

Introduction and Recommendations

1. INTRODUCTION

Congress established the Antitrust Modernization Commission “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.”¹ This Report sets forth the Commission’s recommendations and findings on how antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today.

The antitrust laws seek to deter or eliminate anticompetitive restraints that impede free-market competition. To do so properly, antitrust law must reflect an economically sound understanding of how competition operates. As Congress recognized, competition in the twenty-first century increasingly involves innovation, intellectual property, technological change, and global trade.

In many high-tech sectors of the economy, firms must constantly innovate to keep pace in markets in which product life cycles are counted in months, not years.² To protect their innovations, firms may rely on intellectual property. In some cases, intellectual property assets may be more important to businesses than specialized manufacturing facilities.

The digital revolution has produced new, general-purpose technologies that enable firms to create many new goods and services for consumers.³ New information and communication technologies have revolutionized firms’ production and distribution processes as well, allowing faster and easier access to suppliers and distributors. Technological advances have played an important role in facilitating global integration,⁴ as newly available communication technologies have shrunk the time and distance that separate markets around the world.⁵ New markets across the globe have opened for trade following the determination by policymakers in many developing countries that free-market competition yields productivity and other benefits far superior to the results produced by central planning.⁶

Antitrust analysis must reflect a proper understanding of how these forces affect competition. To be sure, many of these seemingly new phenomena raise competitive issues parallel to those that confronted antitrust in earlier decades.⁷ So-called “general-purpose technologies,” such as electricity, railroads, and the internal combustion engine, for example, also revolutionized production, made many new goods and services available to consumers, and created industries that produced analogous competitive issues.⁸ Nonetheless, a present-day assessment of how well antitrust law is operating to address current issues is important to ensure that competitive markets continue to benefit consumer welfare. As the nature of competition evolves, so must antitrust law.

A. Antitrust Law Seeks to Protect Competition and Consumer Welfare

The Supreme Court has explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁹

As this language confirms, free-market competition is, and has long been, the fundamental economic policy of the United States.¹⁰ 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.¹¹ Businesses in competitive markets develop and sell the kinds and quality of goods and services that consumers desire, and firms seek to do so as efficiently as possible, so they can offer those goods and services at competitive prices.¹²

In free markets, consumers determine which firms succeed. Consumers benefit as firms offer discounts, improve product reliability, or create new services, for example, to keep existing customers and attract new ones. The free-market mechanism generally provides greater success “to those firms that are more efficient and whose products are most closely adapted to the wishes of consumers.”¹³

Competitive markets also drive an economy’s resources toward their fullest and most efficient uses, thereby providing a fundamental basis for economic development.¹⁴ Competition facilitates the process by which innovative, cutting-edge technologies replace less efficient productive capacity. Market forces continuously prod firms to innovate—that is, to develop new products, services, methods of doing business, and technologies—that will enable them to compete more successfully.¹⁵ The ongoing churning of a flexible competitive economy leads to the creation of wealth, thus making possible improved living standards and greater prosperity.¹⁶

To be competitive, markets need not conform to the economic ideal in which many firms compete and no firm has control over price. In fact, the real world contains very few such markets.¹⁷ Rather, competition generally “refers to a state of affairs in which prices are sufficient to cover a firm’s costs, but not excessively higher, and firms are given the correct set of incentives to innovate.”¹⁸ Experience has shown that intense competition can take place in a wide variety of market circumstances.¹⁹ Some factors—such as many sellers and buyers, small market shares, homogeneous products, and easy entry into a market—may suggest competitive behavior is likely.²⁰ The absence of those factors, however, “does not nec-

essarily prevent a market from behaving competitively.”²¹ Economic learning in recent decades has afforded a greater appreciation of the variety of factors that can affect competitive forces at work in particular markets.

Antitrust law prohibits anticompetitive conduct that harms consumer welfare.²² Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to “improve” competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct.²³ Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

B. Periodic Assessments of the Antitrust Laws Are Advisable

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy.²⁴ In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years.²⁵ Prior commissions have made recommendations about both the substance and procedure of antitrust law.

