



POTENTIAL RECOMMENDATIONS FOR REVIEW

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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 review of available transcripts. 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 initial deliberations. Finally, the precise wording of any recommendation may change according to the views of the Commission.

Explanatory Notes

- The text of potential recommendations is precisely the same as that considered by the Commission at the relevant deliberation meeting, except as noted. Where Commissioners proposed modifications to the language, those modifications that were accepted by all favoring the recommendation are underlined; if it is unclear whether a proposed modification was accepted by all favoring the recommendation, it is noted in brackets and italics.
- Text of potential recommendations with support from 7 or more Commissioners appears in bold.
- Text of potential recommendations with support from 4 to 6 Commissioners appears in italics.
- Text of potential recommendations with support from 3 or fewer Commissioners does not appear in this document, although those views will be noted in the Report. For the text of those recommendations, see the relevant discussion outline.
- In general, within each topic, the text of potential recommendations appears in order of number of Commissioners indicating support—that is, recommendations as to which the most Commissioners indicated support appear first, and so on.
- Topics or potential recommendations that appear within a box are set for further deliberation on July 25. A discussion outline for those topics has been provided separately.
- Indications of support for a particular recommendation are denoted by a ✓. Positions that were unclear from Staff's recording and the transcripts are denoted by a *. If a Commissioner did not take a position or was absent from the deliberation, that is indicated by "--". The absence of any notation indicates that the Commissioner supported an alternate recommendation.

Criminal Remedies

A. Distinctions for different types of antitrust crimes

1. **No change to the Sentencing Guidelines is needed with respect to distinguishing 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 (“DOJ”) limits criminal enforcement to hard-core cartel activity as a matter of both historic and current enforcement policy, but the AMC should endorse and recommend continued discretionary limitation of criminal prosecution by DOJ to hard-core cartel activity. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	✓	✓	✓	✓		✓	✓	✓	✓

B. Twenty percent proxy

1. **Recommend that the Sentencing Guidelines should be amended to make explicit that the 20 percent proxy may be rebutted by proof by a preponderance of the evidence that overcharge was lower or higher, where the difference would materially change the base fine. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓		✓		✓	✓	✓	✓	✓	✓	✓

2. **Recommend that the Sentencing Commission should reevaluate and explain the rationale for the 20 percent proxy, including both the assumption of an average overcharge of ten percent of the amount of commerce affected and the difficulty of proving the actual gain or loss. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	✓	✓	✓	✓				✓	✓

C. 18 U.S.C. § 3571(d)

See Supplemental Criminal Remedies Discussion Outline.
--

Government Civil Remedies

A. Civil fines

1. **No additional authority should be given to either DOJ or the FTC to obtain civil fines for substantive antitrust violations. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	✓			✓	✓

B. FTC's authority to seek monetary relief

See Supplemental Governmental Civil Remedies Discussion Outline.

Indirect Purchaser Litigation

See Supplemental Indirect Purchaser Discussion Outline.

Civil Remedies

A. Treble Damages

See Supplemental Civil Remedies Discussion Outline.

B. Prejudgment Interest

See Supplemental Civil Remedies Discussion Outline.

C. Attorneys' Fees

See Supplemental Civil Remedies Discussion Outline.

D. Joint and Several Liability, Contribution, and Claim Reduction

- Recommend retention of joint and several liability, but recommend statutory change that would allow claims for contribution against other non-settling conspirators. (7-8*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓		*			✓	✓		✓	✓	✓

- Recommend retention of joint and several liability, but recommend statutory change that would provide for claim reduction, such that the remaining liability of the non-settling conspirators would be reduced, before trebling, by the amount of the settlement. (9-10*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓		*	✓	✓	✓	✓	✓	✓	✓	✓

- [Added at meeting] Recommend that each defendant's allocated share of liability, for both contribution and claim reduction, is equal to its market share or gain from the violation. (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	*	✓	✓	✓	✓	✓	✓	✓	✓

State Enforcement Institutions

A. Merger enforcement

1. **Recommend improved [substitute: continued – JJ, DV] coordination among enforcers, which would help achieve consistency and predictability of outcomes, irrespective of any limits on state merger enforcement.** [This is guidance only, and recommends no new requirements. – DK, BB] (8-9*)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--	✓	*	✓	✓		✓	✓	✓

- a. **Recommend that data requests are consistent across enforcers.** (6-9*)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	*	✓	--	*	✓	✓	✓		✓	✓	*

- b. **Recommend harmonization of the substantive antitrust law between states and the federal government.** (6-9*)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*		✓	--	*	✓	✓	✓		✓	✓	*

- c. **Recommend adoption of a model confidentiality statute to eliminate inconsistencies between state and federal confidentiality agreements.** (4-9*)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	*	✓	--	*	*	✓	*		✓	✓	*

See also Supplemental State Enforcement Institutions Discussion Outline.

