



**AMC REPORT**  
**INTRODUCTION AND EXECUTIVE SUMMARY**  
[Preliminary Draft Outline]

*The purpose of this preliminary draft outline of the AMC Report Introduction and Executive Summary is to help focus the Commissioners' discussion of and consensus on (i) the major "messages," tone, and direction of the Introduction and Executive Summary, and (ii) staff's proposed organization of the Introduction and Executive Summary and the level of detail it will include. Having the Introduction and Executive Summary in mind may also assist the Commissioners as they continue to deliberate on specific recommendations and possibly consider whether to convert some of what are now cast as recommendations into discussion points within the Report. This is a conceptual and preliminary outline that we plan to discuss at the conclusion of the Commission's deliberations on the Tentative Recommendations.*

*This draft is based almost exclusively on the Tentative Recommendations to be discussed at the Commission's meeting of January 11, 2007 (i.e., those for which six or more Commissioners have previously indicated support). It includes most (but not all) recommendations, as worded in that list. It also includes some proposed "findings" based on those recommendations, which have not previously been specifically reviewed and discussed by the Commissioners. The precise wording of various findings and recommendations may change, of course, depending on the results of the Commission's deliberations on January 11. The purpose of this document, however, is to provide a vehicle to obtain Commissioner views on "big picture" issues.*

**I. Introduction**

- In general, free-market competition is the fundamental economic policy of the United States. Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—forces firms to lower prices, improve quality, and innovate. Reliance on free markets benefits all consumers in the United States and creates incentives for efficiency and innovation that lead to greater productivity and flexibility in the U.S. economy.
- The purpose of antitrust law is to protect competition. Antitrust laws seek to promote aggressive competition on the merits by prohibiting anticompetitive business conduct that harms consumer welfare.
- Congress created the AMC to determine whether antitrust analysis in the United States continues to keep pace with the global, high-tech economy of the twenty-first century. Industries in which innovation, intellectual property, and technological innovation are central features play important roles in this economy.
- The AMC considered whether updated antitrust analyses and processes are needed to ensure the proper application of U.S. antitrust law to firms competing in U.S. markets. Antitrust standards and processes should be sufficiently flexible to

accommodate new economic and other learning relevant to assessing the likely effects of particular business conduct on competition, yet also clear and predictable in application.

- Antitrust analysis has changed a great deal since the most recent reports by federal commissions, completed in the 1960s and 1970s, on the state of the antitrust laws. Most importantly, the flexibility of antitrust analysis has increased, as the courts and the agencies have refined antitrust analysis to incorporate new economic learning. This has improved the potential for a sound competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change. For example:
  - In the analysis of joint firm conduct under Section 1 of the Sherman Act and the analysis of unilateral firm conduct under Section 2 of the Sherman Act, antitrust law has largely turned away from the application of *per se* rules toward a “Rule-of-Reason” type of analysis, which can accommodate the assessment of a greater variety of factors than *per se* rules.
  - Likewise, the analysis of mergers has moved away from a reliance primarily on structural presumptions about concentration toward a more complex analysis that incorporates predictions of competitive effects using tools of modern economic analysis.
  - The antitrust “Rule of Reason” and current merger analysis require consideration of, and according weight to, procompetitive efficiencies that may result from firms’ agreements, unilateral conduct, or proposed transactions. This is a significant positive change from the typical antitrust analysis of thirty years ago.
  - In addition, the courts and the federal antitrust agencies have evidenced a greater appreciation of the importance of intellectual property in promoting innovation and, accordingly, the need to incorporate this recognition into a dynamic analysis of competitive effects.
  - All of these changes have improved the likelihood of an accurate assessment of competitive effects. The flexibility to account properly for the efficiencies associated with business conduct means that antitrust analysis has become less likely to condemn improperly business conduct that in fact benefits consumer welfare.
- The increased flexibility of antitrust analysis has not come without costs, however.
  - As antitrust analysis has become more flexible, it has also arguably become less predictable. This increases business costs to comply with the antitrust laws. Although, in some cases, antitrust analysis now clearly approves certain previously prohibited conduct, in other areas the movement away from previously over-inclusive *per se* rules simply affords businesses a much greater opportunity to explain why their

conduct is procompetitive, but less predictability on whether courts and other antitrust enforcers will agree.