The tradition of assigning commissions to evaluate antitrust law began in 1938, when President Roosevelt recommended that Congress appropriate funds for the study of the antitrust laws.²⁶ Recommendations from that first commission, the Temporary National Economic Commission (TNEC), played a role in spurring Congress to strengthen the law against anticompetitive mergers.²⁷ In 1955 the Attorney General’s National Committee to Study the Antitrust Laws recommended important changes to antitrust analysis, most notably to reduce the use of per se rules that deemed many types of conduct automatically illegal.²⁸ Twenty years later, these proposals combined with further economic learning to produce significant changes in antitrust law.²⁹

Between 1969 and 1979, three commissions issued reports, each known by the names of those who led them—the Neal Report,³⁰ the Stigler Report,³¹ and the Shenefield Report.³² Among other things, these reports reflected ongoing debates about whether and when monopolies, or firms with large market shares in highly concentrated markets (oligopolies), should be subject to more stringent antitrust enforcement.³³ The recommendation of the Neal Report to reduce concentration in oligopolies by requiring firms to divest assets was opposed by the Stigler Report, which described the connection between concentration and competition as “weak.”³⁴ The recommendation of the Shenefield Report to make it easier to prove monopolization also did not gain traction.³⁵

Recommendations from these commissions for revised or new antitrust procedures and remedies were more successful. For example, the Neal Report recommended that, in certain circumstances, businesses be required to notify the antitrust agencies before consummating a merger;³⁶ in 1976 Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act, which imposed pre-merger notification requirements.³⁷ The Stigler Report recommended substantial increases in government antitrust penalties, a recommendation adopted into law through The Antitrust Procedures and Penalties Act of 1974.³⁸ The Shenefield Report led directly to passage of the Antitrust Procedural Improvements Act of 1980³⁹ and “provided important encouragement to federal judges to manage trials—including the massive *AT&T* trial—effectively.”⁴⁰ The Shenefield Report also issued twenty recommendations for further deregulation, providing significant support to the deregulation movement.⁴¹

Most recently, the increasing importance of global trade spurred the 1998 establishment of the International Competition Policy Advisory Committee (ICPAC)—chaired by former Assistant Attorney General James F. Rill and former International Trade Commission Chairwoman Paula Stern—to study international aspects of antitrust law.⁴² The ICPAC Report provided the impetus for the International Competition Network, through which nearly one hundred nations now discuss antitrust procedures and policies.⁴³

C. Major Changes in Antitrust Analysis over the Past Twenty-Five Years Make this a Timely Report

In the decades since the Neal, Stigler, and Shenefield Reports undertook their assessments, antitrust law has gone through what is arguably the most important period in its development. The antitrust landscape differs greatly from earlier decades in terms of antitrust analysis and the role of antitrust enforcement agencies, among other things.

Most important, antitrust case law has become grounded in the related principles that antitrust protects competition, not competitors, and that it does so to ensure consumer welfare. Substantial economic learning now undergirds and informs antitrust analysis. Time and again in recent decades, the Supreme Court has used economic reasoning to develop standards for antitrust analysis. Case-by-case decision-making has provided myriad opportunities for the integration of economics into antitrust analysis, and litigating parties and the courts have used them.

Economic learning has provided the foundation for updated antitrust analysis in part by revealing the potential procompetitive benefits of some business conduct previously assumed to be anticompetitive. The accommodation of such advances in economic learning has increased the flexibility of antitrust law, with courts and the antitrust agencies now considering a wide variety of economic factors in their analyses. Improved economic understanding and greater analytical flexibility have increased the potential for a sound competitive assessment of business conduct in all industries, including those characterized by innovation, intellectual property, and technological change.

The improvements in economic understanding and the increases in analytical flexibility have added further complexity to antitrust law, however. In response, courts have searched for standards that can make antitrust analysis more manageable. They also have given increased attention to whether businesses can understand and comply with, and courts can efficiently and competently administer, particular antitrust rules. Whether particular antitrust rules overdeter procompetitive conduct or underdeter anticompetitive conduct has received greater scrutiny as well.