B. Non-merger civil enforcement

1. **No change is appropriate to the current role of the states in non-merger civil antitrust enforcement.** (8)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓		--	✓	✓	✓	✓		✓		✓

2. *Recommend that state civil non-merger enforcement be restricted [substitute: primarily focused on – DV] to those matters involving localized conduct or effects.* [This is guidance only, and recommends no new requirements. – DK, DG] (5-6*)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--	*		✓		✓	✓	✓	

3. *Recommend that state civil non-merger enforcement be restricted to certain types of antitrust matters. [This is guidance only, and recommends no new requirements. – DK]*
(4)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--			✓		✓		✓	

Federal Enforcement Institutions

A. Dual federal enforcement authority

1. **No statutory change is appropriate; substantive merger enforcement under the HSR Act should continue to be conducted by the two antitrust agencies. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓			✓	✓		✓

B. Clearance

See Supplemental Federal Enforcement Institutions Discussion Outline.

C. Harmonization of standards

1. **Recommend statutory change to ensure that the legal standard for obtaining a preliminary injunction in merger cases is the same for both the FTC and DOJ. (7-8*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*		✓	--	✓		✓		✓	✓	✓	✓

- a. **Section 13(b) of the FTC Act should be modified to specify the traditional equitable standard is applied when the FTC seeks a preliminary injunction in HSR merger cases. [This does not create a higher burden on the FTC. – JY, JW] (4-7*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*		*	--	✓				✓	*	✓	✓

- b. *The Clayton Act should be modified to adopt the standard specified in Section 13(b) of the FTC Act for preliminary injunctions in HSR merger cases. (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--		✓	✓			✓		

2. *No statutory change is appropriate. There is insufficient evidence that preliminary injunction standards applicable to the two agencies have resulted in materially different outcomes. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓		--		✓		✓				✓

D. Harmonization of procedures

1. **Recommend statutory modification to Section 13(b) of the FTC Act that would prohibit the FTC from pursuing administrative litigation if it fails to obtain a preliminary injunction in an HSR merger case. However, the FTC would not be barred from pursuing administrative litigation, post-closing, based on evidence that a consummated merger has actually had anticompetitive effects. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	--	✓			✓	✓	✓	✓	✓

2. **Recommend that the FTC and DOJ consolidate proceedings for preliminary and permanent relief in HSR merger cases whenever possible. (6-7*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--	✓		✓	*	✓		✓	

3. *Recommend that the FTC adopt a policy that will limit its use of Part III procedures with respect to mergers subject to HSR Act notification to exceptional circumstances, but do not recommend any statutory change. (6)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			--		✓	✓	✓		✓	✓	✓

Federal Merger Enforcement: Process

A. Pre-merger notification system

1. **Recommend no changes to the current HSR reporting thresholds. (7-9*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓	✓	✓		✓		✓	✓	*		✓

B. Second request process

1. **Recommend that the agencies adopt reform(s) to reduce the burdens placed on parties by the HSR Second Request process they currently use. (9-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓	✓	✓	✓	✓	*	✓	✓	*	✓	✓

- a. **Recommend that DOJ adopt limits on back-up tape retention similar or identical to those adopted by the FTC in its 2006 Merger Process Reforms. (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

- b. **Recommend that the agencies implement procedural reforms to reduce the burden of translating foreign language documents. (10-11*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓

- c. **Recommend that DOJ adopt limits on the number of custodians required to be searched and the time period covered by the request similar or identical to those adopted by the FTC in its 2006 Merger Process Reforms. (7-11*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓	*	✓	*		✓	✓	✓	*	✓	✓

- d. *[Added at meeting]* – **Recommend that a party may opt into a custodian limitation, carrying with it specific procedures. [For a full description of this proposal, see Attachment A.] (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

