

**AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW**

2008 TRANSITION REPORT

The views expressed herein are on behalf of the American Bar Association Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and unless otherwise noted, should not be construed as representing the policy of the American Bar Association.

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AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW

I. INTRODUCTION

In this report (“Report”), the Section of Antitrust Law (“Section”) of the American Bar Association (“ABA”) presents its views regarding the current state of federal antitrust and consumer protection enforcement, as well as recommendations regarding prospective policies and initiatives. These views and recommendations are presented only on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA, and should not be construed as representing the policy of the ABA unless otherwise noted.

Council of the Section has adopted this Report based on the work of the Section’s Transition Report Task Force (“Task Force”). The Immediate Past Chair of the Section, Kathryn M. Fenton—in consultation with the current Chair, James A. Wilson—created the Task Force to evaluate the current state of federal antitrust and consumer protection enforcement and prepare recommendations to assist the next Administration, whichever party prevailed in November. The Task Force, comprised of highly regarded senior lawyers and economists from the Section’s membership (many with federal antitrust agency experience), is purposefully diverse with respect to political affiliations (Republicans, Democrats and Independents all are represented), geography (members hail from throughout the United States, as well as Brussels/London), and organization (the members’ places of business include plaintiff-side and defense-side law firms, corporations, economic consulting firms, and a state attorney general’s office).¹ The Task Force chairs, Janet L. McDavid and Phillip A. Proger, both are former chairs of the Section.² Leslie C. Overton, a former member of the Section’s Council, served as the Task Force Coordinator. The views in this Report reflect the collective views of the Section’s Council and the Task Force, rather than the views of any particular Council or Task Force member, and should not be attributed to any member. While the Council and the Task Force are responsible for the content of this Report, the Task Force sought and received beneficial input through formal interviews and informal discussions with a wide variety of government, academic, and private sector sources. The Section and the Task Force greatly appreciate the input of these individuals.³

¹ The members, which include former senior officials from the Federal Trade Commission (“FTC”) and the U.S. Department of Justice Antitrust Division (“DOJ” or “Antitrust Division”), are: William J. Baer; William J. Blechman; Rachel C. Brandenburger; Mary T. Coleman; Patricia A. Conners; Susan A. Creighton; Margaret E. Guerin-Calvert; Michael D. Hausfeld; Aimee Imundo; William C. MacLeod; R. Hewitt Pate; and Jerome A. Swindell. Ms. Fenton and Mr. Wilson participated *ex officio*. Logan M. Breed, John D. Fred, and Benjamin J. Robinson also provided valuable support for the Task Force’s work.

² Ms. McDavid and Mr. Proger are partners at Hogan & Hartson LLP and Jones Day, respectively. The places of business (and, if applicable, former government positions) of the other Task Force members are provided at Appendix B.

³ More than 50 interviewees, some of whom requested anonymity, provided helpful input. The views and recommendations in this Report were informed by our interviews with these people, but are not attributable to any of those individuals.

This is the Section’s sixth report evaluating and reporting on the state of federal enforcement of the antitrust laws of the United States. While this Report focuses primarily on antitrust, it also addresses consumer protection enforcement by the Federal Trade Commission (“FTC”).

II. EXECUTIVE SUMMARY

A. Effective Antitrust and Consumer Protection Enforcement and the Economy

It is widely accepted that appropriate, effective, economics-based antitrust enforcement—which preserves competition to enhance efficiency and consumer welfare—is essential to a well-functioning market-based economy. Over the past three decades, there has been broad bipartisan consensus and convergence among the Antitrust Division (“Antitrust Division” or “DOJ”) and the FTC (collectively, the “agencies”) and U.S. courts around antitrust policy based on industrial organization economics. Enforcement that is too aggressive can deter potentially efficient business relationships, while too little enforcement will have an insufficient deterrent effect and could lead to business arrangements that reduce competition in ways not outweighed by efficiencies. There are some differences of opinion, of course, regarding what constitutes too much or too little enforcement; each administration—and each senior enforcement official—grapples with finding the sweet spot in-between the two.

Consumer protection enforcement also is necessary to protect the economy’s consumers from fraud, deception, and unfair practices in the marketplace. Consumers have benefited significantly from the growth of the Internet and the resulting ease of access to a wealth of products and information. Vigorous consumer protection enforcement is necessary, however, to preserve consumer confidence that the businesses and services they use will keep secure their personal and financial data, and to protect consumers from unfair and deceptive technological practices like spyware and phishing. Given the challenged economy, and the nation’s housing and credit crisis in particular, there also is a need to enforce federal laws that protect individuals vulnerable to a wide range of domestic and international fraud and scams, such as those involving credit cards and mortgages, as well as predatory or discriminatory lending practices or deceptive credit counseling. The FTC plays a crucial role in educating and guiding consumers and businesses regarding privacy, identity theft, and other important issues so that they are less likely to fall prey to “economic villains.”

B. The Current State of Antitrust and Consumer Protection Enforcement

The Section’s overall assessment of the current state of antitrust and consumer protection enforcement is that the agencies generally have been effective in their efforts to pursue their missions in a manner consistent with mainstream bipartisan principles. The agencies deserve positive recognition for several continuing and new initiatives subsequently discussed in this Report—even to the extent they are neither complete nor perfected—including vigorous criminal enforcement by DOJ, very active consumer protection enforcement at the FTC, and, with respect to both agencies, efforts at merger process reform, continued participation and leadership in international cooperation efforts, especially through the International Competition Network (“ICN”), and continued efforts to provide greater guidance to the public through hearings, workshops, closing statements, and merger enforcement data. The Section also commends the

FTC on its ongoing effort to conduct an extensive internal review and retrospective self-evaluation prior to its 100th anniversary.

There is, however, a debate among some within the bar, academia, and the business community regarding whether the FTC and DOJ are striking the right balance between under-enforcement and over-enforcement. This is not the first time the agencies have been subjected to such criticism. From time to time over the years, some observers have accused each of the FTC and DOJ of enforcing the antitrust laws too vigorously or not aggressively enough. While DOJ has actively and aggressively prosecuted criminal cartels, there is a perception among some in the bar, academia, and business community of under-enforcement in the merger and civil non-merger enforcement areas at DOJ,⁴ while other observers have expressed concern about what they perceive to be over-enforcement at the FTC, and have questioned the FTC's decision to bring specific recent cases, particularly in the non-merger area.⁵ Statistical comparisons in a vacuum are not a substitute for thorough review of all of an agency's enforcement decisions, which the Task Force lacks the ability to perform.⁶

One particularly troubling concern, however, as discussed elsewhere in this Report, is an actual or perceived divergence between the agencies regarding enforcement standards. Although there is a value to diversity of viewpoints, such divergence should not lead to different outcomes depending upon which agency investigates. A view that federal antitrust enforcement is unfair or arbitrary, with results driven by the agency assigned to investigate rather than by the merits, undermines the credibility of the agencies domestically and abroad. The agencies should continue to work together to reduce any material differences in their approaches to civil antitrust enforcement.

The Section believes that there is room for improvement with respect to the issue of inter-agency convergence and in a number of other key areas discussed throughout the Report. The

⁴ Compare Baker & Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, 22 ANTITRUST 29 (2008), available at <http://faculty.haas.berkeley.edu/shapiro/detecting.pdf> and John D. Harkrider, *The Use of Econometrics in Antitrust Analysis*, available at <http://www.avhlaw.com/assets/attachments/29.pdf>, with Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, *Lewis Bernstein Memorial Lecture: Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives* (June 26, 2008) and Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement Over Time and Between the Agencies*, 22 ANTITRUST 37 (2008); cf. Am. Bar Ass'n Section of Antitrust Law Spring Meeting, March 28, 2008: Roundtable Conference with Enforcement Officials (comments of former FTC Chairman Deborah Majoras) (hereinafter ENFORCEMENT OFFICIALS ROUNDTABLE), available at <http://www.abanet.org/antitrust/at-source/08/04/Apr08-EnforceRT4=25f.pdf>; Fenton, et al., *Roundtable Discussion, Advice for the New Administration*, 22 ANTITRUST 7 (Summer 2008).

⁵ See, e.g., ENFORCEMENT OFFICIALS ROUNDTABLE, *supra* note 4, at 25-26 (questioning FTC's decision to bring the *N-Data* case); George W. Jordan III, "In the Matter of Negotiated Data Solutions – The FTC's Expanded Application of Section 5 Authority to Patent Hold-Ups," *Antitrust Source*, April 2008, available at <http://www.abanet.org/antitrust/at-source/08/04/Apr08-Jordan4=21f.pdf>.

⁶ Much of the information necessary for such a review is unavailable to the public due to confidentiality protections. Without the underlying factual information on which the enforcement decisions are made, it is impossible to determine with any certainty whether decisions on particular cases were appropriate. Some members of the Task Force believe that statistical comparisons are meaningless absent an agreed baseline and that evaluations of DOJ civil enforcement decisions indicate a strong record of appropriate enforcement, while other members of the Task Force disagree. There is a similar difference of opinion among the Task Force regarding the significance of such statistical comparisons in assessing the FTC's enforcement record.

Section offers 66 recommendations to help the new Administration achieve such improvement. Each of these recommendations is discussed in the Report, which is divided into 15 parts. The recommendations also are listed in Appendix A. Many of the topics discussed in this Report also were recently addressed by the Antitrust Modernization Commission (“AMC”),⁷ which held 18 hearings, heard 120 witnesses, and received 192 comments, including from the Section. The AMC’s final report (“AMC Report”), issued in April 2007, like this Report, did not advocate sweeping reforms—it found that the state of the U.S. antitrust law generally was “sound.”⁸

With this background, the Report now will turn to the 12 topics the Task Force identified as being the most important to the success of the new Administration, providing recommendations related to each. While there are other topics that may merit careful consideration by the new Administration, the Section believes that focusing on these key topics will best advance the core bipartisan objectives of antitrust law and consumer protection—protecting competition and promoting consumer welfare.

III. INVESTIGATORY PROCESS

A. Merger Process Reform

The merger review process can impose significant burdens on all involved. The burden—financial and otherwise—imposed by the U.S. merger review process surpasses those of any other jurisdiction in the world. Parties expend considerable time and expense in providing information requested during the merger investigation. The agencies similarly must devote significant time and resources to reviewing the information provided. Accordingly, the agencies should continually assess the merger review process and look for ways to make the process more efficient for both the parties and the agencies. The Section recognizes the agencies have announced significant efforts in the past few years to improve the process and reduce the burden on the parties and agencies alike. On the whole the Section has observed more transparency and greater communication between the agencies and parties, but there is still work to be done given inconsistent implementation at both agencies.

⁷ The AMC was created “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.” It was created by an act of Congress in 2002 and began work in 2004. The Commission was a bipartisan group of academics, economists, practitioners, and enforcers appointed by the President and the respective majority and minority Leadership of the House of Representatives and Senate with the goal of ensuring “fair and equitable representation” of various viewpoints. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

⁸ Antitrust Modernization Commission, Report and Recommendations, at (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (hereinafter AMC REPORT). The AMC did provide 80 recommendations, which were similar to those advocated by the Section. *Id.* The AMC Report also addressed the issue of recovery by indirect purchasers, proposing that Congress pass legislation overruling the Supreme Court’s *Illinois Brick and Hanover Shoe* decisions to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. While the Antitrust Section supports this recommendation, *see* Am. Bar Ass’n Section of Antitrust Law, Response to Antitrust Modernization Commission June 12, 2006 Request for Public Comment on Civil Remedies (July 17, 2006), available at <http://www.abanet.org/antitrust/at-comments/2006/07-06/com-civil-remedies.pdf>, this Report does not focus on the issue of indirect purchaser litigation because it does not relate directly to federal antitrust enforcement.

Four years ago, the Section commended the agencies on their efforts to reform the merger review process and increase transparency. The Section recognized that there was still room for improvement and called on the agencies to improve transparency by releasing more informative and comprehensive data and promoting forthright discussion between staff and parties at all stages of investigations. Further, the Section made recommendations designed to address the scope and burden of the second request process, including imposing limitations on the staff's ability to seek documents and information, limiting the scope of mandated electronic searches, and reexamining the second request process to achieve a better balance between private and public interests.

Since the release of the Section's last report on the state of federal antitrust enforcement, both agencies have addressed the issue of transparency. In 2006, for example, the agencies released the Commentary on the Horizontal Merger Guidelines⁹ ("Merger Commentary") that explains how the agencies have applied certain principles of the joint DOJ/FTC Merger Guidelines ("Guidelines")¹⁰ in the context of actual investigations. The FTC and DOJ also have continued to issue closing statements in some cases, agency officials have continued to offer guidance through speeches in a number of fora, the agencies have published information regarding their merger enforcement activities, and the FTC has updated its merger enforcement data.

The agencies also have made strides in reforming the merger review process. In 2006, both agencies announced merger review process reform initiatives. The FTC's reforms reduced the relevant time period for searches, provided for the exchange and cooperation with the parties with respect to competitive effects theories and empirical data, respectively reduced the burden on parties with respect to back-up tapes and privilege logs, and made modifications to the Model Second Request. There is, however, anecdotal evidence that suggests the agencies are not following the modifications to the Model Second Request. They also introduced a custodian presumption that allows the parties to search 35 or fewer custodians in exchange for agreeing to certain conditions, including a post-complaint discovery period of at least 60 days. The DOJ's reforms modified the Model Second Request and introduced a "Process & Timing Agreement" option under which, in exchange for providing information to the DOJ early in the investigation and agreeing to a post-complaint discovery period, parties will be able to limit second request searches to central files and 30 or fewer employees.

The reform initiatives have had mixed success. A limited number of parties have taken advantage of the FTC's timing agreement option. DOJ has reported that as of June 2008, only one party had agreed to its post-complaint discovery process in exchange for a limit on employees whose files need to be searched.¹¹ Anecdotally, however, staff and parties increasingly are entering into agreements as to the scope and timing of a particular investigation. Thus, it may be that while parties are not necessarily following the letter of these reforms, the reforms are being used as the basis for improved negotiations between the parties and the

⁹ Dep't of Justice & Federal Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006) (hereinafter MERGER COMMENTARY), available at <http://www.usdoj.gov/atr/public/guidelines/214247.htm>.

¹⁰ Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997) (hereinafter GUIDELINES), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

¹¹ See Barnett, *supra* note 4.

agencies, at least in some instances. Moreover, there appears to have been an improvement in communications between the agencies and parties as to what data are available and how these can be most effectively provided to the agencies.

While these reforms have had benefits, the demands of electronic production continue to challenge the agencies and parties alike. Given the mixed success of the merger reform initiatives and growing pressures of electronic document production, the Section recommends that the agencies institute policies requiring an assessment of the merger process reforms and adopt policies to continue increasing the transparency and decreasing the burden on the agencies and parties. The Section looks forward to working with the agencies to develop these policies.

Recommendation 1: The agencies should fix the merger clearance process.

The merger clearance process, which the Section identified as a critical weakness of federal antitrust merger review in its 2001 and 2005 transition reports, continues to be a significant problem. In some cases where relevant agency expertise is unclear, the agencies engage in a protracted negotiation—sometimes even exceeding the 30-day HSR waiting period—to determine which agency will conduct the merger investigation. These unnecessary delays impose significant burdens on companies with time-sensitive transactions and postpone the procompetitive benefits of those transactions for consumers and shareholders. The delay and uncertainty associated with the current failed process have a variety of costs, such as needless “pull and refiles,” to restart the statutory clock, delayed closings, and an erosion of the agencies’ credibility.

To their credit, the agencies attempted to address this problem in early 2002 by formalizing an agreement allocating regulatory jurisdiction on an industry-specific basis to minimize lengthy disputes.¹² Although the agreement appeared to alleviate the inefficiencies of merger clearance quite effectively, the agencies quickly abandoned it under Congressional pressure. For the short time period the agreement remained operative, communication between the agencies seemed to improve. Most importantly, the agreement eliminated unnecessary delays in the clearance process for almost all matters. Once the agencies withdrew the agreement, however, the process regressed to its prior suboptimal state, with clearance of certain transactions being delayed by days or even weeks critical to the initial review process. Time has not improved the situation. The status quo is not only embarrassing, but it also has strained relations between the agencies and impaired their ability to work together efficiently. It is imperative that the agencies resolve this needless inefficiency in the merger review process. Failure to do so is simply bad government.

The Section recommends that if the agencies cannot determine within a ten-day period which one will review a particular transaction, then they should resolve clearance through a simple coin flip.

Recommendation 2: The agencies should assess the impact of the merger process reform initiatives.

¹² See Memorandum of Agreement Between The Federal Trade Commission and The Antitrust Division of The United States Department of Justice Concerning Clearance Procedures for Investigations, (March 5, 2002) available at <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

The merger reform initiatives undertaken by the agencies in 2006 built upon the reforms implemented earlier in the decade. After seven years under these reforms, it is time for the FTC and the DOJ to assess the impact of their various initiatives. It is a commonly expressed opinion that the system today operates more transparently, effectively, and cooperatively than it did ten years ago. The Section recognizes the progress reported by many within the agencies and private bar who indicate that parties and staff are communicating better and more often, and increasingly are working with one another to reach a balance that reflects the interests of all involved.