- The ability of antitrust analysis to take into account a greater variety of factors can increase the accuracy of the result, but also increase the amounts of information necessary for antitrust analysis. For example, as merger analysis has become more complex, antitrust enforcers have sought greater amounts of information, raising the costs to obtain clearance of some mergers.
- Other changes in the economy also have complicated antitrust enforcement in the decades since the 1960s and 1970s. Foreign-based companies are significant competitors in many U.S. markets. U.S. firms compete worldwide to a much greater extent than previously was the case. Many markets for products and services are not limited to the United States, but are worldwide.
  - Global competition means that many proposed mergers or acquisitions are now reviewed not just by U.S. authorities, but also by authorities in many other jurisdictions.
  - Global antitrust enforcement raises the costs of business compliance and potentially subjects firms to inconsistent or contradictory legal requirements.
- These changes in both antitrust analysis and the global economy pose new challenges for how best to maintain the balance of flexibility and predictability in antitrust analysis, as well as how to manage the increased costs and complexity that accompany an antitrust analysis that takes into account a greater number of factors along with a global economy with multiple antitrust enforcers.

To address these issues, the Commission [studied etc. describe a little of process here].

The Commission's study leads it to make the following findings and recommendations.

## II. Summary of Recommendations

### A. Substantive Standards

**FINDING: The economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of all industries, including those in which innovation, intellectual property, and technological change are central features.**

#### **RECOMMENDATIONS:**

- There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological innovation are central features. Antitrust analysis, guided by valid economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries.
- No statutory change is recommended with respect to Section 7 of the Clayton Act. There is general consensus that the basic framework for analyzing mergers followed by the Federal Trade Commission and Department of Justice Antitrust Division, as well as courts, is fundamentally sound, although there are instances in which reasonable minds may disagree about the outcomes reached in particular merger cases in which that framework is applied. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.
- Congress should not legislatively amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions of particular cases, in general, the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.

**FINDING: Innovation provides a significant share of consumer benefits associated with competition, particularly in the most dynamic industries. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have important bearing on a valid antitrust analysis.**

#### **RECOMMENDATIONS:**

- Antitrust analysis must pay careful attention to the incentives and obstacles facing firms seeking to develop and commercialize new technologies. Antitrust enforcers should explicitly recognize that market conditions, business strategies, and industry structure can be highly dynamic.

- To account properly for dynamic effects in a relevant antitrust market, antitrust analysis must recognize that current market shares may overstate or understate likely future competitive significance.
- Antitrust analysis should give further consideration to efficiencies that lead to more rapid or enhanced innovation, including the development of new or improved products. For example, the FTC and DOJ should continue to give substantial weight to arguments that a merger will increase innovation. The agencies also should be more flexible in lengthening the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions beyond the two-year period.
- The FTC and DOJ give insufficient credit to some claims of efficiencies. The agencies should increase the weight they place on certain types of efficiencies. For example, the agencies and courts should give greater credit for fixed-cost efficiencies, particularly in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.
- The FTC and DOJ should continue to seek to ensure that merger enforcement policy is appropriately sensitive to the needs of U.S. companies to innovate and obtain the scope and scale needed to compete effectively in global markets, while continuing to protect the interests of U.S. consumers.

**FINDING: In general, antitrust standards should be clear and predictable in application, administrable, and designed to minimize over-deterrence and under-deterrence, both of which impair long-run consumer welfare.**

**RECOMMENDATIONS:**

- Additional clarity and improvement in Section 2 legal standards is desirable, particularly with respect to areas where there is currently a lack of 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. In particular, the existing standards regarding bundling, as expressed in cases such as *LePage's*, may prohibit conduct that is procompetitive or competitively neutral and thus these standards may actually harm long-term consumer welfare. This additional clarity and improvement is best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and refusals to deal with a rival.
- The current *Merger Guidelines*, in conjunction with agency policy statements, commentary, and enforcement activity, provide informative guidance to merging parties and accurately reflect current enforcement policy. Nonetheless, the FTC and DOJ should continue to work toward increasing transparency through a variety of means.

