a member of Patton Boggs Public Policy Practice Group in 1998, after serving 3 years as special associate counsel to President Bill Clinton. His practice at the firm is diverse, spanning a broad range of legislative and public policy areas while at the same time providing strategic counseling to clients on antitrust, telecommunications, intellectual property and administrative practice and procedure.

I am going to submit both of their bios for the record and proceed to hear them.

Both Ms. Garza and Mr. Yarowsky have submitted a joint statement to the Task Force. Without objection, it will be made a part of the record and any other opening statements will be included as well.

And I would like to include for the record the other members on the Antitrust Modernization Commission and the Commission staff.

We welcome you today. We are here to talk about the high points and the points where there might be differences of view. And I think I would ask the former chairperson, Ms. Garza, to begin, please.

TESTIMONY OF DEBORAH GARZA, CHAIR, ANTITRUST MODERNIZATION COMMISSION

Ms. GARZA. Thank you, Chairman Conyers, Ranking Member Chabot, Members of the Antitrust Task Force, for inviting us to testify today on the findings and recommendations of the Antitrust Modernization Commission.

We really are delighted to be here to be able to respond to any questions you have and to open what we hope will be a very productive dialogue, because as you recognized, Chairman Conyers, these are very difficult issues deserving of a lot of discussion and consideration.

Before I begin, I would like to acknowledge that the AMC staff is all sitting behind us in the first row. They are really the backbone and the reason why we were able to get the report out at all much less on time and under budget.

I think that I can speak for all of the commissioners in saying that it was an honor to be entrusted with the large task of studying the U.S. antitrust laws and reporting to the President and Congress on whether they need to be modernized for today's economy. We took that trust seriously and we took to heart Congress's direction that we solicit and consider the views of all interested persons.

We did that, and after 3 years of work and many, many days of hearings and deliberation, we produced a consensus report in which all the commissioners joined.

Our Nation's antitrust laws have served the U.S. well for more than 100 years and are a model for the rest of the world. In fact, I spent this morning discussing with the members of the delegation of the Chinese National People's Congress, which is considering adopting their own antitrust laws, what our antitrust laws provide. And this I think is an indication that the whole world appreciates the role, thanks to I think the U.S., of competition law and the role it has played in helping to ensure innovation and investment that is essential to a healthy and growing economy.

The report is over 500 pages long. In total, we made about 80 recommendations. Rather than trying to summarize our findings and recommendations in 5 minutes, I thought I would touch on just a very few high points, or what I consider to be high points and important points.

First and foremost, the report is an endorsement of free market principals. Free trade unfettered by either private or Government restraints promotes the most efficient allocation of resources and the greatest consumer welfare.

Second, the report concludes that the state of U.S. antitrust law is essentially sound. Certainly there are ways in which enforcement can be improved, and we suggest some of those. On balance, however, the Commission believes that U.S. antitrust enforcement has achieved an appropriate focusing on: one, fostering innovation; two, promoting competition and consumer welfare rather than protecting competition; and, three, aggressively punishing criminal cartel activity while carefully assessing other conduct that may officer substantial benefit.

And, third, the Commission does not believe that new or different rules are needed to address so-called "new economy issues." Consistent applications of the principals that I just noted will ensure that the antitrust laws remain relevant in today's environment and tomorrow's as well.

The U.S. antitrust laws, as written, are sufficiently flexible to be consistently modernized through the interpretations and actions of the courts, the enforcement agencies and under the supervision of Congress.

And with that, to leave us with plenty of time the address specific questions we have, I will complete my statement.

Mr. CONYERS. Thank you so much. Excellent beginning.

Mr. Yarowsky, we welcome you back again to the Committee, where you have been before, and we would appreciate hearing from you now.

TESTIMONY OF JONATHAN R. YAROWSKY, VICE CHAIR, ANTITRUST MODERNIZATION COMMISSION

Mr. YAROWSKY. Thank you, Chairman Conyers, Ranking Member Chabot, Subcommittee Chairman Berman and other Members of the Task Force who may appear.

I am honored to have had your confidence to serve on this Commission, and I am honored to have served with such distinguished individuals from such diverse backgrounds and with such an amazing staff, as you have heard. You will hear a lot about that.

Ever since 1938, Commissions have been created, primarily by Congress, to review the state of antitrust policy. This has happened with almost clockwork precision every 20 or 25 years. And I think as you stated in your opening statement, and as Chairwoman Garza has said, yes, the state of antitrust is "good."

That is not a small statement, because after 13 days of hearings, over 120 witnesses and many days of public deliberations, the Commission found that no changes were needed in the following areas: changing Section 7 of the Clayton Act, that sets out the merger standard; changing Section 2 of the Sherman Act, that creates the monopolization standard; changing the filing requirements, the initial filing requirements for the Hart-Scott-Rodino Act; whether to create different rules for different industries; answer, no; changing the fundamental enforcement architecture of the antitrust laws that provides for dual enforcement roles for both the Federal Government and the States; for having two separate agencies, the DOJ and the FTC; and for leaving the central features of the remedial system, treble damages and attorney's fees, in place.

It is easy to say everything ultimately was recommended to stay the same, at least in these main features, but it was not easy to get to that point. There were very vigorous debates about leaving the current structure in place, and where we have come out took a lot of dynamic energy, to say the least.

But you know what is interesting to me, having lived up here for a long time, is that many of the things I just listed are really the handiwork of Congress. Much of the architecture of what you all have done in past Congresses has been recommended to stay in place. Where we have advocated change—and we have advocated a number of, I think, important legislative changes—these other areas are where there is either confusing case law or administrative issues, whether in the courts or in the agencies.

However, this vote of confidence for leaving so much of the underlying policy in place, comes in the face of a torrent of developing economic reasoning into the competitive analysis in the past 25 years. The central role of economics is no longer an ideological debating point. It certainly was 20 years ago, about the right weight to give to economic analysis. And it has led to more institutional

continuity and enforcement over a series of different Administrations in the past 15 years. I think this is all for the good.

But with the central role played by economics, comes a real possibility that the courts and Congress may be left behind when it comes to discussing issues such as the three-part test to determine whether bundled discounts or rebates violate section 2 of the Sherman Act. What I mean by that is that Congress must stay deeply involved with all of the economic discussions that are going on with the larger policy views, so that Congress continues to shape the contour and structure of the antitrust laws.

For about a year and a half in the White House I was connected with judicial selection, and one of the observations I had, personal observations, was that very few of the candidates—and this is not a criticism—for the bench really had very little background in antitrust and were particularly daunted by the economics that were developing and whether they would be up to dealing with that.

They did take some comfort, however, in reviewing the statutes of Congress as well as the legislative history as a starting point, and that was their entry point. And that just reinforced for me what I came to believe, working here and since then, that we need a very active Committee here.

The Committee has fought long and hard to make sure that they will stay relevant. Some of the great moments of this Committee history and in this room, for Members now on the dais and those looking down from the walls, have come from the often bipartisan coming together to defend the antitrust laws, to vigorously assert jurisdiction over certain regulatory initiatives that are occuring in other Committees for which they have primary jurisdiction.

If it had not been for the effort of this Committee, then telecommunication policy, energy policy and many other policies would not have had the benefit of a competitive slant. That is going to be increasingly more important as we go forward.

So with that, I can say that I am honored to be here again. We look forward to your questions.

[The joint prepared statement of Ms. Garza and Mr. Yarowsky follows:]

JOINT PREPARED STATEMENT OF DEBORAH A. GARZA AND JONATHAN R. YAROWSKY

Joint Written Statement of
Deborah A. Garza, Chair, and Jonathan R. Yarowsky, Vice-Chair,
Of the Antitrust Modernization Commission
Before the Antitrust Task Force of the House Committee on the Judiciary
U.S. House of Representatives

Hearing on "The Findings and Recommendations of the
Antitrust Modernization Commission as established by
The Antitrust Modernization Commission Act of 2002"

May 8, 2007

Thank you Chairman Conyers, Ranking Member Chabot, and Members of the Antitrust Task Force of the House Committee on the Judiciary. Three years ago, as authorized by the Antitrust Modernization Commission Act of 2002, the Antitrust Modernization Commission (the "Commission" or "AMC") undertook a comprehensive review of U.S. antitrust laws to determine whether they should be modernized. It is our pleasure to testify before you today on behalf of the AMC about its findings and recommendations, which were submitted to Congress and the President on April 2, 2007. A copy of the AMC Report and Recommendations ("Report") was distributed to each member of Congress and is available at http://www.amc.gov/report_recommendation/amc_final_report.pdf.

The Commission's Report is the product of a truly bipartisan effort. The members of the AMC 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

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

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 and foremost, the Report is 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 national economic 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 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-related 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

[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.

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 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 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.

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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.

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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 recommendations are designed to ensure that damages would not exceed the overcharges (trebled) paid by direct purchasers, that the full adjudication of such claims occur 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.

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The Commission recommends a number of steps to address these concerns. First, "as a matter of priority" the DOJ and 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 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 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.

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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.

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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 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

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

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.

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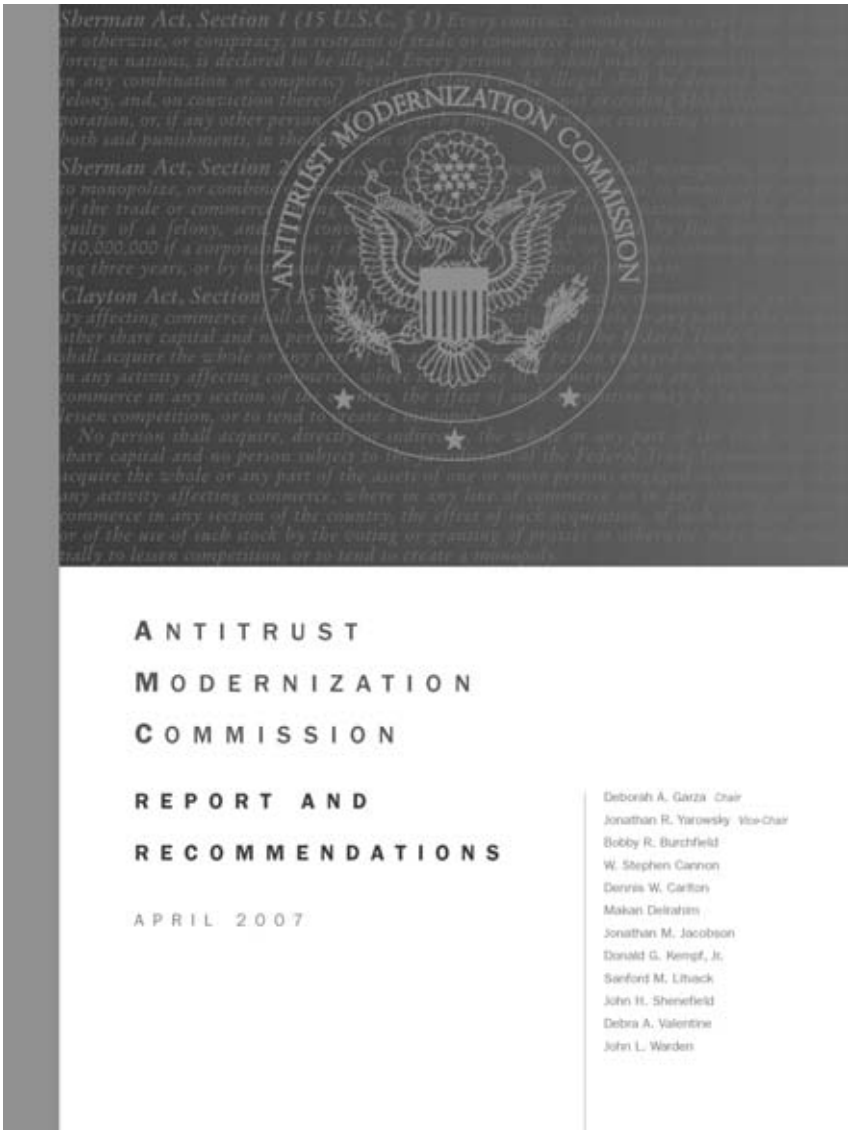
The federal antitrust laws are more than 115 years old. Although the free-market principles on which they stand remain a rock-solid foundation, the world, our economy, and our understanding of how markets work have changed substantially. For that reason, we believe it was a wise decision to authorize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

ATTACHMENT 1



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.