Nonetheless, it is apparent that some reforms have been more successful or consistently implemented than others. Accordingly, the Section recommends that the agencies undertake an assessment of the impact of their merger reform efforts. Particular attention should be paid to options like the timing agreements to determine why they are so under-utilized and to determine whether they should be maintained as is, amended, or abandoned altogether. The agencies also should consider whether their efforts to be transparent with parties in merger investigations are providing the parties adequate information regarding remedies, imminent Commission action, or the competitive issues most of interest to staff, the Bureau, and the Commissioners (or the deputies and the Assistant Attorney General at DOJ). Self-assessment would help determine the usefulness of the reforms of the past eight years and to set the course under the new Administration. As part of this assessment, the agencies should try to identify metrics to measure the success of reform initiatives and publish information about those metrics.

Recommendation 3: The scope and burden of electronic production should be addressed.

The escalating volume of electronic data production imposes significant time and financial costs on the agencies and parties alike. The agencies have encountered difficulties keeping up with the need to improve their technical resources to handle the submissions of parties, while parties face mounting expenditures in time and money to review and produce the universe of responsive electronic documents.¹³ While the merger review reforms have addressed some of this burden by introducing options to limit the number of custodians searched and modifying the Model Second Requests, it is widely believed that challenges posed by electronic document production still are considerable and are growing more formidable as time passes.

Due to the pressing nature of the challenge, the Section recommends that the agencies and the private bar take steps now to analyze and address together the problems posed by electronic productions. The Section has already begun to explore ways that the agencies can more effectively address these challenges, and looks forward to engaging with the new Administration in a constructive dialogue regarding these issues. Such a dialogue could occur through a joint agency-private bar task force or workshop to draw upon the expertise and experiences of all involved to tackle the issue of electronic review and production. As part of this process, the agencies should work with each other to standardize the approaches taken to the

¹³ See *Barnett*, *supra* note 4, at 22. In 2005, then-FTC Chairman Majoras noted that the average cost of complying with a second request had reached more than \$5 million, due in large part to the proliferation of electronic documents. Cecilia Kohrs Lindell, *Feds aim to cut merger-filing burden*, THE DEAL, August 9, 2005. Such costs undoubtedly have risen since that time.

extent possible.¹⁴ Third party vendors who specialize in electronic document production also should be consulted. While the Section believes that many of the ideas considered by the agencies in recent years, including fostering closer interaction between parties and staff to create more targeted and effective requests and searches, may play an important role in addressing this issue, the sheer scope of the challenge calls for the attention and cooperation of all involved.

B. Transparency

Recommendation 4: The agencies should continue their transparency efforts, including specifically new merger guidelines, while improving the quality and quantity of the information they make publicly available.

Recent efforts to increase transparency at the agencies have been quite helpful. Transparency is a key to continued improvement in the merger review process. Enhanced transparency facilitates better communication and cooperation between agency staff and parties and enables agency officials and the private bar to make more informed decisions regarding all aspects of the merger review process. Without the availability of quality information, attempts at reforming the merger review process and addressing the pressing challenges of electronic production will be incomplete.

The Guidelines outline the general approach taken by the agencies in analyzing mergers and the agencies' recently released Merger Commentary provides further detail. The agencies have also released useful data on merger challenges (with the FTC providing more detailed data). The agencies have also continued to issue closing statements for notable transactions that they have chosen not to challenge, but there are restrictions on the information that can be disclosed because of confidentiality concerns. The agencies remain committed to transparency, but seem wary as to how statements may be used against the agencies. As in past transition reports,¹⁵ the Section urges the agencies to continue their efforts with respect to transparency through release of data, speeches, commentary, closing statements, and Competitive Impact Statements. In particular, the Section urges the Antitrust Division to collect and disclose the type of detailed data that the FTC has disclosed. In addition to benefits to the business community and bar in the United States, the improved transparency can have international benefits by providing access and guidance to agencies around the world, as discussed in Part IV of this Report. The agencies should also revise the current Guidelines to reflect more accurately current agency enforcement practices, or establish a task force to evaluate whether the current Guidelines reflect state of the art thinking, particularly in the area of non-horizontal mergers.

C. Investigative Timing

Recommendation 5: The agencies should expeditiously review mergers involving regulated industries, and regulatory agencies should not duplicate the agencies' competition analysis.

¹⁴ Currently, the differences in technical electronic production requirements between the agencies mean that the same production can be much more expensive if the transaction is examined by DOJ rather than the FTC.

¹⁵ See e.g., Am. Bar Ass'n Antitrust Section, "The State of Federal Antitrust Enforcement," Feb. 2005, at 35-37, available at http://www.abanet.org/antitrust/at-comments/2005/02-05/state_of_fed_enforc.pdf.

The AMC recommended that the antitrust agencies should perform the competition analysis in mergers involving regulated industries and that regulatory agencies should not duplicate that analysis.¹⁶ The Section agrees with this recommendation.¹⁷ In particular, the Section encourages the antitrust agencies to fulfill their mandate expeditiously, even when review by another regulatory agency, such as the Federal Communications Commission (“FCC”), is pending, and not to use the fact of review by another agency and the ensuing delay in consummation to extend the antitrust review. Finally, while DOJ and FTC staff should communicate regularly with other regulatory staff and work together consistent with their confidentiality obligations, the antitrust agencies must not use the fact of multi-agency review to delay.

Recommendation 6: The speed of non-HSR investigations should be addressed.

Unlike investigations of potential mergers or acquisitions, investigations into already consummated transactions or anticompetitive conduct are not constrained by the HSR statutory deadlines. As a result, these investigations can become “black holes” for agency resources, dragging on for months or years. This is troublesome for a number of reasons. First, the businesses that are the target of these investigations are forced to operate with a considerable level of uncertainty, which is exacerbated where agency staff provides limited feedback as to the status or direction of the investigation. Second, the targets of non-HSR investigations may have perverse incentives to delay cooperation and “drag their feet” responding to agency requests in hopes that the investigation will eventually close due to its length. Finally, the length of these investigations can mean that where a challenge to the behavior is warranted, any relief is significantly delayed. This can be of particular concern in areas where the need for relief is particularly pressing, as it can be in investigations into consummated mergers that do not meet HSR thresholds or ongoing conduct with potentially substantial effects.

The Section recommends that the agencies pay greater attention to non-HSR investigations and institute reforms that ensure adequate management procedures are in place to encourage timely resolutions. The potential harm to parties and consumers, and the considerable drain on agency resources, warrants a hard look at how agency officials treat these investigations and how they can better manage and assess the useful life of these investigations.

Recommendation 7: The agencies should require timelines for non-HSR investigations.

The Section recognizes that each non-HSR investigation is unique, and as a group they do not lend themselves to a one-size-fits-all approach to timing. Such investigations can benefit from timelines that create a roadmap for the investigation, however. Agency officials can set deadlines for communications with the parties regarding the status and theory of the

¹⁶ See AMC REPORT, *supra* note 8, at 341-42.

¹⁷ As indicated in the AMC Report, the industries whose mergers are reviewed by federal antitrust agencies and regulatory bodies are as follows: “banking (regulated by various banking agencies); certain aspects of electricity (regulated by the Federal Energy Regulatory Commission); telecommunications/media (regulated by the Federal Communications Commission); and railroads (regulated by the Surface Transportation Board).” AMC REPORT, *supra* note 8, at 381 n.37.

investigation, meetings among the parties and agency senior management, and evaluations of the investigation and whether it should go forward or close.¹⁸

The Section understands that flexibility is important because resources can be diverted and that the parties may be less than diligent in submitting information to agency staff. Adaptable timelines that set deadlines for the various phases of an investigation can address that need for flexibility while still ensuring that investigations do not drag on unduly. Each side will benefit when the parties have realistic expectations regarding how long particular stages of the investigation are likely to last. It will increase the incentives of the parties to cooperate at each stage, eliminating some of the attractiveness of stalling in hopes that the investigation will just go away.

D. Engagement Between Staff and the Parties

Recommendation 8: The agencies' staff should be open and forthcoming with parties on a timely basis.

Much of the success of the merger process reform initiatives has been driven by the increase in early and frequent interaction between transaction parties and agency staff regarding the process and theories of the investigation. Regular interaction encourages transparency, reduces the likelihood of overly broad requests for information, and increases the efficiency of the parties' searches and productions. These lessons should be applied more regularly in HSR investigations and should be extended to the non-HSR context. Where the parties are clear about the status of the investigation, the likelihood of productive cooperation between both sides increases.

Too often non-HSR investigations extend over months or even years with minimal contact between the parties and agency staff. As the Section has witnessed in the context of HSR investigations, parties are better able to respond when they have more information about the status and the theory of the investigation, and in turn staff receives submissions from the parties that are better tailored to the agency's needs. The Section is well aware that this is contingent upon the cooperation of the parties involved and it is not possible where the parties are not responsive. Interaction is not a universal solution to the problems in non-HSR investigations, but in the cases where the parties and staff are willing to cooperate, it can play a role in streamlining and improving the effectiveness of the investigation. Moreover, continued interaction between staff and the parties, or if needed between senior management and the parties, may spur parties to comply more rapidly with information requests, particularly if interaction can be used to reduce the burdens imposed by the requests but still provides the staff with needed information. The agencies also should make clear that they are willing to enforce subpoenas and CIDs if parties are not being cooperative in responding to these requests.¹⁹

¹⁸ During the first part of the Bush Administration, DOJ officials attempted to address the issue of non-HSR timing by instituting a "red, yellow, and green light" timeline system. This internal initiative appeared to improve the speed and efficiency of some investigations.

¹⁹ See, e.g., *FTC v. Take-Two Software, Inc.*, No. 08-MISC-360-HHK, Emergency Petition of the Federal Trade Commission for an Order Enforcing a Subpoena Duces Tecum and a Civil Investigative Demand Issued In a Pre-Merger Investigation (D.D.C. Aug. 5, 2008), available at <http://www.ftc.gov/os/caselist/0810138/080605petition.pdf>.

IV. RESOURCES AND TRIAL CAPABILITIES OF THE AGENCIES

The resources – human and financial – and trial capabilities of the Antitrust Division and the FTC are important to the effectiveness of those agencies. Given the challenges inherent in striking the proper balance between under-enforcement and over-enforcement by the FTC and the DOJ, it is very helpful to have senior agency officials highly knowledgeable about antitrust and familiar with the economic concepts so important to antitrust analysis. For the FTC in particular, a background in consumer protection also is helpful. Recent agency appointments generally have been of individuals with extensive or significant experience in antitrust. Furthermore, to perform their important antitrust and consumer protection missions most effectively, both agencies must continue to receive sufficient levels of funding and retain and attract adequate numbers of competent staff.²⁰

Funding and staff also affect the agencies' trial capabilities. The agencies' ability to deliver on the promise to try a case to verdict and prevail is necessary to the principled and balanced enforcement of the antitrust laws. The number of civil and criminal competition cases that the agencies bring to trial is limited,²¹ thus underscoring the need for the agencies to prepare lawyers for trial and maintain trial readiness, and to have the necessary resources to try the best case possible. In preparing this Report, the Task Force spoke in confidence with a number of trial lawyers who currently are working or have worked in either the DOJ or the FTC.

A. Agency Appointments and Funding

Recommendation 9: Appointed officials should have relevant substantive antitrust expertise and seek significant involvement with respect to the new Administration's overall economic policy.

The Section strongly encourages the continued appointment of such knowledgeable individuals, who will be best positioned to gain the respect of the career staff at the agency, the private bar, and the business community. Such expertise on the part of appointed officials can lead to better morale, more credible enforcement decisions, and a greater ability for the agencies to engage with the private sector regarding substance and process in ways that improve

²⁰ It is notable that the agencies are not net drains on the Treasury since the Department of Justice collected more than \$630 million in criminal antitrust fines in 2007, Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, *U.S. Department of Justice Antitrust Division Update*, Spring 2008, available at <http://www.usdoj.gov/atr/public/231424.htm>, while the FTC collected \$240 million in consumer protection remedies that same year, see Federal Trade Commission, *The FTC in 2008: A Force for Consumers and Competition*, March 2008, available at <http://www.ftc.gov/os/2008/03/ChairmansReport2008.pdf>. Most funds collected through the FTC's consumer protection enforcement go to consumers. The FTC estimates that its antitrust and consumer protection missions consumed stopped over \$800 million of consumer injury in 2007, but that money does not go to the Treasury.

²¹ The Task Force notes that the FTC's trial record in consumer protection cases is much more extensive, and the FTC has been successful in its consumer protection cases. In 2007, BCP reported 137 orders (many obtained in federal courts), while BC reported 33 enforcement actions, most of which were non-litigated consent orders. Performance and Accountability Report (PAR) for Fiscal Year 2007, available at <http://www.ftc.gov/opa/2007/11/par.shtm>, at 8-9.

enforcement overall. Such officials also would have the stature and reputations necessary to gain the respect of, and engage effectively with, enforcers around the world.

With such credibility, agency leadership also may have some success in obtaining opportunities to provide valuable input regarding antitrust and consumer protection to economic policymakers in the new Administration. Given our free market economy, antitrust and consumer protection should be recognized as critical parts of any administration's economic policies, and new agency officials should not be shy about contributing to discussions surrounding such policies.

Recommendation 10: The enforcement agencies must continue to receive sufficient funding to perform their missions effectively.

The failure to maintain adequate financial and human resources impedes the agencies' activities on a number of fronts. First, inadequate monetary resources may limit training opportunities for personnel, which in turn may impact case outcomes (particularly with respect to trials, as discussed below). In addition, inadequate funding and staffing may increase the workload on current employees. Either of these occurrences may impact agency morale and thereby decrease the agencies' ability to attract and retain "top level" staff, especially given the pay discrepancy between the agencies and the private sector.

Inadequate capital funding also limits the resources that the agencies can devote to improving technology, which is an emerging and urgent need at both agencies and holds the potential to improve and optimize enforcement (particularly merger review and consumer protection) by increasing staff productivity and decreasing the burdens imposed upon merging parties and other businesses. Finally, inadequate resources constrain the agencies' ability to perform other crucial parts of their missions, including identifying anticompetitive or anti-consumer behavior (important to both antitrust and consumer protection) and engaging with antitrust enforcers in other countries through technical assistance programs and organizations such as ICN and the Organization for Economic Co-Operation and Development ("OECD"). Effective engagement with global enforcers is particularly important to the achievement of greater coordination and ultimately, convergence of competition regimes around the world, which is strongly desired by enforcers and global businesses alike.

Finally, although not directly related to funding levels, both agencies should be especially concerned with the competitiveness of their salaries in order to ensure that they continue to attract and retain the best legal talent. Salaries at both agencies are significantly lower than in the private sector, which can make recruiting for both entry-level (whose student loan burdens may make government employment cost-prohibitive) and experienced lawyers (whose experience in the private sector may make large pay cuts unpalatable) more difficult and can make departures for the private sector more attractive for current staff. To remedy such issues and ensure the attraction and retention of highly-qualified staff, leadership at both agencies should consider all feasible options for reducing the discrepancy between private sector and public sector salaries (consistent with an efficient allocation of government resources). Such options may include loan forgiveness or adopting a program similar to the pay parity and pay-for-performance approaches employed by the Securities and Exchange Commission (the combined effect of which could result in increases of 15-20%). In any event, the agencies' overarching goal should be to retain the number and quality of resources necessary to continue their strong advocacy on behalf of America's consumers.

B. “Best Practices” for Trial Preparation and Trial Readiness

Recommendation 11: The agencies should consider implementing a “best practices” standard to prepare lawyers to try cases and to remain trial-ready through the sharing of information and programs.

Each agency expends substantial effort—particularly given its limited resources—preparing lawyers to try cases and keeping them trial-ready. There are no guarantees in trials, however, and measuring trial capabilities merely in terms of “wins” and “losses” is not necessarily a good indicator of trial readiness. The Section also recognizes that often only the most difficult cases go to trial, while simpler cases often are settled. Trial results should be one of several criteria considered in gauging trial capabilities. Other factors include the quality of programs within the agencies to prepare lawyers to try cases. Nonetheless, both agencies have sustained several high-profile trial defeats in recent years, which is cause for concern. The agencies should address the issue with a greater sense of urgency.

Ironically, the success of the Antitrust Division’s Leniency Program has contributed to its problems with developing trial capabilities. Under that program, the amnesty applicant may provide the Antitrust Division with sufficient evidence to win a conviction against other cartel participants. Consequently, other co-conspirators plead guilty, leaving fewer criminal trials, and those firms and people left to prosecute are those against whom the evidence may be weakest or against whom the Antitrust Division may not ordinarily seek to prosecute as a matter of policy. If the Antitrust Division does not prosecute in those situations, then cartel members might be incited not to admit a criminal violation and instead risk trial. Perhaps not surprisingly, the Antitrust Division has not fared well in these types of trials. If the criminal cases are more difficult to prosecute, then the Antitrust Division needs to be that much better-prepared and capable to try them.