- e. **Recommend that the agencies adopt a procedure or a standardized agreement by which the parties and the agencies could agree to terminate a second-request investigation without certifying substantial compliance [*end here – JY*], and proceed to litigation in district court with a reasonable discovery schedule, or that Congress amend the HSR Act to establish such a procedure. (7-10*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓	✓	✓	✓		✓	✓	✓	*		*

- f. **Recommend that the agencies implement procedural reforms that allow the parties’ economists to have improved access to the agencies’ staff economists’ models and data. (8-9*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*		✓	✓	✓		✓		✓	✓	✓	✓

- g. **Recommend that the agencies promulgate a policy or regulation establishing a standard for “substantial compliance”. (7)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	✓		✓		✓			✓	✓

- h. **Recommend that DOJ implement procedural reforms to reduce the burden of complying with requests for data like those adopted by the FTC in its 2006 Merger Process Reforms. (7)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			✓	✓		✓		✓	✓	✓	✓

- i. *Recommend that the agencies, when issuing a second request, provide the parties with a statement as to the competitive concerns about the transaction that led the agency not to close the investigation and to issue a second request. (5-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			✓	✓		*		✓	✓	✓	

- j. *Recommend that the agencies limit the number of specifications in a second request to a predetermined number (e.g., 20). (4-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	*	✓			*	✓			✓	

- k. *Recommend that the agencies implement procedural reforms to reduce the burdens of complying with requests for data that are not kept by the parties in the ordinary course of business. (3-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*		*				✓	✓	✓		*	

2. **Recommend that the HSR Act be amended to permit parties to appeal directly to a federal district court magistrate judge any claims of unreasonable burden in a second request. (5-9*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	*	✓	*	✓	✓	✓	*			*

3. *Recommend that the HSR Act be amended to permit the agencies to make public the fact that a transaction has been notified as well as subsequent significant milestones in the investigation. (1-4*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		*	✓			*		*			

Federal Merger Enforcement: Substance

A. Assessment of current U.S. merger enforcement policy

1. **Find that there is a general consensus that, while there may be disagreement over specific merger decisions, and policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓

- a. **Find that the Commission was not presented with evidence that current policy is materially hampering the ability of companies to operate efficiently and compete in global markets. (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	*	✓	✓	✓	✓	✓

- b. **Recommend that DOJ and FTC continue to seek to ensure that enforcement policy is appropriately sensitive to the needs of U.S. companies to innovate and obtain scope and scale needed to compete in global marketplaces while protecting the interests of U.S. consumers. [This should not be interpreted to encourage the growth of national champions. – DV] (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	✓	✓	*	✓	✓

- c. **Do not recommend legislative change. (9-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	*	*	✓	✓	*	✓	✓	✓	✓	✓

- d. **Recommend that DOJ and FTC give greater consideration to [substitute: give substantial weight to – JW] [substitute: continue to consider – DC, DG] efficiencies. (6-8*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		*	✓	✓		✓	✓	✓		✓	*

- e. **Recommend that DOJ and FTC give greater consideration to [substitute: give substantial weight to – JW] [substitute: continue to consider – DC, DG] arguments that a merger will increase innovation. (4-6*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	*	✓	✓	✓		*	*				

- f. *Recommend that DOJ and FTC [continue to – DC, DG, JW] rely less on concentration presumptions in predicting competitive effects of a merger, given the relative lack of empirical evidence on the relationship between increased concentration and market performance. (3-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		*	✓	*		✓	*			✓	

- g. *[Added at meeting] Recommend that DOJ and FTC rely less on concentration presumptions and focus more on a direct assessment of the ability and incentives of a merged firm to increase prices unilaterally [delete “unilaterally” – DC, MD] in appropriate cases. (2-4*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	✓	*			*				

2. **Find that merger enforcement policy would benefit from further study of agency enforcement activity and/or economic understanding of the foundations of merger policy. (12)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

- a. **Recommend that DOJ and FTC increase their use of retrospective studies of merger enforcement decisions (which should be released to the public) to assist in determining the efficacy of merger policy. [These studies may be outsourced. – DC, DK, JY] (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓

- b. **Recommend that the agencies periodically conduct internal reviews of data relating to their merger enforcement activity and publish the results. DOJ and the FTC should attempt to coordinate their collection and maintenance of internal data for this purpose. (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	*	✓	✓	✓	✓	✓

