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Antitrust Modernization Commission (AMC)
1001 Pennsylvania Avenue, NW, Suite 800-South
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Submitted by E-mail to comments@amc.gov

Re: AMC Ignores Issues Submitted by Public

Dear Commissioners:

Relpromax Antitrust submitted seven issues for study by the AMC. Of these seven issues, only one issue was recommended for study. The remaining six issues were ignored, or at least not listed as either "recommended for study" or "not recommended for study." These issues were all clearly written, timely submitted, and described in 300 words or less, as per the AMC's instructions. Accordingly, I am surprised that the AMC would simply ignore six of the seven issues.

In a series of five E-mails to your Executive Director & General Counsel, Andrew J. Heimert, I requested specific information on which of the eight working groups considered each of the seven issues. Mr. Heimert provided only two responses. In both E-mails, Mr. Heimert provided only platitudes and generalities, but no specific information. Nor did he indicate whether he was able and willing, or unable or unwilling, to provide that specific information. Hence, I have been left in the dark as to whether, to what extent, and which of the eight working groups considered each of these six issues upon which no written evaluation was submitted by any of the eight working groups.

I submitted comments as an economist and representative of my company. As an economist, I look beyond simply making improvements in the procedures or legal technicalities of the current antitrust laws. Instead, I look to the primary goals of the antitrust system itself, which is to improve competition and to ameliorate or eliminate the effects of monopoly power. Without the views of economists, it is impossible effectively to "modernize" the antitrust laws, or to move competition policy beyond its current emphasis on rooting out "bad conduct" while mostly ignoring industry structure and incentives. The AMC suffers from the dominant, but limiting, perspectives of its eleven attorneys. These attorneys must make a conscious effort to move beyond the limiting perspective of an antitrust attorney.

My reading of the 37 public comments suggests that very few economists or consumer groups submitted comments. I suspect this is due to very limited and ineffective outreach by the AMC to these two groups. I learned of the AMC's operations only by accident, because I happened to peruse the website of the Federalist Society. Under these circumstances, failing to consider the issues submitted by even one economist is equivalent to snubbing the views of all economists.

The AMC, in its writings, fancies itself to be an impartial body of advisors. Impartial judges, in their written opinions, are expected to summarize the important findings of fact, conclusions of law, and related reasoning. A Judge who fails to do this is subject to having his decision overturned or remanded after appeal. Similarly, a regulatory agency is expected to respond to all significant public comment on its proposed rules. An agency which fails to do this may find its rules overturned or remanded by a Federal Court.

The AMC may not be under legal obligation to respond to significant public comment. Nevertheless, failure to respond to significant issues raised by the public, particularly when the AMC specifically requested public comment, suggests lack of interest in perspectives that differ from the pre-existing concerns of the Commissioners. Simply ignoring such alternate perspectives in the reports from the working groups is an inappropriate way of dealing with such public comment.

I do hope this failure is simply an oversight by the AMC, not a deliberate strategy to ignore unwanted public comments. I ask that the AMC acknowledge the issues submitted by Relpromax Antitrust, indicate whether the issues will be studied, and provide the reasons why.

Sincerely,

Carl Lundgren
Economist and President
Relpromax Antitrust, Inc.

Summary of the Responses of the Antitrust Modernization Commission's Working Groups to the Seven Issues Proposed by Relpromax Antitrust

Summary: Of the seven issues raised by Relpromax Antitrust, only Issue # 4 was recommended for study. The remaining issues were ignored, or at least not listed as either "recommended for study" or "not recommended for study." In a few of these instances, there may be indirect recommendations not to study, for reasons that are casual or flippant.

Issue 1. The AMC should consider the use of relative profit maximizing (RPM) incentives as a part of a comprehensive strategy to induce pro-competitive behavior and outcomes.

Issue 1 was not listed by any of the working groups as either "recommended for study" or "not recommended for study."

Issue 2. The AMC should investigate a structural and incentive approach to competition policy, in addition to the conduct approach of existing antitrust law.
Issue 3. An independent competition policy board (CPB) should be established to investigate, recommend, and order structural and incentive changes to industries that may be imperfectly competitive.

Issues 2 & 3 were not directly listed by any of the working groups as either "recommended for study" or "not recommended for study."

These issues may have been indirectly mentioned on page 14 of the report by the "Civil Procedure and Remedies Working Group" as an issue not recommended for study: "Should government remedies be expanded, restricted, or clarified?" The dismissive comment reads in full: "There is general agreement that the agencies have made considerable efforts recently to address these issues and that they are not a high priority for additional reform efforts."