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* * *

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.

Deborah A. Garza
Chair

Jonathan R. Yarowsky
Vice-Chair

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

ACKNOWLEDGMENTS

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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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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 fractionate 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.

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ATTACHMENT 2

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 conductive 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 1980[39] 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 tasks[48] 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.

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.

C. Exclusionary Conduct

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.

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

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.

Chapter II: Enforcement Institutions and Processes

A. Dual Federal Enforcement

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.

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.

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

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.

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.

C. State Enforcement of Antitrust Laws

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.

D. International Antitrust Enforcement

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.

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.

Chapter III: Civil and Criminal Remedies

A. Private Monetary Remedies and Liability Rules

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.

B. Indirect Purchaser Litigation

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.

C. Government Civil Monetary Remedies

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.

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.

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

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.

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.

The State Action Doctrine

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.

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 Sheinfield 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).

Mr. CONYERS. Thank you so very much.

I wanted to bring to your attention from the outset, and you probably know it, that the Commission itself was the work product of Jim Sensenbrenner, the former Chairman of this Committee, and it is one of the issues we agreed upon. And I just wanted his name to get into the record, because I think that it was a good idea, and we frequently agree on many of the antitrust issues.

I am going to just raise a few and let you field them as you will.

The first thing that I congratulate you on is trying to figure out how to narrow the exemptions. To me, that is worth celebrating, because with more than 30 exemptions on the books, more being applied for and also sometimes given other names, I think that this is very, very important.

I also agree with the regard for a division, a more efficient division of labor between the two antitrust enforcement agencies, the Department of Justice and the Federal Trade Commission, FTC. And here your recommendations were very well received.

Transparency was another one that was very important.

Now, the Robinson-Patman repeal leads me to temper some of my enthusiasm for the list of things that I supported. You confused me on repealing Illinois Brick but sticking Hanover Shoe onto it, which seems to me to make things more difficult. The contribution in claims reduction provision attracted some negative feedback in some quarters.

And so let me ask you to comment on any of those items that you choose to.

Ms. GARZA. Well, I will start off with easy, with something you like, immunities and exemptions.

I mentioned that earlier this morning we were with the delegation from China and actually the discussion was all about immunities and exemptions. And the question they had is, we see your antitrust law, we understand it, but can you please explain why you have 30 statutory exemptions. And then also they had questions about State action, another issue.

And so we discussed with them a little bit the history of exemptions and immunities and, you know, some of the most sweeping exemptions I think exhibited an ambivalence about the antitrust laws and a fear, even, of competition. There was a concern that some industries just weren't fit for competition and there was a belief that some industries were national monopolies. That thankfully has changed a lot beginning in the 1970's and into today as we have recognized that very few industries if any are not suitable for competition.

So what we have seen over time is actually a contraction, I think, in the immunities and exemptions and a focus on much more limited immunities for specific conduct or immunities that limit liability to single damages, et cetera.

With that as the background in recognizing how difficult it can be to take away an immunity that has been granted, we decided rather than to attack specific immunities and exemptions, to try to offer you all a framework that you might be able to use in considering whether to adopt immunities and exemptions in the future, but also to use in considering perhaps the repeal of existing exemptions.

And one of the things that we do recommend as well is that to the extent Congress does decide that other societal values have to trump the antitrust laws in a particular area and does enact an exemption, we recommend it that there be considered a sunset provision, which would change the dynamics perhaps that exist today and ensure that after some period of time, in order to keep on, there has to be a reevaluation and the parties who were the proponents of the immunity have to come forward to you with evidence to show that there is a net gain to the U.S. economy consumers as a result of the exemption.

Mr. YAROWSKY. I would just add one thing. Many of those 30 exemptions did not come from this Committee. A number of them did. But where they came from were other Committees, looking at other initiatives, and then they threw them in, because they happened to have jurisdiction over those industries, or they were thrown in during the process of a conference report. Which again reinforces that your vigorous assertion of jurisdiction, even if it has to be sequential referrals, is absolutely critical to guard against further erosion in this area.

Mr. CONYERS. You know, the wave of mergers and consolidation and the lack of challenges is something I have to raise on my list. I don't want you to try to address it now. Maybe I will get it a little bit later.

But I now choose to turn to Mr. Chabot, the Ranking Member.

Mr. CHABOT. Thank you very much, Mr. Chairman.

Hopefully I can get in a few quick questions and things here and get your responses.

First of all, I think we all are aware that gas prices are on the rise once again, causing real harm to real people in this country, all across this country. And obviously when this happens, there are calls for Congress to increase regulation of the oil and gas industry or modifying the standards for oil and gas mergers.

What are the implications of the Commission's recommendations regarding regulated industries with respect to such calls for increased regulation, for oil and gas, for example?

Ms. GARZA. Well, the Commission specifically found and recommended that there should not be a separate standard for evaluating mergers in various industries, and while we didn't specifically mention the oil and gas industry, that was something that we were obviously conscious of. We were aware of the fact that Congress was considering whether it was appropriate to have a different or higher standard for mergers in the oil and gas industry.

And the Commission's conclusions were that there wasn't any need to do that. Section 7 and the way that it is enforced by the courts and enforced by the antitrust authorities, is sufficiently flexible in order to take account of all of the relevant acts.

Now, in the regulated industries area, which we also looked at, we recommended that the antitrust agencies should have the primary role of assessing the competitive implications of mergers and that the regulatory agencies, the non-antitrust regulatory agencies, such be involved only to the extent that there are some other non-competition related societal goals that are important to ensure that cannot be safeguarded through application of the antitrust laws.

Mr. CHABOT. What are the implications of the increasing globalization of antitrust law? What are some likely consequences, for example, if America retains its shipping antitrust exemption in light of the E.U.'s recent decision to rescind its exemption? And what are the implications for potential internationalization of the Robinson-Patman Act, also?

Mr. YAROWSKY. I will just start out with that, Mr. Chabot.

Obviously, there is a convergence in many ways now with some of the foreign antitrust laws and the U.S. antitrust laws. In some ways, that will be a very good thing, I think, is the general sense, procedural aspects of, let's say, merger review. There has been a lot of discussion about why, in a global merger, where it is being reviewed here in America as well as at the E.U., why are there different time frames for review? It would be much better if there was a more consistent, harmonized procedure that people could rely on and get results and answers quickly.

The issue of substantive antitrust law convergence is a really difficult one. Do we really want it to be an issue like the GATT talks, trade talks, where suddenly there is a uniform global antitrust law in this area. We have different traditions. I guess one could say that about trade and everything else.

But I think the general sense is you have got to go much more cautiously about imposing a substantive standard across the board and certainly being very careful about throwing antitrust into kind of trade talks that could be decided in kind of an international diplomatic situation instead of a substantive situation with antitrust analysis.

Mr. CHABOT. Thank you.

Go ahead, Ms. Garza.

Ms. GARZA. I just quickly wanted to react to two things you mentioned. One was ocean shipping and the other was the Robinson-Patman Act.

On the ocean shipping front, I think the commissioners did feel that the fact that we are now the only developed Nation that continues to support an exemption for ocean shipping price setting should be a bit of an embarrassment to us, and we think that the action that the Europeans took is perhaps a good opening for us to follow and do the same.

On the Robinson-Patman Act, I guess I will be brave enough to address that, Chairman Conyers. The one thing that moved me, at least, in agreeing with my fellow commissioners on our recommendation was the fact that it does become difficult to explain to non-U.S. competition authorities what the Robinson-Patman Act does.

As the report indicates, we think that in many ways the Robinson-Patman Act operates in a way that is antithetical to the antitrust laws. And we try to discourage foreign competition authorities from enacting strict price regulations when they are looking at adopting competition regimes.

But it becomes very difficult for us to in effect say, "Well, don't do as we do; do as we say," while we have got the Robinson-Patman Act on the books, but it is really not enforced very much and there are ways to enforce it so it is not as harmful. And it makes

it more difficult for us, basically, to convince other Nations that they should not enact similar statutes that really police pricing.

Mr. CONYERS. Thank you so much.

Howard Berman?

Mr. BERMAN. Thank you, Mr. Chairman.

I would like to focus the witnesses attention on the recommendations and the antitrust and patents section and have you expand a little on the recommendations. I mean, you come down on the side of saying that while there is a tension, we can have our patent laws and have our antitrust laws and maintain a climate that incentivizes innovation and at the same time avoid the most negative anticompetitive implications of granting exclusive rights. But you worry about features of our current patent system.

Could you highlight for us which of the recommendations of the Federal Trade Commission and the National Academy of Sciences that would constitute reforms of the patent system that you think are the most important and that Congress should pay attention to adjusting? Either of you.

Mr. YAROWSKY. I will take the first crack at this, but I do want to say before I do that I am working on patent reform and so I want that——

Mr. BERMAN. Is that why you look familiar?

Mr. YAROWSKY. Yes, that is probably why I look familiar.

The recommendations of the FTC, the National Academy of Sciences and other expert groups really focus initially on patent quality. If too many patents are issued with not precise quality, that has a devastating affect on competition, because remember, patents do have exclusive rights, monopoly rights.

If too many patents are issued, that space, the competition space, gets filled with these little monopolies, and so they better be defined very carefully and precisely so that you don't occupy any more space than you have to.