- c. **Recommend that the agencies conduct or commission further study of the relationship between concentration [substitute: market characteristics – DC, JJ, JW, DG] and market performance to provide a better basis for assessing the efficacy of current merger policy. (9-10*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	✓	✓	✓	*	✓	✓		✓	✓

B. Innovation markets

1. **Find that no substantial changes to merger enforcement policy are necessary to account for dynamic, innovation-driven industries, because the current *Merger Guidelines* and merger policy as it has been developed by the agencies and courts are sufficiently flexible to address these features. (9-10*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓			✓	*	✓	✓	✓	✓	✓

2. **Recommend that the agencies update the *Merger Guidelines* to explain how they evaluate impacts on innovation. (6-7*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			✓	✓	✓		✓		*	✓	✓

3. **Recommend that the agencies be more flexible in lengthening the two-year time horizon for entry where appropriate to account for innovation that may change competitive conditions beyond two years. (6-7*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	✓			*	✓			✓	✓

4. *Find that the two-year time horizon for entry is applied flexibly by the agencies and should not be changed. (4-5*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓					✓	*		✓	✓		

5. *Recommend that the agencies continue to use innovation-market analysis in appropriate merger cases. (5-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓				✓	*		✓	✓		✓

C. Efficiencies

1. **Find that the agencies may give insufficient credit to some claims of efficiencies, and recommend that the agencies place increased weight on certain types of efficiencies. (6-8*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	✓	✓	*	✓		✓		*	✓

- a. **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. (7-8*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	✓	✓	✓	*		✓		✓	✓

- b. *The agencies should give greater credit for efficiencies in R&D and innovation. (3-4*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			✓	✓		*		✓			

2. **Recommend that the agencies revise their policy with respect to efficiencies to adopt a “total welfare” [substitute: long-run consumer welfare – DC, DK] standard. (4-7*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	*	✓	✓		✓				*	

3. *Find that the U.S. enforcement agencies and courts adequately consider efficiencies in merger analysis and recommend no change to current policy. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓				✓		✓		✓		

D. Accurate reflection of enforcement and transparency

1. **Find that 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. Encourage DOJ and the FTC to continue to work towards increasing transparency and heightening understanding of the basis for enforcement policy. (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	*	✓	✓	✓	✓	✓

2. **Recommend that the agencies increase transparency. (11-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	*	✓	✓	✓	✓	✓

- a. **Recommend that the agencies increase transparency by issuing “closing statements” to explain the rationale for taking no enforcement action in a matter after a significant investigation. (10-11*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	*	✓		✓	✓	✓

- b. **Recommend that the agencies 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. (10-12*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	*	*	✓	✓	✓	✓

3. **Recommend that the agencies revise the *Merger Guidelines* to include an explanation of how the agencies evaluate non-horizontal mergers. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓

4. *Find that the current Merger Guidelines do not reflect current enforcement policy with respect to the concentration threshold levels and recommend that the agencies modify the Guidelines to increase the concentration thresholds to reflect current and recent practice. (3-4*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓					*	✓			✓	

Exclusionary Conduct

A. Substantive standards

1. **In general, standards for applying the Sherman Act’s broad proscriptions against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize both over-deterrence and under-deterrence, both of which impair long-run consumer welfare. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

2. **Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. [*Delete first sentence – DK*] In particular, while 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 is not generally improper, even for a “dominant” firm and even where competitors might be disadvantaged. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

3. **While existing standards are generally appropriate, additional clarity and improvement is desirable, particularly with respect to [i] bundling, and/or [ii] whether and under what circumstances (if any) a monopolist has a duty to deal with rivals, where there is currently a lack of clear and consistent standards. The Supreme Court’s decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), for example, neither accepted nor rejected the profit sacrifice or any other test for distinguishing lawful from unlawful single-form conduct. The lack of clarity means that firms must decide either to forego practices that would improve their competitive standing (and benefit consumers) or risk becoming embroiled in costly litigation. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--		✓	✓	✓

- a. **Such additional clarity and improvement is best achieved through the continued evolution of the law in the courts, rather than through legislation. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--		✓	✓	✓

- b. **Public discourse (such as occurred in the Commission hearings) and continued research will also aid in the development of sound and clear standards. The U.S. Department of Justice and Federal Trade Commission are commended for and [delete “commended for and” – DK] encouraged to continue their efforts to further the development of the law in the United States as well as in other jurisdictions the laws of which may affect U.S. companies. They should continue to look for opportunities to improve the law through the filing of *amicus* briefs in appropriate cases, particularly cases involving [i] duty to deal and/or [ii] bundling. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--		✓	✓	✓