D. The Commission's History and Process

The Antitrust Modernization Commission began the three years of work that culminated in this Report in April 2004. The Commission met for the first time on April 1 that year, shortly after all appointments to the Commission had been made. The Commission has over those three years engaged in a careful, deliberate course of study to fulfill its statutory mandate of examining “whether the need exists to modernize the antitrust laws” and soliciting the “views of all parties concerned with the operation of the antitrust laws.”⁴⁴ Interested members of the public have participated substantially through the submission of comments and testimony and attendance at the Commission's many hearings and meetings.

1. Legislative History of the Commission

The Commission was created by an act of Congress in 2002. The original bill was introduced by F. James Sensenbrenner, Jr., then-Chairman of the House Judiciary Committee.⁴⁵ Although the bill did not limit the scope of the Commission's study, at the time of its introduction, Chairman Sensenbrenner highlighted three issues he believed the Commission should review in the course of its study: (1) “the role of intellectual property law in antitrust law”; (2) “how antitrust enforcement should change in the global economy”; and (3) “the role of state attorneys general in enforcing antitrust laws.”⁴⁶

The Act obliged the Commission to perform four tasks:

1. “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues”;
2. “to solicit views of all parties concerned with the operation of the antitrust laws”;

3. “to evaluate the advisability of proposals and current arrangements with respect to any issues so identified”; and
4. “to prepare and submit to Congress and the President a report”⁴⁷

The Act provided the Commission with three years to complete these tasks⁴⁸ and authorized \$4 million to be appropriated for the Commission to perform its work.⁴⁹

2. Organization of the Commission

The Antitrust Modernization Commission Act called for the appointment of twelve Commissioners, four by the House of Representatives, four by the Senate, and four by the President.⁵⁰ Appointments by both houses of Congress were split equally between the Democratic and Republican parties.⁵¹ No more than two of the President’s four appointments could be from the same political party.⁵² The Chair was designated by the President; the Vice-Chair was designated jointly by the Democratic leadership of the House of Representatives and the Senate.⁵³

The House of Representatives appointed as Commissioners Donald G. Kempf, Jr., John L. Warden,⁵⁴ John H. Shenefield, and Debra A. Valentine.⁵⁵ The Senate appointed W. Stephen Cannon, Makan Delrahim,⁵⁶ Jonathan M. Jacobson, and Jonathan R. Yarowsky.⁵⁷ The President appointed to the Commission Bobby R. Burchfield, Dennis W. Carlton, Deborah A. Garza, and Sanford M. Litvack.⁵⁸ The President designated Commissioner Garza as Chair; the Democratic leadership of the House of Representatives and the Senate designated Commissioner Yarowsky as Vice-Chair. Pursuant to the AMC Act, the Commission appointed Andrew J. Heimert to be the Executive Director and General Counsel.⁵⁹ The Commission subsequently hired additional staff and appointed advisors to assist it in its work.⁶⁰

3. Transparency and Involvement of the Public

The Commission’s work proceeded in three general phases: selection of issues for study, study of those issues, and deliberation upon the recommendations the Commission would make on the issues it studied. At each phase, the public was invited to participate through written comments and testimony and by observing the Commission’s hearings and deliberations.

The Commission’s principal mechanism for informing the public of its work was through its website, www.amc.gov. All materials that the Commission discussed at its meetings were posted on the website in advance of the meetings. The Commission placed its entire record on the website as it was developed. Comments from the public were posted as soon after receipt as possible. Witness statements for hearings were made available on the website as far in advance of the hearing as the witnesses provided them, and transcripts from the hearings were posted shortly after each hearing.

a. Issue Selection Through Public Comment and Outreach

The first phase of the Commission's work was to select issues for study. Consistent with its mandate to solicit the views of interested persons, the Commission requested that the public propose issues for study.⁶¹ The Commission received comments from fifty-six entities proposing a variety of issues for study.⁶² Commissioners also specifically solicited the views of a variety of persons and organizations, including consumer organizations, current and former state and federal antitrust enforcement officials, and federal judges. The Commission met in January 2005 to deliberate publicly on a list of approximately sixty possible issues synthesized by Commission staff from the comments and input received in the fall of 2004.⁶³ Ultimately, the Commission adopted twenty-five issues (broadly defined) for study.