DOJ has several trial programs for its lawyers. For example, early in their tenure in the Antitrust Division, lawyers are sent to the National Advocacy Center in South Carolina for intensive trial training, including mock bench and jury trials aided by sitting Federal Judges and experienced trial lawyers from the Antitrust Division and the United States Attorneys Office. (The National Advocacy Center is available to lawyers from the Antitrust Division, but not the FTC.) Lawyers also are sent to the National Institute of Trial Advocacy where they can try mock cases and receive training. The National Advocacy Center and NITA programs have been in place for a number of years.

Somewhat more recently, the Antitrust Division started an internal program to train incoming lawyers who focus on criminal matters to conduct grand jury proceedings. Under this program, lawyers are schooled in criminal practice and procedure, participate in mock grand jury proceedings with helpful and hostile witnesses, and prepare a case for trial.

In addition to these structured programs, younger lawyers are integrated into trial teams so they can provide research support and observe trials, and meetings are held after lawyers complete a trial so they can brief the rest of the trial lawyers in the Antitrust Division about the trial so everyone can learn from the experience. There have been preparation “courses” for lawyers on the civil side as well. Additionally, lawyers from the Antitrust Division can be rotated for a meaningful period of time to the United States Attorneys Offices in several Districts

in order to gain trial experience.²² There also is increasing and effective use of investigators (e.g., from the FBI) and new technologies, but limited resources for other types of training or applications. The Antitrust Division also conducts Red Team / Blue Team mock trials in which staff conducts both sides of the case.

The FTC also has dedicated programs to train lawyers for trial. The FTC, like the DOJ, sends lawyers to NITA for trial training. It also emphasizes personal training of younger lawyers by more senior lawyers with trial experience. This training includes substantive law and economics and trial skills in a NITA-type setting, along with detailed and candid debriefings of FTC trial lawyers upon the completion of a trial. A goal of the FTC's training program, like that of the Antitrust Division's programs, is to develop younger lawyers to be the lead (or "first chair") lawyer for trial.

Key to training programs, present and future, is the ability of each agency to retain top-caliber lawyers whom each has trained to try cases. To be sure, given the separate mandates of the Antitrust Division and the FTC, there are differences in substantive legal areas that may require agency-specific preparation of trial lawyers. But the mechanics of trying a case to a judge or jury, the basic document and discovery issues, and the skills and judgment that must be applied in effective trial advocacy generally are the same. While trial results usually are constrained by the facts, the human element undoubtedly plays a role in the outcome as well. There is, therefore, a basis to develop "best practices" to be used by both agencies to prepare lawyers to try cases and to keep them trial-ready. These "best practices" can be developed from the collective experiences of the agencies in trying cases, and they can be implemented in unified trial programs subject to the capacity limitations of a given program and budgetary restraints. (See below.) For example, subject to capacity limitations, the Antitrust Division and the FTC should consider discussing the feasibility of FTC lawyers using the National Advocacy Center to train for bench trials. Adopting or strengthening "best practices" for trial may enhance the reputation of both agencies as a place to go for qualified lawyers to obtain excellent trial experience.

C. Continuity of Supervision of Trial Lawyers

Recommendation 12: The Antitrust Division and the FTC should consider designating as "senior trial counsel" a limited number of experienced staff lawyers who would actively supervise trial preparation.

A "best practices" protocol may include maintaining a continuity of experienced lawyers to supervise lawyers in trial training. The Section addresses this subject separately because our research indicates that both DOJ and the FTC have had difficulty at times in maintaining such continuity.

The agencies should examine the extent to which they enable more senior trial lawyers to supervise or participate in trial preparation. The FTC recently has established a dedicated trial group headed by an experienced trial lawyer who left a law firm partnership to reenter public service. This may be more difficult for the Antitrust Division to do because a number of its cases (mostly criminal) are prosecuted by field offices. The agencies' trial teams may benefit

²² The Antitrust Division properly takes care to avoid a United States Attorney's Office "cherry picking" and retaining a Division lawyer who is on a trial rotation there.

from the experience, attention to detail, and judgment of their more experienced trial lawyers. As part of this effort, the agencies may consider designating a group of senior experienced trial lawyers in a higher GS classification. This may provide a helpful incentive to attract or retain experienced trial lawyers for both agencies.

D. Engagement of Outside Trial Counsel and Other Experts

Recommendation 13: In exceptional circumstances and on a case-by-case basis, the agencies should consider the retention of outside antitrust counsel to prepare or try cases.

A recurring issue facing the agencies is whether to hire outside counsel to prepare and to try a case. There are several factors that are considered in doing this, including the impact on the morale of agency lawyers, the separation of public and private interests, and budgetary constraints. The retention of outside counsel on a case is the exception, not the rule. In those instances in which it has occurred, the case results have been generally favorable, although the agencies may pay a price for this success in terms of staff morale.

The agencies are reluctant to hire outside counsel to prepare and to try cases. In those rare instances in which the agencies have done so, the cases appear to be high profile and the stakes quite high. The agencies' preference is to use their own experienced trial lawyers to prepare and to try cases, even if that means moving those lawyers around from one case to another. This requires a delicate balancing of egos, as an agency lawyer may be called upon to join an existing trial team. Also, an agency's decision must take into account the morale problems that may occur if an agency hires an outside lawyer to prepare or to try a case. Trial lawyers at the Antitrust Division and the FTC will never develop into the trial lawyers that the agencies are seeking if outside counsel is retained on a regular basis to try cases, thereby distorting the incentives and long-term capabilities of the agencies' staffs.

Recommendation 14: The agencies should continue to consider in the ordinary course of each case whether any other outside consultants, such as economists, industry consultants, and technical consultants, are needed, and study the feasibility of developing a forensic psychology program for jury focus work in conjunction with a local university.

Besides outside antitrust counsel, the agencies should have the flexibility (and the funding) to hire independent trial experts for substantive subjects and technical trial support. This includes economists and industry consultants, electronic discovery consultants, jury consultants and audio/visual consultants. With regard to jury consultants, the agencies should consider whether any of the universities in the greater District of Columbia area either have, or would be interested and willing to develop, a forensic psychology program which could support agency jury consulting work.

E. Financial Resources

Recommendation 15: The agencies should devote sufficient funding to trial capabilities, and seek additional funding as needed.

It would be ironic if agencies charged with safeguarding competition would themselves have difficulty competing in court because of insufficient financial resources. The new Administration should consider providing the agencies with additional funding, as needed, specifically designed to enhance or maintain trial capabilities. These dollars could be used to

fund senior trial lawyer positions, pay for outside consultants for such needs as jury focus work and jury selection, allow for more efficient electronic discovery, permit enhanced graphics for courtroom presentations, and pay for experts in industries that are the subject of cases.

V. INTERNATIONAL COOPERATION INITIATIVES²³

Over recent years, there has been a rapid growth in the number of jurisdictions around the world with competition and antitrust law regimes. Currently, there are more than 100.²⁴ This growth, combined with the increasing integration of the world economy, makes cooperation between antitrust agencies around the world absolutely essential. At the same time, challenges to the proper functioning of free market economies are mounting, as crises in the financial markets lead to an increasing number of large-scale government interventions in the markets both within the U.S. and abroad. As a result, the institutions at the core of a well-functioning market economy – and those institutions include the antitrust agencies – have an even more crucial role than ever to play in preserving the effective operation of free markets and economies. The importance of international cooperation between antitrust agencies in ensuring the effective and coherent enforcement of antitrust laws around the world has never been greater or more complex to achieve.

A key objective of international cooperation between antitrust agencies is to achieve convergence as far as possible (taking into account differences that might exist in each jurisdiction), in rules and standards of review and remedies in order to facilitate the conduct of business in a global marketplace. Without such cooperation, inconsistent rules, standards, procedures and remedies can serve as an obstacle to business investment, growth, and economic expansion by imposing regulatory burdens that are costly or even impossible to reconcile.

Mergers between companies that are active in several jurisdictions may qualify for investigation by a significant number of antitrust agencies with different notification requirements, standards of review and timetables. Many of these agencies may be in jurisdictions that are not central to the companies' activities or where the companies have only limited contacts. With more than 80 jurisdictions with merger control regimes around the world, many of which prohibit closure of mergers and acquisitions before clearance is received, there is a growing need for convergence and harmonization of procedures, rules and standards of review. This has been recognized by the ICN, which has adopted recommended practices for merger notification and review procedures and is working on convergence on substantive merger review issues.

A *cartel* in one country may significantly harm economies and markets in different continents. This underlines the importance of international cooperation in cartel enforcement. A number of recent high-profile cases have illustrated the importance, and effectiveness, of international cooperation in the detection of cartels and in the taking of enforcement action against companies and individuals that have engaged in cartel activity.

²³ In formulating our recommendations, we have been greatly assisted by comments received from current and former senior agency officials and leading practitioners and academics in Canada, Latin America, Europe and Asia, as well as the United States.

²⁴ See *International Competition Network Website*, at <http://www.internationalcompetitionnetwork.org/index.php/en/members>.

Unilateral conduct is an enforcement area where there is still considerable international divergence, as discussed elsewhere in this Report. It should, however, be possible to obtain significant benefits from increased cooperation and convergence between jurisdictions. The challenge is to agree on a set of minimum substantive rules that work well in all contexts, while taking account of different local legal and economic conditions. More work remains to be done.

Cooperation is also called for in the assessment of other types of *civil non-merger enforcement* in relation to certain horizontal and vertical agreements.

International cooperation may take a number of forms, including a leadership role by the U.S. in international bodies for the development and enforcement of antitrust laws worldwide, transparency in how the U.S. agencies are applying and enforcing their own laws, “soft cooperation” (e.g. cooperative case handling and technical assistance) and bilateral and multilateral cooperation agreements between countries and regions. Cooperation between agencies on individual cases with an international dimension (for example, in synchronizing investigative actions and searches in cartel cases, aligning timetables and agreeing upon remedies in merger²⁵ and unilateral conduct cases) is another valuable way of increasing harmonization.

A. U.S. Involvement in International Competition Bodies

Recommendation 16: The Section recommends continued and increased active involvement by both U.S. agencies in their leadership roles in international bodies (especially the ICN and OECD), with adaptation of those roles as antitrust agencies and regimes around the world evolve and develop, and devotion of agency resources to those bodies’ work in high-priority areas like unilateral conduct, merger review procedure and analysis, and cartels.

The United States has played a significant leadership role, at both senior management and staff levels, in antitrust law enforcement globally. It is challenging to achieve and maintain the desired level of cooperation with over 100 antitrust agencies, or even the 30 or so major agencies whose actions may significantly impact the U.S. regime. International bodies such as the ICN and OECD provide an opportunity for antitrust policy makers from jurisdictions around the world to meet and exchange experience and views. The ICN has become a key vehicle for international cooperation and convergence because of its universal scope, focus on practical tools and recommendations, and collaboration with the private sector. The OECD’s Competition Committee is a valuable forum to promote understanding, cooperation, and analytical convergence among economically advanced countries. UNCTAD is an important venue to address issues faced by developing countries with young agencies, and APEC’s competition group is of growing importance in reinforcing sound antitrust policy and enforcement in Asia.

Active involvement of the U.S. agencies in these bodies is a key element in building a consensus among members on important issues and the formulation of common standards and recommended practices. The Section commends the U.S. agencies for the significant role they have played, particularly in the ICN and OECD. The leadership of, and close cooperation

²⁵ See the 2002 U.S./EU Best Practices on Cooperation in Merger Investigations, available at <http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm>.

between, the U.S. agencies, European Commission, and other major competition authorities has been instrumental in allowing the ICN to achieve so much in so little time since it began in 2001.

The agencies should provide sensitive leadership, judging when to push for change and when to “take the foot off the gas” and recognizing that as antitrust agencies and regimes around the world evolve and develop, leadership and learning will increasingly become a two-way street. Furthermore, maintaining and extending good personal relationships, at all levels, across the member agencies is widely recognized as the best way of facilitating the work of the ICN, OECD and similar organizations.

The agencies should also devote resources to areas of high priority, including the ICN’s work on unilateral conduct, merger review procedure and analysis, and cartels, and the OECD Competition Committee’s substantive “roundtables” and peer reviews. Such support will help shape and implement the ICN and OECD agendas as they expand their work from procedural convergence to more substantive areas.

Recommendation 17: The agencies should continue to encourage all members of the ICN to implement recommendations on “best practice” substantive and procedural approaches, and to continue to improve their institutional infrastructures in a way that supports the implementation of competition laws and adequate due process.

The U.S. agencies should build on their track record by continuing to lead on the implementation of recommended practices and standards to improve the harmonization of antitrust enforcement globally. For example, while more than half the members have introduced changes to their merger review regimes to reflect ICN recommendations, there is scope for the U.S. agencies to stimulate greater implementation. The agencies could seek to ensure that all members implement the ICN recommendations that jurisdiction is asserted only over transactions that have an appropriate nexus, that notification thresholds are clear and understandable and that merger reviews are completed within a reasonable timeframe.

The U.S. agencies also should advocate to developing competition authorities the need for institutions in their jurisdictions that preserve the rule of law and due process, and help prevent corruption, such as an effective, honest, and independent judiciary. Such institutions provide a foundation for a well-functioning, credible competition regime, particularly one that includes criminal penalties. Because antitrust involves sometimes amorphous standards and large sums of money, there is a significant risk that corruption will taint enforcement, particularly in jurisdictions that struggle with corruption in other contexts. The U.S. agencies should take particular care so as not to encourage a jurisdiction in which basic due process is unavailable or uncertain to adopt or expand its competition laws, especially with respect to criminal penalties.

Recommendation 18: The agencies should encourage ICN members, where appropriate, to develop agreements incorporating the principle of comity whereby one or more agencies could defer to another in resolving a case.

Allocating responsibility based on relative degree of interest (“center of gravity”) is appealing for reasons of both efficiency and effectiveness of enforcement. For example in a merger, the deferring agencies would accept the remedies imposed by the acting agency. However, given the difficulties in determining which jurisdiction should lead – and which should

concede authority – the Section believes that comity arrangements, and/or arrangements similar to those in operation in the EU under the EC Merger Regulation²⁶ and the European Competition Network²⁷ in relation to mergers and non-merger conduct respectively, are most likely to work effectively between well established antitrust agencies. The AMC²⁸ recommended that the U.S. should pursue cooperation agreements incorporating comity with more of its trading partners.

Recommendation 19: The agencies should consider whether efforts to increase formal coordination among senior economists within the various antitrust agencies around the world would be an appropriate way to encourage economic convergence. The agencies should also consider whether technical assistance programs should include a greater focus on economics.

Antitrust agencies around the world (particularly in the more developed regimes) are increasingly using more economics, effects-based analyses in their investigations and decision-making. This has involved both the role that professional economists play within the agencies becoming more important and influential and the agencies seeking to recruit highly-regarded economists to senior policy-making positions within their organizations. The Section welcomes these developments as they assist in improving the robustness and consistency of agency decision-making. In the Section’s views suggests these advantages would have even greater effect in international enforcement, and improve convergence and consistency in decision-making, if there was formal coordination among senior economists from the different agencies on technical approaches towards, and practical application of, economic theory. Additionally, the Section recommends that technical assistance to agencies internationally should include more training on economic theory and practice in antitrust enforcement.

B. Transparency and International Leadership

Recommendation 20: The agencies should increase transparency through more press releases, guidelines, speeches and closing statements, particularly regarding mergers and unilateral conduct, which will help maintain the U.S. agencies’ international leadership.

The U.S. agencies have the challenge of balancing their leadership role with a relative lack of published information on U.S. agency enforcement precedents. Overseas agencies and international organizations play close attention to decisions and jurisprudence of the more established regimes, such as the U.S. and EU. However, there are clear differences in the type and volume of information that is published by the antitrust agencies in an administrative

²⁶ Under the EC Merger Regulation (Council Regulation 139/2004/EC), the European Commission has exclusive jurisdiction to assess the competition aspects of transactions between parties with sufficient turnover in the EU to satisfy the thresholds (unless those parties’ activities are significantly contained within one and the same Member State). However, the rules also allow some degree of flexibility where national authorities or parties consider that the Commission is better placed (or suited) to review a transaction falling below the thresholds or where a national authority is better placed to review a transaction falling within the Commission’s jurisdiction.

²⁷ The European Competition Network (“ECN”) was established as a forum for discussion and cooperation of European antitrust agencies in cases where Articles 81 and 82 of the EC Treaty are applied (see http://ec.europa.eu/comm/competition/ecn/index_en.html). It aims to ensure an efficient division of work between agencies according to a “well placed” agency principle and an effective and consistent application of EC antitrust rules, through sharing of information on new cases and proposed decisions, coordinating investigations, helping each other with investigations and exchanging evidence and other information.

²⁸ AMC REPORT, *supra* note 8, at recommendation 41.

enforcement regime (such as the EU) and a more court-based regime (such as the U.S.). Release of case-related information in the U.S. is limited partly because many cases are pursued by private actions rather than by the agencies and also because, traditionally, the agencies have published far less on most individual cases than is typical in the growing number of regimes with administrative agencies.

