



Business Roundtable

1615 L Street NW
Suite 1100
Washington, DC 20036-5610

Telephone 202.872.1260
Facsimile 202.466.3509
Website businessroundtable.org

UNITED STATES ANTITRUST MODERNIZATION COMMISSION

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Comments of the Business Roundtable Regarding Commission Issues for Study

Henry A. McKinnell, Jr.
Pfizer
Chairman

Franklin D. Raines
Fannie Mae
Co-Chairman

Edward B. Rust, Jr.
State Farm
Co-Chairman

John J. Castellani
President

Larry D. Burton
Executive Director

Johanna I. Schneider
Executive Director
External Relations

The Business Roundtable is pleased to provide our response to the request for comments regarding issues that are appropriate for consideration by the Antitrust Modernization Commission. 69 Fed. Reg. 43,969 (July 23, 2004). The Roundtable is an association of chief executive officers of leading U.S. corporations with a combined workforce of more than 10 million employees in the United States. We are committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness.

The Business Roundtable has long been actively involved in public discussion regarding the proper scope and application of the antitrust laws. We have testified before Congress on pending antitrust legislation, *e.g.*, the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, and we have filed *amicus* briefs in the United States Supreme Court in many important antitrust cases, including most recently *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

The Roundtable wholeheartedly endorses the mission of the Antitrust Modernization Commission “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.” In his statement at the opening meeting of the Commission on July 15, 2004, House Judiciary Committee Chairman F.

James Sensenbrenner, Jr., the principal drafter of the Commission statute, identified a number of important areas for consideration, including the merger review process, the relationship between federal antitrust enforcement and enforcement by the states and by foreign entities, the relationship between the antitrust laws and other federal regulatory regimes, and the interaction between the antitrust laws and the intellectual property laws. The Roundtable's suggestions regarding worthwhile topics for the Commission's consideration within these and other areas are set forth below.

Review of Proposed Mergers and Other Transactions.

Length and Cost of Merger Review. The Roundtable recognizes the importance of federal antitrust review of mergers and other transactions in circumstances where there may be significant harm to competition. But federal merger review frequently results in lengthy delays and enormous expense, both for the parties to the transaction and for other firms contacted by the reviewing agency. The Commission should consider several topics in this area, including:

- (i) whether the Hart-Scott-Rodino ("HSR") Act should again be amended to reduce the number of mergers and other transactions requiring premerger notification;
- (ii) whether the HSR Act should be revised to allow parties which receive unduly broad and burdensome second requests or civil investigative demands to seek judicial review;
- (iii) whether the allocation of regulatory responsibility for particular industries between the Antitrust Division and the Federal Trade Commission should be clarified, and whether the processes used by the two agencies in litigating merger cases should be harmonized; and
- (iv) whether the operating expenses of the Antitrust Division and the Federal Trade Commission should continue to be funded in significant part through HSR filing fees.

Harmonizing Antitrust Law and Merger Enforcement Across Jurisdictions.

Because of the increasing globalization of trade, proposed mergers may effect competition in many nations. As a result, firms often face overlapping merger reviews conducted by numerous national and international competition authorities, and by States and the federal government, as well as the possibility of private antitrust litigation to block the transaction. In addition, multinational firms may face different legal rules in various jurisdictions governing their unilateral conduct and their participation in international joint ventures. The Commission should consider a number of subjects in this area, including:

- (i) what steps can be taken to reduce duplication of effort (including the development of a multi-jurisdictional form for merger filings) and the possibility of inconsistent outcomes in multi-jurisdictional merger review (We are aware that the International Competition Policy Advisory Committee appointed by the U.S. Department of Justice addressed some of these issues in its February 2000 report; however, we believe that in light of the extraordinary costs associated with multi-jurisdictional merger reviews, careful analysis of this subject by the Commission is warranted);
- (ii) determining whether U.S. and foreign antitrust laws relating to non-merger matters, for example, unilateral conduct, should be brought into closer harmony;
- (iii) what role State attorneys general and State laws should play, both in merger review and in non-merger matters involving interstate commerce;
- (iv) whether the rules regarding private-party standing to challenge mergers should be modified; and
- (v) assessing the respective roles of antitrust and other regulatory agencies, including the Federal Communications Commission and the U.S. Department of Transportation, in reviewing transactions that

implicate multiple statutory regimes, and determining whether the respective roles of the agencies should be changed or clarified.