Obviously, the first look then is at the patent office. Applications have gone up probably 300 percent in the last 15 years for the PTO. That is fine. We have great examiners. But that is a terrible burden for them. There is a 500,000, 600,000 patent backlog that is currently hanging over everyone's head, which then delays the issuance of patents.

If patents are of poor quality or questionable quality, that leads to disputes later on. Well, disputes then spill over into our courts for many years. If there was an alternative dispute mechanism that was expeditious, that would be wonderful, but there isn't really one that currently exists in the Patent and Trademark Office. And so at that point, the patent system, which is supposed to drive economic growth, competition and innovation becomes a problem in and of itself and drags down kind of the competitiveness of many companies.

So I think the first strand is to enhance the resources of the PTO to keep up with this increase in applications, then have clarification about quality. The Supreme Court just came out last week with a decision about clarity—about what is novel and what is just obvious. I think it will be very helpful. And then look at how dispute resolution is being handled both in the courts and at the PTO.

Ms. GARZA. I don't know that I have anything to add to that.

We do recognize that a patent doesn't necessarily signify an antitrust monopoly. And so we think that is important to keep in mind. But on the other hand, there can be a problem if the patent system is abused, if obvious inventions are patented.

And so our recommendation is that in particular the recommendations of the Federal Trade Commission and the National Academy of Sciences that direct themselves to ensuring the quality of patents be taken up by Congress. And I do agree with John that the Supreme Court seems to be taking steps itself to adjust some of what it apparently believes is, if not an abuse, a problem with the current patent system.

But we agree that, you know, if the patent system is out of whack, then you could potentially have a competitive impact, and we agree however that both systems should be able to coexist and both systems should have as the common goal stimulating innovation and competition.

Mr. CONYERS. Thank you.

The gentleman from Florida, Ric Keller?

Mr. KELLER. Thank you, Mr. Chairman.

Ms. Garza and Mr. Yarowsky, I want to just ask you about the Robinson-Patman Act repeal. I don't necessarily disagree with your recommendation, but just to draw out that a little bit.

Ms. Garza, can you give us the top three policy reasons why your Commission recommended that the Robinson-Patman Act should be repealed in its entirety?

Ms. GARZA. Well, you know, I don't know that I have a list of three, but the reason we think that it should be repealed is because it does arguably prohibit the kind of price discounting that the antitrust laws otherwise are intended to encourage.

Mr. KELLER. When you say price discounting, are you talking about volume discounting essentially?

Ms. GARZA. Volume discounting. Various kinds of discounting can be vulnerable under the Robinson-Patman under the Robinson-Patman Act, and because of difficulties that defendants can have in proving justification and meeting other standards of the act, it can really just have a chilling effect.

And I think that, you know, you may not see a lot of litigation nowadays, but in my experience, and maybe other people's experience, is that it does have a chilling effect, and in a way it provides almost an excuse for not competing as hard as companies can compete.

Mr. KELLER. Let me cut you off there.

Mr. Yarowsky, do you have anything to add to that? Any other policy reasons other than it inhibits volume discounting?

Mr. YAROWSKY. No. But at some point, now or later, I would like to explain my position on Robinson-Patman.

Mr. KELLER. Let me ask you a couple of questions, and then I will give you a chance.

It is my understanding from talking with friends of mine who are car dealers that a car dealer, say, who sells Toyota Corollas, and he sells 1,000 cars a year, versus a smaller car dealer who sells Toyota Corollas at only 100 per year, both pay the exact same amount from the manufacturer and they don't get a volume discount from the manufacturer.

Is that your understanding, Ms. Garza?

Ms. GARZA. I don't really have an understanding of how pricing works in the auto industry, but I will say that our feeling is that a manufacturer should have—we start with the proposition that unless the manufacturer has market power, they have an incentive to basically expand output, to basically make sure that they get distributors who are selling a lot and that the volume discounts and other things that they employ are meant to basically reward the most efficient and successful distributors and distribution techniques.

Mr. KELLER. Well, that is my understanding, and I think it is based on Robinson-Patman.

Do you disagree with that, Mr. Yarowsky?

Mr. YAROWSKY. No, not——

Mr. KELLER. Okay. Let me give you a simple example. And I like the corner grocery stores as much as anyone. I go to the one right here on 4th and East Capitol every week. I am probably one of their best customers.

But does Wal-Mart and the little corner grocery store both pay the same amount for the same size can of Campbell's Soup under the Robinson-Patman Act, Mr. Yarowsky?

Mr. YAROWSKY. They may not necessarily pay the same amount. I mean, it really is an individualized set of agreements about what retailers pay. They may well pay the same amount. I think the volume discount exception to Robinson-Patman which could justify differential pricing, that was there from the very beginning, 1936. The question is how it is interpreted and there is been a lot of confusion even about that, which seems pretty obvious.

Mr. KELLER. I am somewhat confused for a couple reasons. It seems like I gave you a chance to give me, both of you, three policy reasons why you want to get rid of Robinson-Patman Act and you can only come up with one, and that is volume discounting, and so when I ask you does Wal-Mart pay a cheaper price that a corner grocery store, I would kind of expect you to tell me no, they all pay the same under this law.

Mr. YAROWSKY. There are some other reasons that have come out. One, it may limit more discounting activity, and that would be a perverse, ironic result. There have been a lot of studies showing that fear of this act, and again I——

Mr. KELLER. Take the remaining time to tell me what you wanted to get out about Robinson-Patman.

Mr. YAROWSKY. Here is my view of Robinson-Patman. I agree with all of the commissioners that it is not working well and there is a real problem. It is not being enforced by the agencies and there is a lot of substantive confusion in the law.

However, rather than just closing your eyes and repealing Robinson-Patman, I don't agree with that. I think Congress needs to revisit Robinson-Patman, that the same forces, the same constituencies that have cried out for Congress to look at it, are still here.

The problem is, I think you need to downsize and re-sculpt the act, if possible, so that it does work, it is lower to the ground, it may not be so convoluted. Remember, what Congress is now having to do is create mini-Robinson-Patman Acts because the larger one doesn't work.

The program access rules—Congress helped stimulate the production of those because, for example, satellite was at a perceived disadvantage from cable in getting content, programming, when they first started out. And the answer was, well, we are giving a volume discount to cable, and the small satellite companies said, well, we can't survive on that. So program access rules came into effect just for that little sphere.

Net neutrality. This Committee really dug into that last year. Without going into the pros or cons of net neutrality, there was also concerns pushing that consideration about price discrimination. Again, if Congress had passed a net neutrality bill, it would not have been a generic bill at all that would have applied across our economy. It just would have been for a small sector.

I think if you repeal Robison-Patman, you are going to see a proliferation of these mini price discrimination regimes. I don't think that is a good idea. I would rather see Congress draw back, do a tough evaluation, spend the time, go over it and see if they can recraft a workable Robinson-Patman Act across the board.

Mr. CONYERS. Thank you so much.

The gentleman from California, Darrell Issa?

Mr. ISSA. Thank you, Mr. Chairman.

I don't want to sound like a one-trick pony, but I am going to pick up on the patent reform and how it relates here. I think everyone that has been on the dais and probably everyone that will come in and out during the hearing agrees that the major thrust of patent reform is to get better patents. And recognizing that we do have a high failure rate when they stand the test of the brightest sunshine in major litigation.

But one question I have is, let's assume for a moment that they are valid and should be enforced. I think I was hearing, you know, that there are still many antitrust violations, and I just want to make sure that it is clear for the record that, assuming they are valid, they are a right to a monopoly and a right to dominate an industry and a right to get premium prices and the Federal Trade Commission tends to resent that.

Is that a fair statement? I am noticing some wincing, so I will assume that you are going to disagree.

Ms. GARZA. I don't know if everything you said is fair, but I don't know——

Mr. ISSA. If I were still a Chairman, it would be. But I am not.

Ms. GARZA. Here is the thing. I would say that you are right, and I think the Commission agrees that a validly issued patent confirms the right of exclusion on the owner, and we say in our discussion of Section 2 as well as the patents that you have the right to command whatever price you can command.

Now, having a patent doesn't mean that you have dominance by any stretch of the imagination, because you could have a patent but that doesn't mean that that technology that is embodied in that patent is superior to other patented or non-patented technology.

So the one thing that is important to keep in mind is that a patent doesn't equal dominance. A patent equals the right to exclude. It does not necessarily equal market power or dominance.

Mr. ISSA. Sure. And following up on that, because you said exactly what I wanted said, in a sense, not because I asked you to say it, because I was a devil's advocate instead.

When we look at pharmaceuticals, it seems like in many Committees of Congress we are constantly trying to make them provide medicines cheaper and thus breaking down the inherent right of their patent to create exclusion for the life of the patent, and we happen to have this life plus the time we took away in administrative function, but it is still life of the patent, and thus say that they should not get the high price.

When we are looking at antitrust, isn't it fair to look at these pharmaceuticals as not different for purposes of their right to get what might be enormous profits if they hit a winner and of course with the enormous loss if it isn't a dominant product or in fact it doesn't get approved.

Ms. GARZA. Well, antitrust policy I think says that if you have a valid patent, you have the right to recover whatever profits you can, and if it is a winning drug, then that's an important incentive to others to invest in developing other drugs.

And as you have indicated, and I don't know, I can't recall right now what the percentage of success is, but the percentage of successes, but the percentage of success is really quite low for pharmaceuticals and the investment required is quite high. So that really illustrates, in some sense, what we said in the report about the importance of preserving incentives to innovate.

So where there is a valid patent and you allow them to recover the rewards of their investment, then you are in essence encouraging further innovation in new patents. That is assuming that there is no other sort of abuses or anything.

Mr. ISSA. Sure. But it is not encouragement. It is a constitutional right based on its encouragement. Did you have anything to add on that?

Ms. GARZA. No.

Mr. ISSA. And I made this point, and the Chairman knows all too well, because many of the Committees of Congress right now seem to want to strip away some part of that for the greater good of society, not for the greater incentive to innovate.

Mr. Yarowsky, earlier, though, you said that the lack of an effective administrative process was part of the problem with patents. And I know that wasn't on point to antitrust, but in the last minute or so, if in fact the reexamination process were open, transparent, open in the sense that you could see and you could make input, would that change your feeling on the administrative remedies?

Mr. YAROWSKY. From my view, as long as you can get a post-grant process, I mean, there are many names being hurled around in the——

Mr. ISSA. And I use reexamination because we understand what they are that people aren't using.

Mr. YAROWSKY. Right. But if I am able to just use a more general phrase like post-grant process, if that process would allow more information to come in with a transparency so there is a public dimension, I think that would help crystalize more quickly the validity question, and the validity question is the key, because once you

feel confident about that, then everybody goes about their own business to innovate further, which is what we all want, and that leads to a more competitive economy.