Whatever the reasons, any relative lack of transparency risks inviting the perception that U.S. enforcement may at times be inconsistent or unpredictable²⁹ in mergers and unilateral conduct, but clearly not in cartel enforcement. A perceived paucity of up-to-date U.S. guidelines, notices, regulations, and reasoned decisions compared with administrative based jurisdictions also means that it may be easier for newer agencies to draw on agency precedents from regimes such as the EU rather than the more court based U.S. system.

The Section recognizes the importance of the agencies' guidelines that have already been issued and also the confidentiality issues that are obstacles to more publications. However, to ensure continued recognition of the U.S. in its original leadership (or first mover) role of antitrust jurisprudence and practice, the agencies should provide greater transparency through the publication of clear, consistent, well-reasoned precedents and/or guidelines across all areas of U.S. enforcement.³⁰ This would help to demonstrate that the agencies are continuing actively to enforce antitrust at home.

Such additional material should help increase the influence of U.S. analysis in other jurisdictions and enable the agencies to refute more effectively criticisms over the level of their intervention and the thoroughness of their reviews. For example, publishing detailed closing statements in all, or at least more, significant cases where the agencies decide not to intervene or to challenge a merger would be welcomed by other agencies and practitioners and is in line with ICN Recommended Practices.³¹ So far, closing statements have been issued only selectively and some have been relatively brief.

Recommendation 21: The agencies should devote further resources to dialogue with other jurisdictions over legal tests for unilateral conduct.

The Section recommends that the agencies develop and publish guidance articulating a single clear set of standards for enforcement in the areas of unilateral conduct, or at least clear statements setting forth the standards to be applied by each agency. This material should explain that the differences in the extent of antitrust intervention between jurisdictions may reflect, *inter*

²⁹ See *supra* Part III.B.

³⁰ See, e.g., Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, Competition Enforcement in an Innovative Economy, Address at the 4th Annual Competition Policy Conference, *The Role of Competition and Liberalization in Furthering Competitiveness*, June 20, 2008 ("Transparency helps firms to confirm their conduct and can reduce unintended harm to competition created by uncertainty"), available at <http://www.usdoj.gov/atr/public/speeches/234246.htm>.

³¹ ICN Mergers Group: Recommended Practices for Merger Notification Procedures: VIII Transparency: "A reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice."

alia, differences in the vibrancy of their markets, the level of competition facing previously state-owned monopolies and the extent of state intervention aimed at liberalizing such industries.³²

The recent report issued by DOJ on “Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act,” and the subsequent public criticism of the analysis from the FTC, have highlighted the risks of inconsistent enforcement inherent in the dual-agency regime in the United States. The U.S. agencies will face increasing difficulties in providing effective and coherent leadership internationally if such internal conflicts continue.

Recommendation 22: The agencies should consider providing translations of some key guidelines or statements to assist the work of the developing competition jurisdictions.

Given the difficulty of reading lengthy and technical decisions in a foreign language, the translation of certain key statements and guidelines would assist in the understanding and application of U.S. antitrust principles by other regimes.

C. International “Soft” Cooperation

Recommendation 23: The agencies should seek to coordinate internationally and expand upon the United States’ role in “soft” cooperation (e.g., policy formulation, advice, case handling and judicial training) to maximize the impact of such assistance on global harmonization and avoid duplication among agencies.

The United States has played an important role in assisting in the formulation and application of procedural and substantive rules in developing antitrust jurisdictions. Given the increasing number of developing antitrust regimes and antitrust agencies seeking to influence those developments, however, we suggest that the U.S. agencies should not only continue and expand on this work, but also provide leadership by seeking to coordinate technical assistance among the nations that provide it. The need for resources for “soft” cooperation is greater than ever and so is the need for ensuring that they are deployed as effectively and efficiently as possible.

In the less-developed or emerging antitrust regimes, technical assistance in the formulation and application of antitrust law plays a key role in achieving convergence in both procedures and standards of review. The demand for this assistance has grown substantially over recent years. There has also been a growth in the number of developed national agencies and international bodies providing such assistance. Hence, there is a real risk of increasing overlaps between providers. This risk is increased by the fact that there is competition between agencies to present their models as the best ones. In order to maximize their influence, the U.S. agencies should seek to coordinate with other agencies and bodies providing assistance, taking a leading role where this is beneficial. The U.S. agencies are, rightly, regarded as having done an excellent job in providing technical assistance to new antitrust agencies. In particular, the success of international coordination in cartel enforcement is well recognized (with some notable cases in the last year), where DOJ is, rightly, regarded as the leading agency in the world. The U.S. agencies should consider whether more regional approaches would be one effective way of

³² The different challenges facing the U.S. and EU agencies, for example, were highlighted by Neelie Kroes (European Commissioner for Competition) at the Am. Bar Ass’n Section of Antitrust Law Spring Meeting, March 28 2008: roundtable conference with enforcement officials, available at <http://www.abanet.org/antitrust/at-source/08/04/Apr08-EnforceRT4=25f.pdf>.

coordinating technical assistance with other providers. Another way could be to work through an international body, such as the ICN and/or OECD.

Technical assistance should cover both procedural as well as substantive alignment. The former could cover coordinating the timing and publicity surrounding investigations, improved co-ordination of information requests and agency disclosure policies. Cooperation between agencies on individual cases with an international dimension (for example, in synchronizing investigative actions and searches in cartel cases, aligning timetables and agreeing remedies in merger³³ and unilateral conduct cases) is another way of increasing harmonization.

Recommendation 24: Technical assistance should cover government-related restrictions on competition, as well as mergers, cartels and other anticompetitive agreements, and unilateral conduct.

Government-related restrictions on competition can result in significant distortions of competitive conditions in the markets affected. Agencies can make valuable contributions through advocacy activities, advice and screening of existing or proposed legislation.

It is in the field of unilateral conduct that there is greatest scope to increase consistency and convergence, but this will not be easy. Inconsistent analysis of cross-border conduct imposes costs by raising uncertainty. It can also cause multinational firms to reduce their competitive vigor to ensure that they comply with the most restrictive jurisdiction's rules. The different market conditions in some jurisdictions may argue for different approaches to intervention, however.

Recommendation 25: The U.S. agencies should develop staff exchanges internationally with other authorities. These can be a particularly effective form of technical assistance (and have been fairly extensively used between European antitrust agencies).

The Section commends the FTC's efforts in this area and recognizes the legal limitations on DOJ to adopt similar practices. Long-term, resident advisors develop relationships with officials by working on cases and issues over time and are "on the spot" to help when difficult issues arise. Short term missions to provide assistance on discrete projects are also useful. Judicial training has also been valuable, as has technical training such as efforts to import U.S. learning on the fundamental economics of antitrust.³⁴ The U.S. agencies should continue to devote sufficient resources to these valued forms of assistance.

D. Bilateral and Multilateral Agreements

Recommendation 26: The agencies should consider whether more bilateral and multilateral agreements should be negotiated with both the established and developing antitrust law jurisdictions.

Bilateral and multilateral agreements play a key role in facilitating cooperation between countries and sending the right signals about the importance of international cooperation in

³³ See the 2002 U.S./EU Best Practices on Cooperation in Merger Investigations, *supra* note 25.

³⁴ See also Recommendation 19, *supra*.

achieving effective and consistent antitrust enforcement. The U.S. currently has antitrust cooperation agreements with eight other countries/jurisdictions.³⁵ With the rapid development of certain major economies and the proliferation of antitrust laws across the globe, we recommend that the U.S. agencies should carefully consider whether to expand the number of U.S. cooperation agreements, with particular focus on certain key jurisdictions, so as to include major trading partners of the U.S. with well-established antitrust agencies. Consideration should also be given to whether such agreements should be negotiated with China and India as the two major countries with new antitrust agencies and regimes. However, it may be premature to develop such agreements when the agencies and regimes are so new and “soft” cooperation may be more appropriate for the time being.

The U.S. agencies should also advocate that antitrust-specific issues be considered and addressed in treaties on extradition, on cooperation in criminal matters, and in mutual legal assistance treaties generally.

While it is clear that informal arrangements can and do work well, experience has shown that formal agreements can provide for a better structured and therefore more effective dialogue. Agreements provide a useful legal framework that explicitly authorize cooperation and coordination between agencies. They can also be a catalyst, encouraging greater contact and cooperation than would have existed without an agreement.

However, a formal agreement is not a pre-requisite to cooperation. While formal arrangements are more effective in creating a framework for cooperation, in practice, agencies are able to cooperate informally and, for example, share information on cases by obtaining confidentiality waivers from the parties. In addition, the negotiation and implementation of bilateral agreements brings some administrative costs, and the proliferation of such agreements could make advances towards multilateral cooperation more complicated. Further formal bilateral agreements therefore need to be carefully chosen.

The essential elements for any such agreements would include coordination of enforcement activities (particularly important in international cartel and merger cases) and exchange of information (subject to confidentiality restrictions) to synchronize investigative actions and searches in cartel enforcement and, as far as possible, merger review timetables (in order to share learning on substantive analyses and attempt to avoid misunderstandings and surprises).

The sharing of experience and policy discussions is also important in achieving greater convergence between competition regimes around the world. Such sharing enables those involved to understand each other’s views better and to learn from each other. However, such cooperation may be better suited to a multilateral cooperation framework facilitated by an international body, such as the ICN and/or OECD.

³⁵ The jurisdictions are: Australia (1982, 1999); Brazil (1999); Canada (1995, 2004); Germany (1976); EU (1991, 1998, 2002); Israel (1999); Japan (1999); and Mexico (2000).

VI. CRIMINAL ENFORCEMENT, PENALTIES, AND LENIENCY

The detection, prosecution, and deterrence of cartel offenses has been, and continues to be, the highest priority of the Antitrust Division.³⁶ The Antitrust Division's prosecution of hard-core cartels over the years has achieved real success. Its use of methods such as "covert taping, informants, search warrants, and foreign assistance request[s]" no doubt contributed to this success.³⁷ Also, the Antitrust Division's revised Corporate Leniency Policy has made self-reporting both easier and more attractive to would-be amnesty applicants.³⁸ The Antitrust Division's success in this area has spurred "dozens of countries on six continents [to] ... announce[] new or revised leniency programs, with still other countries in the process of following."³⁹

The most recent enforcement statistics reinforce this point. In 2007, the Antitrust Division imposed more than double the amount of jail sentences than it did in 2005 -- just two years prior (compare 31,391 jail days in 2007 with 13,157 jail days in 2005).⁴⁰ The Antitrust Division also obtained more than \$630 million in criminal fines last year -- the second highest amount of total antitrust criminal fines that it has ever obtained in a single year.⁴¹

A. International Coordination and Cooperation in Cartel Enforcement

Today, almost all of the 100+ antitrust enforcement regimes worldwide have laws prohibiting cartels -- with a small but growing number of these laws containing criminal penalties for cartel conduct.⁴² Two jurisdictions that have relatively recently criminalized their antitrust laws include the U.K. in 2003, and Australia, which is expected to have criminal antitrust laws in place by the end of this year.⁴³

The ever-increasing number of enforcers, however, gives rise to the possibility that businesses operating in multiple jurisdictions will be subject to conflicting and/or differing outcomes. Thus, increased cooperation among antitrust regimes — whether it occurs through

³⁶ See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, Am. Bar Ass'n Antitrust Spring Meeting, at 1 (Mar. 26, 2008).

³⁷ *Id.* at 9.

³⁸ *Id.* at 13.

³⁹ *Id.* at 16.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 1-2.

⁴² Countries that provide for such criminal sanctions include the United Kingdom, Canada, Japan, Ireland, France, Norway, Austria, Germany, Korea, and the Slovak Republic. See Scott D. Hammond, *From Hollywood to Hong Kong -- Criminal Antitrust Enforcement is Coming to a City Near You*, Chicago, Illinois, at 7 (Nov. 9, 2001).

⁴³ See Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, *Criminal Enforcement of Antitrust Laws: The U.S. Model*, Annual Conference on Int'l Antitrust Law and Policy, New York, N.Y., at 11 (Sept. 14, 2006); *From Hollywood to Hong Kong*, at 6; Graeme Samuel, Chairman of the Australia Competition & Consumer Commission, *Delivering for Australian Consumers: Making a Good Act Better*, at 6 (June 25, 2008) (stating that Australia's criminal antitrust sanctions are expected to be in force by the end of 2008).

increased dialogue at the level of international organizations, or through the increased use of bilateral agreements — plays an important role in today’s antitrust enforcement environment.

B. Increased Cooperation Through Bilateral Agreements

Recommendation 27: The Antitrust Division should be encouraged to continue to exchange information in pending investigations with other antitrust regimes where possible.

The use of bilateral agreements also has improved coordination and cooperation among antitrust regimes worldwide. Agreements such as the Mutual Legal Assistance Treaties (“MLATs”) and Antitrust Mutual Assistance Agreements (“AMAAs”) have facilitated the exchange of information and assistance in global antitrust enforcement. MLATs, in particular, are routinely used to coordinate the sharing of information in criminal antitrust cases between various international agencies. In 1994, Congress enacted the International Antitrust Enforcement Assistance Act (“IAEEA”) to allow the United States to enter into AMAAs, which permit U.S. antitrust agencies to share *confidential* information in both civil and criminal antitrust enforcement with foreign antitrust enforcers, subject to certain safeguards. 15 U.S.C. §§ 6201-6212.

The Antitrust Division should continue to exchange information regarding pending investigations and cooperate with foreign enforcement agencies on a case-by-case basis to the extent feasible and consistent with applicable law (grand jury secrecy, treaties, etc.). To encourage amnesty applications, however, the Antitrust Division should continue its present policy of sharing information received from amnesty applicants with foreign enforcement agencies only upon consent of the amnesty applicant.⁴⁴

C. Review of the Antitrust Division’s Policy of Making the Public Names of Individual Employees who the Division “Carves Out” from Corporate Plea Agreements

Recommendation 28: The new Administration should review the Antitrust Division’s policy of insisting upon the public naming of “carve outs” at the time of entering into a corporate plea agreement.

The Antitrust Division permits corporate defendants in criminal antitrust investigations to enter into plea agreements. Unlike amnesty applicants (discussed above), corporate defendants that enter into plea agreements with the Antitrust Division still must pay a criminal fine, are not insulated against treble damages in any follow-on civil suits, and may or may not be able to obtain the Division’s non-prosecution commitments covering all of its employees under the Agreement. Nevertheless, there are substantial incentives for corporations to settle with the Division -- even when the corporation cannot be the first-in and thus cannot qualify for full amnesty.⁴⁵

⁴⁴ See Part V, *supra*.

⁴⁵ See generally Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division U.S. Department of Justice, Address at the 54th Annual Am. Bar Ass’n Section of Antitrust Law Spring Meeting: Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations (Mar. 29, 2006) (discussing the various incentives that are in place for Second-In, Third-In and other criminal antitrust defendants).

While many corporations that enter into plea agreements with the Antitrust Division do obtain non-prosecution protection for all of their employees, there often are times when the Division will not agree to allow certain employees to be covered by the Agreement. These employees are thus “carved-out” of their employers’ plea agreements, and can be individually prosecuted by the Antitrust Division at a later date. The identities of carve outs from corporate antitrust plea agreements are made public,⁴⁶ whether they are ever indicted or not, and the Antitrust Division will not entertain requests for case-by-case exceptions to this policy.⁴⁷

Publicly disclosing the identity of carved-out individuals can have a deleterious effect on those individual’s social and professional reputations. Such damage to their reputations can be irreversible -- particularly when the Antitrust Division never indicts and the carve outs are left without a forum (such as a trial) in which they can attempt to publicly clear their names.

The Section recognizes the value of transparency in plea negotiations, and commends the Division for its commitment to public transparency. The Section urges the new Administration to review the Antitrust Division’s policy for naming “carve outs” at the time of entering into a corporate plea agreement.

VII. RETROSPECTIVE ANALYSES OF AGENCY CIVIL ENFORCEMENT EFFORTS

A. Agency Self-Assessments

Recommendation 29: Both agencies should engage in formal self-assessments that address the key areas of their civil enforcement missions:⁴⁸

- a. Merger Enforcement
- b. Non-Merger Civil Enforcement
- c. Competition Advocacy
- d. “Part III” Administrative Litigation (FTC)
- e. Consumer Protection (FTC)

⁴⁶ Scott D. Hammond, *The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All*, OECD Competition Committee, Paris, France, at 2 (Oct. 17, 2006) (stating that “the Division negotiates, signs, and publicly files plea agreements throughout the course of its investigations”).

⁴⁷ The Antitrust Division maintains that carve outs are not necessarily stigmatized as wrongdoers because a person may be carved out for reasons *other* than an ongoing grand jury investigation. *See Doe v. Hammond*, Memorandum Opinion, No. 07-1496 (JDB) at 7-8 (Aug. 22, 2007). The Antitrust Division also believes that public disclosure of the identity of carve outs increases transparency and overall public confidence in the plea agreement process. *Model of Negotiated Plea Agreements*, at 3.

⁴⁸ Criminal enforcement at DOJ is widely regarded as very effective, but a retrospective analysis of DOJ’s performance in cartel investigations could still be helpful. Moreover, it would be much easier to find consensus on such an analysis than in other areas of antitrust law, such as monopolization cases, where there is less agreement among antitrust experts on the criteria by which enforcement actions should be judged.

