



TENTATIVE RECOMMENDATIONS

This document contains all tentative recommendations of the AMC for which six or more Commissioners have previously indicated support. The recommendations are ordered as staff currently contemplates they will appear in the Report. Each recommendation is numbered solely for the convenience of Commissioners' discussion at the January 11 meeting. In a few cases, short explanatory material that was considered in conjunction with particular recommendations appears as bullet points in this document. Otherwise, this document does not contain reasons for the Commission's recommendations or for any individual Commissioner's disagreement with a particular recommendation; these reasons will be included in the Report itself.

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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 previous deliberations. Finally, the precise wording of any recommendation may change according to the views of the Commission.

I. SUBSTANTIVE ANTITRUST ISSUES

A. NEW ECONOMY

ANTITRUST

1. 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.
 - The economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property, and technological change are central features.
 - Antitrust analysis, guided by valid economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries. Over the years, antitrust analysis has been refined 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.¹
 - 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 particular, 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.
 - The evolution of antitrust law—both through case law and agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency

¹ Commissioners Cannon and Delrahim do not join.

Tentative Recommendations—*Not for Citation*

guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change.

- Economic learning continues to evolve. Thus, it is important that antitrust develops through mechanisms that allow ongoing reassessments of economic principles relevant to antitrust analysis.
2. 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.
- a. 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:
 - i. 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.²
 - ii. 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.
 - iii. Antitrust analysis should give further consideration to efficiencies that lead to more rapid or enhanced innovation, including the development of new or improved products.
 - b. A price above marginal cost, by itself, does not suggest market power in a relevant antitrust market. Firms with low marginal costs but large fixed costs, particularly for research and development and other innovative activity, may need to price significantly above marginal costs simply to earn a competitive return in the long run.
 - c. A number of industries in which innovation, intellectual property, and technological change are central features also have one or more of the following characteristics. Depending on the facts at issue, such characteristics may have an important bearing on a proper antitrust analysis:
 - i. Very high rates of rapid innovation;
 - ii. Falling average costs (on a product, not a firm, basis) over a broad range of output;

² Commissioner Delrahim does not join.

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- iii. Relatively modest capital requirements;
- iv. Quick and frequent entry and exit;
- v. Demand-side economies of scale;
- vi. Switching costs;
- vii. First-mover advantages.

B. MERGERS

FEDERAL ANTITRUST MERGER ENFORCEMENT POLICY GENERALLY

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.³
- 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.⁴
 - The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.⁵
4. 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.⁶

INNOVATION AND EFFICIENCIES

5. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.⁷
- Current law, including the *Horizontal Merger Guidelines*, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.⁸
6. The FTC and DOJ should continue to give substantial weight to arguments that a merger will increase innovation.⁹
7. The agencies 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.¹⁰

³ Commissioner Delrahim does not join. Commissioner Kempf is undetermined.

⁴ Commissioner Kempf does not join.

⁵ Commissioner Kempf does not join.

⁶ Commissioner Valentine is undetermined.

⁷ Commissioner Delrahim does not join. Commissioner Kempf is undetermined.

⁸ Commissioners Garza and Kempf do not join.

⁹ Commissioners Burchfield, Jacobson, Shenefield, Valentine, and Yarowsky do not join.

Commissioner Cannon is undetermined.

¹⁰ Commissioners Burchfield, Jacobson, Shenefield, and Valentine do not join.

Commissioner Kempf is undetermined.

8. *[Alternative A]* The FTC and DOJ should give substantial weight to arguments that a merger will enhance efficiency.¹¹
- [Alternative B]* There is no need to change current merger policy with respect to efficiencies because the U.S. enforcement agencies and courts adequately consider efficiencies.¹²
- a. The FTC and DOJ give insufficient credit to some claims of efficiencies.¹³
 - b. 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.¹⁴

Note: No specific recommendation regarding the appropriate welfare standard. Five Commissioners favor a “consumer welfare” standard.¹⁵ Four Commissioners favor a “total welfare” standard.¹⁶ One Commissioner favors a “long-run consumer welfare” standard.¹⁷ Two Commissioners are undecided.¹⁸

FURTHER STUDY OF MERGER ENFORCEMENT POLICY

9. The FTC and DOJ should continue to work toward heightening the understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of agency enforcement activity and the economic foundations of merger policy.¹⁹
- a. The FTC and DOJ should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.²⁰
 - b. The DOJ and FTC should conduct further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.²¹

¹¹ Six Commissioners—Carlton, Delrahim, Garza, Kempf, Shenefield, and Warden—favor this recommendation.