So I would agree with you, if that post-grant process could be more transparent and lead to validity determinations more clearly and more quickly, I think that would be a very positive result.

Mr. ISSA. Thank you.

And I know the Chairman is looking forward to the Subcommittee marking up just such a bill in the relatively near future.

With that, I yield back.

Mr. CONYERS. Thank you very much.

I apologize for not calling on Sheila Jackson Lee before Darrell Issa, but I do now. The gentlelady from Houston is recognized.

Ms. JACKSON LEE. Thank you, distinguished Chairperson.

In our anteroom is a number of Russian parliamentarians. It means that this room has many diverse opportunities and responsibilities, and as Chairman they are admiring your leadership. I apologize if I was in and out dealing with a number of members from the Russian Duma. I know that they are there as they are listening to this process of democracy.

With that in mind, let me thank the commissioners for their work. I think that the principals that you have enunciated, the commitment that we have to the free market competition, should remain a touchstone of the United States economic policy and the recognition of the core antitrust laws, that they are sound and help safeguard the competition of today's economy, are all good points. And I think you had one other point that I am noting, possibly that new or different rules are not needed for industries in which innovation, intellectual property and technological innovation are central features.

I have a second thought to that and I raise a particular industry. I heard you mention in briefly and I would like to have some comment on that as well as to follow up some of the questions of my colleagues.

We have watched the oil and gas industry over the decades have a metamorphic change, whether it is caterpillar to butterfly, butterfly to caterpillar. But we see the large combinations of ExxonMobil. We see the large combinations of Chevron-Texaco, ConocoPhillips, and it goes on and on.

For some reason, I thought the innovativeness of the industry, the broadness of the industry, was far more vibrant and challenging when there was less of this huge oil monopolies, and I happen to come from what has been claimed to be the energy capital of the world and we proudly claim that in Houston, Texas. But I have watched my independence be dominated and domineered, a word that I have just crafted, by these large conglomerates.

It seems that rules do need to be changed in order to create a vibrant, competitive industry. Where are the independents in the energy industry? What value do we get out of the large conglomerates? Do we get new technology? We certainly don't get a sensitivity in pricing. In fact, that is one of the major challenges of our legislative agenda this year, is gasoline pricing. Of course, some people will look at it from the perspective of conservation, alter-

native fuels, but why are we not looking at it in the very staid, rigid monopolistic focus that the industry has crafted.

I know I can't see any real documentation of any new technology, new intellectual innovation in the energy industry, based upon their large size. Do you see any?

So my question would be, when is it time to look at a monopoly or monopolies and sense that there needs to be new rules?

My second question would be to again try this question on Robinson-Patman. I am glad, Mr. Yarowsky, that you have indicated that we don't need a repeat of it, but I am interested to find out how price discrimination can be prohibited by the Robinson-Patman Act or prevented by other antitrust laws.

And if you could start with those two questions. The first one, I really want to have both of you elaborate on. I think we need to keep an open mind on industries that seemingly have harmed the consuming public through their largeness.

Mr. YAROWSKY. Sure, okay. Why don't I take a stab at going first on both of those.

On the oil and gas mergers, Congresswoman, the only thing that we definitively came up with that is relevant, and then I will mention another factor, but I don't mean to represent it as a Commission deliberation or recommendation but to be very responsive as I can to you, is that we agree that the merger standard to evaluate mergers shouldn't be different industry by industry. Because if you started doing that, there might be some purpose served in the immediate time to do that for one industry, but then time would go on and you would be left with different standards for different industries and it would be very difficult to run a uniform policy.

So that doesn't answer all your questions, but that was the one recommendation we did have.

We had a second recommendation, I think it is relevant, though, it is more general, but it goes to what you described. A second recommendation we had was that we recommended that the agencies develop what we call kind of vertical merger guidelines. I mean, what the guidelines mainly do, the merger guidelines, are horizontal mergers, and you were describing some of those, where the same type of company merges with another like type of company and creates a more powerful, consolidated entity.

But there are also vertical mergers, so that you then integrate manufacturing, distribution and retailing. Those have powerful effects on innovation. I am not saying they are all bad or all good, but they do have very strong effects on issues like innovation and competition and can influence what happens downstream with the consumer, the ultimate consumer, which is something we all live with. Those guidelines, we think, need to really be revisited, because they really haven't been looked at for many years, and reissued.

And I think they would have bearing on oil and gas mergers that we have seen as well as other mergers. I think that is something tangible that we recommended that should be done.

On Robinson-Patman, the real question, Congresswoman, is this. The antitrust laws generally have a certain meaning, the words, because they have been there now for over a century. So when someone talks about antitrust injury under any of the antitrust

laws, it has a meaning that the courts have developed over time. Robinson-Patman, and this isn't a criticism, it is just what happened in 1936, used different words than existed in the basic antitrust law statutes, which had to do with restraints of trade and monopoly.

And it was a much more intricately designed statute, and it was really the result of a crying out—this was during the Depression and post-Depression as small businesses were completely swallowed up. There was a real reason why Congress addressed this and has continued to look at it seriously. But it was a very kind of difficult statute to craft and courts in some ways have made the effort to try to harmonize the words of that statute with the general antitrust statute. Some have tried, some have thrown up their hands and said, well, they are different and so the meanings are different.

Well, I don't think that is a good result. And my feeling is, though it is going to be very difficult, I have seen that this Committee can do very difficult things and achieve them. And I just think it is worth the energy, if there is time in the agenda, to devote a lot of time to seeing if there is a way to re-craft Robinson-Patman to get a more harmonized meaning that the courts will understand, probably downsize it because it is very voluminous, and then I think you can build consensus that it should be enforced by the agencies, which has not occurred. For 15 years, it has not been enforced. That is a terrible thing because it builds no confidence in the system.

And, you know, the States also have their little mini-Robinson-Patman Acts, some of them do, so even if you would just repeal Robinson-Patman, those acts would still live on.

So I just think it is worth the effort and time to see what might be done to re-craft Robinson-Patman. And so my vote on the Commission, not to defend my vote, was simply that it is not working. I have to agree with that. It is not working. But my hope is that you can revisit it, create definitions that would work and then achieve the same social goals that people feel are very important.

Ms. JACKSON LEE. Mr. Chairman, I thank you for indulging——

Mr. YAROWSKY. I am sorry for such a long answer.

Ms. JACKSON LEE. Can Ms. Garza make a quick response to those two questions?

Thank you very much, Mr. Yarowsky. It was a very thoughtful answer.

Ms. GARZA. Let me address your question about mergers in the oil and gas industry.

To clarify, the reason we didn't think it was appropriate to have a special standard is because the standard that exists today is very broad—the statutory standard. It basically prohibits mergers and acquisitions that would substantially reduce competition in any line of trade. And the test that the courts and the agencies apply are all focused on identifying whether a merger and acquisition—what effect it would have on output and price. So they are looking at the right thing; what effect is this transaction going to have on output and price. Is it going to reduce output and raise price?

And the analysis that they undertake itself is very complex. But we are sensitive to the concerns that you raise. And it is not a good

situation for public confidence in the laws, for example, for people not to understand the basis for enforcement decisions, and by that I mean both cases that are brought and cases that aren't brought.

So we do actually make a number of recommendations that are designed to help ensure that the Congress in your oversight capacity understands the basis for enforcement generally, but also in respect to specific transactions, and also that the public does.

Now, the FTC and the DOJ have done a very good incredible job at that with guidelines and speeches and others. But we have recommended that they go even further, with more closing statements, we call them, basically explanations when there is a transaction that people have an expectation might be challenged and there is a decision taken not to challenge it, that there be an effort to explain as well as can be done, respecting confidentiality concerns, why the agencies didn't take the steps they took.

Now, that is a burden on the agencies, but we think it is very important for them to have to do that so people understand the bases for enforcement. Otherwise you lose your respect for the antitrust laws and the enforcement, and that would be problematic.

We would like to see these laws as being basically as self-enforcing as possible and we would like the public to have confidence that they are, that their welfare is being looked after. So we agree with you on that, and we think that one answer to that is substantially increase transparency.

Ms. JACKSON LEE. My only conclusion, Mr. Chairman, is that there is a great input by the merged oil and gas industries and there is a great price increase, and that seems to be ongoing.

I thank the witnesses.

I thank the Chairman.

Mr. CONYERS. I want to thank you all. This has been very helpful.

I want to say that we raised some questions that certainly need to be examined even though this is a several-year product that you have before us. But it is an important one, because this Antitrust Task Force is committed to trying to generate a little more challenge to the enormous number of mergers that have taken place over the last period of years.

And Chairwoman Garza, Vice Chairman Yarowsky, you have acquitted yourself well on behalf of your fellow commissioners and the staff that labored so diligently on this matter, but we want to keep 5 legislative days open for any questions that may come to you that we can include in the record.

And so, without objection, the Members will have 5 additional legislative days to submit questions which we will forward to you.

And, without objection, the record will be open for 5 legislative days for the submission of any other material.

We thank you for your excellent testimony and hard work.

The hearing is adjourned.

[Whereupon, at 3:25 p.m., the Task Force was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for convening this hearing of the Antitrust Task Force.

Vigorous, unimpeded competition sustains our economy and keeps it strong. It leads to innovative products that better our lives and keep prices low. The Judiciary Committee has a long history of oversight to ensure that American markets retain healthy competition.

At the heart of that competition is the Sherman Act, which the Supreme Court has dubbed the "Magna Carta of free enterprise." Sections 1 and 2 of the Act, which Congress passed in 1890, are deceptively simple; each is only one sentence long.

However, those two sentences have come to regulate all manner of business dealings in this country, including who a company can—and must—deal with, how it prices its goods, and whether it can merge with a rival company.

The antitrust laws are unique in American legal culture in that they are enforced by two federal agencies, the Department of Justice and the Federal Trade Commission. In addition, each state's attorney general can bring suit under both federal and state antitrust laws.

The antitrust laws can be enforced both criminally and civilly. Private citizens can also bring suit to recover damages and enjoin anticompetitive business practices.

Antitrust enforcement has also expanded beyond America's borders. When the United States passed the Sherman Act over 100 years ago, it was alone in the world. Today over 100 countries have some sort of competition law, and more are considering them.

In fact, China is currently debating its own antitrust laws, despite being a country that does not necessarily share America's fundamental economic principles.

Antitrust law affects every industry as evident from the wide variety of hearings that the House Judiciary Committee has held under its antitrust jurisdiction. The Committee has held hearings on telecommunications, sports, oil and gas, utilities, ocean shipping, airlines, agriculture, and financial services.

Given the impact of antitrust law on the American economy, it is vital that we examine how well these laws are working, particularly in light of the innovation that today's high tech economy has brought.

The Antitrust Modernization Commission, which spent the last three years studying the antitrust laws, found that the Sherman Act is fundamentally sound and requires no major changes by Congress.