4. **Existing standards regarding bundling, as expressed in cases such as *LePage’s*, prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--		✓	✓	✓

5. *Existing standards regarding unilateral refusals to deal prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓			✓	--				

B. Tying cases with a patent or copyright

1. **The Supreme Court’s decision in *Independent Ink v. Illinois Tool Works*, 126 S. Ct. 1281 (2006), appropriately held that market power should not be presumed from a patent in antitrust tying cases. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

2. **Courts similarly should not assume market power from a copyright [or trademark – MD]. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

Robinson-Patman Act

A. Purposes

1. **Find that the Robinson-Patman Act does not serve any purposes not already served by Sections 1 and 2 of the Sherman Act. (7-9*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	--	✓	*	✓	✓		✓	✓	

2. *Find that the Robinson-Patman Act should [but does not – SC, DK] promote consumer welfare, total welfare, and competition. [The antitrust laws should promote consumer welfare, total welfare, and competition, whereas Robinson-Patman does none of these. – SC, DK] (4-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	--	✓	*		✓				

B. Costs and benefits

1. **Find that the Robinson-Patman Act imposes significant costs on U.S. businesses and consumers that outweigh its benefits to consumers and competition. (7-9*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	--	✓	*	✓	✓		✓	✓	

2. *Make no specific finding with respect to the costs and benefits of the Robinson-Patman Act. (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			--	✓			✓	✓			✓

C. Repeal or modification

1. **Recommend that Congress repeal the Robinson-Patman Act in its entirety. (9)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	✓	✓		✓	✓	

2. *Recommend that Congress repeal the criminal provisions of the Robinson-Patman Act, but leave the civil provisions as is. (5-6*)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
*	✓		--	✓			*	✓			✓

Patent/Antitrust Interface

See Supplemental Patent and Antitrust Discussion Outline.

State Action Doctrine

A. Clear articulation prong

1. **Recommend that courts reaffirm a “clear articulation” standard as proposed in the FTC Report. (9)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	--	✓		✓	✓	✓

2. *Recommend that courts adopt a “sovereign compulsion” test, under which “clear articulation” would be found only where a state compelled the action giving rise to the antitrust claim. (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			✓		✓				✓	✓	

B. Active supervision prong

1. **Recommend that courts adopt a “tiered” approach with different requirements based on the situation. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--		✓	--	✓	✓	✓		✓

- a. **Recommend that “active supervision” applies to any entity consisting in whole or in part of market participants. (7)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--		✓	--	✓	✓	✓		✓

- b. *Recommend a rigorous case-by-case analysis of whether there is an appreciable risk that the challenged conduct is the result of private actors pursuing their own private interests, rather than state policy. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--			--		✓	✓		✓

- c. *Recommend no active supervision required as to agencies that are part of the state. (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--			--		✓	✓		✓

2. *Recommend that private parties acting in “good faith” to comply with the terms of regulation should not be found liable [substitute: should be subject to only single damages] for violating the antitrust laws [unless a clear and convincing evidentiary standard is met.] (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--			--		✓		✓	✓

C. Market participation exception

1. *Recommend that courts create an exception to the state action doctrine for municipalities acting as market participants. (6)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--		✓	--	✓		✓	✓	✓

2. *Recommend that courts create an exception to the state action doctrine for state government entities acting as market participants. (6)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--		✓	--	✓		✓	✓	✓

D. Interstate spillover exception

1. *Recommend that courts consider the extent of spillovers when applying the clear articulation and active supervision requirements. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--		✓	--	✓		✓		

2. *Recommend a statutory exception to the state action doctrine when there are interstate spillovers. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--	✓		--		✓	✓	✓	

E. Codification

1. **Do not recommend codification of the federal state action doctrine.** (10)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	--	✓	✓	✓	✓	✓

F. Local Government Antitrust Act

1. *Recommend addition of an active supervision prong to the LGAA.* (5)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--		✓	--			✓		✓

2. *Recommend revision of the LGAA to provide for single damages in addition to injunctive relief.* (5)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--		✓	--		✓	✓	✓	

3. *Do not recommend any change to the Local Government Antitrust Act of 1984 ("LGAA").* (4)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓		--	✓		--	✓	✓			