- The agencies should increase issuance of “closing statements” to explain the rationale for taking no enforcement action in a matter after a significant investigation into a proposed merger.
- The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the FTC in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the FTC’s and DOJ’s merger enforcement activity. To facilitate and ensure the high quality of such reviews and reports, DOJ and FTC should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.
- The agencies should update the *Merger Guidelines* to explain more extensively how they evaluate the potential impact of a merger on innovation.
- The agencies should update the *Merger Guidelines* to include an explanation of how the agencies evaluate non-horizontal mergers.

**FINDING: Global competition requires antitrust enforcers to increase their efforts to harmonize different standards and processes to minimize the potential for the application of inconsistent or contradictory legal requirements and to minimize businesses’ compliance costs, which often are passed on to consumers. In addition, U.S. and foreign antitrust enforcers should take care to respect appropriate jurisdictional boundaries.**

**RECOMMENDATIONS:**

- The U.S. Justice Department and Federal Trade Commission should, to the extent possible, continue to pursue procedural and substantive convergence on sound principles of competition law, including through the Organization for Economic Cooperation and Development (“OECD”) and International Competition Network (“ICN”).
- The United States should continue to pursue bilateral and multilateral antitrust cooperation and comity agreements with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.
- These cooperation and comity agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment to such goals imposed by inconsistent or conflicting antitrust enforcement. Existing agreements should be amended to add appropriate language.
- The U.S. Justice Department and Federal Trade Commission should study and report to Congress on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

- The FTAIA should be amended or construed to apply the following general principle: any person who makes a purchase outside the United States from a seller outside the United States should be deemed not to have suffered injury as a result of any U.S. anticompetitive effects.

**FINDING: The importance of innovation in the global, high-tech economy has highlighted the role of patents in competition. How well the patent system operates matters for competition. A failure to strike the proper balance between competition and patent law and policy can harm innovation and competition.**

**RECOMMENDATION:**

- Congress should seriously consider recommendations in the FTC and NAS-STEP reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition.

B. Enforcement Institutions

**FINDING: The existence of two federal antitrust agencies—the Department of Justice Antitrust Division and the Federal Trade Commission—may impose extra, unnecessary costs on firms proposing mergers or acquisitions, due to the length of time the agencies take to decide which agency will review the proposed transaction. In addition, firms proposing a merger or acquisition may face different procedural possibilities for agency enforcement action against the transaction, depending on which agency reviews the proposed transaction, and these differences may influence firms’ willingness to litigate or settle a merger challenge. These consequences of dual enforcement are costly and unfair to businesses.**

**RECOMMENDATIONS:**

- The Federal Trade Commission and Department of Justice, working with Congress, should take steps to reduce or eliminate the differences in enforcement practices and other costs that arise from having two federal antitrust enforcement agencies, in order to minimize the consequences for parties of which agency conducts an investigation.
- The FTC and the DOJ should develop and implement a new merger clearance agreement based on the principles in the 2002 clearance agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. The appropriate congressional committees should encourage both federal antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.
- Congress should enact a statute that requires the FTC and the DOJ to clear all mergers reported under the Hart-Scott-Rodino Act to one of the agencies within a short time period after the filing of the premerger notification.

- The FTC should adopt a policy in HSR merger cases that, when it seeks injunctive relief in federal district court, it will seek both preliminary and permanent injunctive relief and will seek to consolidate those proceedings, as is the general practice of the DOJ.
- Congress should amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation if it fails to obtain a preliminary injunction from a federal district court in an HSR merger case.
- Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the DOJ and the FTC by amending Section 13(b) of the FTC Act.