That said, the Commission's 450 page report has more than 80 recommendations on a variety of subjects, including repeal of *Illinois Brick,* repeal of the Robinson-Patman Act, modifications to the merger review clearance process, and amendments to the Federal Trade Commission's ability to bring injunctions and to pursue administrative litigation in merger cases.

The Commission's report also provides a framework for Congress to assess immunities from the antitrust laws, such as the McCarran-Ferguson Act and the Shipping Act, and exemptions related to regulated industries.

Accordingly, today's hearing can help inform the Task Force's work on a number of issues that it may consider, including competition in the credit card, pharmaceutical, oil and gas, healthcare, professional sports, and telecommunications industries, just to name a few.

I would like to congratulate Chairwoman Deb Garza and Vice-Chair Jon Yarowsky for their hard work. Together with the other 10 Commissioners and professional staff, they produced an excellent report on time and under budget. The report is well written and helps make difficult concepts easy to understand. It also

contains a wealth of supporting data and is an example of how such studies should be conducted in the future.

I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, ANTITRUST TASK FORCE

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Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEES:
JUDICIARY
SUBCOMMITTEES:
COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
CRIME, TERRORISM AND HOMELAND SECURITY

HOMELAND SECURITY
SUBCOMMITTEES:
CHAIR
TRANSPORTATION SECURITY AND INFRASTRUCTURE PROTECTION
BORDER, MARITIME, AND GLOBAL COUNTERTERRORISM

FOREIGN AFFAIRS
SUBCOMMITTEES
AFRICA AND GLOBAL HEALTH
MIDDLE EAST AND SOUTH ASIA

SENIOR WHIP
DEMOCRATIC CAUCUS
WHIP
CONGRESSIONAL BLACK CAUCUS
CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

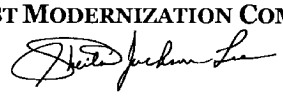
CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE

COMMITTEE ON THE JUDICIARY
ANTITRUST TASK FORCE

OVERSIGHT HEARING:

"FINDINGS AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION"



MAY 8, 2007

Mr. Chairman, I move to strike the last word.

Thank you, Mr. Chairman for holding this oversight hearing. Let me also thank the Ranking Member and all the members of the Task Force for volunteering to serve on this very important Antitrust Task Force. After all, the law of antitrust is the law of fair

competition. The continued vitality of our nation's economic system depends upon fair and vigorous competition. This has proven to be the best and most effective way of ensuring innovation, improving quality, reducing prices, widely distributing goods and services throughout the population, and turning the diversity of the nation into its greatest strength and asset. I am therefore very pleased to be a member of this Task Force. I strongly believe that working together, we can achieve great things for the American people.

Let me also extend a very warm welcome to our witnesses, the Hon. Deborah A. Garza, and the Hon. Jon Yarowsky, the Chair and Vice Chair, respectively, of the Antitrust Modernization Commission.

Today's hearing provides the Task Force an opportunity to review the findings and recommendations of the Antitrust Modernization Commission (AMC) based upon its comprehensive review of U.S. antitrust laws, as well as the policies and practices of the Department of Justice's Antitrust Division and the Federal Trade Commission in implementing those laws. Based upon its review, the AMC offers three principle conclusions:

- Free-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is essentially that robust competition among businesses

leads to better quality products and services, lower prices, and higher levels of innovation.

- The core antitrust laws—Sherman Act sections 1 and 2 and Clayton Act section 7—and their application by the courts and federal enforcement agencies are sound and help to safeguard competition in today's economy.

- New or different rules are not needed for industries in which innovation, intellectual property, and technological innovation are central features. The Commission found that unlike some other areas of the law, the core antitrust laws are general in nature and have been applied to many different industries to protect free-market competition successfully over a long period of time despite changes in the economy and the increasing pace of technological advancement.

A. Background on U.S. Antitrust Laws

For over a century, the antitrust laws have provided the ground rules for fair competition. They are our economic bill of rights. Antitrust principles are necessary to preserve competition and to prevent monopolies from stifling innovation. Competition produces better products and lower prices and wider choices – all to the benefit of consumers.

Underlying our antitrust laws is a fundamentally conservative notion: that free and unfettered competition will produce the best results for consumers. To the extent that anticompetitive conduct or conditions have hindered competition, the government must step in.

The three principal antitrust statutes are sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. Section 1 of the Sherman Act prohibits concerted activity that produces restraints on trade, which are scrutinized under a per se or rule of reason analysis. Price fixing, output restrictions, and market allocations that always or almost always reduce competition are considered a per se violation of the antitrust laws. Anti-competitive conduct of a less onerous nature is judged according to the "rule of reason." This analysis focuses on whether the alleged restraint is justified by legitimate business purposes and whether its anti-competitive features are balanced by some tendency toward effective competition.

Section 2 of the Sherman Act prohibits the monopolizing of a market through restrictive or exclusionary conduct. It is sometimes used in conjunction with Section 7 of the Clayton Act, which prohibits mergers where "the effect . . . may be substantially to lessen competition, or to tend to create a monopoly." Effective merger enforcement is intended to arrest competitive problems in their incipiency, rather than waiting for the merger's anticompetitive effects to cause actual harm in the marketplace.

The Department of Justice Antitrust Division maintains and promotes competition by enforcing the federal antitrust laws in three ways. The Division may prosecute willful violations of the antitrust laws by filing criminal lawsuits. Alternatively, the Division may file civil actions, when appropriate, to enjoin violations of the law and to require remedial steps for past violations. The Division also provides guidance to the business community through joint statements of policy and an accelerated business review process in order to reduce uncertainty about the antitrust laws.

The FTC Bureau of Competition enforces the federal antitrust laws either through actions to foster voluntary compliance with the law, by entering into a consent decree with the company, or through administrative or federal court litigation. The FTC may issue an administrative complaint, and the case is heard before an Administrative Law Judge ("ALJ") who can issue a cease and desist order. Final decisions by the ALJ may be appealed to the U.S. Court of Appeals. The FTC may also go directly to court in some cases to obtain an injunction or civil penalties. Finally, the FTC issues trade regulation rules upon finding evidence of unfair practices in an entire

industry. These rules may also be challenged in the U.S. Court of Appeals.

In addition to the two federal agencies, states can enforce the federal antitrust laws by bringing *parens patriae* suits, even when the federal agencies have chosen not to challenge the conduct. Each state also has its own antitrust laws, and private citizens may enforce the antitrust laws through civil suits in which treble damages can be sought.

B. The AMC's Findings and Recommendations

The Commission was established by the Antitrust Modernization Commission Act of 2002 to study the U.S. antitrust laws and determine whether they should be modernized. Specifically, the Act obliged the Commission to examine whether the need exists to modernize the antitrust laws and to identify and study related issues. The Act also directed the Commission to evaluate the merits of proposed changes to the antitrust laws and to prepare and submit to Congress and the President. The President designated Commissioner Deborah A. Garza as Chair; the Democratic leadership of the House and Senate designated Commissioner Jon Yarowsky as Vice-Chair.

Mr. Chairman, I am very interested in hearing from our witnesses in more detail the justifications for several of the more important recommendations made by the Commission.

For example, the Commission recommends the repeal of the Robinson-Patman Act, enacted in 1936, which requires sellers to charge the same price to all buyers except in certain circumstances. Citics argue that it discourages price discounting and appears to be ineffective in protecting the small businesses that were intended to be its beneficiaries. The Commission recommends that Congress repeal the Act because anticompetitive price discrimination is already prevented by other antitrust laws.

The Commission also recommends that legislation be enacted overruling *Illinois Brick* and *Hanover Shoe* – two Supreme Court decisions to allow both direct and indirect purchasers of price-fixed goods to sue in federal court. Under these two Supreme Court decisions, only direct purchasers can sue for damages in federal court. Indirect purchasers can use under state law in 36 states plus D.C. The AMC proposes that Congress overrule the decisions to the extent necessary to allow both direct and indirect purchasers to recover for their injuries.

The Commission also recommends legislation that would eliminate regulatory delay caused by uncertainty over which agency – the DOJ or the FTC – will review a transaction. The AMC suggests amending the Hart-Scott-Rodino Act to require clearance within a short period of time, and also recommends that merger be treated the same regardless of which agency reviews them. The AMC also includes proposals to reduce the burden of merger review and increase transparency and recommends that substantial weight be given to efficiencies, including those relating to achieving innovation.

Finally the Commission disfavors exemptions and immunities from the antitrust laws. Although the Commission does not recommend that Congress repeal every antitrust immunity, it strongly urges the adoption of a framework for reviewing and granting immunities.

According to the Commission, antitrust immunity should be granted only when there is compelling evidence that (1) competition cannot achieve important societal goals that trump consumer welfare, (2) a market failure clearly requires government regulation in place of competition. For existing immunities, the AMC recommends that Congress begin creating a full public record on all proposed or

existing immunities; that Congress consult with the FTC and DOJ about the effects of the immunity; and that Congress require proponents to submit evidence showing that the immunity should trump free market competition. If Congress determines the immunity is warranted, the AMC further proposes that Congress consider a limited form of such immunity; that a sunset is adopted; and that the FTC and DOJ provide reports to Congress before any vote on renewal.

These are provocative and, in some respects, revolutionary proposals. I am looking forward to a constructive dialogue about these proposals with our witnesses.

For all of these reasons, Mr. Chairman, I thank you for convening this hearing. I yield the remainder of my time.

BIOGRAPHIES OF DEBORAH GARZA, CHAIR, ANTITRUST MODERNIZATION COMMISSION; AND JOHNATHAN R. YAROWSKY, VICE CHAIR, ANTITRUST MODERNIZATION COMMISSION

Deborah A. Garza, Chair, Antitrust Modernization Commission

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, Antitrust Modernization Commission
Partner, Patton Boggs, LLP

Jonathan R. Yarowsky joined the Patton Boggs Public Policy practice group in 1998, after serving for three years as special associate counsel to the President. His practice at the firm is diverse, spanning a broad range of legislative and public policy areas while at the same time providing strategic counseling to clients on antitrust, telecommunications policy, intellectual property, and administrative practice and procedure.

As special associate counsel to the President, Mr. Yarowsky advised President Clinton on legislative and policy matters, including telecommunications, antitrust, and crime policy. During his final year at the White House, Mr. Yarowsky supervised the selection and confirmation of nominees to the federal judiciary, working closely with the President and senators on both sides of the aisle.

Before his service at the White House, Mr. Yarowsky held the position of general counsel to the Committee on the Judiciary for the U.S. House of Representatives. During his five-year tenure as general counsel, he supervised a staff of 40 lawyers and was responsible for developing the legislative policy agenda for the Full Committee and overseeing substantive work of six subcommittees in the areas of: economic and commercial law; intellectual property and judicial administration; constitutional law and civil rights; crime and criminal justice; administrative law; and international law and immigration. Throughout this period, Mr. Yarowsky was the chief committee staff liaison with House and Senate leadership, other congressional committees and the Executive Branch. He personally developed and drafted a series of antitrust bills that were enacted into law and developed other legislative initiatives in the areas of telecommunications, financial services, insurance, banking, civil justice, and international trade.