Earlier this year, FTC Chairman Kovacic announced that the Commission would undertake a comprehensive self-assessment to consider two fundamental questions: (1) how well the agency has performed compared to the objectives its creators envisioned a century ago; and (2) what the agency should do to meet the demands of protecting competition and consumers in the markets of today.⁴⁹ The Assistant Attorney General for Antitrust has also this year given an account of the Antitrust Division's merger enforcement and a retrospective on one of the major decisions of his tenure.⁵⁰

The history of antitrust abounds with assessments of the enforcement agencies. Among the contributors to the tradition are the Section, academics, interest groups, practitioners, and the agencies themselves. Both the FTC and the DOJ have regularly published reports and assessments of their performance,⁵¹ while the private sector has contributed an impressive volume of reviews and critiques of the agencies' activity. The dialogue among the agencies and their constituents is often entertaining, but not as enlightening as it would be if the agencies fully engaged themselves in the discussion and increased the quantity and quality of information bearing on their performance.⁵²

The agencies should be commended for their continuing contributions to the record on their performance, and the FTC deserves special recognition for launching a formal review. Informed judgments regarding the options available to a new Administration depend on a reliable body of data and analysis regarding the recent records of both FTC and DOJ.

B. Merger Enforcement Activity

Recommendation 30: The agencies should select a sample of prior merger decisions and assess whether subsequent developments in the markets involved justified the decisions.

Considerable debate has surrounded relatively simple questions, such as how many cases have been brought by different administrations at FTC and DOJ.⁵³ Do variations in the number of investigations, second requests, challenges and litigation outcomes offer any insight into the enforcement policies of the agencies over the years and through administrations? If the data

⁴⁹ William E. Kovacic, Chairman, Fed. Trade Comm'n, Presentation Before the 21st Annual Western Conference of the Rutgers University Center for Research in Regulated Industries: The Federal Trade Commission at 100: Into Our Second Century (June 18, 2008), available at <http://www.ftc.gov/speeches/kovacic/080618ftcat100.pdf>.

⁵⁰ Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, Lewis Bernstein Memorial Lecture: Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives (June 26, 2008) (discussing the Whirlpool/ Maytag merger), available at <http://www.usdoj.gov/atr/public/speeches/234537.pdf>.

⁵¹ The Section found helpful the FTC's Performance and Accountability Report (PAR) for Fiscal Year 2007, available at <http://www.ftc.gov/opa/2007/11/par.shtm>.

⁵² See Dennis Carlton, then-Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, The Need to Measure the Effect of Merger Policy and How to Do It, Dec. 2007, available at <http://www.usdoj.gov/atr/public/eag/228687.pdf>.

⁵³ See, e.g., Fenton, et al., *supra* note 4; Baker & Shapiro, Detecting and Reversing the Decline in Horizontal Merger Enforcement, *id.* at 29, available at <http://faculty.haas.berkeley.edu/shapiro/detecting.pdf>; see also Muris, Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between the Agencies, 22 ANTITRUST 37 (2008).

reveal disparities or trends, then more complex questions arise as to the explanation of the trends. But the question of whether disparities or trends exist should not be difficult to resolve. Accordingly, we recommend that the agencies assess the frequency of merger enforcement decisions, in light of the variables that can be expected to affect those decisions (such as sector overlaps), and release sufficient data for review of the assessments.

Basic data are crude proxies for agency activity. Most practitioners and policymakers would agree that enforcement is an intensely fact-driven process, the benefits of which are extremely difficult to assess. A key means of increasing confidence in enforcement decisions is to evaluate past efforts – including in the merger area, deals that were blocked, deals that were approved with significant conditions, and deals that were approved without conditions – to determine whether the decision accomplished the intended effect and enhanced consumer welfare.⁵⁴ The Section commends the Antitrust Division for its recent transparency regarding the Maytag/Whirlpool transaction.⁵⁵

The sample should include decisions to intervene as well as decisions to decline enforcement. And in view of the FTC's recent challenges of consummated transactions, and the unique circumstances presented by such cases, the costs and benefits of these challenges should be assessed separately.

C. Civil Non-Merger Enforcement

Recommendation 31: The agencies should develop metrics to assess the value of recent civil non-merger cases, as well as the potential cases in areas where resources are currently devoted to investigations.

Enforcement priorities, primarily revealed through case selection, establish the foundation of effective antitrust policy. Whether the agencies are selecting the right cases continues to provoke debate, even within the FTC itself.⁵⁶ As in the merger review context, a key means of increasing confidence in the agencies' non-merger civil enforcement efforts is to conduct a rigorous empirical analysis of whether these efforts are enhancing consumer welfare. Such an assessment would focus first and foremost on whether the agencies' efforts are saving consumers money, but also take into account such benefits as enhanced innovation and increased consumer choice. The Section commends the FTC for reporting data on these areas.⁵⁷

The Section suggests that each agency assess its success rate in civil non-merger challenges and consider whether any adjustments are needed with respect to the criteria for case selection or the manner of investigating or litigating such cases.

⁵⁴ See, e.g., Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

⁵⁵ Barnett, Current Issues in Merger Enforcement, *supra* note 4.

⁵⁶ See, e.g., *In re Negotiated Data Solutions LLC*, File No. 0510094 (Jan. 23, 2008).

⁵⁷ See Fed. Trade Comm'n, Performance and Accountability Report (2007), available at <http://www.ftc.gov/opp/gpra/2007parreport.pdf>.

D. Competition Advocacy

Recommendation 32: Each agency should assess whether it is devoting appropriate resources to advocacy.

Advocating competition policy (and, in the FTC’s case, consumer protection policy) is an important aspect of both agencies’ missions. In its 1989 Transition report, the Section noted, “Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission’s entire budget.” Timely interventions can often persuade governmental decision-makers to re-consider or modify proposed regulatory actions that would otherwise result in substantial consumer harm. Indeed, due to the operation of certain antitrust exemptions—most notably, the state action doctrine and the federal doctrine of implied repeals—advocacy may be the *only* means of challenging most governmental restraints of trade.

In 2005, the Chairman of the FTC described the benefits of the Commission’s advocacy as substantial, but she could not measure them.⁵⁸ Between 1980 and 2005, the FTC filed over 750 interventions.⁵⁹ The same year, the Assistant Attorney General described some of DOJ’s more significant interventions and observed, “The key to injecting competition values into political decision making is effective competition advocacy.”⁶⁰ The Section agrees, and recommends that the agencies’ self assessments include the costs and benefits of advocacy efforts, determine whether adequate resources have been devoted to them, and assess areas where advocacy can benefit competitive markets and consumers.

E. FTC “Part 3” Administrative Litigation

Recommendation 33: The FTC should continue to assess and address challenges with Part III litigation, but revise its recent proposed rule revisions, which have fundamental flaws.

The FTC recently made a commitment to employ more effectively its unique adjudicative procedures. The process was intended to provide access to Administrative Law Judges (“ALJs”) with substantial antitrust expertise, as well as a forum for the rapid resolution of complex competition matters. Currently, neither expectation is being met. Some matters have languished in Part III for years (and have even been pending before the Commissioners for more than a year), and some decisions emerging from the process have faced criticism on appeal—in cases such as *Schering-Plough* and *Rambus*—suggesting that some federal courts of appeal share defendants’ concerns. For example, the FTC issued its complaint in *Rambus* in June 2002 and its final decision in February 2007. The D.C. Circuit reversed the decision in April 2008, and

⁵⁸ Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, Keynote Address, Current Topics in Antitrust Economics and Competition Policy, A Dose of our Own Medicine: Applying a Cost/Benefit Analysis to the FTC’s Advocacy Program, (Feb. 8, 2005), available at <http://www.ftc.gov/speeches/majoras/050208currebtopics.pdf>.

⁵⁹ *Id.*

⁶⁰ R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks to the 12th International Conference on Competition: Competition and Politics (June 6, 2005), available at <http://www.usdoj.gov/atr/public/speeches/210522.pdf>.

denied the FTC's petition for rehearing in August, six and a half years after the litigation commenced.⁶¹

Administrative litigation also has come under increasing criticism from both FTC personnel and respondents. Respondents and commentators often have raised the sensitivity of the dual roles the Commissioners play as both prosecutors and appellate judges. The Commission recently added a new dimension to this issue by appointing a Commissioner to sit as an administrative law judge in multiple proceedings that the FTC had initiated. Proceedings ended before a challenge to the appointment was tested, but the issue remains an important one.

Questions remain regarding the relative efficacy of merger challenges under Section 13(b), pursuant to which the FTC takes merger challenges from the federal courts for preliminary relief to adjudication for trial and appeal, and whether the FTC can resolve such cases quickly enough that litigation is a meaningful option.

The FTC has been trying to address concerns about the speed and quality of its administrative proceedings, although its proposed action thus far raises problematic issues of its own. On September 25, 2008, the FTC issued a Notice of Proposed Rulemaking ("NPRM") seeking public comment on proposed rule revisions that would amend Parts 3 and 4 of the agency's Rules of Practice to expedite its adjudicative proceedings. The agency's goal was to improve the quality of its adjudicative decision-making and clarify the respective roles of the Administrative Law Judge ("ALJ") and the Commission in Part 3 proceedings.⁶² The amendments would change both the timing and the procedures for Part 3 litigation. On the procedural side, the NPRM would give the Commission the authority to decide in the first instance all dispositive pre-hearing motions, including motions for summary decision, unless the Commission in its discretion chooses to refer the motion to the ALJ. The amendments also would expressly provide authority for the Commission or an individual Commissioner to preside over discovery and other pre-hearing proceedings before the matter is transferred to the ALJ.

On timing, the evidentiary hearing would be held five months from the date of the complaint in merger cases and eight months from the complaint in non-merger cases, unless the Commission decides a different date would be appropriate. Respondents would be required to file answers to the complaint within 14 days of service (instead of the current 20 days), and new deadlines would be imposed on pre-hearing procedures, such as the initial meet and confer and the scheduling conference. The amendments would allow the ALJ or the Commission to shorten any time periods set in the rules, as long as the change "would not unfairly prejudice any party." The new rules would also eliminate the unilateral authority of the ALJ to extend the one-year deadline for filing the initial decision, requiring instead Commission approval for extensions (and then only for "extraordinary circumstances").

In general, the Section appreciates the FTC's desire to expedite its adjudicative process, which the Commission admits has been criticized as "too protracted." However, even if the Commission has the statutory authority to make the proposed changes, it should consider

⁶¹ *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

⁶² In a Part 3 proceeding, the FTC's action is tried before an ALJ, who then issues an initial decision and order in the matter. The Commission then issues its decision and order, which can be appealed to a U.S. Court of Appeals (and subsequently the U.S. Supreme Court) by the respondents.

whether the NPRM is prudent and wise because the Section considers the FTC's proposed approach to fixing this problem flawed in several material respects.⁶³

Unfortunately, virtually all of the time compression seems to come at the expense of the respondents. For example, FTC staff will still have up to a year to investigate and draft a complaint in non-merger investigations (and typically investigate mergers for 6-12 months), but the respondents will have significantly less time to mount a defense once the complaint is filed. Notably, the NPRM imposes no deadlines for decisions by the Commission, which often has been the source of substantial delays.

Moreover, the proposed procedural changes will put the Commission in awkward situations that could raise the appearance of a conflict of interest. For example, if a respondent files a motion to dismiss before the evidentiary hearing, the Commission will have to rule on that motion – just shortly after the Commission itself voted out the complaint that the respondent claims does not state a valid cause of action. Similarly, the Commission may find itself sitting in judgment over the decisions of an individual Commissioner (or the entire Commission) on a discovery issue, as well as on dispositive motions or final decisions.

While five months to the start of trial for a merger case may be faster than such cases have been considered in the past, it is nonetheless a very long time in which to prevent a proposed merger from closing—especially because the merger investigation probably already consumed 6-12 months and the administrative trial presumably follows entry of a preliminary injunction in federal court, which itself involved several months of delay and pretrial proceedings. A typical Antitrust Division preliminary injunction hearing is typically resolved in federal court in far less time, leaving the status of the transaction in jeopardy for a shorter time period.

The effect of these proposed rule changes would be to undermine the legitimacy of the FTC's decision making process and possibly the FTC's prospects for success on appeal. In short, the FTC's impulse to expedite its proceedings is commendable, but the agency needs to rework the NPRM to streamline the adjudicative process without unnecessarily disadvantaging respondents or undercutting the legitimacy of the Commission's decisions.

F. Consumer Protection

Recommendation 34: The FTC should assess whether its consumer protection-based rulemaking and enforcement are in proper balance.

The FTC's consumer protection mission—which exceeds its competition mission in resources, activity, and public attention—has evolved substantially over the past eight years. Rulemaking, mostly at the direction of Congress, has reached a level perhaps unseen since the 1970s, and has added the FTC's voice to some of the major policy debates of the decade. Major enforcement initiatives have ensued – for example, cases enforcing Do-Not-Call, CAN-SPAM, and other privacy-related rules. Rules also are under development in other controversial areas, including energy pricing and lending practices.

⁶³ The Section has established a task force to provide detailed comments on the NPRM.

The Bureau of Consumer Protection (“BCP”) is assuming a major role sorting out the turmoil in credit markets. BCP has conducted policy reviews in several topical issues—such as obesity, environmental claims, emerging technologies and behavioral economics—perhaps presaging significant changes in policy or enforcement. Moreover, BCP authority is poised for substantial strengthening and extending as Congress ponders increasing the FTC’s civil penalty authority, removing long-standing exemptions and streamlining rulemaking procedures.⁶⁴ Exploring and explaining the acts and practices that could fall within the broad proscriptions of Section 5 would be even more important if it is expanded in areas heretofore exempt.

The Section commends the FTC for adapting its consumer protection mission to the rapidly changing demands placed upon it. Given the wide range of activities subject to its consumer-protection jurisdiction, and the possibility that Congress might extend that authority substantially, the FTC should assess the resource allocation among the various programs, including whether rulemaking and enforcement are in proper balance. Congressionally mandated rules can divert substantial resources from enforcement against practices already prohibited. The assessment also should address the litigation experience in BCP and whether it offers any insights to the Bureau of Competition (BC) or the Antitrust Division. For example, does BCP (which brings most of its cases in court) use administrative adjudication adequately and effectively?

Finally, in a recent case involving alleged misconduct in a standard-setting organization, *Negotiated Data Solutions LLC (N-Data)*,⁶⁵ the FTC asserted that the respondents’ practices were not only unfair methods of competition, but unfair acts or practices – in violation of the traditional consumer-protection authority under Section 5 of the Federal Trade Commission Act. In a pending rulemaking intended to prevent deception and manipulation in oil pricing, the FTC proposes to adopt a standard of deception different from the traditional standard articulated under Section 5.⁶⁶ The FTC should assess whether the recent uses of Section 5 to address unfair acts and practices – such as in *N-Data* and the proposed rule against oil-price manipulation – are sound policy. In particular, the FTC should assess whether the standards developed in cases involving consumers and the general public should be applied to issues involving competition outside the scope of the Sherman Act. If the FTC determines that these standards are appropriate, then we recommend that it explain under what circumstances they would be applied, how those standards should be applied, and under what circumstances those standards would be replaced by other substantive standards of unfairness or deception.

VIII. SUBSTANTIVE MERGER REFORMS

Recommendation 35: The agencies should consider revisions to the Merger Guidelines, and ensure that they remain up-to-date on an ongoing basis.

⁶⁴ See S.2831, The Federal Trade Commission Reauthorization Act of 2008 (removing exemptions for nonprofit entities and certain common carriers, directing Commission to issue regulations covering mortgage lenders, and streamlining procedures for general rulemaking).

⁶⁵ File No. 051-0094 (2008), available at <http://www.ftc.gov/opa/2008/01/ethernet.shtm>.

⁶⁶ 73 Fed. Reg. 48317 (August 19, 2008); see also Press Release, Fed. Trade Comm’n, FTC Seeks Comments on Proposed Rule Prohibiting Petroleum Market Manipulation (August 13, 2008), available at <http://www.ftc.gov/opa/2008/08/nprm.shtm>.

The Guidelines have provided very important guidance to the agencies, the private sector, and the courts as to an appropriate framework for assessing the competitive effects of horizontal mergers. However, there are concerns that some parts of the Guidelines no longer reflect current economic thinking and the approach taken by the agencies or do not adequately address certain issues that arise in merger cases. For example, as discussed in more detail below, there are concerns that the Guidelines do not adequately describe the approach undertaken by the agencies in unilateral effects cases, especially as relates to auction markets, high tech mergers and potential competition, evolving markets, or the role of market definition relative to competitive effects. In addition, the thresholds listed in the Guidelines are much lower than where in practice challenges (or even investigations) generally occur. Furthermore, as discussed below, issues such as potential competition and vertical mergers are not addressed by the Guidelines, nor are lessons from recent learning, such as the issues related to two-sided markets.