b. Information Gathering Through Public Comment and Hearings

Having selected issues for study, the Commission began an extended study and evaluation of these issues and proposals regarding them.⁶⁴ The Commission compiled its record through two principal mechanisms: comments from the public and hearings.⁶⁵

The Commission requested comment from the public on the issues it selected, including specific questions about the U.S. antitrust laws and whether change was advisable to any of them.⁶⁶ Although the majority of comments were provided to the Commission in 2005—during the Commission's major study period—members of the public continued to submit comments throughout the entire period of the Commission's work. Overall, the Commission received 192 comments from 126 persons or organizations.⁶⁷

Between June 2005 and October 2006, the Commission held 18 hearings over 13 days, with testimony by 120 witnesses, generating almost 2500 pages of transcripts.⁶⁸ Witnesses were selected to provide a balance and diversity of views. The public was invited to, and did, comment on issues addressed in the hearings.⁶⁹ All hearings were open to the public.

c. Deliberations on Possible Recommendations and Report Drafting

Commission deliberations on the recommendations in this Report occurred between May 2006 and February 2007. Overall, the Commission met to deliberate on eleven days. All deliberations of the Commission were held in public. Documents prepared by staff to assist the Commissioners in their deliberations were made available to the public in advance of the meetings and at the meetings themselves. The Report was drafted to explain the recommendations agreed to by a majority of Commissioners, and reflects the views of the Commissioners supporting each recommendation.

2. RECOMMENDATIONS

The charge to this Commission has been to study, evaluate, and make recommendations for the antitrust landscape as it now exists, much changed from earlier years. The current antitrust panorama, of course, covers a broad array of issues; to study all of the possible issues would be neither efficient nor desirable. To use its resources most productively, the Commission chose to focus on four primary areas: substantive standards of antitrust law; enforcement institutions and processes; civil and criminal remedies; and statutory and other exceptions to competition (such as immunities and exemptions from the antitrust laws). The Chapters that address these issues are briefly described below.

Chapter I addresses certain aspects of substantive antitrust law. Chapter I.A reviews changes in antitrust law in recent decades and discusses antitrust analysis in industries in which innovation, intellectual property, and technological change are central features (the “new economy”). Chapters I.B and I.C assess two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, in light of the importance of intellectual property to competition in a high-technology economy, Chapter I.D briefly discusses how the operation of patent law can affect competition.

Chapter II discusses enforcement institutions and processes. Chapter II.A deals with the two federal antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, and Chapter II.B addresses issues surrounding these agencies’ implementation and enforcement of the Hart-Scott-Rodino Act’s pre-merger notification process. Chapter II.C discusses antitrust enforcement at the state level, while Chapter II.D addresses international antitrust enforcement.

Chapter III addresses civil and criminal antitrust remedies. Chapter III.A discusses the monetary remedies available to private parties, such as treble damages, as well as liability rules. Issues related to indirect purchaser litigation are assessed in Chapter III.B. Chapter III.C examines civil remedies available to the federal government, and Chapter III.D discusses criminal remedies that the government may obtain.

Finally, Chapter IV evaluates statutes and particular doctrines that provide exceptions to free-market competition. Chapter IV.A addresses the Robinson-Patman Act. Chapter IV.B discusses statutory immunities and exemptions from antitrust law, regulated industries, and the state action doctrine.

The following are recommendations agreed to by a majority of the Commission. Dissenting votes are identified in the text of the Report and, in some instances, are discussed in separate statements of Commissioners.

Chapter I: Substantive Standards of Antitrust Law

A. Antitrust Law and the “New Economy”

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.
 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 an important bearing on a valid antitrust analysis.
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B. Substantive Merger Law

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.
 - 3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger 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.
 - 3b. 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.
 4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.
 - 4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.
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5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.
6. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.
7. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.
8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.
9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.
10. The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.
 - 10a. The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission 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.
 - 10b. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.