Prior to serving as general counsel of the Full Committee, he served as chief counsel for the House Judiciary Subcommittee on Economic and Commercial Law. It was during this time that he honed his expertise in antitrust and competition policy, working closely with officials at the Antitrust Division of the Department of Justice and the FTC. In addition to his work in antitrust, Mr. Yarowsky was also responsible for developing policy and drafting subcommittee legislation in the areas of bankruptcy and commercial law.

Professional Affiliations:
Vice Chair, Antitrust Modernization Commission, appointed 2004
Member, National Commission on Crime, appointed 1995

PREPARED STATEMENT OF GLENN ENGLISH, CEO, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND CHAIRMAN, CONSUMERS UNITED FOR RAIL EQUITY

STATEMENT

GLENN ENGLISH
CEO, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
CHAIRMAN, CONSUMERS UNITED FOR RAIL EQUITY

MAY 8, 2007

HEARING OF THE
ANTITRUST TASK FORCE
HOUSE JUDICIARY COMMITTEE

THE FINDINGS AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION, AS ESTABLISHED BY THE ANTITRUST MODERNIZATION COMMISSION ACT OF 2002

Mister Chair, my name is Glenn English. I am the Chief Executive Officer of the National Rural Electric Cooperative Association and also serve as Chairman of Consumers United for Rail Equity (CURE), a captive rail customer advocacy group representing a broad array of vital industries – rural electric, public and investor owned electricity providers; chemical manufacturers and processors; paper, pulp and forest products; agricultural commodities producers and processors; cement and building materials suppliers; and many other American industries that depend on our nation's railroads for transportation.

We appreciate the opportunity to file this statement in the record of this hearing. Those American economic interests that are dependent on the railroad industry for our transportation, including the members of both the National Rural Electric Cooperative Association and Consumers United for Rail Equity, are extremely interested in the Report and Recommendations of the Antitrust Modernization Commission.

Mister Chair, the lack of competition in the railroad industry today hits home for members of NRECA. NRECA consists of nearly 1000 cooperatives in 47 states providing electricity to 39 million Americans. About 80% of the electricity we provide to our customers is generated from domestic coal. The vast majority of our generating plants are depeudent on the uation's railroads for coal delivery. Horror stories abound. Consolidation of the rail industry has resulted in many of our generators being held "captive" to one single railroad for coal transportation. As a result, a great many of our electric generators are subject to railroad monopoly power over price and service with no access to competition. Our electric

generators are experiencing steep price increases with no ability to negotiate acceptable rates. At the beginning of 2006, Dairyland Power Cooperative in Wisconsin experienced an almost 100% rate increase for moving coal to its generating plants, resulting in 45% higher consumer electric bills. Laramie River Station, a large coal generating facility in Wyoming operated by Basin Electric Power Cooperative of North Dakota, which provides electricity to consumers in nine states, experienced a 100% rate increase when their contract expired at the end of 2004. Basin calculates that they are paying 5 times the cost to the railroad of moving their coal.

But price is not our only problem, Mister Chair. Because we are captive to the railroads, they can take our business for granted and often provide far worse service than would occur if they operated in a competitive environment. Last year, due to operational problems on their system, the railroad serving Basin Electric failed in their coal deliveries and the generating plant got down to a three day supply of coal. The generating facility was forced to operate at a minimal level, forcing more expensive electricity to be purchased "off the grid" for the customers in nine states that are served by this facility.

With the railroad industry upon which we depend broadly exempt from the nation's antitrust laws and lack of competition in that industry a continuing problem, we are especially interested in Chapter IV.B of the Report which addresses immunities and exemptions from the antitrust laws, as well as the role of the antitrust laws in regulated industries.

The recommendations in this chapter touch directly on an issue that directly concerns the members of both NRECA and CURE – lack of competition in the rail

industry. Agricultural interests, the chemical industry and electricity generators and their customers, among others, are being directly injured by the high rates and poor service for the movement of bulk cargoes that has resulted from railroad consolidation. The reliable movement of both domestic coal to our nation's power plants and ethanol to our nation's refinery and population centers is vitally important as the nation attempts to move away from foreign sources of energy. Rail customers, particularly "captives" – those without access to transportation competition - believe that part of the continuing problem with rail service is caused by the railroad industry's ability to avoid competition for transportation. Instead of improving itself through competition, as have all other American deregulated industries, the railroads can "fall back" on their captive traffic, protected by their current antitrust exemptions.

The Report of the Antitrust Modernization Commission finds that "[s]tatutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy." The Report is absolutely correct in recommending:

1. ***Such immunities should be disfavored and allowed only "where and for long as," a clear case has been made for them.***
2. ***Free-market competition should be favored over industry-specific regulation, which should be reserved for the rare instances of natural monopoly***

Under current law, the Surface Transportation Board of the Department of Transportation may approve a rail merger without reference to the nation's antitrust laws. The Department of Justice has no authority to challenge such

mergers in federal district court as violating the nation's antitrust laws. Since 1980, the STB and its predecessor, the Interstate Commerce Commission (ICC), have approved so many rail mergers – some of which the Department of Justice opposed as violating the nation's antitrust laws – that today only four major railroads move over 90% of the nation's freight. Two of these railroads operate in the west and two in the east. Rail customers report that these four railroads rarely compete with each other for traffic.

In October, 2006, at the request of a number of Senators, the Government Accountability Office issued a report (GAO-07-94) that examined the state of the national rail system. The GAO concluded that there is insufficient competition in the rail industry and the federal agency responsible for ensuring sufficient competition, the Surface Transportation Board, is failing in its mission. A one page summary of this report with the internet link to the report is attached as Attachment 1.

Many state attorneys general are concerned about the lack of competition in the rail industry and the current railroad exemption from the nation's antitrust laws. Seventeen state attorneys general signed an August 17, 2006 letter to both the House and Senate Judiciary Committees asking that the railroad exemption from the nation's antitrust laws be repealed. A copy of this letter is attached as Attachment 2.

The lack of jurisdiction over proposed railroad mergers is not the only problem that is occurring due to the railroad exemption from the nation's antitrust laws. The Surface Transportation Board has adopted policies that are contrary to the nation's antitrust laws and allow the major railroads to block rail customer access to

competing railroads. In 2004, then Chairman James Sensenbrenner (R-WI) wrote the Department of Justice, Antitrust Division, about these policies and the position of the Department on the railroad industry's exemption from the nation's antitrust laws. Cong. Sensenbrenner's letter and the Department of Justice response were made public. Copies of these letters are attached as Attachments 3 and 4.

The first of the two anti-competitive policies addressed in the 2004 exchange of letters is the refusal of the major railroads to provide rates to their customers for transportation on their system to the point where the rail customer can gain access to a competing railroad. The railroad policy, approved by the Surface Transportation Board, is that the railroad will not provide a rate to a point of competition if the railroad itself can move the freight to the destination. This practice prevents the rail customer from gaining access to competition, which results in much higher rail transportation prices for that customer and, often, poor service.

The second anti-competitive policy is the exclusive service arrangements the major railroads have with most of the nation's short line railroads. This exclusive "tie-in" agreement is called a "paper barrier" because but for this agreement, many short line railroads can move freight to more than one major railroad, thus providing competition in freight movement.

Both practices raise serious questions of legality under the nation's antitrust laws, yet neither is being addressed due to the railroads' current antitrust exemption.

A Legislative Response

Mister Chair, Recommendation #59 of the Antitrust Modernization Commission report suggests that all exemptions from the nation's antitrust laws should be treated as temporary and that the exempt industry should "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." We believe that this recommendation is very appropriate concerning the railroad industry's antitrust exemption.

Congresswoman Tammy Baldwin (D-WI) and a bipartisan group of colleagues have introduced H.R. 1650, the Railroad Antitrust Enforcement Act of 2007. Senator Herb Kohl (D-WI), Chair of the Antitrust Subcommittee of the Senate Judiciary Committee, joined by a bipartisan group of colleagues, has introduced identical legislation in the Senate as S.772. The pending legislation invites Congress to do exactly what the Commission has recommended with respect to the railroad antitrust exemption: determine if the exemption should continue.

The 39 million Americans who receive their electricity from and own the members of the National Rural Electric Cooperative Association would benefit greatly from the rail transportation competition that would result from removing the railroad industry's antitrust exemption, as would the members of CURE and their consumers. We encourage the Committee to ensure competition in the rail industry by reporting H.R.1650 to the full House this year and ensuring favorable House action.

ATTACHMENT 1

3/15/07

Government Accountability Office Report
"Freight Railroads: *Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed*"
October 2006
http://www.gao.gov/new.items/d0794.pdf

America needs a national rail system that provides reliable transportation at a reasonable price. In 1980, Congress determined that competitive rail activities should be governed by the market, while government supervision should continue for those rail customers without access to competitive transportation. This recent GAO report indicates that these Congressional goals have not been met. Making our nation's railroads efficient, affordable and reliable is critical to America's economic security in the 21st century.

An October 2006 Government Accountability Office (GAO) report supports complaints that there is little competition available to rail customers; the Surface Transportation Board (STB), the regulatory body that oversees the railroads, has not taken the appropriate actions to achieve effective competition among rail carriers; the rate complaint processes at the STB do not work; the STB does not accurately measure railroad revenues; and there is significant doubt whether the rail system, under current federal rail policy, will be able to meet future traffic demands. Indeed, although the question of service was beyond the scope of this GAO report, there is substantial evidence that the rail industry is not meeting today's freight traffic demands.

The GAO Concluded:

- "Concerns about competition and captivity (in the rail industry) remain as traffic is concentrated in fewer railroads."
- "[The Surface Transportation Board's] rate relief processes are largely inaccessible and rarely used."
- "We believe that an analysis of the state of competition and the possible abuse of market power, along with the range of options STB has to address competition issues, could more directly further the legislatively defined goal of ensuring effective competition among rail carriers."
- "Costs, such as fuel surcharges, have shifted to shippers, and STB has not clearly tracked the revenues the railroads have raised from some of these charges."
- "Significant increases in freight traffic are forecast, and the industry's ability to meet them is largely uncertain."