Statutory Immunities and Exemptions

A. General

1. **In general, immunities and exemptions from the antitrust laws should be disfavored. They should be granted rarely, if ever, [*delete “, if ever,”*] 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.** (11)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

2. **Recommend that courts construe all immunities and exemptions narrowly [*end here*], and against the beneficiary claiming protection by the immunity or exemption.** (11)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

3. **Recommend that Congress employ an approach to immunities and exemptions similar to that of the ABA Antitrust Section Proposal [*and the Framework Proposal by AMC Consultants Bush, Leonard, and Ross*].** (11)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

- a. **Apply three principles: grant only (1) narrow immunities, (2) after considering their likely impact on consumers [*and producers*], (3) when a particular social, political, or other goal trumps the goals of antitrust.** (11)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

- b. **Use two procedural safeguards: (1) the proponents of an immunity should be required to submit evidence to show that competition has less value than the goal promoted by the immunity, and that the immunity is the least restrictive means to achieve that goal; (2) Congress should consult with FTC and DOJ about the competitive effects of the immunity and the justification for an immunity under existing antitrust standards.** (11)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

4. **Recommend that Congress employ an approach to immunities and exemptions similar to that of the Framework Proposal by AMC Consultants Bush, Leonard, and Ross [and the ABA Antitrust Section Proposal]. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

- a. *[Added at meeting]* **Full and fair hearing. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

- b. **Balancing of the costs and benefits of the immunity. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

- c. **Creating renewal requirements (or sunset provisions) to ensure periodic reevaluation by Congress. (11)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓	✓	✓	✓

5. **Recommend that Congress direct the FTC to study [in consultation with DOJ] (and provide sufficient funds for such study) [substitute: DOJ and the FTC sponsor studies of] the competitive effects of and justifications for all immunities and exemptions and report on whether they appear to meet the standards set forth in option 1, above. (9)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	✓	✓	✓	✓	--		✓	✓	✓

B. Analyze different types of immunities/exemptions differently

1. **Recommend that, if Congress determines a particular immunity or exemption may be justified, that Congress first consider limited forms of immunity [end here], such as a limitation of damages available in private civil actions to actual damages, and/or a disclosure requirement similar to that of the National Cooperative Research and Production Act. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	✓	✓	✓	✓	--	✓			

C. Sunset provisions

1. **Recommend that Congress include a sunset provision [of 7 years] on all immunities and exemptions, pursuant to which the provision would terminate at the end of some period of time unless specifically renewed.** [*This is not intended to make it easier to pass immunities.*] (9)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓	✓	✓		✓	✓	--	✓	✓	✓	✓

2. [*Added at meeting*] *Recommend that Congress include with sunset provisions a requirement that FTC and/or DOJ submit a report 120 days before the immunity is set to expire as to whether the immunity is unduly hampering competition.* (4)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓				✓		✓	--		✓		

Regulated Industries Issues

A. General

1. **The federal antitrust enforcement and other regulatory agencies should consult on the effect of regulation on competition. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	✓	--	✓	✓	✓	✓

2. **In general, [*begin here*] competition is the fundamental economic policy of the United States [*end here*], and statutes that create regulatory regimes (including any savings clauses) [*delete parenthetical clause*] should be construed consistently with that policy to the maximum [*delete "maximum"*] extent possible. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	✓	--	✓	✓	✓	✓

3. **Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	✓	--	✓			✓

4. **Antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals. (7)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓			--		✓	✓	✓

5. *Antitrust enforcement agencies and courts should take account of the special circumstances of regulated industries, including the effect of regulation. (6)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓		✓	--	✓	✓		--	✓		✓	

6. *The role of antitrust versus regulation will depend on the industry. [End here] Until there is a workably competitive context, for example, regulation may be superior to traditional antitrust rules in reshaping the structure of a regulated industry and limiting the incentives for incumbents to engage in strategic conduct that may frustrate the development of competition. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--	✓	✓		--	✓		✓	

B. Merger review

See Supplemental Regulated Industries Discussion Outline.