¹² Six Commissioners—Burchfield, Cannon, Jacobson, Litvack, Valentine, and Yarowsky—favor this recommendation.

¹³ Four Commissioners—Burchfield, Cannon, Jacobson, and Litvack—do not join.

¹⁴ Five Commissioners—Burchfield, Cannon, Litvack, Valentine, and Yarowsky—do not join.

¹⁵ Five Commissioners—Jacobson, Litvack, Shenefield, Valentine, and Yarowsky—favor this recommendation.

¹⁶ Four Commissioners—Carlton, Delrahim, Garza, and Kempf—favor this recommendation.

¹⁷ Commissioner Warden favors this recommendation.

¹⁸ Commissioners Burchfield and Cannon.

¹⁹ All Commissioners join.

²⁰ All Commissioners join.

²¹ Commissioners Burchfield and Valentine do not join this recommendation.

- c. The agencies should consider “outsourcing” any studies of this type to economists and others not closely aligned with the agencies.²²

TRANSPARENCY IN FEDERAL AGENCY MERGER REVIEW

- 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.²³
- 10.** The FTC and DOJ should continue to work toward increasing transparency through a variety of means.²⁴
- a. 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.²⁵
 - b. 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.²⁶ 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.²⁷
 - c. The agencies should update the *Merger Guidelines* to explain more extensively how they evaluate the potential impact of a merger on innovation.²⁸
 - d. The agencies should update the *Merger Guidelines* to include an explanation of how the agencies evaluate non-horizontal mergers.²⁹

²² All Commissioners join.

²³ Commissioner Kempf does not join.

²⁴ All Commissioners join.

²⁵ Commissioner Shenefield does not join. Commissioner Kempf is undetermined.

²⁶ Commissioner Kempf is undetermined.

²⁷ All Commissioners join.

²⁸ Five Commissioners—Burchfield, Cannon, Carlton, Kempf, and Shenefield—do not join.

²⁹ Commissioners Burchfield and Kempf do not join.

C. EXCLUSIONARY CONDUCT

11. In general, standards for applying Section 2’s broad proscription against anticompetitive conduct 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.
12. 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.
13. 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.
14. 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.
15. 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.³⁰
16. Market power should not be presumed from a patent in antitrust tying cases.

³⁰ Commissioner Shenefield does not join.

D. THE INTERSECTION OF PATENTS AND ANTITRUST

STANDARD SETTING

17. The AMC encourages the agencies and the courts to continue to review under the rule of reason the agreements of standard-setting members with patent holders—in advance of standard selection—on pre-set royalties for patents that cover the ultimate standard.

PATENTS AND COMPETITION

- Patents and patent law play an important role in the property rights regime essential to a well-functioning competitive economy.
- Properly applied, patent and antitrust law are actually complementary, as both are aimed at encouraging innovation, industry, and competition.³¹
- 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. For example, to grant patents on obvious inventions may harm competition and innovation by lowering the value of creating a non-obvious invention and by directly impeding competition.³²
 - Firms may be required to defend against the claims in a patent granted on obvious subject matter, thus causing litigation costs that are a drain on the system.³³
 - The grant of patents on obvious subject matter increases the risk that firms must pay royalties to the holder of a patent on obvious subject matter. Such payments expropriate the value of any true innovation and distort the incentives that the patent system was designed to provide.³⁴
 - To grant patents on obvious inventions may slow follow-on innovation by discouraging firms from conducting research and development out of fear that they may be infringing the obvious patent.³⁵
 - To avoid litigation for the infringement of, or the payment of royalties on, patents on obvious subject matter, firms may develop their own patents on obvious subject matter, so that they can cross license those patents with others. This may contribute to patent

³¹ Commissioner Warden does not join.

³² Commissioners Jacobson and Shenefield do not join.

³³ Commissioners Delrahim and Shenefield do not join.

³⁴ Commissioner Shenefield does not join.

³⁵ Commissioner Shenefield does not join.

proliferation and raise competition concerns about entry barriers in industries in which patents have proliferated.³⁶

18. 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.
 - a. In particular, Congress should seriously consider the NAS-STEP and FTC recommendations targeted at ensuring the quality of patents.
 - b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.
 - c. The courts and the PTO should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.

³⁶ The Commission split six to six on this finding. Six Commissioners—Carlton, Garza, Jacobson, Kempf, Litvack, and Warden—supported it. Six Commissioners—Burchfield, Cannon, Delrahim, Shenefield, Valentine, and Yarowsky—did not.