The Section recognizes that any attempt to modify the Guidelines is a substantial undertaking that requires much hard work by the agencies. However, it is likely that the revision process would substantially advance learning as the agencies communicate with each other, the private sector, and other jurisdictions to assess what is the current learning and approach to competitive analyses of mergers and how these can be best reflected in Guidelines. So, while we commend and applaud the agencies for having issued the Guidelines in the first place, we believe by doing so they incurred an ongoing obligation to ensure that the Guidelines remain current in their reflection of agency process and substance. The Section therefore encourages the agencies to establish a joint working group with input from the private antitrust bar to explore and propose appropriate revisions on an ongoing basis so that the Guidelines are synchronized with existing agency standards and practice and remain up to date.

Recommendation 36: The agencies’ merger analysis should give additional weight to certain efficiencies, such as research and development expenses.

In general, the agencies believe that they give appropriate weight to all types of merger-specific efficiencies—including those not specified in the Guidelines, such as fixed cost efficiencies—as part of their exercise of prosecutorial discretion. However, the AMC Report recommended that the agencies’ analysis of the likely competitive effects of a merger should give more weight to certain types of efficiencies. In particular, the agencies should give greater recognition to “certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.” The Section agrees, and suggests that the agencies’ Guidelines be revised to do so. In the context of a transaction involving high-technology companies, the merger often will benefit consumers primarily by making innovation more likely or less costly—not by reducing marginal costs, which typically are already very low in such industries.

Recommendation 37: The agencies should improve application and understanding of unilateral effects theories.

Unilateral effects is the most commonly applied theory of potential competitive harm from mergers – it is accepted among the antitrust community as an important viable theory of competitive harm from mergers and relatively well understood by most practitioners. However, the theories used in unilateral effects cases, whether differentiated products, auction models or homogeneous products, are not well articulated in the Guidelines.

Despite the general acceptance of these theories by practitioners, the agencies recently have had difficulty winning in court based on unilateral effects theories. In part, this is because there is a perception that the standard for challenging a merger has become more difficult as judges have relied less on structural presumptions or customer views and more on evidence and a clear story as to how the merger is likely to result in competitive harm. Whether this is actually a significant problem, however, is not clear. Litigated cases are unusual and thus small in number and are biased towards the most difficult cases, so some losses are to be expected. Moreover, the agencies are still able routinely to obtain relief in settlements based on unilateral theories.

However, there is concern that judges do not understand the theories. In addition, there is some controversy as to what should be the necessary elements of a unilateral effects theory and how best to present the case in court. Some have questioned whether market definition is necessary in a unilateral effects case when there is good evidence of effects. Moreover, the perceived need to address market definition has raised challenges in litigation. These cases have often focused on relatively narrow markets that may not be intuitive to a judge or lay person even if potentially economically viable. Agencies face a quandary – have a narrow less-intuitive market definition with relatively high shares, or a more-intuitive market definition with lower shares.

Moreover, unilateral effects theories (e.g., those based on “diversion” analyses) rely on specific simple economic models. The models are logically correct in the abstract. The basic intuition of these analyses (i.e., that “diversions” can increase the potential profitability of a price increase) is one potential basis of concern for potential unilateral effects. However, the models necessarily predict a price increase as long as there is any diversion between the parties. Whether or not the theories have a potentially valid application in a specific situation requires substantial facts and analysis. And beyond the applicability of the models to a specific situation, reliable estimates of the key parameters required in these models in a specific situation are generally at best problematic.

In addition, unilateral effects cases often rely heavily on quantitative estimates of the potential impact of the merger. However, quantitative evidence is never “perfect.” Most merger cases are predictive and thus quantitative analyses are generally trying to serve as a proxy for the effects of the merger. It is not unusual for different analytical techniques to lead to different results.

Given these issues, we believe that it is important that the agencies provide greater clarity and understanding to the use of unilateral effects theories. The Section believes that the recent Unilateral Effects Workshop sponsored by the FTC was a good step in this direction and that further work is important, including revisions to the Guidelines. The Section also recommends that the agencies ensure that competitive effects evidence in cases brought on unilateral theories is based on a broad range of evidence that is consistent with an intuitive story of competitive harm.

Recommendation 38: The agencies should clarify the role of market definition in unilateral effects cases.

Statute and precedent make it hard to ignore market definition and moreover, there are many who believe that the market definition exercise provides an important check on what will be at best imperfect competitive effects evidence. Whether it is formally done as a market

definition exercise, to challenge a merger successfully, the agencies must be able to tell an intuitive story of why competition between the two firms is important and this requires understanding the range of competitive constraints that exist in the marketplace.

However, it is also important that market definition not become the sole focus of the case. Effects evidence can be important and should be considered during the investigation even if market definition is not yet established. As has been noted, in many unilateral effects cases, market definition and competitive effects will rely on much of the same evidence and evidence with regard to competitive effects can impact market definition. Clarifying this interaction is important.

Recommendation 39: The use of quantitative evidence must fit with other aspects of the case and must be robust.

Prior to discussing effects evidence, particularly quantitative evidence, an intuitive story of why competition between the merging firms matters is needed. The economic evidence must also be subjected to rigorous testing: (1) do different potential approaches come up with similar results; (2) how closely do the analyses being used proxy for the effects of the merger; (3) how well do the results fit with the other evidence in the case?

Recommendation 40: The agencies should continue actively to pursue coordinated effects cases, try to improve understanding as to when coordinated effects concerns may exist, and seek to improve the economic basis for the theories.

In recent years, despite some increased discussion of coordinated effects in the early 2000s, the agencies have primarily focused on unilateral effects with a much lesser emphasis on potential coordinated effects theories; in many cases, coordinated effects theories are just an add-on to a unilateral effects case. However, there is also a sense that this theory is an important potential harm from mergers that should not be ignored particularly if unilateral effects are hard to show.

The consensus is that proving coordinated effects is harder than unilateral effects in an industry without a history of collusion. First, the theory is not as well developed and there has been little new learning in recent years. Second, there are not as well developed tests of when a merger is likely to result in increased coordination. Economic tests are not precise and are more “one-way” – i.e., show when coordination is unlikely but hard to show that it is likely.

The Guidelines currently provide a checklist approach but it is not necessary that all the conditions be met for coordination to occur (particularly depending on the type of coordination considered) nor is it necessarily clear when the elements are “met” and how the merger would change the potential for coordination. Moreover, with a standard that puts the burden on the agencies to prove effects, it is very hard to meet that standard for coordinated effects cases because there are not clear lines as to what causes a shift from non-coordinated to coordinated behavior or what makes coordination easier or more effective.

The agencies should encourage more research into coordinated effects theories, perhaps by holding workshops and considering a revision to the Guidelines. In addition, the agencies should not always focus on price based theories. In particular, the agencies should look for opportunities to correct *Arch Coal's* misinterpretation that theories based on quantity are

“innovative.” Other areas for future clarification include the agencies’ position on mavericks, countervailing buyer power and efficiencies in coordinated effects cases.

Recommendation 41: The agencies should provide greater transparency regarding the U.S. approach to vertical mergers, and should consider using revisions to the Guidelines to do so.

There are no longer substantial differences between U.S. and EU approaches to the circumstances in which mergers (including vertical mergers) can be anticompetitive, and there also is consensus on potential efficiencies that can result from vertical mergers. But there may be differences in U.S. and EU views of potential harms from Type 1 and Type 2 errors.

The EU has recently issued guidelines on vertical and conglomerate mergers, but the United States has no official vertical guidelines, and the data the agencies have released focused on horizontal mergers. The Merger Commentary did not address vertical mergers. So the only “official” U.S. views on vertical mergers are the vertical provisions in the 1984 DOJ Guidelines, which the FTC never endorsed. Senior management in both agencies believe that staff understands the standards to be applied in evaluating vertical mergers, but others believe that greater transparency in standards might be useful to the bar and business community.

There is a broad consensus that vertical mergers are more likely to have procompetitive effects than anticompetitive effects, and that the potential harms can also be the source of positive effects. As a result, enforcement involving vertical mergers is unusual, but there are circumstances in which competitive harm is possible and challenges occur. While vertical merger cases are not common, they do exist and the U.S. agencies will bring them.⁶⁷

To the extent that the agencies conclude that the Guidelines should be revised, we recommend that the revisions also include a discussion of the approach to vertical mergers and the types of vertical mergers that may raise competition issues.⁶⁸ Even if the agencies do not revise the Guidelines, they should still provide greater transparency about the type of vertical transactions that may have anticompetitive effects, including through speeches,⁶⁹ commentary,

⁶⁷ See, e.g., Complaint, In re Fresenius Medical Care AG & Co. KGaA, FTC Docket No. C-4236 (October 20, 2008); Complaint, *United States v. Monsanto Co.*, 1:07-cv-00992 (D.D.C. May 31, 2007); Press Release, Fed. Trade Comm’n, FTC Seeks to Block Cytac Corp.’s Acquisition of Digene Corp. (June 24, 2002), available at http://www.ftc.gov/opa/2002/06/cytac_digene.shtm; Competitive Impact Statement, *United States v. Premdor*, Civ. Action No. 1:01CV01696 (D.D.C. Aug. 3, 2001), available at <http://www.usdoj.gov/atr/cases/f9000/9017.htm>; see generally Am. Bar Ass’n Antitrust Section, “The State of Federal Antitrust Enforcement,” Feb. 2005, at 37, available at http://www.abanet.org/antitrust/at-comments/2005/02-05/state_of_fed_enforc.pdf; Am. Bar Ass’n Antitrust Section, “Comments of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the European Commission’s Draft Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings,” May 2007, available at <http://www.abanet.org/antitrust/at-comments/2007/05-07/comm-assess-mergers.pdf>.

⁶⁸ One task force member recommended suggesting use of EU guidelines to assist in this process.

⁶⁹ For example, in 2002, former FTC Bureau of Competition Director Joseph Simons gave a speech in which he explained the FTC’s decisions to challenge the proposed merger of Cytac/Digene and to close its investigation of Synopsys/Avant!. Joseph J. Simons, Director, Bureau of Competition Fed. Trade Comm’n, Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute (October 24, 2002), available at <http://www.ftc.gov/speeches/other/021024mergenforcement.shtm>.

closing statements, or Competitive Impact Statements, perhaps preceded by a workshop to explore the issues.

Recommendation 42: The agencies should provide greater transparency on potential competition/innovation theories through possible revisions to the Guidelines, speeches, commentary, and workshops.

In some cases the agencies identify potential competition or innovation issues, particularly in the defense, pharmaceutical, medical device, and software industries. There appears to be a consensus that the potential competition or innovation concerns should be focused on those cases where actual competition is likely in the near term there is good evidence to suggest that the potential competitor(s) will provide an important, unique constraint on competition, and that the availability of other potential competitors or innovators is crucial.⁷⁰ However, neither the Guidelines nor the Merger Commentary discuss the agencies' approach to potential competition concerns. Moreover, particularly in deals involving pipeline pharmaceutical and medical device products, there is not a clear basis for identifying the circumstances under which concerns should be raised when there is a great deal of uncertainty as to which products will succeed and how products are likely to compete.

If the agencies undertake revisions to the Guidelines, then they should consider addressing the issues of potential competition and innovation competition. If they do not revise the Guidelines, the agencies should provide greater transparency regarding potential competition issues, through speeches, and commentary, or possibly hold workshops to discuss these issues, particularly in pharmaceutical and medical device products.

Recommendation 43: The agencies should gather more information regarding the effectiveness of remedies and improve the remedies process.

Because most merger challenges are resolved through remedies, an important issue is whether merger remedies are effective. There is a consensus that the agencies should litigate if remedies are not likely to be sufficient to address competitive concerns.

Recently released best practices on remedies by both agencies⁷¹ have been helpful to provide clarification on the process of negotiating remedies with each agency.⁷² Senior officials at the Antitrust Division believe that a remedies retrospective analysis could be useful because they do not know whether their remedies have been effective, and there are concerns that some parties are not fully complying with their remedies obligations.

As a result, the Section believes that the agencies should gather better information on how well remedies work and improve the remedy processes. Both agencies should consider

⁷⁰ See e.g., Fed. Trade Comm'n, Statement concerning *Google/DoubleClick*, FTC File No. 071-0170 (Dec. 20, 2007), available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

⁷¹ See www.ftc.gov/bc/bestpractices/bestpractices030401.htm; see also Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (October 2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.pdf> (hereinafter REMEDIES MANUAL).

⁷² The FTC undertook a detailed remedies study and released a report in 1999, but that report is now dated and could be refreshed. See "A Study of the Commission's Divestiture Process", available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>; see also REMEDIES MANUAL at *id.*

conducting a retrospective on remedies, particularly in those cases where a full “ongoing” business was not divested. The FTC and the Antitrust Division also should learn from each other with respect to practices that work. Finally, because many transactions involve review by international enforcers as well, the Section suggests that the U.S. agencies coordinate with those agencies with respect to remedies.

There is value to a dedicated remedies staff, such as the FTC Compliance Division, because if the remedy fails, relief has not been achieved. The Antitrust Division could benefit from more institutional knowledge concerning remedies, perhaps in Operations. But there also is delay and inflexibility in the Compliance Division at the FTC that leads to substantial delays in finalizing remedies and closing transactions. Through an exchange of information and best practices, the FTC could learn from the Antitrust Division about being more flexible and timely on remedies.

IX. CIVIL NON-MERGER ENFORCEMENT

A. Enforcement Actions Based Exclusively on Section 5 of the FTC Act

Recommendation 44: The new Administration should not depart from the FTC’s long-standing restraint in bringing antitrust enforcement actions based exclusively on Section 5 of the FTC Act without (1) identification of a compelling need for increased standalone enforcement; (2) creation of sufficient competition-based limiting principles; (3) development of an understanding of the implications of the resulting greater divergence in enforcement standards between the two agencies; and (4) creation of a plan for addressing such implications.

The Federal Trade Commission’s recent complaint against and settlement with Negotiated Data Solutions LLC (*N-Data*), issued by a 3-2 divided Commission, has generated renewed discussion in the bar regarding under which circumstances, if any, the FTC should depart from its longstanding restraint in bringing enforcement actions in exclusive reliance on theories of “unfair methods of competition” or “unfair and deceptive acts or practices” under Section 5 of the FTC Act.⁷³

While Section 5 allows it to reach conduct that does not also violate the Sherman or Clayton Acts, the FTC has generally limited standalone enforcement to cases like invitations to collude, which don’t constitute a fully consummated Sherman Act Section 1 violation, but carry a clear potential for competitive harm.⁷⁴

⁷³ The settlement involves a company, N-Data, that reneged on a prior licensing commitment made to a standard-setting organization by a predecessor, thereby increasing the royalty for a technology already included in that standard. The Commission recognized that facts of the case do not provide a basis for antitrust liability under the Sherman Act or Clayton Act.

⁷⁴ The FTC held a workshop on October 17, 2008 regarding the scope of Section 5. See Press Release, Fed. Trade Comm’n, Commission Announces Workshop to Explore Scope of the Prohibition of Unfair Methods of Competition Under Section 5 of the FTC Act (Aug. 28, 2008), available at <http://www.ftc.gov/opa/2008/08/section5.shtm>.

As former Chairman Majoras explained in her *N-Data* dissent, the FTC’s past restraint in employing standalone Section 5 enforcement has been in part self-imposed, due to recognition of a consensus among academics that the Sherman and Clayton Acts are interpreted broadly enough to address virtually all matters that are

Such limiting principles are necessary not only to prevent the FTC from running afoul of legal precedent, but also to provide essential guidance to the business community so that businesses can predict which actions are likely to be deemed “unfair” under Section 5 and which are not. Standalone Section 5 enforcement beyond cases involving a clear potential for competitive harm makes it difficult to counsel clients, and increases the likelihood that businesses will be so chilled by uncertainty that they will avoid potentially procompetitive behavior.

Additional uncertainty related to stand-alone Section 5 enforcement stems from the divergence it would open up between DOJ and the FTC. The legality of a company’s conduct should not be dependent upon which agency received clearance for the investigation. As we have stated elsewhere in this Report, a company’s antitrust liability should not depend upon which federal enforcement agency investigates. Such divergence with respect to treatment of conduct that does not violate the Clayton or Sherman Acts would greatly undermine the perceived fairness of federal antitrust enforcement, and could undermine the agencies’ efforts toward greater antitrust convergence around the world. The October 2008 public workshop held at the FTC was a good first step, but should be followed up with additional input from and dialogue with business leaders, the bar, economists, and DOJ. The FTC should share its thinking on the subject through speeches or a report.

If the FTC were to conclude that expansion of the scope of standalone Section 5 enforcement is appropriate, it should identify ways to minimize the perceived unfairness and capriciousness of such antitrust enforcement.

Clear competition-based limiting principles are important both to avoid running afoul of legal precedent and to give necessary guidance to businesses so as to minimize chilling effects on procompetitive activity. The FTC should also broadly seek input from business leaders, the bar, economists, and DOJ regarding the design of such principles.

B. Energy Sector Enforcement at the FTC

Recommendation 45: The FTC should continue to devote sufficient resources to ensure vigilant, multifaceted enforcement that scrutinizes the energy sector for signs of anticompetitive behavior, and bring enforcement action only when warranted by the results of the investigation, rather than politics.