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- 11.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.
- 11a.** The agencies should issue “closing statements,” when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies’ merger enforcement policy.
- 11b.** The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission 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 merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.
- 11c.** The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.
- 11d.** The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.
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C. Exclusionary Conduct

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- 12.** In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.
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13. Congress should not 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 in 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.
 14. Additional clarity and improvement are 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 unilateral refusals to deal with a rival in the same market.
 15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.
 16. The lack of clear standards regarding bundling, as reflected in *LePage’s v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.
 17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.
 18. In general, firms have no duty to deal with a rival in the same market.
 19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.
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D. Antitrust and Patents

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.
 21. Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences 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. In particular:
 - 21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.
 - 21b. 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.
 - 21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.
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Chapter II: Enforcement Institutions and Processes

A. Dual Federal Enforcement

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice 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 appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.
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23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.
24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal 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.
25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.
26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.

B. The Hart-Scott-Rodino Act Pre-Merger Review Process

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.
28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.
29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

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30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.
 31. The agencies should evaluate and consider implementing several specific reforms to the second request process.
 - 31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.
 - 31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.
 - 31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.
 - 31d. The agencies should reduce the burden of translating foreign-language documents.
 - 31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.
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C. State Enforcement of Antitrust Laws

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.
 33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.
 34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.
 35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.
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- 36.** Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations.
- 36a.** The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.
- 36b.** Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.
- 36c.** The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.
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D. International Antitrust Enforcement

- 37.** The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.
- 38.** As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.
- 39.** Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.
- 40.** Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international antitrust technical assistance.
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41. The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.
 - 41a. Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.
 - 41b. Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and “benchmarking reviews.”
 42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.
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Chapter III: Civil and Criminal Remedies

A. Private Monetary Remedies and Liability Rules

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43. No change is recommended to the statute providing for treble damages in antitrust cases.
 44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.
 45. No change is recommended to the statute providing for attorneys’ fees for successful antitrust plaintiffs. 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.
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46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.

B. Indirect Purchaser Litigation

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:

- Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.
 - Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.
 - Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.
 - Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.
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C. Government Civil Monetary Remedies

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

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49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.
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D. Criminal Remedies

50. While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.
51. 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. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.
52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.
53. 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 amount of overcharge was higher or lower, where the difference would materially change the base fine.
54. 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 Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.
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Chapter IV: Government Exceptions to Free-Market Competition

A. The Robinson-Patman Act

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

B. Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

56. 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.

Immunities and Exemptions

57. 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.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

- Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
- The likely adverse impact of the existing or proposed immunity on consumer welfare; and
- Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.

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- 59.** 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 Federal Trade Commission and the Antitrust Division of the Department of Justice 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.
- 60.** 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 (for example, 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.
- 61.** Courts should construe all immunities and exemptions from the antitrust laws narrowly.
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Regulated Industries

62. 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.
 63. 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.
 64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.
 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.
 66. 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 clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.
 67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* 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.
 68. 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.
 69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.
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70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.
 71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.
 72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.
 73. 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 pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.
 74. 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.
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The State Action Doctrine

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75. 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.
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76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.
77. As proposed in the FTC State Action 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.
78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.
79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.
80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.