Clarifying the Relationship Between the Antitrust and Intellectual Property Laws.

The antitrust laws and the intellectual property laws share a common objective: the enhancement of consumer welfare through the promotion of innovation. The antitrust laws promote innovation largely through promoting vigorous competition to stimulate innovation. The intellectual property laws stimulate innovation by enabling innovators to profit from their work. The different legal regimes sometimes come into conflict, principally where the antitrust laws arguably limit the exercise of the rights conferred by the intellectual property laws. While the Antitrust Division and the Federal Trade Commission have recently held a series of hearings and issued a report on the subject, the Commission should study the issue and make recommendations regarding whether changes to either statutory regime are warranted.

Other Important Issues

Examination of the rules for determining when treble damages are available. In several statutes, Congress has begun to articulate circumstances under which treble damages are not appropriate under the federal antitrust laws. *See, e.g.*, Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat 661 (2004); National Cooperative Research and Production Act of 1993, Pub. L. No. 103-42, 107 Stat 117 (1993). The Commission should consider whether further restrictions on the availability of treble damages may be warranted, including, for example, whether treble damages should be available in “rule of reason” cases.

Clarification of when the *per se* rule applies. There are a number of activities beyond “hard-core” price-fixing and market-allocation activities as to which there is uncertainty as to whether and when the *per se* rule may apply. The Commission should examine this issue and offer its views regarding the appropriate scope of the *per se* rule, including whether it is appropriate to hold that resale price maintenance and certain forms of tying are *per se* unlawful.

Private Antitrust Litigation. A significant amount of public and private resources is consumed by private antitrust litigation. The Commission should study a number of issues relating to this subject, including:

- (i) whether Congress should pre-empt legislation, enacted by many States after the *Illinois Brick* decision, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that allows indirect purchasers to recover damages for violations of State antitrust laws;
- (ii) whether the rules governing class action antitrust litigation should be modified to reduce the incentives for filing meritless claims; and
- (ii) Whether the limits on the application of the U.S. antitrust laws to activities involving foreign commerce set forth in the Foreign Trade Antitrust Improvement Act require further elucidation in light of the recent Supreme Court decision in *Empagran*, in which the Supreme Court adopted the view espoused by the Roundtable as *amicus* that U.S. antitrust laws do not apply to foreign conduct that causes harm only abroad and that such claims cannot be the basis for antitrust class actions in the U.S.

Robinson-Patman Act. The Commission should study whether the Robinson-Patman Act's restrictions on "price discrimination" need to be clarified or modified, including whether any of the exceptions and defenses to Robinson-Patman liability identified in court decisions should be codified, and whether the criminal penalties for violating the Act should be eliminated.

Clarification of the standards under Section 2 of the Sherman Act for claims of monopolization or attempted monopolization based on "bundled" prices and rebates. The recent decision of the United States Court of Appeals for the Third Circuit in *3M Co. v. LePage's Inc.*, 324 F.3d 141 (3rd Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004), creates considerable uncertainty about the circumstances under which a firm may offer "bundled" pricing and other "above-cost" discounts to its customers. This uncertainty may discourage firms from engaging in discounting activities that benefit

consumers. The Commission should study this issue, and offer its views regarding the appropriate rules regarding this commonplace commercial activity.

The Roundtable appreciates the opportunity to provide our views, and we look forward to working closely with the Commission as it undertakes this important effort.

Respectfully submitted,
BUSINESS ROUNDTABLE

Contacts:

Marian Hopkins
Director of Public Policy
Business Roundtable
1615 L Street, NW Suite 1100
Washington, DC 20036
(202) 872-1260
mhopkins@brt.org

Janet L. McDavid
Jeffrey H. Blattner
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, DC 20004
(202) 637-8780 (JLM)
(202) 637-6860 (JHB)
jlmcdavid@hhlaw.com
jhblattner@hhlaw.com