E. INTERNATIONAL

COMITY

19. 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”).
20. 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.
21. 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.³⁷
22. The United States should seek agreements with other countries on the following principles:
 - a. Any country as to which a cross-border transaction or conduct does not have a direct, substantial, and reasonably foreseeable anticompetitive effect should defer to the enforcement judgment of the country or countries where there is such an effect.³⁸
 - b. [Not yet voted on:] *When a competition authority in one country with a substantial nexus to a transaction or conduct has taken enforcement action, other countries with a lesser nexus should presumptively defer to that action. The first country should consult with other jurisdictions before taking action that will affect their significant interests.*
 - c. When more than one country pursues an enforcement action against the same transaction or conduct, those countries should avoid imposing inconsistent or conflicting remedies, for example, through consultation or by fashioning remedies on a joint basis.³⁹
 - d. A mechanism should be established whereby any private entity that is potentially subject to inconsistent or conflicting rules or remedies with respect to the same transaction or conduct can request consultation and/or coordination between or among jurisdictions to avoid inconsistency or conflict.⁴⁰
 - e. In any case where the United States and another jurisdiction nevertheless impose inconsistent or conflicting remedies, they should agree to conduct

³⁷ Commissioner Cannon does not join.

³⁸ Commissioners Cannon and Jacobson do not join.

³⁹ Commissioner Cannon does not join.

⁴⁰ Commissioner Cannon does not join.

ongoing “benchmarking” reviews of the impact of the divergent remedies on the parties and competitive processes.⁴¹

- 23.** 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.⁴²

FTAIA

- 24.** As a 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.⁴³

24a. IAEAA

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.^{43a}

24b. TECHNICAL CHANGES

Recommend that Congress provide budgetary authority, as well as appropriations, directly to the FTC and/or DOJ to provide international antitrust technical assistance.^{43b}

⁴¹ Commissioner Cannon does not join.

⁴² Commissioner Cannon does not join.

⁴³ Commissioners Cannon and Jacobson do not join.

^{43a} Commissioners Shenefield and Valentine do not join; Commissioner Kempf is undetermined.

^{43b} Commissioner Cannon does not join; Commissioner Kempf is undetermined.

II. ENFORCEMENT INSTITUTIONS

A. FEDERAL ENFORCEMENT

DUAL FEDERAL MERGER ENFORCEMENT

25. 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. To this end, the Commission recommends that the appropriate Congressional Committees encourage both federal antitrust agencies to reach a new agreement, and that the agencies consult with these Committees in developing the new agreement.
26. To ensure prompt clearance of all transactions reported under the HSR Act, the Commission recommends that Congress and the President enact legislation to require the FTC and the DOJ to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short time period (*e.g.*, no more than nine calendar days) after the filing of the premerger notification.⁴⁴

DIFFERENTIAL MERGER ENFORCEMENT STANDARDS

27. 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.⁴⁵ The FTC should not be barred from pursuing administrative litigation, however, if it has evidence that a consummated merger has had anticompetitive effects.
28. 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, so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.⁴⁶
29. 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 to specify that, when the FTC seeks a preliminary injunction in an HSR merger case, the FTC is subject to the same standard for the grant of a preliminary injunction as the DOJ.⁴⁷

⁴⁴ Commissioners Cannon and Yarowsky do not join.

⁴⁵ Commissioners Burchfield and Kempf do not join.

⁴⁶ Commissioners Cannon and Yarowsky do not join.

⁴⁷ Three Commissioners—Burchfield, Cannon, and Yarowsky—do not join.

B. HART-SCOTT RODINO

PRE-MERGER FILING REQUIREMENTS

30. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.⁴⁸
31. Congress should delink the funding of the antitrust agencies from HSR filing fee revenues.⁴⁹

SECOND REQUEST PROCESS

32. The FTC and DOJ should continue to pursue reforms to reduce the burdens imposed on merging parties by second requests. In particular, they should consider implementing several specific reforms:
- a. Adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.⁵⁰
 - b. Adopt a procedure through which parties could terminate a second request before certifying substantial compliance, and proceed directly to federal court.⁵¹
 - c. Provide the merging parties with a statement of reasons, either oral or written, of the competitive concerns that led to a second request.⁵²
 - d. Provide the merging parties with access to the agencies' economists' models and files.⁵³
 - e. Reduce the burden of translating foreign-language documents.
 - f. Reduce the burden of requests for data not kept in the normal course of business by the parties.⁵⁴

⁴⁸ Commissioners Kempf and Warden do not join.