Notes

- ¹ Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002), *amended by* Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007) [hereinafter AMC Act].
- ² WILLIAM J. BAUMOL, *THE FREE-MARKET INNOVATION MACHINE: ANALYZING THE GROWTH MIRACLE OF CAPITALISM* 3 (2002) [hereinafter BAUMOL, *FREE-MARKET INNOVATION MACHINE*].
- ³ Ben S. Bernanke, Gov., Fed. Reserve, Productivity, Remarks at the C. Peter McColough Roundtable Series on International Economics, Council on Foreign Relations (Jan. 19, 2005) [hereinafter Bernanke, Productivity] (citing Timothy F. Bresnahan & Manuel Trajtenberg, *General Purpose Technologies: “Engines of Growth?”*, 65 *J. OF ECONOMETRICS* 83–108 (1995)).
- ⁴ Ben S. Bernanke, Chairman, Fed. Reserve, Global Economic Integration: What’s New and What’s Not?, Remarks Before Federal Reserve Bank of Kansas City’s Thirtieth Annual Economic Symposium (Aug. 25, 2006) [hereinafter Bernanke, Global Economic Integration].
- ⁵ Alan Greenspan, Chairman, Fed. Reserve, Current Account, Remarks at Advancing Enterprise 2005 Conference (Feb. 4, 2005).
- ⁶ Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference (Jan. 26, 2004) [hereinafter Greenspan, Economic Flexibility]; INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE, FINAL REPORT 33 (2000) [hereinafter ICPAC REPORT].
- ⁷ See Jonathan M. Jacobson, *Do We Need A “New Economy” Exception for Antitrust*, 16 *ANTITRUST*, Fall 2001, at 89, 89.
- ⁸ See Bernanke, Productivity; Bernanke, Global Economic Integration.
- ⁹ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).
- ¹⁰ See NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL at 177 (1979) [hereinafter SHENEFIELD REPORT] (“Free market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy.”); Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before National Association for Business Economics Annual Meeting (Sept. 27, 2005); see also J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 1 (Dec. 5, 2005) (“The fundamental premise of the federal antitrust laws is that free and open competition is the most effective means to ensure lower prices, increased quality . . . and great innovation.”).
- ¹¹ ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS* 57 (5th ed. 2004) [hereinafter GELLHORN, *ANTITRUST LAW AND ECONOMICS*] (“[C]ompetition presses producers to satisfy consumer wants at the lowest price while using the fewest resources.”).
- ¹² See, e.g., Terry Calvani, *Consumer Welfare is the Prime Objective of Antitrust*, *LEGAL TIMES*, Dec. 24, 1984, at 14 (“In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.”).
- ¹³ BAUMOL, *FREE-MARKET INNOVATION MACHINE*, at 10.
- ¹⁴ See WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* 90–91 (2004).
- ¹⁵ BAUMOL, *FREE-MARKET INNOVATION MACHINE*, at 10.
- ¹⁶ Greenspan, Economic Flexibility.
- ¹⁷ DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 57 (4th ed. 2005) (stating that “perfect competition is rarely, if ever, encountered in the real world”); see also David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 *BERKELEY TECH. L.J.* 729, 734–35 (Spring 2001).

¹⁸ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 13 (2005) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*].

¹⁹ See, e.g., William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Legal and Economic Thinking*, 14 J.L. & ECON. PERSP. 43, 52 (2000) [hereinafter Kovacic & Shapiro, *Antitrust Policy*] (“[E]conomists came to realize that departures from the perfect competition model are normal, indeed inevitable, even in ‘competitive’ industries.”).

²⁰ GELLHORN, *ANTITRUST LAW AND ECONOMICS*, at 72.

²¹ *Id.* at 72–73.

²² Debate continues about the precise definition of “consumer welfare.” See, e.g., Merger Enforcement Transcript at 112–195 (Nov. 17, 2005) (various witnesses debating the proper meaning). The Supreme Court has not ruled specifically on this issue. The Commission’s use of the term “consumer welfare” does not imply a choice of a particular definition.

Judge Robert Bork argued that Congress’s goal in passing the Sherman Act was to optimize efficiency, regardless of whether producers or consumers capture the gains. See generally ROBERT BORK, *THE ANTITRUST PARADOX* 61–66 (1978) [hereinafter BORK, *ANTITRUST PARADOX*]. This will achieve consumer welfare, proponents maintain, because all consumers in the economy benefit when fewer resources are needed to make a product and those freed-up resources can be put to a higher and better use. See, e.g., Merger Enforcement Trans. at 171–72 (Rule). In certain limited cases—for example, if a merger to monopoly would significantly lower costs and lead to a more efficient allocation of resources, but would also raise consumer prices—Judge Bork’s approach would permit the transaction to be consummated, despite an increase in consumer prices, because the merger would create efficiency gains that outweighed deadweight losses. See BORK, *ANTITRUST PARADOX*, at 91, 107–11.