(Source: Pages 1-11 of the GAO report)

WWW.RAILCURE.ORG
1050 Thomas Jefferson St. NW, Suite 600 Washington, DC 20007
Phone 202.298.1844 Fax 202.338.2416

ATTACHMENT 2

A Communication from the State Attorneys General of:

Arizona, Arkansas, California, Connecticut, the District of Columbia, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Wisconsin

August 17, 2006

The Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Honorable F. James Sensenbrenner, Jr.
Committee on the Judiciary
United States House of Representatives
2449 Rayburn House Office Building
Washington, DC 20515

Honorable John Conyers
Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Re: In Support of H. R. 3318 and S. 3612, Applying the Nation's Antitrust Laws to Railroads

Dear Sirs:

We, the undersigned Attorneys General, are writing to encourage Congress to remove the current railroad antitrust exemptions and subject the nation's major railroads to the basic law that ensures competition in our nation. Two bills pending in your committees are essential to this goal, the Railroad Antitrust and Competition Enhancement Act of 2005 (H.R. 3318) and the Railroad Antitrust Enforcement Act of 2006 (S. 3612). Rail customers in our states in a variety of industries are suffering from the classic symptoms of unrestrained railroad monopoly power: unreasonably high and arbitrary rates and poor service.

In 1980, the Congress deregulated most railroad activities through the Staggers Rail Act of 1980. The Interstate Commerce Commission, replaced in 1995 by the Surface Transportation Board (STB), was charged with the responsibility of restraining railroad monopoly power against those rail customers without access to competition. At the same time, the Congress did not remove the antitrust exemptions that had been granted to the railroad industry when they were extensively and tightly regulated. Since 1980, the major railroad industry has consolidated from over 40 companies to only four companies that provide over 90% of the nation's rail service. We understand from citizens in our

states that the Surface Transportation Board has failed in its responsibility to restrain railroad monopoly power. In fact, a 2004 Department of Justice Antitrust Division letter to the Chairman of the House Judiciary Committee strongly suggests that some of the railroad practices allowed by the STB would be of questionable legality under the nation's antitrust laws.

Thus, today, the citizens of our states often find themselves subject to unrestrained railroad monopoly power, with significant adverse consequences:

- Coal is used to generate about 50% of the electricity in the nation. A number of coalfired electricity generators in the west, midwest, southwest and southeastern portions of our nation are having trouble with railroad monopoly power. Not only are they confronting rate increases that sometimes reach 100%, but they are not receiving the amount of coal for which they have contracted with the railroads for delivery. The result is increased electricity costs for consumers from the rate increases and even steeper electricity cost increases where the utility must buy replacement electricity generated from high priced natural gas.

- Agriculture is suffering significantly from railroad monopoly power. As an example, increasingly the costs of rail transportation are being shifted from the railroad to the farmer. Small grain elevators are being forced to either consolidate into larger elevators that can load a unit train of grain or transship their grain to such loading facilities. Rates are increasing arbitrarily and service is declining. The net result is that farmers are putting less money into their pockets from their crops.

- Two-thirds of the chemical plants in the nation are served by a single railroad, with many of their customers also subject to single rail service. This railroad monopoly power is resulting in rates and service that is making American manufactured goods from chemical products uncompetitive with imported goods – which normally enjoy competitive rail transportation rates because they have their choice of entry points into the nation.

- Multi-national companies that can site their plants in any number of countries are extremely reluctant to invest in a U.S. site that is served by a single railroad. One global forest products company is currently considering a major investment at the site of its current paper manufacturing facility in a midwestern state. The site is served by a single railroad. The transportation cost of moving finished product from this midwestern state to its market in another midwestern state, a distance of less than 1,000 miles, is the same as the transportation cost of moving the finished product from Europe to its midwest market, a distance of 5,000 miles. This domestic transportation cost disadvantage presents a significant obstacle to increased foreign investment in our nation.

In summary, the major railroads of our nation provide an essential service to our economy. They must be financially viable and efficient. Historically, our nation has found that the best way to ensure economic success and economic efficiency is through the discipline of competition.

We ask that you ensure a strong and viable rail system in the United States by ensuring that the railroads are subject to market competition through full application of the nation's antitrust laws.

Very truly yours,

Lawrence E. Long
Attorney General of South Dakota

Mike Hatch
Attorney General of Minnesota

Mike McGrath
Attorney General of Montana

Wayne Stenehjem
Attorney General of North Dakota

Terry Goddard
Attorney General of Arizona

Mike Beebe
Attorney General of Arkansas

Bill Lockyer
Attorney General of California

Richard Blumenthal
Attorney General of Connecticut

Robert J. Spagnoletti
Attorney General of the District of Columbia

Tom Miller
Attorney General of Iowa

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August 17, 2006
Page 4

Gregory D. Stumbo
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Hardy Myers
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Attorney General of Wisconsin

ATTACHMENT 3

F. JAMES SENSENBRENNER, JR., Wisconsin
CHAIRMAN

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RIC KELLER, Florida
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
JOHN R. CARTER, Texas
TOM FEENEY, Florida
MARSHA BLACKBURN, Tennessee

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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ROBERT WEXLER, Florida
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SANCHEZ, California

July 15, 2004

The Honorable R. Hewitt Pate
Assistant Attorney General
Antitrust Division
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Assistant Attorney General:

I write to request that the Department of Justice Antitrust Division provide the Committee with its assessment and views on issues involving the application of the antitrust laws in the railroad transportation industry, and, more generally, on railroad competition policy.

United States railroads currently enjoy limited antitrust immunity. It is not clear that this immunity from antitrust actions serves the public interest in this marketplace. Some of these antitrust exemptions were established over eight decades ago, when competitive conditions in this marketplace were fundamentally different.

For example:

- Railroads are generally exempt from Sherman Act antitrust actions for treble damages if common carrier rates "approved by the [government]" are involved. This exemption is based upon notions of inherent conflict between a pervasive regime of rate regulation and published rates – a regime which no longer exists in the largely deregulated environment in which railroads presently operate. *See* Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

- Railroads are generally exempt from private antitrust actions "for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49." *See* 15 U.S.C. § 26 et. seq.

- Persons participating in approved or exempted railroad consolidation, merger, and acquisition of control are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction . . .". *See* 49 U.S.C. § 11321(a).

To the extent that exemptions from the antitrust laws unfairly shield competitors from competition, these exemptions require scrutiny and reconsideration as conditions warrant. This scrutiny is especially justified given the highly concentrated nature of the railroad industry. After years of industry consolidation, only two major carriers in the West and two major carriers in the East remain in this marketplace. In addition, many individuals, communities, and regions are served by only one railroad carrier.

Additionally, railroad customers have raised a number of concerns toward a range of industry practices that have allegedly suppressed competition in this marketplace. These practices include refusals by railroads to establish common carrier rates on individual "bottleneck" rail segments and corresponding demands that service be provided only on full-through rail routes. This practice produces anticompetitive harm by preventing customers from enjoying the benefits of carrier competition on rail segments in which at least two carriers compete. Another troubling allegation concerns Class I railroads imposing "paper barriers" after spinning off lower density lines to short-line railroads and subsequently preventing these carriers from handling business in conjunction with other railroads that would otherwise be eligible to provide competitive service. Additionally, concerns have been expressed that both of the major western Class I railroads are now attempting to publicly price major portions of their bulk commodity services in a manner that could raise anticompetitive concerns.

I relay these concerns, not because I seek to substantiate them as indicators of anticompetitive conduct in this marketplace, but rather, because they indicate that additional investigation into industry competitive practices may be warranted. Additionally, these concerns may highlight the need to revisit existing law and regulatory policies to more forcefully promote effective intramodal competition in the transportation marketplace. They may also indicate that investigation by the Department of Justice into such practices may be appropriate.

Given the special expertise of the Antitrust Division and its authority to investigate issues of competitive conduct in the railroad transportation industry, the Committee would benefit from receiving the written views of the Division on this matter.

I thus request an assessment of those concerns raised above. I appreciate your willingness to provide the Committee with this information, and request that you respond to this request no later than August 27, 2004.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/Jud.

ATTACHMENT 4

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 27, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sensenbrenner:

This responds to your letter of July 15, 2004, to the Department of Justice regarding the application of the antitrust laws in the railroad industry. You note that the various statutory antitrust exemptions for railroad industry activities were enacted many decades ago, and you question whether continuing this antitrust immunity serves the public interest. The Department appreciates having the benefit of your perspective on this important issue of competition policy.

The antitrust laws are the chief legal protector of the free-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better-quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumers. Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective.

In the first decades of the past century, for example, Congress enacted antitrust exemptions in industries in which it believed normal free-market competition to be unworkable. These industries included the railroad, airline, trucking, and telephone industries. In lieu of competition protected by the antitrust laws, Congress established comprehensive regulatory regimes that regulated prices, service offerings, and market entry as well as other aspects of these industries. These regulatory regimes often included statutory antitrust exemptions for conduct approved by the regulatory agency. And if the regulatory regime was sufficiently pervasive, the courts could hold that it had implicitly displaced private damages recovery under the antitrust laws. *See* Keogh v. Chicago Northwestern Railway, 260 U.S. 156 (1922); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986).

In the last decades of the past century, policymakers began to reconsider whether competition was truly unworkable in these industries, and efforts were undertaken to replace

market regulation with competition where possible. As these industries became deregulated, antitrust exemptions no longer made sense. In the case of airlines, for example, the antitrust exemption for mergers approved by the Civil Aeronautics Board was repealed and, after a transition period, merger enforcement in the airline industry reverted to the Department of Justice under the antitrust laws.

In 1995, when Congress abolished the Interstate Commerce Commission and created the Surface Transportation Board to retain some of the ICC's old regulatory authority, the Department urged Congress to turn over review of railroad mergers to the antitrust enforcement agencies, as it had done with airlines. *See* Statement of Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, Before the House Transportation Subcommittee on Railroads, January 26, 1995 (attached). Congress opted instead to leave that responsibility with the Surface Transportation Board, with an accompanying antitrust exemption, with the Justice Department limited to an advisory role before the Surface Transportation Board. *See* 49 U.S.C. § 11321(a).

Your letter also describes three specific practices in the railroad industry about which concerns have been raised about possible anticompetitive effects.

The first practice is the refusal by a railroad that controls one segment of a freight movement to quote rates separately for that "bottleneck" segment, instead quoting rates only for the entire freight movement. You note that this practice denies shippers the benefits of competition on segments of the move where an alternative carrier might compete for the business. Because of the Surface Transportation Board's involvement in approving these rates, and its acceptance of this practice, relief may not be available under the antitrust laws. If this practice were subject to the antitrust laws, it could be evaluated as a refusal to deal in possible violation of section 2 of the Sherman Act, or as a tying arrangement in possible violation of section 1 of the Sherman Act. Whether it would constitute an antitrust violation would depend on the particular facts.

The second industry practice you describe is "paper barriers." Paper barriers are created when Class I railroads spin off segments of their trackage to short-line or low-density carriers with contractual terms that prohibit the acquiring carriers from competing with the Class I railroads for business. Since these contractual terms are part of an underlying sale transaction that is reviewed and approved by the Surface Transportation Board, they may be exempted from the reach of the antitrust laws, depending on the scope of the approval language in each of the Board's relevant orders. If paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage – i.e., whether the restraint is reasonably necessary to achieve the pro-competitive benefits of the sale.