**FINDING: The Hart-Scott-Rodino premerger notification process is fundamentally sound. It can, however, impose significant costs on merging parties, both in delay and response efforts, that the FTC and DOJ should continue to take steps to reduce.**

**RECOMMENDATIONS:**

- No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.
- The FTC and DOJ should continue to pursue reforms to reduce the burdens imposed on merging parties by second requests, and should consider implementing several specific reforms.
- Congress should delink the funding of the antitrust agencies from HSR filing fee revenues.

**FINDING: The available data on state merger and non-merger enforcement of the federal antitrust laws show relatively little inconsistency with federal antitrust enforcement approaches.**

**RECOMMENDATIONS:**

- No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to assessing the competitive implications of mergers. However, these agencies are encouraged to coordinate their activities and to take comity considerations into account so that mergers are not subjected to multiple—and possibly inconsistent—proceedings.
- No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement. State non-merger enforcement should continue to focus primarily on matters involving localized conduct or competitive effects.

C. Civil and Criminal Remedies

**FINDING: There is insufficient evidence that existing remedies systematically overdeter or underdeter anticompetitive conduct.**

**RECOMMENDATIONS:**

- No change is recommended to the statute providing for treble damages in antitrust cases. Treble damages should remain available in all antitrust cases.
- No change is recommended to the statute that provides for prejudgment interest in antitrust cases.
- No change is recommended to the statute providing for attorneys’ fees for successful antitrust plaintiffs.
- There is no need to give the antitrust agencies expanded authority to seek civil fines.
- There is no need to clarify, expand, or limit the agencies’ authority to seek monetary equitable relief.
- While no change to existing law is recommended, the U.S. Department of Justice should continue to limit its criminal antitrust enforcement activity to “naked” price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.
- No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to “bid-rigging, price-fixing, or market allocation agreements among competitors,” and the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

**FINDING: Some rules regarding civil and criminal antitrust remedies can create unfairness for individual defendants and should be modified to enhance the overall fairness of the antitrust remedial system.**

**RECOMMENDATIONS:**

- Congress should enact a statute applicable to all antitrust cases that would permit non-settling defendants to obtain reduction of a plaintiff’s claim, before trebling, by the amount of the settlement or the allocated share of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling antitrust violators.
- Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for the use of the 20 percent harm proxy to calculate base fines for antitrust crimes.
- The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of

the evidence that the actual overcharge was higher or lower, where the difference would materially change the base fine.

**FINDING: The existing antitrust remedial scheme can impose significant litigation costs on defendants and the judicial system in certain types of cases. There is a substantial need to reduce the costs of these cases by streamlining litigation where possible.**

**RECOMMENDATIONS:**

- To facilitate direct and indirect purchaser litigation that takes place in one federal court for all purposes, including trial, and avoids inefficiency and duplicative recoveries, Congress should enact a comprehensive statute with the following elements:
  - Overrule *Illinois Brick* and allow indirect, as well as direct, purchasers, to sue to recover damages for violations of federal antitrust law.
  - Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.
  - Allow consolidation of all purchaser actions in a single federal forum for both pretrial and trial proceedings.
  - Modify *Hanover Shoe* in the context of actions with claims by both direct and indirect purchasers. [Not yet voted on: In such cases, class certification should continue to be decided on the assumption there was no “pass on” of damages from a direct to an indirect purchaser,], and the defendant’s liability should be limited to the damages (trebled) suffered by direct purchasers (without regard to pass on). These damages then should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims. Retain *Hanover Shoe*’s holding that, when only direct purchasers sue, defendants may not seek to avoid liability by claiming that the direct purchaser “passed on” to indirect purchasers the overcharges the direct purchaser paid in the first instance.