The energy industries play a key role in the U.S. and global economies, and the high costs of fuel have adversely affected and frustrated consumers. There continues to be a widespread perception or suspicion among consumers and politicians that the substantially higher prices at the pump and for home heating, as well as record oil company profits, seen in recent months and years are the result of anticompetitive behavior by energy industry participants. Consequently, the FTC, which is responsible for antitrust enforcement in those

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appropriate subjects of antitrust enforcement. She also attributes the FTC’s very limited use of Section 5 on a standalone basis to “the insistence of the appellate courts that the Commission’s discretion is bounded and must adhere to limiting principles,” which the *N-Data* majority did not offer. Dissenting Statement of Chairman Majoras, *In the Matter of Negotiated Data Solutions LLC*, File No. 0510094 (2008), at 2-3.

sectors, is and will likely continue to be under substantial pressure from Congress and the executive branch to “do something” that will lead to lower energy prices.

While it is popular in political circles to point to oil companies’ record profits as evidence of anticompetitive activity, much less time is spent considering the more significant role energy policy and supply and demand play with respect to oil and gas prices. FTC Chairman Bill Kovacic testified to Congress in his former role as the FTC’s General Counsel that “[t]he most important factor affecting both the level and movement of gasoline prices in the United States is the price of crude oil...[which is] determined by supply and demand conditions worldwide, most notably by production levels set by OPEC countries.”⁷⁵

Although the FTC has pointed out the broader market factors affecting energy prices, it has also been vigilant in scrutinizing the energy sector for signs of anticompetitive behavior, and has taken enforcement action when it has concluded the evidence so warranted. As the FTC reported to Congress in June 2008, “no other sector of the economy is subject to more antitrust scrutiny by the FTC than the energy industries.”⁷⁶ In the first half of 2008, for example, between 125 and 150 FTC staff members participated in matters related to antitrust and pricing issues involving oil or natural gas companies.⁷⁷

In addition to merger review, the FTC handles various civil non-merger investigations, such as inquiries into whether observed prices are the result of anticompetitive activity in particular regions of the country, and has ongoing projects like the Gasoline and Diesel Price Monitoring Project administered by the Bureau of Economics since 2002. Additionally, the FTC prepares various reports related to the energy sector, such as the results of its 2006 congressionally-mandated investigation into whether gas prices were manipulated in prior years and whether price gouging occurred in the aftermath of Hurricane Katrina, and hosts various events like conferences related to the energy sector.

The Section applauds the FTC’s vigilance in enforcing the antitrust laws in this important economic sector, and recommends that the new Administration continue such efforts. The Section also commends the FTC’s willingness to acknowledge instances where its investigations result in evidence consistent with markets operating competitively, even though such findings are neither politically expedient nor popular. The FTC’s conclusions in its 2006 report that market forces, rather than manipulation of supply by oil companies, appear to largely explain increases in gas prices are a good example of the FTC’s effort to provide the results of an investigation “accurately and dispassionately” despite the politicized nature of energy sector issues.⁷⁸ The new Administration should continue to do the same.

⁷⁵ *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Before The Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs H. Comm. on Government Reform*, 108th Cong. (July 7, 2004) (Prepared Statement of the Fed. Trade Comm’n, Chairman William E. Kovacic), available at <http://www.ftc.gov/os/2004/07/040707gaspricetestimony.pdf>.

⁷⁶ Federal Trade Comm’n, Report of the Fed. Trade Comm’n on Activities in the Oil and Natural Gas Industries, 1 (2008), available at <http://www.ftc.gov/os/2008/06/P082108semiannenergyreport.pdf>.

⁷⁷ *Id.* at 2.

⁷⁸ As former Chairman Majoras explained, “Our duty as responsible enforcers of the law is to conduct thorough investigations and then present the results accurately and dispassionately. The challenge is that we must distinguish between markets corrupted by anticompetitive conduct and markets that are functioning competitively

Recommendation 46: The FTC should continue to speak out forcefully regarding the lack of a need for industry-specific legislation and price gouging legislation, and avoid implementing any industry-specific antitrust regulations itself unless required to do so by Congress.

The Section has consistently expressed the view that the current federal antitrust laws are sufficient to address anticompetitive conduct including in the oil and gas industry.⁷⁹ Indeed, there have been numerous antitrust cases throughout history involving the oil industry, many of which have led to the development of key antitrust law principles.⁸⁰ Industry-specific legislation would not add any significant protection, and could even harm consumers by leading to less output and higher prices.

The FTC has shared the view that industry-specific legislation is not needed, as illustrated by its recommendation that Congress not adopt price gouging legislation, but instead scrutinize unilateral pricing behavior under existing antitrust laws. In a 2006 report to Congress, the FTC indicated that it “cannot say that federal price gouging legislation would produce a net benefit for consumers.”⁸¹ In his prior role as the FTC’s general counsel, Chairman Kovacic also testified that such legislation could result in “interference with the market’s pricing mechanism that is likely to lead to even worse shortages and more harm to consumers.”⁸²

Recommendation 47: The FTC should retain the position of Associate General Counsel for Energy.

The Section believes that the Associate General Counsel for Energy position, which was created in 2004 and is tasked with serving as a liaison among Congress, the agencies, the public, and the policy enforcement divisions of the FTC, helps ensure the proper coordination of

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even if they are producing results that we may not particularly like.” Deborah Platt Majoras, Chairman, Federal Trade Comm’n, Opening Remarks of Chairman, FTC Conference on “Energy Markets in the 21st Century: Competition Policy in Perspective” (April 10, 2007), available at <http://www.ftc.gov/speeches/majoras/070410energycoferencereemarks.pdf>.

⁷⁹ See, e.g., Am. Bar Ass’n Section of Antitrust Law Comments on Fed. Trade Comm’n “Market Manipulation” Rulemaking, June 23, 2008; see also Comments of the Am. Bar Ass’n Section of Antitrust Law Regarding the Oil and Gas Industry Antitrust Act of 2006. The Section’s policy regarding industry-specific legislation in the oil industry is consistent with the policy of the ABA, which in 1992 adopted a formal Policy (Report 103B) on then-pending legislation regarding gasoline pricing, which provides: “[T]he American Bar Association opposes enactment of legislation regulating gasoline pricing and modifying the antitrust laws by creating industry-specific laws applicable to the sale of gasoline.”

⁸⁰ See, e.g., *United States v. Standard Oil Co. of New Jersey*, 221 U.S. 1 (1911) (establishing the “rule of reason” analysis); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (establishing “per se” rule against price fixing). For a more detailed treatment regarding the risks of industry-specific legislation, see *id.*

⁸¹ Fed. Trade Comm’n, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*, 196 (Spring 2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>.

⁸² *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) (Prepared Statement of the Fed. Trade Comm’n, Chairman William E. Kovacic).

initiatives and an efficient use of resources. The existence of the position further signals the FTC’s commitment to vigilant antitrust and consumer protection in the energy sector.⁸³

C. Truncated Rule of Reason Analysis

Recommendation 48: The agencies should provide more clarity regarding truncated rule of reason analysis, determine whether their staffs are performing such analysis consistently, and obtain input from the legal, economic, and business community regarding the appropriate analytical framework.

As the agencies have recognized, a full rule of reason analysis is not always necessary to determine whether the anticompetitive effects of certain restraints of trade outweigh possible procompetitive benefits. In such situations, the agencies, like courts, can apply a truncated rule of reason, or “quick look,” analysis, avoiding the time, expense, and data required for a full-blown rule of reason analysis. But based on interviews and individual attorneys’ experiences, it is not clear to the Section that both agencies – or even different staffs within the same agency – are employing quick look analysis under similar factual circumstances, or are utilizing the same analytical framework.

Such divergence has the potential to lead to different outcomes, particularly if one agency’s quick look framework places a greater burden on defendants than the analytical approach applied at the other agency. Furthermore, disparities in the factual circumstances that trigger quick look analysis could mean that parties are subjected to longer, more expensive investigations at one agency rather than the other. As described elsewhere in this Report, any significant substantive differences in legal and economic analysis between the agencies—particularly where such differences could be outcome-determinative—must be identified and addressed, because they contribute to a perception that federal antitrust enforcement is arbitrary or unfair.

X. SCOPE OF SECTION 2 OF THE SHERMAN ACT

Sherman Act Section 2, which prohibits the creation or maintenance of monopoly power through exclusionary conduct, is perhaps the most amorphous aspect of antitrust law. The antitrust agencies can play a valuable role in providing clarity and transparency to this uncertain area of the law, both in the U.S. and internationally. It will require the commitment of time and resources to ensure that the agencies are providing intellectual leadership regarding the application of antitrust standards to single-firm conduct. Unfortunately, rather than providing this leadership, the agencies have recently been engaged in a public dispute over the proper application of Section 2. The agencies originally intended to issue a joint report on Section 2 after holding joint workshops to explore various unilateral conduct issues. Ultimately the agencies were unable to agree on the report’s recommendations, and DOJ decided to issue a report of its own that prompted written critiques from several FTC Commissioners. Publicity concerning differences that exist between the agencies may benefit the legal and business communities by providing transparency regarding substantive divergences between the agencies’ interpretations of Sherman Act Section 2. However, such highly publicized disagreements

⁸³ The Section recognizes, of course, that the FTC must follow any directive from Congress mandating energy-specific antitrust regulation.

between the agencies do not foster clarity; rather, they exacerbate the already difficult task for practitioners and courts that must evaluate unilateral conduct under Section 2.

A. Clarity and Transparency of Standards for Evaluating Conduct Under Section 2

Recommendation 49: The agencies should continue to devote resources through hearings, amicus briefs, and enforcement actions where appropriate to improvements in the standards used to identify anticompetitive conduct under Section 2, so that the standards are clear and predictable, administrable, and minimize both under- and over-enforcement.

Section 2 enforcement does not enjoy the level of domestic and international consensus that has developed in the fields of cartel and merger enforcement. As the AMC observed in its report, “how to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law.” As evidenced by the recent issuance of the DOJ report titled, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (“DOJ Report”),⁸⁴ the *Statement of Federal Trade Commission Chairman William E. Kovacic*, and the *Statement of Commissioners Harbour, Leibowitz, and Rosch* issued in response, there are significant differences of opinion among current federal antitrust enforcers about the appropriate approach to Section 2. Practitioners and scholars likewise often disagree strongly about basic premises relating to Section 2. Foreign authorities and observers, who must fashion antitrust principles for economies that may be very different from the U.S. economy, also advocate views concerning monopolization or dominance that diverge from U.S. court and agency precedents.

In broad terms, opinion about Section 2 divides over questions concerning the appropriate attitude toward monopoly power and the utility of government intervention to address it.⁸⁵ As reflected in the DOJ Report, one strand of opinion emphasizes the view that striving for monopoly power provides incentives for innovation and progress, defining anticompetitive conduct is difficult, over deterrence through government intervention may chill useful competitive conduct, and the administrative costs of enforcement often outweigh the benefits. Another strand, reflected in the statements of Commissioners Harbour, Leibowitz, and Rosch, emphasizes that only strong enforcement of Section 2 can protect consumers from the higher prices and decreased innovation that can accompany monopoly power and conduct by dominant firms that disadvantages competitive rivals, and that excessive concern with false positives and administrative costs allows consumer harm to continue unabated and become

⁸⁴ U.S. Dep’t of Justice, “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.htm> (hereinafter DOJ REPORT).

⁸⁵ DOJ has filed only one Section 2 case in 8 years (the *Daily Gazette* case challenging a consummated merger under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act), although the FTC has brought Section 2 enforcement actions. See Am. Bar Ass’n Section of Antitrust Law Spring Meeting, March 28 2008: Roundtable conference with enforcement officials, available at <http://www.abanet.org/antitrust/at-source/08/04/Apr08-EnforceRT4=25f.pdf>. The DOJ has not been idle with respect to Section 2, however, and has devoted resources to amicus activity in cases like *Trinko* and *Weyerhaeuser* in order to promote judicial clarification of Section 2 standards that DOJ believes have the potential to chill procompetitive conduct. The DOJ positions were in large part accepted by all of the justices in each of those cases. See *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312 (2007); *Verizon Communs. v. Law Office of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

entrenched, contrary to statutory intent and historical precedent. On all Section 2 issues, members of this Task Force and the antitrust community hold a wide range of views. As FTC Chairman Kovacic’s statement suggests, an appreciation for history can be important in putting these views in context.

One area of considerable debate concerns whether there should be a single test applicable for evaluating all forms of possible exclusionary conduct – such as a “no economic sense” test, a “disproportionality” test, a “profit sacrifice” test, or a “consumer welfare balancing” test – or whether different standards should be applied to different forms of conduct. DOJ and the FTC advocated a “no economic sense” test, at least for some types of exclusionary conduct, in the brief the agencies jointly filed with the Supreme Court in *Trinko*. DOJ advocated a “disproportionality” test in the DOJ Report that would ask whether a practice’s harm to competition substantially outweighs its likely procompetitive benefits.⁸⁶ Others, including FTC Commissioners Harbour, Leibowitz, and Rosch, believe that adoption of such a general purpose test would be unwise, and that Section 2 analysis requires specific analytical tools for specific types of practice, or favor a “balancing” approach.

The agencies have devoted substantial resources to efforts to clarify the scope of Section 2. They filed amicus briefs in the courts advocating for particular standards in cases involving a variety of types of unilateral conduct, including predatory bidding (*Weyerhaeuser*), refusals to deal (*Trinko*), and price squeezes (DOJ in *LinkLine*), and in those cases decided to date, the Supreme court has endorsed their positions. The FTC also has brought enforcement actions involving unilateral conduct in the private standard-setting context (*Rambus, N-Data*), in the potential manipulation of government processes (*BMS, Unocal*), and in invitations to collude (*Valassis*).⁸⁷

Where the agencies believe that judicial standards appear to create a likelihood of substantial over-deterrence, the agencies should continue to use amicus briefs as they have done in recent years (in cases such as *Weyerhaeuser* and *Trinko*). Where judicial standards appear to create the potential for substantial under-deterrence, the agencies should consider filing enforcement actions where appropriate. In such circumstances, cases brought by the agencies may be the most effective means of changing erroneous judicial standards. The FTC’s *Unocal* and *BMS* cases challenging Noerr-Pennington claims appear to be of this type.

The use of hearings and reports often may be a fruitful means for advancing legal standards, as illustrated by the AMC’s development of a proposed standard for bundled discounts (which appears materially to have advanced the debate regarding the appropriate standard for bundled discounts, as reflected in the various standards briefed to the court in *PeaceHealth*⁸⁸).

The agencies should play an important role in enforcement of Section 2 because they are objective and should act on behalf of consumers and competition, unlike private cases brought

⁸⁶ See DOJ Report, *supra* note 84, at 45.

⁸⁷ As indicated elsewhere in this Report, the FTC also held a workshop on October 17, 2008 regarding the scope of Section 5. See *supra* note 74.

⁸⁸ *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 896 (9th Cir. 2007), *amended and superseded by* 515 F.3d 883 (9th Cir. 2008). See also *LinkLine Communications, Inc. v. SBC California, Inc.*, 503 F.3d 876 (9th Cir. 2007), *certiorari granted* June 23, 2008.

by competitors who may be more concerned about effects on them than on consumers or competition. Private litigation might not adequately address competitive concerns for a variety of reasons in certain cases, including litigants' incentives that may not coincide with consumer welfare, collective action problems, and so forth. In contrast, the agencies can weigh the merits of the conduct at issue under appropriate standards and, where a problem is identified, determine whether there is an effective, workable remedy that would prevent or constrain the exercise of market power without restricting legitimate competition. The FTC's standard-setting cases appear to be examples of such cases. The agencies also should allocate significant resources to enforcement against single-firm conduct where the potential for consumer harm is large and there are reasons of "market failure" why private litigation is unlikely to provide a sufficient enforcement mechanism. Finally, the agencies should submit amicus briefs to promote competition in cases where judicial standards appear to create a potential for under-deterrence.

Although there will never be unanimity of opinion on Section 2 issues, all stakeholders benefit from transparency and the development of appropriate standards on which businesses can rely in fashioning their conduct. Through continued engagement with the courts, clarity may be advanced through the process of judicial review that is a key strength of the U.S. antitrust system.

B. Promoting the Adoption of Common International Standards for the Evaluation of Unilateral Conduct

Recommendation 50: With the increasing number of antitrust enforcers around the globe, it is essential that the agencies work with other agencies around the world formally and informally to fashion consistent antitrust approaches for analyzing specific types of exclusionary conduct.

With the continued globalization of the economy and the multiplication in the number of antitrust agencies around the world, it is vitally important that the U.S. agencies work towards the adoption of common, appropriate standards for the evaluation of unilateral conduct.⁸⁹ Recent examples of multiple jurisdictions conducting investigations regarding the same alleged conduct, as appears recently to have been the case for example with respect to Microsoft and Intel, underscore the need for the adoption of consistent standards that avoid the prospect of inconsistent and conflicting outcomes and remedies. A uniform international standard for monopolization or dominance law may not be obtainable. The antitrust systems of other countries must take account of economic conditions and statutes that may be very different from those in the U.S., as for example in economies characterized by substantial recent government ownership or government control in which the introduction of competition is comparatively recent. Nonetheless, particularly with respect to businesses and products that are marketed in numerous jurisdictions, attempts to coordinate enforcement activities and eliminate conflicting results and remedies merit substantial effort.