The third industry practice you describe is the practice by both of the major western Class I railroads of publicly disclosing tentative prospective shipping rate offerings. Under the antitrust laws, the public disclosure of pricing information among competitors can, under some circumstances, facilitate collusion and result in increased prices, in violation of section 1 of the Sherman Act. *See, e.g.*, United States v. Airline Tariff Publishing Co., 1994 Trade Cas. (CCH) ¶ 70,687 (D.D.C. 1994). Publicly announcing prospective rates outside the confines of a rate approval proceeding at the Surface Transportation Board is likely to be subject to review under the antitrust laws. If you know of anyone who has information that you believe might be useful for evaluating this practice under the antitrust laws, please encourage them to contact the Antitrust Division.

Thank you for bringing your interest in these issues to our attention, and for soliciting our views as you consider these issues. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

DEPARTMENT OF JUSTICE

STATEMENT OF

STEVEN C. SUNSHINE
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON RAILROADS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

CONCERNING COMPETITIVE REVIEW OF RAILROAD MERGERS AFTER ICC SUNSET
ON
JANUARY 26, 1995

Madam Chairwoman and Members of the Subcommittee: I very much appreciate this opportunity to appear before you today to explain how the Department of Justice would review railroad mergers and acquisitions if the Interstate Commerce Commission's authority to review and approve those transactions is repealed. The Department of Justice believes that railroad mergers and acquisitions should be reviewed under the same legal standards that apply to virtually every other sector of our nation's economy. We believe that the antitrust approach would provide significant advantages, saving time and scarce federal resources and reducing burden and delay on the merging parties, while still protecting the public interest by preventing anticompetitive mergers.

For most of our economy, Congress has chosen to rely on market competition rather than government regulation to protect consumers and the public interest. Not only does competition best allocate scarce goods and services to those who value them most highly, it also forces firms to become as efficient as possible. Consumers benefit where competition is vibrant -- it provides the highest possible quality of goods and services at the lowest possible cost. The antitrust laws protect competition by prohibiting unreasonable restraints of trade, including mergers that threaten substantially to lessen competition.

A number of important industries have in recent years been largely freed from economic regulation, including trucking, airlines, and natural gas production. Building on earlier regulatory and legislative efforts, the

Staggers Rail Act of 1980 substantially deregulated the freight rail industry by placing more reliance on market forces. The Staggers Act is widely credited with revitalizing freight railroads, many of which were in precarious financial condition. The next logical step to deregulate further the rail industry would be to eliminate prior government review and approval of mergers under the "public interest" standard that is currently embodied in the Interstate Commerce Act.

Under the Interstate Commerce Act (ICA), rail carrier mergers must receive prior government approval under a broad "public interest" standard before they are permitted to occur. If a merger transaction involves two class I railroads, the ICC may not approve it unless and until the Commission determines that the transaction is, on balance, "consistent with the public interest."[1]

The ICA directs the Commission to consider competition, but only as one of five factors to balance in assessing the public interest: the effect of the proposed transaction on the adequacy of transportation to the public; the effect on the public interest of including, or failing to include, other rail carriers in the proposed transaction; the total fixed charges that would result from the proposed transaction; the interest of carrier employees affected by the proposed transaction; and whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.[2]

The ICA contemplates intervention in the process by competitors and other interested parties, and provides for lengthy time periods for the Commission to conduct evidentiary hearings and issue its determinations. It can take the Commission up to two to three years to render its decisions on mergers having significant competition issues. Even a rail merger that raises few competitive concerns can be under review at the ICC for a year or more. For example, the ICC recently completed its review of the proposal by the Union Pacific for authority to take control of the Chicago & North Western. Union Pacific filed its application on January 29, 1993; the ICC approved the transaction in December 1994. There was extensive participation by competitors -- competitors who were perhaps more concerned with their own private interests than with the merger's likely impact on rail customers.

A more dramatic example of the time that ICC proceedings can take was the Santa Fe's proposal to take control of the Southern Pacific, which the Department opposed at the Commission. Those railroads first notified the ICC about their proposed combination on November 22, 1983. The ICC's ultimate decision, which disapproved the transaction, was not made until almost 3 years later, on October 10, 1986. Then, close to 2 more years passed before the ICC ordered Santa Fe to divest the Southern Pacific stock, which the ICC had allowed Santa Fe to hold in a voting trust.

The ICA's public interest standard as applied in ICC railroad merger

proceedings has led to the negotiation of many protective and other conditions that caused the merged carrier to make concessions to protesting parties, which often include its principal competitors. Such conditions can limit the potential efficiencies of a merger and protect competitors from the enhanced competition that could otherwise result from a procompetitive combination.

In contrast, merger enforcement under the antitrust laws protects competition, not competitors. Section 7 of the Clayton Act, 15 U.S.C. 18, the primary provision of the antitrust laws governing mergers and acquisitions, prohibits those transactions that threaten "substantially to lessen competition in any line of commerce in any section of the country." The central issue under the Clayton Act is whether the merger will result in increased prices to consumers or reduced services.

Merger decisions are made far more quickly under the antitrust laws than under the ICA. Under the premerger notification provisions of the Hart-Scott-Rodino ("HSR") Act,[3] routine mergers that raise no antitrust issues can be consummated upon the expiration of a 30-day waiting period (15 days for cash tender offers). When requested, the antitrust enforcement agencies will in appropriate cases agree to "early termination" of the waiting period in less than 30 days.

Where a merger does raise antitrust concerns, we are able to obtain all of the information we need to resolve those concerns expeditiously. If we need additional information from the parties to complete our investigation, we can issue a "second request" that will extend the waiting period an additional 20 days after the parties supply the requested information.[4] The Department seeks information from competitors, suppliers, customers, employees, and other knowledgeable parties in order to analyze the effects of the merger. In addition, we can seek documents, deposition testimony, and interrogatory answers from the parties and other persons pursuant to the Antitrust Civil Process Act.

When the Department determines that a proposed merger raises significant competitive issues, several steps are available to speed resolution of the matter. Most such matters are resolved in 6 months to a year. The parties can "fix-it-first" by restructuring the transaction, which avoids a legal challenge by the Department. If the investigation runs its course and the Department decides to challenge the transaction, the parties and the Department frequently negotiate a consent judgment that corrects the competitive problem but otherwise allows the remainder of the transaction to go forward.

If the Department concludes that a merger transaction as structured would violate the antitrust laws, and the parties do not wish to restructure it, the Department must go to court to prevent the transaction. The Department can seek a preliminary injunction, which prohibits the merger pending a full trial for a permanent injunction. Even if the case goes through a full trial, it

will likely be resolved less than a year after the complaint is filed, substantially less time than it usually takes the ICC to reach a final decision on a merger under the ICA. However, only a small percentage of the mergers reviewed by the Department are challenged in court.

The analytical framework we use in merger investigations is set forth in the 1992 Horizontal Merger Guidelines, issued jointly by the Department of Justice and the Federal Trade Commission. These Merger Guidelines have been cited and relied on by the courts in merger cases. Under the Merger Guidelines, we assess the merger's likely harm to competition, and consider any efficiencies that may outweigh potential harmful effects.

Our competitive analysis takes into account the position of each of the merging firms in each economically meaningful "relevant market", the relevant market's concentration, the extent to which that concentration would be increased, the competitive conditions likely to exist in the market after the transaction, and the likely ability of the resulting firm to raise prices or lower services to the detriment of consumers. We define relevant markets carefully, through an evaluation of any effective substitutes customers have for the services provided by the merging firms.

For railroad mergers, the analysis begins with identification of the affected routes. For two railroads with largely parallel routes, the logical starting point for defining a market is the carriage of a particular commodity from one point (called an origin) to a second point (called a destination) by the merging railroads.

Once the affected routes are identified, the analysis generally focuses on an evaluation of the other rail, intermodal, product, and source competition options available to shippers. Intermodal competition is the ability of a shipper to substitute another mode of transportation, usually truck or water carriage, for the shipment of a particular commodity between a particular origin and destination. If truck or water service is available and is a close substitute for rail carriage for certain commodities, these competitive alternatives would prevent a rail carrier from raising its rates for these commodities. For other commodities, however, trucks may be at a significant disadvantage to rail where, for example, the distance the commodity is shipped is great, the volume of the commodity shipped is large, or the value of the commodity as compared to its weight is small.

Other forms of competition considered include product and source competition. "Product competition" is the ability of a shipper to substitute another commodity that allows use of a transportation system other than the merged rail carrier. "Source competition" is the ability of shippers in the region of the merging railroads to avoid high rail rates by shipping a commodity to another destination or by obtaining it from another source, again using other than the merged rail carrier.

If one or more of these forms of competition is available, its existence will be reflected in the Department's definition of the markets affected by the

merger. If such competition is significant, it may defeat or limit the ability of the merged carrier to raise prices. The degree to which any of these methods of competition will be effective will vary according to the nature of the commodities, routes, and perhaps other factors, including differences in demand and/or supply elasticity for different commodities.

The antitrust laws do not prohibit efficient railroad mergers that can benefit shippers. The Merger Guidelines expressly recognize that mergers can enhance efficiency. When necessary to an evaluation of the net competitive effects of a merger, we consider the prospect that real efficiencies will be achieved that could not be realized absent the merger. Thus, the Department of Justice will challenge a merger only when its likely harm to competition is not outweighed by its likely efficiencies.

The Department has not opposed rail mergers that did not significantly threaten competition. Over the past 10 years, the Department opposed only one rail merger in its entirety -- the proposed consolidation of the Santa Fe and Southern Pacific Railroads -- a transaction the ICC ultimately disapproved. The Department raised no objection to the two rail mergers most recently approved by the ICC: Kansas City Southern's acquisition of Mid-South, and the Union Pacific's control of the Chicago & North Western.

In sum, our analysis of proposed railroad mergers using the Merger Guidelines is the same general analysis we use in reviewing mergers subject to the antitrust laws. That analysis is sophisticated, thorough, and flexible -- it involves far more than simply computing market shares or concentration figures. It takes into account all the dynamics of the markets with which we are dealing.

Subjecting railroad mergers and acquisitions to the antitrust laws would expedite both the investigation and resolution of such transactions.

Madam Chairwoman, this concludes my prepared remarks. I would be happy to respond to any questions that you or other members of the Subcommittee may have.

FOOTNOTES:

1. 49 U.S.C. 11344(c). If a merger transaction does not involve two class I railroads, the ICA requires approval unless the ICC finds there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States and the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. Id. 11344(d).

2. 49 U.S.C. 11344(b)(1).

3. 15 U.S.C. 18a.

4. 15 U.S.C. 18(b)(1), (e).