⁴⁹ Commissioner Jacobson does not join; Commissioner Carlton abstained from voting on this recommendation.

⁵⁰ Commissioners Cannon and Yarowsky do not join.

⁵¹ Commissioners Cannon and Jacobson do not join.

⁵² Five Commissioners—Burchfield, Cannon, Carlton, Litvack, and Yarowsky—do not join.

⁵³ Three Commissioners—Cannon, Jacobson, and Litvack—do not join.

⁵⁴ Three Commissioners—Cannon, Jacobson, and Yarowsky—do not join.

C. STATE ENFORCEMENT

MERGERS

- 31.** 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.⁵⁵ 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. Actions that federal and state antitrust enforcers should consider in order to achieve further coordination and cooperation (which would improve the consistency and predictability of outcomes in such investigations) include the following:
- The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law. In particular, they should seek convergence on horizontal merger guidelines.
 - Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.⁵⁶
 - Through NAAG, the state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

NON-MERGER

- 32.** No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.⁵⁷ State non-merger enforcement should continue to focus primarily on matters involving localized conduct or competitive effects.⁵⁸

⁵⁵ Commissioners Shenefield, and Warden do not join.

⁵⁶ Commissioners Burchfield and Delrahim do not join.

⁵⁷ Four Commissioners—Carlton, Delrahim, Shenefield, and Warden—do not join.

⁵⁸ Five Commissioners—Burchfield, Cannon, Jacobson, Litvack, and Yarowsky— do not join.

III. CIVIL AND CRIMINAL REMEDIES

A. MONETARY REMEDIES AND LIABILITY RULES

TREBLE DAMAGES

33. No change is recommended to the statute providing for treble damages in antitrust cases. Treble damages should remain available in all antitrust cases.⁵⁹

PREJUDGMENT INTEREST

34. No change is recommended to the statute that provides for prejudgment interest in antitrust cases only in certain, limited circumstances.⁶⁰

ATTORNEYS' FEES

35. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs.⁶¹ In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.⁶²

JOINT AND SEVERAL LIABILITY, CONTRIBUTION, AND CLAIM REDUCTION

36. 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.

⁵⁹ Commissioners Garza and Carlton do not join.

⁶⁰ Four Commissioners—Carlton, Garza, Shenefield, and Delrahim—do not join.

⁶¹ Commissioners Litvack and Warden do not join.

⁶² Commissioners Cannon and Kempf do not join.

B. INDIRECT PURCHASER LITIGATION

37. 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:⁶³
- 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.⁶⁴
 - 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.⁶⁵

⁶³ Three Commissioners—Cannon, Carlton, and Garza—do not join.

⁶⁴ Three Commissioners—Litvack, Shenefield, and Warden—do not join.

⁶⁵ Commissioners Burchfield and Kempf do not join.

C. REMEDIES AVAILABLE TO THE FEDERAL GOVERNMENT

- 38.** There is no need to give the antitrust agencies expanded authority to seek civil fines.
- 39.** There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the FTC's policy governing its use of monetary equitable remedies in competition cases.⁶⁶

⁶⁶ Commissioner Kempf does not join.

D. CRIMINAL REMEDIES

- 40. 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.
- 41. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce as a proxy for actual harm, including both the assumption of an average overcharge of ten percent of the amount of commerce affected and the difficulty of proving actual gain or loss.
- 42. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised 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.⁶⁷
- 43. 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.
- 43a. No change should be made to the current maximum Sherman Act fine of \$100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses.^{67a} Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.^{67b}

⁶⁷ Commissioners Carlton and Garza do not join.

^{67a} Commissioners Jacobson and Warden do not join.

^{67b} Commissioners Jacobson, Kempf, and Warden do not join.

IV. EXCEPTIONS TO COMPETITION

B. ROBINSON-PATMAN ACT

44. Congress should repeal the Robinson-Patman Act in its entirety.⁶⁸
45. [Note: Discussions at the July 26th deliberation meeting proposed this tentative recommendation.] *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.*⁶⁹

⁶⁸ Commissioners Shenefield and Yarowsky do not join.

⁶⁹ Commissioners Shenefield and Yarowsky do not join.

C. IMMUNITIES & EXEMPTIONS, REGULATED INDUSTRIES, AND STATE ACTION

Note: Recommendations already accepted by majority vote appear in regular type.

