

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
Government Affairs

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

September 30, 2004

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

Re: Suggestions from the U.S. Chamber of Commerce regarding antitrust issues that are appropriate for Commission study

To Antitrust Modernization Commissioners:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector and region, appreciates the opportunity to comment on the Antitrust Modernization Commission's request for suggestions of issues that are appropriate for Commission study. The U.S. Chamber continuously works to promote the fundamental principles of free enterprise and recognizes our free market system is essential to achieving and maintaining a vibrant and productive economy.

The Chamber recognizes the critical role that an effective and balanced antitrust and trade regulation policy plays in ensuring the fair and efficient operation of our free market system. The Chamber further believes that that policy will perform best if it is based on a sound understanding of business realities in a global economy and a strong commitment to avoid unwarranted controls that reduce competitive vigor and so are counterproductive.

In accordance with these principles, the Chamber supports as the basic objective of antitrust and trade regulation policy, the prohibition of practices that are inconsistent with a market-driven business economy. We urge implementation of our antitrust and trade regulation laws in a way that will foster maximum freedom and fairness of competition, with a minimum of Government interference in the conduct of business transactions and corporate governance. We appreciate the mission of the Antitrust Modernization Commission to evaluate the current operation of antitrust enforcement and determine whether a need exists to modernize antitrust laws. The Chamber respectfully submits the issues outlined below for the Commission's consideration.

Coordination of Enforcement Efforts To reduce the burden on private enterprise and maximize the efficiency with which the antitrust and trade regulation laws are enforced, government should seek to minimize instances of multiple agency jurisdictions over competition issues. On those occasions where multiple agencies are involved, including where federal and state authorities, or U.S. and foreign authorities undertake simultaneous investigations, the agencies should strive to coordinate and streamline their enforcement policies and activities. The Commission should study these issues and make recommendations on ways to avoid inconsistent or duplicative enforcement policies or actions.

Enforcement Guidelines Antitrust and Trade Regulation enforcement agencies should continue to issue and update enforcement guidelines in those areas of the law where court decisions and the agencies' experience and expertise have led to well-developed and generally accepted analytical principles. Agency guidelines should accurately reflect the methods by which the agency performs its analysis, yet remain sufficiently flexible to allow case-by-case assessment of facts and issues.

Recognition of Business Realities Courts and antitrust enforcement agencies should continually strive to increase their understanding of the business environments in which the firms before them operate, and to place appropriate emphasis on the business realities and the actual economic effects and benefits of the examined activities. The Commission should study the changes that have occurred with respect to the way businesses compete, including the increasingly global nature of competition we have witnessed in most industries.

Mergers and Acquisitions Merger enforcement policy should be governed by reasonable and predictable rules designed to facilitate the operation of a free market for capital assets. Pre-merger notification requirements should apply only to those parties and transactions that are of sufficient size to have a potential significant impact on competition. The U. S. Chamber has long opposed the concept of funding antitrust enforcement through HSR filing fees. The Commission should consider whether the merger review process should be modified to be more efficient, less burdensome and costly to the business community, and timelier.

Consistent with individual company rights to protect confidential information, the enforcement agencies should publicize the basis for their decision. The FTC's Statement in the "cruise line" merger investigation is an example of the type of "transparency" we suggest be adopted wherever appropriate.

Monopolization The Sherman Act's prohibitions on monopolization and attempted monopolization should be interpreted consistently with the goal of encouraging vigorous competition. Even firms with market power must be allowed to compete, and their efforts should not be unduly hindered by the antitrust laws. The Commission should examine this issue and any related inconsistencies.

Intellectual Property Rights The protection of intellectual property rights stimulates innovation and invention, which in turn strengthens competition. Antitrust enforcement policy should be consistent with intellectual property policy. Holders of intellectual property rights should be free to exploit those rights within their defined scope. Ownership of a patent or copyright should be viewed in the same manner as ownership of any other asset or group of assets, and should not be presumed to confer monopoly power in a relevant antitrust market. The Commission should study the issue and make recommendations on whether changes to either policy are necessary.

Price Discrimination Firms must be afforded the freedom to respond to their competition in setting prices, and thus should not be unduly hindered by prohibitions on price discrimination. The Chamber endorses case law under the Robinson-Patman Act that has given greater scope to the meeting competition and other available defenses and has required plaintiffs to prove actual business injury. The Commission should study the need for clarification of the Robinson-Patman Act's restrictions on price discrimination.

The Chamber appreciates the opportunity to submit topics for the Commission to consider for review. We look forward to discussing these and other issues with you in the near future.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Josten". The signature is fluid and cursive, with a prominent initial "R." and a long, sweeping tail.

R. Bruce Josten