Among whom is there such general agreement? For instance, is there general agreement that the Microsoft monopoly should not be broken up? Whether or not there may be general agreement among the AMC commissioners, there surely is not general agreement among economists or the general public.

How do the agencies expand their powers to consider structural and incentive issues, without Congressional authorization? This is not simply a question of finding new "remedies" for "bad conduct." Right now, the agencies live within an antitrust straightjacket which first requires evidence of "bad conduct" before pro-competitive measures of any kind can be implemented upon imperfectly competitive firms or markets. Agencies' priorities are determined by the law as it currently is, not by what the law should be. The AMC must seek a higher vision for its own priorities.

Issue 4. The economic goals of antitrust should be clarified. Does antitrust seek to maximize consumer surplus, total surplus, or something else?

Issue 4 may have been indirectly addressed in item 5 of the report by the "Mergers, Acquisitions, and Joint Ventures Working Group" as an issue recommended for study.

Issue 5. The government should provide transparency in its economic modeling and analysis of antitrust cases.

Issue 5 was not listed by any of the working groups as either "recommended for study" or "not recommended for study."

Issue 6. To encourage competitive innovation, trade secrecy should be scaled back and patents should be supplemented by a system of prizes.

The trade secrecy part of Issue 6 was not listed by any of the working groups as either "recommended for study" or "not recommended for study."

The patent part of Issue 6 may have been indirectly addressed in items 3 and 8 of the report by the "Intellectual Property Working Group" as issues not recommended for study.

Item 3 asks, "Should a duty to deal in intellectual property (e.g., compulsory licensing) be implied in circumstances in which there is no such duty for other types of property?" The response is narrowly tailored to judicial interpretation of current antitrust law. It does not address any issue raised by Relpromax Antitrust. Nevertheless, there may be sound reasons to treat intellectual "monopoly" property differently than ordinary property, perhaps by imposing a duty to license under some set of circumstances. This could be implemented as a limited buy-out of some patent rights.

Item 8 asks, "Should the patent system be replaced with a system of government-granted prizes for innovation (coupled with government buy-outs of some patents)?" The dismissive comment reads in full: "This issue relates principally to a wholesale replacement of the existing patent system, and only indirectly implicates antitrust issues. It is therefore well outside the scope of the Commission's mandate and expertise, and is not appropriate for study."

Relpromax Antitrust did not recommend "wholesale replacement of the existing patent system," nor do I know of any commenter who did. However, Relpromax Antitrust did recommend "government buy-outs of some patents." This latter proposal does not require any changes to the existing patent system, and it could help reduce the adverse impact of government-created monopolies. Hence, the IP Working Group has not, in fact, correctly addressed this issue.

The IP Group's attitude towards item 8 contrasts sharply with its recommendation to study item 2-b (page 6): "Are there ways in which the process of granting and enforcing patents could be improved to reduce adverse effects on competition?" The Group correctly notes, "… the main impact on competition likely arises from deficiencies in the patent issuance and enforcement system. Recommendations in this area therefore may carry limited weight." Nevertheless, the Group concludes "… study and recommendations regarding patent law and policy may nevertheless prove helpful."

Issue 7. The government should collect cost, revenue, and profit data for lines of business in large firms.

Issue 7 may have been indirectly addressed in item 9 of the report by the "Intellectual Property Working Group" as an issue not recommended for study.

Item 9 asks, "Should programs to collect data for use by researchers and firms be established or expanded?" The IP Group responds, "The Commission has no unique ability to make recommendations regarding data collection and disclosure, whether by government agencies or private or non-profit entities. To the extent that it examines issues and finds available data to be inadequate, the Commission can report on the need for more and better data."

This response does not adequately address the issue raised by Relpromax Antitrust. Relpromax Antitrust raised the issue that such requirements for information disclosure would directly aid competition itself. The Commission is uniquely positioned to study such competition issues and is legislatively mandated to do so.

In addition, such data is useful for further research on antitrust issues. This is not simply a matter of whether the Commission can find whatever data it needs to examine some limited set of issues that the Commission desires to study. It is primarily a question of whether the economic research community will have the data it needs to examine fully all the competition issues for the economy.

References:

Adobe Acrobat versions of the eight reports of the Antitrust Modernization Commission's eight working groups can be found at the web address, http://www.amc.gov/commission_documents.htm under the heading, "Commission Recommendation Memoranda."

Carl Lundgren, "Using Relative Profit Incentives to Prevent Collusion," *Review of Industrial Organization*, Volume 11, Number 4, August 1996, pp. 533-550.

Carl Lundgren, "Comments Regarding Commission Issues for Study," submitted by Relpromax Antitrust, Inc. to the Antitrust Modernization Commission (AMC), September 30, 2004.