Material in italics has been reviewed by members of two Study Groups—Immunities and Exemptions, and Regulated Industries—but not yet by the full Commission. The language in italics is intended to integrate more fully the material on exceptions to competition and to implement discussions at the Commission’s recent deliberations regarding regulated industries.

GOVERNMENTAL ACTION TO LIMIT FREE-MARKET COMPETITION IS LIKELY TO HARM CONSUMERS AND IS RARELY JUSTIFIED.

Findings

- 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.*
- *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.*
- *Immunities from antitrust enforcement often have disproportionate costs and benefits. They can benefit a small number of competitors at the cost of harming a large number of consumers. Competitors dislike the rigors of competition and therefore may attempt to avoid it by seeking immunity from antitrust law.*
- *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.*
- *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 by a single state immunized 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

46. *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.*
47. *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.*
48. *The courts should construe any exceptions to competition as narrowly as possible.*
49. *Courts should interpret statutory savings clauses to give deference to the antitrust laws.⁷⁰*
50. *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.*
51. *The courts should find implied immunity from the antitrust laws only when there is a plain repugnancy between antitrust law and the regulatory scheme at issue.*
52. *The courts should not grant antitrust immunity under the state action doctrine to entities that are not a sovereign state, unless those entities are acting pursuant to a clearly articulated state policy that is deliberately intended to displace competition in the manner at issue, and the state has provided supervision sufficient to ensure that the conduct at issue is not the result of private actors pursuing their private interests, rather than state policy.*
53. *The courts should not apply the state action doctrine when the effects of potentially immunized conduct are not predominantly intrastate.*
54. *When governmental entities act as market participants, the courts should apply the same rigorous test for state action immunity as the courts apply to the conduct of private parties.*

⁷⁰

Commissioners Garza and Warden do not join.

EXPRESS IMMUNITIES AND EXEMPTIONS

- 55.** In evaluating the need for existing or new immunities, Congress should consider the following:
- a. Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
 - b. The likely adverse impact of the existing or proposed immunity on consumer welfare; and
 - c. Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.
- 56.** The following steps are important to assist Congress in its consideration of those factors:
- d. Create a full public record on any existing or proposed immunity under consideration by Congress.⁷¹
 - e. 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.
 - f. 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.
- 57.** 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:
- g. 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).
 - h. Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.
 - i. 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.⁷²

⁷¹ Four Commissioners—Carlton, Delrahim, Garza, and Litvack—do not join.

⁷² Commissioners Carlton and Shenefield do not join.

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- 58.** Courts should construe all immunities and exemptions from the antitrust laws narrowly.

IMPLIED IMMUNITIES

59. 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*.⁷³
60. 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.⁷⁴

REGULATED INDUSTRIES

61. *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.⁷⁵
62. The federal antitrust enforcement and other regulatory agencies should consult on the effects of regulation on competition.
63. Antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effect of regulation.⁷⁶
64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.⁷⁷
65. 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.*⁷⁸
66. *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.⁷⁹
67. *Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.*
68. *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*

⁷³ Commissioner Delrahim does not join.

⁷⁴ Commissioners Burchfield and Warden do not join.

⁷⁵ Three Commissioners—Jacobson, Kempf, and Shenefield—do not join.

⁷⁶ Four Commissioners—Cannon, Kempf, Litvack, and Valentine—do not join.

⁷⁷ Commissioner Warden does not join.

⁷⁸ Commissioners Garza and Warden do not join.

⁷⁹ Commissioner Kempf does not join.

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banking merger statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.

69. *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.*
70. *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.*

STATE ACTION DOCTRINE

71. 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.*
72. As proposed in the FTC Report, 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.⁸⁰
73. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on different factual circumstances.⁸¹
74. The courts should not apply the state action doctrine where the effects of potentially immunized conduct are not predominantly intrastate.⁸²
75. *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.*⁸³
76. The Commission was split on whether to recommend addition of an active supervision prong to the Local Government Antitrust Act.⁸⁴

⁸⁰ Commissioner Kempf does not join.

⁸¹ Three Commissioners—Garza, Kempf, and Warden—do not join.

⁸² Three Commissioners—Cannon, Delrahim, and Kempf—do not join.

⁸³ Four Commissioners—Burchfield, Cannon, Garza, and Kempf—do not join.

⁸⁴ Six Commissioners—Burchfield, Carlton, Delrahim, Jacobson, Valentine, and Yarowsky—would add an active supervision prong to the LGAA. Six Commissioners—Cannon, Garza, Kempf, Litvack, Shenefield, and Warden—would not.