



ITEMS FOR DISCUSSION

The following pages include recommendations as to which Commissioners have requested further discussion at the February 22, 2007, deliberation meeting.

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The indications of support for particular potential recommendations in this document are based on Staff's recording of the positions taken by Commissioners during deliberations and follow-up discussions. It has not been reviewed for accuracy by the Commissioners. No Commissioner is bound by anything in this document, and it is understood that Commissioners may change their positions as tentatively indicated in previous deliberations. Finally, the precise wording of any recommendation may change according to the views of the Commission.

Item 1

CHAPTER I.C: EXCLUSIONARY CONDUCT

Current Recommendation

Additional clarity and improvement in Section 2 legal standards is desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether, and under what circumstances (if any), a monopolist has a duty to deal with rivals.

Proposed Revised Recommendation

[In addition, include in text discussion of the following point:]

- Serious consideration should be given to the possibility that no one test can suffice for all types of exclusionary conduct, given the wide variety of conduct that may be challenged under Section 2.

Item 2

CHAPTER I.C: EXCLUSIONARY CONDUCT

Current Recommendation

In particular, the lack of appropriate standards regarding bundling, as reflected in cases such as *LePage's*, may deter conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.¹

Proposed Revised Recommendation

[In addition, include in text discussion of the following points (a or b, and/or c:)]

- a. Serious consideration should be given to a safe harbor for above-cost pricing, such as that provided by the Supreme Court in *Brooke Group*.
- b. Serious consideration should be given to a test that examines the relationship between incremental revenues and incremental costs. [J. Jacobson to present]
- c. Serious consideration should be given to the establishment of clear safe harbors for refusals to deal that do not involve either the unilateral termination of an ongoing relationship between the plaintiff and defendant or the refusal to deal with a rival on the same terms currently offered to other customers. Further exploration of the “consumer welfare” and “no economic sense” tests should also be undertaken.

¹ Commissioner Shenefield does not join.

Item 3

CHAPTER II.B: HART-SCOTT-RODINO ACT

SECOND REQUEST PROCESS

Proposed Revised Recommendation

[Include among specific reforms the following:]

Adopt a standardized agreement or procedure by which the parties and the investigating agency could agree to terminate a second request investigation before the parties certify substantial compliance, and proceed to litigation in district court within thirty days.

Item 4

CHAPTER II.B: HART-SCOTT-RODINO ACT

SECOND REQUEST PROCESS

Proposed Revised Recommendation

[Include among specific reforms the following:]

Adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request. [In accordance with the following process:] [J. Jacobson to present]

HSR Custodial Limit

1. The HSR Report Form will be modified to include a box labeled “Optional custodian limitation for potential additional request for information.” If the notifying party checks this box, the procedures set forth below will apply. If, however, the box is not checked, any additional request for information may proceed without the limitations set forth below, consistent with current practice.
2. A party electing the custodian limitation option must (a) provide or create, and submit with the form, complete and accurate organization charts (or equivalent materials that allow staff to identify the party’s employees and their positions), and (b) provide the name, and make available for interview, a responsible officer to explain the organization charts, the roles of the listed personnel, and the location of company records. The officer designated should be the senior person within the organization most familiar with these issues. If necessary, more than one such person should be made available.
3. If the notifying party has complied with paragraph 2 above, then, depending on the dollar size of the transaction, the reviewing agency will be limited to requiring a search of documents in the files of 15 employees (at the low end) to 35 employees (at the high end).
4. If the agency staff believe that the files of custodians in excess of the numbers set forth in paragraph 3 are required to pursue their investigation, staff should first notify the affected party of the total number custodians whose files it seeks and request the party’s consent. If consent is not provided within two business days, staff may seek materials from additional custodians only upon the personal approval and certification of the need for such materials by, as the case may be, the Chair (or Acting Chair) of the Federal Trade Commission or the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Antitrust Division of the Department of Justice.

Item 5

CHAPTER II.B: HART-SCOTT-RODINO ACT

SECOND REQUEST PROCESS

Current Recommendation

In all cases, provide the merging parties with access to the agencies' economists' analysis and sufficient underlying data to permit a response to the agencies' concerns.²

Proposed Revised Recommendation:

[Include among specific reforms one of the following:]

[a] The agencies should provide the merging parties with access to the agencies' economists so that the merging parties may, through discussion, better understand the theoretical and empirical bases for the economists' conclusions.

[D. Carlton to present]

[b] To enable merging companies to understand the bases for 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. [D. Garza to present]

² Six Commissioners join: Delrahim, Garza, Kempf, Shenefield, Warden, and Yarowsky. Two Commissioners do not join—Cannon, Carlton, Jacobson and Litvack. Commissioners Burchfield and Valentine are undecided.

Item 6

CHAPTER II.C: STATE ENFORCEMENT

MERGERS

Current and Revised Recommendation

No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to ~~assessing the competitive implications of~~ **reviewing** mergers.³ However, federal and state antitrust enforcers are encouraged to coordinate their activities and to **seek to avoid take** ~~comity considerations into account so that mergers are not~~ **subjected** ~~companies~~ to multiple, and possibly inconsistent, proceedings. 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 such investigations:

- The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, **particularly with respect to mergers**. ~~In particular, they should seek convergence on horizontal merger guidelines.~~⁴
- [other actions omitted, but to be included in report]

[D. Garza to present]

³ Commissioners Delrahim, Garza, Shenefield, and Warden do not join.

⁴ Commissioners Carlton, Garza, and Valentine join to the extent such convergence is towards the federal Merger Guidelines.

Item 7

CHAPTER III.B: INDIRECT PURCHASER LITIGATION

Proposed Revised Recommendation

Direct and indirect purchaser litigation would be more efficient and fairer 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, or windfall recoveries to persons who did not suffer injury.⁵ To facilitate this, Congress should enact a comprehensive statute with the following elements:⁶

- 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 the federal antitrust laws. 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 direct and indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.⁷
- Allow consolidation of all purchaser actions in a single federal forum for both pretrial 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.

[B. Burchfield, J. Jacobson, and D. Kempf to present]

⁵ *To be noted in Report:* Commissioners Carlton Garza, Jacobson, Litvack, Valentine, and Warden would recommend a rule prohibiting recoveries by indirect purchasers, if writing on a clean slate. Commissioners Burchfield, Cannon, Delrahim, Kempf, Shenefield, and Yarowsky would allow suits by both direct and indirect purchasers.

⁶ Commissioners Cannon, Carlton, and Garza do not join this recommendation in any respect.

⁷ Commissioner Delrahim does not join this aspect of the recommendation. Commissioners Litvack, Shenefield, and Warden join this aspect of the recommendation, but would prefer preemption of state laws.

Item 8

CHAPTER IV.A: ROBINSON-PATMAN ACT

Current Recommendation:

Congress should repeal the Robinson-Patman Act in its entirety.⁸

- Until Congress repeals the Robinson-Patman Act, courts should interpret the Act to require plaintiffs to make a showing of injury to competition similar to that required under the Sherman Act.⁹

Proposed Revised Recommendation

Congress should repeal the Robinson-Patman Act in its entirety.¹⁰

[Omit bulleted point and associated discussion from Report.]

⁸ Commissioners Shenefield and Yarowsky do not join.

⁹ Commissioners Garza, Shenefield, and Yarowsky do not join.

¹⁰ Commissioners Shenefield and Yarowsky do not join.