C. Implied immunities

1. **Courts should continue to apply current legal standards [as expressed in *National Gerimedical* – JJ] [and cases following – DK] in determining when an immunity from the antitrust laws should be implied. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	✓	--	✓	✓	✓	✓

2. **Recommend that Congress evaluate whether the filed-rate doctrine should continue to apply in regulated industries and legislatively overrule it [substitute: consider legislatively overruling it] where the regulatory agency no longer specifically reviews proposed rates. (7)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--	✓	✓	✓	--	✓	✓		✓

3. *Recommend that Congress pass a statute stating that, in statutes dealing with regulatory regimes, absent a provision expressly providing otherwise, the antitrust laws continue to apply. [rewrite using National Gerimedical standard – JJ] (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		✓	--	✓	✓	✓	--				✓

4. *Recommend that courts should not imply an immunity unless active regulatory supervision makes it unlikely that anticompetitive conduct (or effects) will occur, and that [start here] courts should construe any implied immunity narrowly. (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓		--		✓	✓	--				✓

D. Savings clauses

1. **Confirm that *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act under the facts of the case, and that it does not displace the role of the antitrust laws in regulated industries. (9)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓		--	✓	✓	✓	✓

2. **Recommend that courts interpret savings clauses to give [strong] deference to the antitrust laws. (7)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--		✓	✓	--		✓		✓

3. *Recommend that Congress craft savings clauses carefully to delineate clearly and specifically what antitrust claims remain in light of the regulatory regime. (5)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓		--			✓	--	✓			✓

4. *Trinko was wrongly decided insofar as it can be read as holding that, as a matter of law, violations of Section 251(c) of the 1996 Telecommunications Act cannot be the basis for a violation of Section 2 of the Sherman Act. Such a holding is inconsistent with Congress' intent in enacting the antitrust savings clause in the 1996 Telecommunications Act and unduly limits the role of the antitrust laws in ensuring all the benefits of a competitive marketplace. (4)*

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	✓		--		✓		--	✓			✓

E. Industry-specific standards

1. **Recommend that Congress and regulatory agencies decline to set industry-specific standards for particular antitrust violations. (9)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	✓	✓	--	✓	✓	✓	--		✓	✓	✓

International Issues

A. FTAIA

See Supplemental International Discussion Outline.
--

B. IAEAA

1. **Recommend that the IAEAA be amended to clarify that it does not require inclusion in an AMAA of a provision allowing for non-antitrust uses of information exchanged in accordance with the AMAA. (8)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓	✓	--	✓			✓	✓

C. Technical changes

1. **Recommend that Congress provide budget authority, as well as appropriations, directly to FTC and/or DOJ to provide international antitrust technical assistance. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

D. Comity

1. **Recommend that the antitrust agencies continue to pursue additional comity agreements with foreign jurisdictions and make greater use of the existing agreements. (10)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

- a. **Recognize that inconsistent and/or conflicting enforcement impede trade, investment, and welfare. (10-11*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

- b. *[Added at meeting]* **Avoid inconsistent remedies. (10-11*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

- c. *[Added at meeting]* **Recommend that agencies conduct ongoing benchmarking reviews of matters reviewed by multiple jurisdictions that**

imposed divergent decrees. This would allow ensuring that future remedies are consistent across borders. (10-11*)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

- d. **Include a mechanism to allow any respondent who can show multiple jurisdictions are conducting an investigation into their conduct to demand [request] all investigating jurisdictions coordinate their investigations.** (10)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

- e. *[Added at meeting]* **Fashion remedies jointly.** (10)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

- f. **Presumptive deferral to other countries by any country upon which the alleged anticompetitive conduct will not have a direct, predictable, and foreseeable effect.** (9)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓		--	✓	✓	✓	✓	✓

- g. *Presumptive deference to the jurisdiction with the “center of gravity” of the transaction, but provide other countries with a “voice” in the process.* (6)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	--				✓	--	✓	✓	✓	✓	✓

- h. *Adopt [substitute: Study] comity mechanisms used in other areas, such as bankruptcy, airline regulation, and product safety.* (4)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--		✓		✓	--			✓		

2. **Recommend that the antitrust agencies pursue development of an international, centralized, pre-merger notification system.** *[Substitute: Encourage the antitrust agencies to study the development of an international, centralized, pre-merger notification system, and report to Congress]* (10)

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	--	✓	✓	✓	✓	--	✓	✓	✓	✓	✓

3. **Recommend that the antitrust agencies continue to pursue procedural and substantive convergence, to the extent possible, through existing organizations such as ICN and OECD. (10-11*)**

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
✓	*	✓	✓	✓	✓	--	✓	✓	✓	✓	✓