Others, however, argue that Congress’s main goal was to prevent price increases to consumers—that is, wealth transfers from consumers to producers. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concerns of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982) [hereinafter Lande, *Wealth Transfers*]. Proponents of this approach distinguish between the consumers of products in a relevant market (consumers) and the shareholders of the firms in that market (producers). See, e.g., Merger Enforcement Trans. at 121, 161 (Baker). They maintain that antitrust law should not allow wealth transfers from consumers to producers, even if gains in overall efficiency must be sacrificed. See Lande, *Wealth Transfers*, at 69–70; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1592 (1983).

The use of one standard or the other can have various implications for antitrust analysis. See, e.g., Merger Enforcement Trans. at 118–19, 137–38 (Cary) (discussing circumstances in which fixed-cost savings should, or should not, be considered in merger analysis). Nonetheless, the use of one standard versus the other often does not change the results of that analysis, and the cases in which the choice of standard would make a difference are relatively few. See Merger Enforcement Trans. at 166–67 (Cary) (standards often do not produce inconsistent results); *id.* at 122 (Baker) (stating that “possibilities for conflict are largely hypothetical,” and that in his experience, “agency investigations rarely turn on the welfare standard”); *id.* at 172–73 (Rule) (difficulties in calculating with precision different types of efficiencies raises questions about how much difference using one standard rather than another makes).

²³ See generally Kovacic & Shapiro, *Antitrust Policy*, at 43 (“As economic learning changed, the contours of antitrust doctrine . . . would shift as well.”).

²⁴ See generally Timothy J. Muris, FTC Chairman, Improving the Economic Foundations of Competition Policy, Remarks at George Mason University Law Review’s Winter Antitrust Symposium (Jan. 15, 2003) (referring to the “importance of regularly reassessing the economic assumptions of current policy, of distilling economic insights . . . and of doing empirical research . . .”).

²⁵ See Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421, 425 (2006) [hereinafter Calkins, *Looking Backwards*]; Albert Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1029 (2003) [hereinafter Foer, *Putting AMC into Perspective*]; Thomas E. Kauper, *The Report of the Attorney General’s National Committee to Study the Antitrust Laws*:

A Retrospective, 100 MICH. L. REV. 1867, 1867 (2002) [hereinafter, Kauper, *Antitrust Laws: A Retrospective*].

- ²⁶ Foer, *Putting AMC into Perspective*, at 1032–33. The TNEC had twelve members, including members of Congress and antitrust agency officials. *Id.* at 1033.
- ²⁷ *Id.* at 1036 (crediting the TNEC with leading to Clayton Act amendments that “strengthened the law against anticompetitive mergers”).
- ²⁸ Kauper, *Antitrust Laws: A Retrospective*, at 1871–72 (“The general thrust of the Report is clear. It contemplates an antitrust world virtually free of per se rules.”).
- ²⁹ *Id.* at 1873 (stating that “[m]ost of the per se rules adopted in the previous two decades have disappeared”).
- ³⁰ PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11 (1968–69).
- ³¹ REPORT OF THE NIXON TASK FORCE ON PRODUCTIVITY AND COMPETITION, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 413, at X-1 to X-14 (June 10, 1969).
- ³² SHENEFIELD REPORT.
- ³³ See generally William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1134–38 (1989).
- ³⁴ Calkins, *Looking Backwards*, at 436; see also Foer, *Putting AMC into Perspective*, at 1040–41 (citing CHARLES R. GEISST, *MONOPOLIES IN AMERICA* 240 (2000)).
- ³⁵ See Foer, *Putting AMC into Perspective*, at 1043–44 & n.55.
- ³⁶ Calkins, *Looking Backwards*, at 434–35.
- ³⁷ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).
- ³⁸ Calkins, *Looking Backwards*, at 439.
- ³⁹ *Id.* at 442 (“The Shenefield Report’s most immediate consequence was passage of the Antitrust Procedural Improvements Act of 1980”); Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 2, 94 Stat. 1154, 1154–58; see H.R. REP. NO. 96-870 (1980) (legislative history). Among other things, the Act increased potential sanctions for attorney delay, authorized prejudgment interest especially in response to delay, and encouraged wider use of collateral estoppel. Calkins, *Looking Backwards*, at 442.
- ⁴⁰ Calkins, *Looking Backwards*, at 447.
- ⁴¹ Foer, *Putting AMC into Perspective*, at 1043 (“Probably the most important contribution of [the Shenefield Report] was to underscore . . . the desirability of continuing the nation’s . . . movement toward deregulation.”); see also Calkins, *Looking Backwards*, at 440.
- ⁴² Foer, *Putting AMC into Perspective*, at 1044; *id.* at 1045 (citing the launch of the International Competition Network as ICPAC’s “most important effect” and “the materialization of [ICPAC’s] Global Competition Initiative—a new venue where governmental officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work towards common solutions of competition law and policy problems”) (quoting ICPAC REPORT, at 29) (internal quotations and emphasis omitted).
- ⁴³ See International Competition Network Website, *available at* <http://www.internationalcompetitionnetwork.org>.
- ⁴⁴ AMC Act, § 11053.
- ⁴⁵ Antitrust Modernization Commission Act of 2001, H.R. 2325, 107th Cong. (2001).
- ⁴⁶ Press Release, H. Comm. On the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001), *available at* http://judiciary.house.gov/Legacy/news_062701.htm.

