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Antitrust Modernization Commission
Attn: Public Comments
1001 Pennsylvania Avenue, Suite 800-South
Washington, DC 20004-2505

Re: Suggestions of Issues for Commission Study From the National Association of Manufacturers

The National Association of Manufacturers (NAM) is pleased to provide this response to the request of the Antitrust Modernization Commission for issues appropriate for study by the commission.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

The NAM wishes to support the mission of the Antitrust Modernization Commission to review whether the need exists to modernize the antitrust laws and appreciates the opportunity to offer its views concerning topics worthy of the commission's study. We respectfully submit the following topics for consideration by the Commission.

Federal Merger Review: The NAM recognizes the need for review of acquisitions that present the potential for significant harm to competition. However, merger reviews by the two federal antitrust agencies can involve significant delays, burden and expense to the parties, as well as the resultant lost opportunity costs in the case of delayed transactions that ultimately are consummated. The commission should consider several topics, including -

- whether the Hart-Scott-Rodino (HSR) Act should be revised to impose time limits on merger reviews absent an extension authorized by a federal court;
- whether the HSR Act should be revised to allow parties to seek judicial review of unduly broad and burdensome "second requests" and civil investigative demands;
- whether the expenses of the Federal Trade Commission and the Antitrust Division should continue to be funded by HSR filing fees. The NAM has previously opposed the existing linkage, which creates an inherent conflict of interest for the agencies and exposes them to substantial funding cuts during periods of reduced merger activity; and
- whether the HSR Act should again be revised to further increase the size of transactions requiring pre-merger notification and limiting the acts triggering filings to those acts with antitrust significance.

Multijurisdictional Enforcement Issues: Many U.S. companies operate in global markets and must comply with the laws of the countries within which they conduct business, as well as the federal and state laws in the United States. Investigations of mergers and other conduct by firms are thus subject to overlapping reviews or differing substantive rules. Clear, consistent guidance on the application of

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antitrust laws to business conduct is critical to compliance. The commission should consider study of two issues in this area:

- What steps can be taken to reduce the burden and delay imposed by multijurisdictional merger reviews and the possibility of inconsistent outcomes? The NAM is familiar with the recommendations of the International Competition Policy Advisory Committee (an NAM representative provided testimony to the committee) but the NAM believes further study of this area is appropriate. In addition, the commission should consider steps to prevent the abuse of processes intended to aid foreign jurisdictions by individuals for unrelated purposes and against the wishes of the foreign jurisdiction, as occurred in the recent Intel case.
- What appropriate actions can be considered to substantially reduce or eliminate the potential for inconsistent outcomes presented by the various state antitrust laws, enforcement schemes and litigation permitted by those laws? While federal and state enforcement cooperation has increased, overlapping jurisdiction under state and national law precludes clear guidance to business and one-stop shopping. One potential resolution is to consider substantive federal preemption of state antitrust laws, except for truly intrastate conduct.

Single Damages for Certain Antitrust Offenses: Some offenses, such as price fixing, are clearly pernicious; others involve conduct that may be subject to substantial uncertainty as to whether it is unreasonable. In either case, the defendant is subject to treble damages. The commission should consider whether to recommend the detrebling of all antitrust offenses except for hard-core price fixing and its equivalents.

Illinois Brick Codification: The Supreme Court's decision in Illinois Brick required a private antitrust plaintiff to be a direct purchaser from a defendant in order to recover damages. The Court was correctly concerned about multiple recoveries and the difficulty in apportioning damages among multiple levels of sellers. The NAM has consistently opposed attempts to change this rule with federal legislation. Many states, however, have passed laws that effectively "repeal" Illinois Brick for their state antitrust laws. The AMC should consider codification of the Illinois Brick and earlier Hanover Shoe decisions by Congress and making such a law preemptive of contrary state laws.

Sector-Specific Antitrust Laws: Some commentators have suggested that our antitrust laws be revised for the high-tech section of our economy. The antitrust laws as written are more than sufficiently flexible to handle that part and all other parts of our economy. While the AMC should encourage study of how the antitrust laws apply to new parts of the U.S. economy, it should reject any suggestion of sector-specific laws and regulations.

Sincerely,



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