D. Exceptions to the Antitrust Laws

**FINDING: The Robinson-Patman Act is likely to harm competition and consumer welfare by prohibiting or discouraging price discrimination that lowers prices to consumers; protecting competitors, rather than competition; and increasing costs of doing business and thereby likely raising prices to consumers in a variety of ways.**

**RECOMMENDATION:**

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

**FINDING: Governmental action creating exceptions to free markets can deny consumers the benefits of free-market competition and harm consumer welfare. Such governmental action can take at least three different, but related forms: 1) statutory or court-implied immunities and exemptions from antitrust enforcement; 2) statutes that replace**

competition with the regulation of prices, costs, and entry; or 3) courts' inappropriate application of the state action doctrine to grant antitrust immunity when not required by federalism concerns. Although the claimed justifications differ, to some extent, for each of these three exceptions to free-market competition, the harm to consumer welfare that they can cause is similar.

**RECOMMENDATION:**

- Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either 1) competition cannot achieve societal goals that outweigh consumer welfare, or 2) a market failure requires the regulation of prices, costs, and entry in place of competition.

**FINDING:** Immunities from antitrust enforcement often have costs disproportionate to their benefits. They can benefit a small number of competitors, who seek to avoid the rigors of competition, at the cost of harming a large number of consumers.

**RECOMMENDATIONS:**

- In general, statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.
- The following steps are important to assist Congress in its consideration of those factors:
  - Create a full public record on any existing or proposed immunity under consideration by Congress.
  - Consult with the Antitrust Division of the Department of Justice and the Federal Trade Commission about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.
  - Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.
- If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:
  - Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (e.g., a limit on damages to actual, rather than treble, damages).
  - Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.

- Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.

**FINDING: Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.**

**RECOMMENDATIONS:**

- Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that Congressional intent is advanced in such cases by giving the antitrust laws full effect. For example, *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.
- Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a plain repugnancy between the antitrust and regulatory provisions, as stated in cases such as *National Geremedical*.
- Courts should construe all immunities and exemptions from the antitrust laws narrowly.

**FINDING: In recent decades, public policy in the United States has moved toward partial or full deregulation in industries formerly subject to economic regulation—that is, regulation of prices, costs, and entry. The trend toward deregulation has benefited consumers and the economy and should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits consumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than economic regulation.**

**RECOMMENDATIONS:**

- In general, public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.
- When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

- Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory agency should not re-do the competition analysis of the antitrust agency. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent premerger notification and investigation procedure, such as set forth in the banking merger statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.
- Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency’s “public interest” standard to determine whether in fact such regulatory review is necessary. In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency’s review of the proposed transaction’s likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such “particular, identified interests” would be interests other than those consumers interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.
- In addition, Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

**FINDING: The federal lower courts in some cases have misinterpreted or misapplied the state action doctrine to override the federal policy in favor of free-market competition in ways inconsistent with prior Supreme Court rulings. In addition, the courts have not protected out-of-state consumers from anticompetitive conduct that has been immunized by a single state through the state action doctrine. Nor have the courts established more stringent standards for application of the state action doctrine when, as is increasingly the case, a governmental entity acts as a market participant.**

**RECOMMENDATIONS:**

- Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.
- As proposed in the FTC Report on the State Action Doctrine, the courts should reaffirm a clear articulation standard that focuses on two questions: 1) whether the conduct at issue has been authorized by the state, and 2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.
- The courts should adopt a flexible approach to the active supervision prong, with different requirements based on different factual circumstances.
- The courts should not apply the state action doctrine where the effects of potentially immunized conduct are not predominantly intrastate.

- When governmental entities act as market participants, the courts should apply the same test for application of state action immunity to them as the courts apply to private parties seeking immunity under the state action doctrine.

**III. Commission Process and Procedure**

- A. Legislative history of Commission
- B. Organization of Commission
  - 1. Appointment of Commissioners; working groups/study groups; staff
- C. Transparency and Involvement of Public
  - 1. Issue Selection (outreach to interested members of public and antitrust bar; solicitation of public comments)
  - 2. Information gathering (Solicitation of public comments, including outreach; Public hearings, including summary of witnesses)
  - 3. Transparency (Application of FACA; public meetings; website; deliberations and report drafting)
- D. Acknowledgements