- ⁴⁷ AMC Act, § 11053.
- ⁴⁸ *Id.* § 11058.
- ⁴⁹ *Id.* § 11060. Actual appropriations to the Commission made in fiscal years 2004, 2005, 2006, and 2007 totaled slightly less than \$4 million after application of across-the-board rescissions.
- ⁵⁰ *Id.* § 11054(a).
- ⁵¹ *Id.*
- ⁵² *Id.* § 11054(a)(1).
- ⁵³ *Id.* § 11054(i).
- ⁵⁴ 150 CONG. REC. H224 (daily ed. Jan. 28, 2004).
- ⁵⁵ 149 CONG. REC. H44 (daily ed. Jan. 7, 2003).
- ⁵⁶ 149 CONG. REC. S2872 (daily ed. Feb. 26, 2003).
- ⁵⁷ 149 CONG. REC. S87 (daily ed. Jan. 7, 2003).
- ⁵⁸ The White House, Personnel Announcement (Mar. 5, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/03/20040305-5.html>. Bobby Burchfield was appointed by the President to replace Deborah Platt Majoras, who resigned her position as a Commissioner upon her appointment to be the Chairman of the Federal Trade Commission in August 2004. See The White House, Personnel Announcement (Dec. 17, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/12/20041217-17.html>.
- ⁵⁹ AMC Act, § 11056(a)(1).
- ⁶⁰ *Id.* Short biographies of Commissioners and Commission staff are provided in Appendix D of the Report.
- ⁶¹ See 69 Fed. Reg. 43,969 (July 23, 2004).
- ⁶² See *generally* Appendix C (listing comments proposing issues for Commission study).
- ⁶³ See 69 Fed. Reg. 70,627 (Dec. 7, 2004). The Commission held brief subsequent meetings to consider the adoption of additional specific issues for study. See 70 Fed. Reg. 8568 (Feb. 22, 2005); 70 Fed. Reg. 37,747 (June 30, 2005).
- ⁶⁴ See AMC Act, § 11053(3).
- ⁶⁵ The Commission's Record is contained on the CD-ROM included with this Report.
- ⁶⁶ See 70 Fed. Reg. 28,902 (May 19, 2005). The Commission issued several additional requests for comment from the public on issues it adopted for study at later points and when its study revealed the desirability of obtaining more specific comments on certain issues. See 70 Fed. Reg. 46,474 (Aug. 10, 2005); 70 Fed. Reg. 69,510 (Nov. 16, 2005); 71 Fed. Reg. 30,863 (May 31, 2006); 71 Fed. Reg. 34,590 (June 15, 2006).
- ⁶⁷ See Appendix C of this Report (listing comments received on issues selected for study).
- ⁶⁸ Panels generally consisted of four or five witnesses each, although for some panels there were as few as one or two, or as many as seven, witnesses. A list of hearings and panelists appears in Appendix B of this Report.
- ⁶⁹ See, e.g., 70 Fed. Reg. 37,746 (June 24, 2005); 71 Fed. Reg. 57,462 (Sept. 29, 2006).