The agencies should continue to provide leadership in international organizations such as OECD, UNCTAD, and the ICN, and assist in the development of appropriate unilateral conduct legal standards. For example, the FTC is co-chairing the ICN's Unilateral Conduct Working Group, which plans to conduct an in-depth study regarding appropriate standards for unilateral conduct. The U.S. agencies should also cooperate informally with other agencies in the

⁸⁹ See also Part V, *supra*.

formulation of guidelines or recommended practices. Furthermore, the agencies also should be engaged actively in discussions with other U.S. enforcers, including state antitrust enforcement authorities, to ensure consistent treatment of unilateral conduct within the United States. With respect to specific investigations, the agencies should continue to exchange information with other antitrust enforcers when appropriate waivers and confidentiality protections are in place.

C. Intellectual Leadership in the Development of Standards for Assessing Unilateral Conduct

Recommendation 51: The U.S. agencies should devote substantial resources to providing intellectual leadership and increasing transparency through policy research and development. When appropriate, the agencies also should bring enforcement actions in areas where there is a likelihood that the case will be an important precedent that goes beyond its specific circumstances or where necessary to restore competition or prevent a significant reduction in competition.

Given the potential for unduly permissive, restrictive, or conflicting standards, the substantial consequences for consumer harm from under-deterrence, and the potential adverse consequences for innovation and investment from over-deterrence, it is vitally important that U.S. agencies provide leadership in this area. Although they can be resource-intensive, “policy research and development” efforts such as empirical studies, hearings, reports, and literature surveys can play a vital role in the development of standards that strike the proper balance between under- and over-deterrence. The U.S. agencies are uniquely positioned to be able to conduct such policy R&D through the combination of length of experience, size and quality of economic resources, and ability to conduct empirical studies. The agencies should consider whether it would be useful to undertake any retrospective studies regarding the effectiveness of different forms of remedial relief. The agencies also might undertake empirical analyses regarding appropriate means of measuring market power.

Such “policy R&D” has the added benefit of increasing transparency regarding the application of antitrust standards to single-firm conduct, though the agencies should continue to also offer guidance through vehicles like speeches and closing statements.

Enforcement actions also play an important role in providing intellectual leadership in this area. Single-firm conduct cases can be extremely resource-intensive (*see, e.g., Rambus, Microsoft*) and hence should be undertaken only with great care. The FTC’s standard-setting and Orange Book cases are examples of “repeat play” situations that have created important precedents and advanced antitrust thinking. The DOJ’s cases in *Dentsply, Microsoft*, and *American Airlines* likewise have contributed enormously to the development of the law in important areas, even when the agency has not ultimately been successful.

XI. THE IP/ANTITRUST INTERFACE

Bridging the interface between intellectual property and antitrust has proved to be one of the most significant challenges for modern antitrust enforcement. The disciplines are of equal dignity, and both have consumer welfare as the ultimate goal, though their respective approaches arguably differ diametrically. Our IP laws derive from the Constitution’s Copyright and Patent Clause and promote innovation and disclosure of invention through exclusionary grants of property rights. The antitrust laws promote competition and protect the interests of consumers

by rendering unlawful certain exclusionary business practices that have adverse market effects. There can be a tension between these objectives and the balance to be struck requires delicacy.

The Section applauds the agencies' use of *amicus* briefs to provide their views on matters concerning the IP/Antitrust interface. Two particularly effective examples are the agencies' joint briefs on standing for direct purchasers of a patented product that allege fraud on the PTO and on presumptions of market power in tying cases.⁹⁰ Likewise, the agencies have been effective in providing a competition perspective in patent law cases before the Supreme Court. The agencies should continue to submit *amicus* briefs in appropriate cases in all courts. The agencies should also continue to provide guidance in this area through articles and speeches.

In the Section's last report on the state of federal antitrust enforcement, we recommended that "a joint report, . . . reflecting the views of both antitrust enforcement agencies on the IP/antitrust interface, would be useful."⁹¹ The Section therefore commends the agencies' issuance of their April 2007 joint report, which clarified their views on: (1) unilateral refusals to license patents; (2) patent incorporation into collaboratively set standards; (3) portfolio cross-licensing agreements and patent pools; (4) variations on IP licensing practices; (5) tying and bundling of IP rights; and (6) practices that extend the market power conferred by a patent beyond its statutory term.⁹²

⁹⁰ See Br. for the United States & Fed. Trade Comm'n as *Amici Curiae* Supp. Pls.-Appellants, In re DDAVP Direct Purchaser Antitrust Litig., No. 06-5525-cv, available at <http://www.ftc.gov/os/2007/05/DDAVPCommission-DoJBrief.pdf> (2d Cir. May 25, 2007); Br. For the United States & Fed. Trade Comm'n as *Amici Curiae* Supp. Petitioners, *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, No. 04-1329 (U.S. March 1, 2006), available at <http://www.ftc.gov/os/caselist/illinoistools/050805briefillioistools.pdf>.

⁹¹ Am. Bar Ass'n, Section of Antitrust Law, "The State of Federal Antitrust Enforcement – 2004," http://www.abanet.org/antitrust/at-comments/2005/02-05/state_of_fed_enforc.pdf, at 27 (Feb. 2, 2005).

⁹² U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf> (2007).

A. Standard Setting Organizations

Recommendation 52: The Section continues to believe that standard-setting conduct may merit enforcement action in appropriate cases, and continues to urge the agencies to take a case-by-case approach to these issues.⁹³ In addition, the Section recommends that the FTC study whether certain types of problematic standard-setting conduct are appropriately addressed pursuant to Section 5 of the FTC Act.⁹⁴

In particular, the Section believes that the joint report provided an important discussion of the agencies' analysis of competition concerns when patents are incorporated into collaboratively set standards by standard-setting organizations ("SSOs"). For example, the agencies noted that "[e]x ante consideration of licensing terms by SSO participants can be procompetitive" and stated that they "will usually apply the rule of reason when evaluating joint activities that mitigate hold up by allowing potential licensees of the standard to negotiate licensing terms with IP holders."⁹⁵ DOJ has provided further guidance regarding SSOs through its Business Review Procedure, and we encourage further use of this mechanism.⁹⁶

Of course, not every competition concern regarding standard-setting can be addressed through *ex ante* negotiations. For example, competition issues can be raised when there is an allegation that an SSO participant has failed to disclose information⁹⁷ or has refused to comply with a commitment to license a patent on fair, reasonable, and non-discriminatory ("FRAND") terms, although whether such conduct is unlawful will, of course, depend on the facts.⁹⁸

⁹³ Am. Bar Ass'n, *supra* note 91, at 29. It remains to be seen, however, how difficult proving causation in a standard-setting case will be given the Court of Appeals decision in *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

⁹⁴ *See, e.g.*, Statement of the Fed. Trade Comm'n, *In re Negotiated Data Solutions LLC*, File No. 0510094, available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf> (Jan. 23, 2008). As noted in the comments submitted by the ABA's Section of Science & Technology Law to the FTC's with respect to the N-Data case, "the Section of Antitrust Law believes that the consent decree raises important issues as to the appropriate scope of Section 5 of the Federal Trade Commission Act, but has chosen not to address those concerns in a context involving the resolution of a specific investigation. The fact that these comments do not address this issue should not be interpreted to suggest that the Section of Antitrust Law will not take a position on this issue in a context it feels is more appropriate to address the underlying policy concerns." Comments of Am. Bar Ass'n Section of Science & Technology Law, <http://www.ftc.gov/os/comments/negotiateddatasol/534241-00016.pdf>, at 1 n.1 (Apr. 24, 2008). We suggest that the FTC now begin the process by undertaking to study this issue.

⁹⁵ *Antitrust Enforcement and Intellectual Property Rights*, *supra* note 92, at 7.

⁹⁶ *See* Letter from Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, to Michael A. Lindsay, attorney for Institute of Electrical and Electronics Engineers, Inc., available at <http://www.usdoj.gov/atr/public/busreview/222978.pdf> (Apr. 30, 2007); Letter from Thomas O. Barnett, Assistant Attorney General, U.S. Dep't of Justice, to Robert A. Skitol, attorney for VITA, available at <http://www.usdoj.gov/atr/public/busreview/219380.pdf> (Oct. 30, 2006).

⁹⁷ *See, e.g.*, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

⁹⁸ *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

B. Patent Reform

Recommendation 53: The agencies should devote resources to studying further the implications of patent quality on competition, and continue to explore ways to establish avenues of communication with the PTO.

Apart from standard-setting, the Section believes that the agencies should continue to study and address the ways in which the patent system should account for competition concerns. Although patent law issues may not always have an obvious relationship to competition concerns, the issuance and maintenance of questionable patents, for example, may operate to stifle competition. In some circumstances, conventional antitrust doctrine may not be able to remedy the harm caused by such patents, and thus a focus on the patent issuance process is an important means by which to protect competition.

In 2003, the FTC released a report⁹⁹ that we previously described as “the first significant effort by an antitrust enforcement agency to examine the competitive impact of patent quality itself.”¹⁰⁰ The FTC followed this report with a series of town meetings on patent reform in 2005, co-sponsored with the National Academies’ Board on Science, Technology, and Economic Policy and the American Intellectual Property Law Association.¹⁰¹ The Section believes this report and the FTC’s efforts regarding patent reform have played an important role in amplifying the significance of competition concerns to patent law and policy. However, since the report was issued, there have been developments in patent law that may bear on the FTC’s recommendations and the issues discussed.¹⁰² Some of these developments in patent law comport with the FTC’s recommendations.

C. Pharmaceutical Patent Issues

Recommendation 54: The agencies should continue to provide guidance regarding pharmaceutical patent settlements through *amicus* briefs, other public fora such as hearings, and where appropriate, carefully-considered enforcement actions.

The Section also recommends that the agencies continue to develop the law in the area of exclusionary payments in pharmaceutical patent settlements. The agencies have differing views on this subject,¹⁰³ although there are some points of convergence.¹⁰⁴ While complete

⁹⁹ Fed. Trade Comm’n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (Oct. 2003).

¹⁰⁰ Am. Bar Ass’n, *supra* note 91, at 26.

¹⁰¹ See Fed. Trade Comm’n, *A Summary Report of Discussions at Town Meetings on Patent Reform*, <http://www.ftc.gov/opp/intellect/050601summarytownmtg.pdf> (May 23, 2005).

¹⁰² These developments are judicial, regulatory, and legislative. The Supreme Court recently has issued a series of patent law opinions. See *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109 (2008); *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746 (2007); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). In addition, the Patent and Trademark Office (“PTO”) proposed new rules, see 72 Fed. Reg. 46,716-843 (Aug. 21, 2007), but those have been the subject of a judicial challenge. See *Tafas v. Dudas*, 541 F. Supp. 2d 805 (E.D. Va. 2008). Finally, Congress has considered, but not enacted, patent reform proposals. See Patent Reform Act of 2007, H.R. 1908, S. 1145, 110th Cong. (2007).

¹⁰³ See, e.g., *Br. of United States as Amicus Curiae, Fed. Trade Comm’n v. Schering-Plough Corp.*, No. 05-273, <http://www.usdoj.gov/atr/cases/f216300/216358.pdf> (U.S. May 2006).

convergence about the appropriate analysis of these settlements may not be possible, the Section encourages the agencies to continue to explore where they do agree. For example, the agencies should explore the degree, if at all, to which they have common views about whether the concern with exclusionary payments is particularly heightened in cases involving the Hatch-Waxman Act.¹⁰⁵

The Section believes the agencies should oppose industry-specific legislation intended to resolve perceived competitive concerns with patent settlements and related pharmaceutical issues.¹⁰⁶ Such legislation removes certain business conduct from the normal operation of the antitrust laws, and the Section repeatedly has expressed its view that industry-specific legislation is unnecessary.¹⁰⁷

Recommendation 55: The agencies should provide a unified message regarding a potential legislative abbreviated pathway for generic companies to obtain approval for biologics. The agencies should provide input to ensure that such a statute will not be implemented in ways that could have unintended anticompetitive results.

The Section also encourages the agencies to study and contribute to developments with respect to biologic pharmaceutical products, the vast majority of which are marketed with complete freedom from generic competition. Unlike Hatch-Waxman for chemically-derived products, there is no abbreviated pathway for generic companies to obtain approval for biologics. There are substantial safety concerns that must be addressed, because with many biologics it is not possible to be certain that there is consistency between products of different manufacturers. There is, however, a growing consensus that development of an abbreviated pathway for biologics should be given serious consideration. Other jurisdictions have taken the lead in

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¹⁰⁴ See, e.g., Br. of United States as *Amicus Curiae*, *Joblove v. Barr Labs., Inc.*, No. 06-830, <http://www.usdoj.gov/atr/cases/f223500/223525.pdf>, at 13 (U.S. May 2007) (“The court of appeals primarily erred by focusing on whether the underlying patent infringement claim was ‘objectively baseless’—a standard typically used in determining whether a defendant is entitled to antitrust immunity under the Noerr-Pennington doctrine—rather than engaging in a broader inquiry concerning the patent holder’s likelihood of success on that claim.”); Pl. Fed. Trade Comm’n’s Mem. in Opp. to Cephalon’s Mot. to Dismiss, *Fed. Trade Comm’n v. Cephalon, Inc.*, Civ. Action No. 08-cv-2141-RBS, at 22 (E.D. Pa. June 2, 2008) (“The *Tamoxifen* court’s extreme view of a patent’s exclusionary power has no basis in patent law or Supreme Court precedent.”).

¹⁰⁵ Drug Price Competition and Patent Term Restoration Act of 1984.

¹⁰⁶ E.g., H.R. 1902, 110th Congress (2007). In the past, the Commission has indicated its agreement with legislative attempts to enact industry-specific legislation dealing with reverse payments. See, e.g., Fed. Trade Comm’n, *Protecting Consumer Access to Generic Drugs: The Benefits of a Legislative Solution to Anticompetitive Patent Settlements in the Pharmaceutical Industry*, available at http://www.ftc.gov/os/testimony/P859910%20Protecting_Consume_%20Access_testimony.pdf (May 2, 2007) (prepared statement before the Subcommittee on Commerce, Trade, and Consumer Protection of the United States House of Representatives); see also Fed. Trade Comm’n, *Anticompetitive Patent Settlements in the Pharmaceutical Industry: The Benefits of a Legislative Solution*, available at http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf (Jan. 17, 2007) (prepared statement before the Committee on the Judiciary of the United States Senate).

¹⁰⁷ See, e.g., *supra* note 79.

implementing such procedures,¹⁰⁸ and Congress has held hearings on this issue. The Section believes that the agencies should contribute their expertise in order to ensure that any resulting legislation properly balances the incentives between innovator and generic companies to ensure the greatest consumer benefit.¹⁰⁹ While we support the FTC's recent effort to understand these issues,¹¹⁰ we urge DOJ and the FTC to work together in order to produce a unified perspective, particularly given divergent agency positions in the Hatch-Waxman context.

D. International Convergence

Recommendation 56: The Section encourages the agencies to continue to play a leadership role regarding the IP/Antitrust interface on a global basis, including participation in bilateral and multilateral working groups with established and emerging competition regimes.

While the Section believes that a general convergence of global competition approaches regarding the IP/Antitrust interface is desirable, a complete convergence may not be possible or desirable. Thus, the agencies should continue to work toward a principled convergence of competition approaches, including by continuing to show leadership in the importance of ensuring that competition law rests on a sound economic base.

XII. COMPETITION LAW AS A COMPONENT OF NATIONAL HEALTH CARE POLICY

Healthcare represents a substantial portion of spending in the U.S. economy, and growth in healthcare spending in absolute terms has increased dramatically over the last few decades.¹¹¹ The trend is expected to continue with healthcare expenditures projected to double from 2007 to 2016, thereby representing approximately 20% of GDP by 2016.¹¹² The major categories of

¹⁰⁸ See, e.g., European Medicines Agency Committee for Medicinal Products for Human Use, Guideline on Similar Biological Medicinal Products (Oct. 30, 2005), available at <http://www.emea.europa.eu/pdfs/human/biosimilar/043704en.pdf>.

¹⁰⁹ See, e.g., Pamela Jones Harbour, "The Federal Trade Commission's Perspective on Biosimilars: Current Initiatives and Long-Term Goals," Sept. 23, 2008, available at <http://www.ftc.gov/speeches/harbour/080923biosimilars.pdf> (warning of three types of potential "unintended consequences" of federal legislation in this area: (1) risk of exclusion payments; (2) risk associated with an exclusive marketing period for follow-on generics; (3) risks that branded biologics will "game" the system to lengthen exclusivity periods to delay generic entry). The Section assumes, *arguendo*, that the public safety issues will be resolved.

¹¹⁰ Fed. Trade Comm'n, "FTC Announces Workshop and Roundtable on Emerging Health Care Competition and Consumer Protection Issues," August 27, 2008, available at <http://www.ftc.gov/opa/2008/08/hcissues.shtm>.

¹¹¹ For example, according to the 2008 Economic Report of the President, "Americans spent over \$7,000 per capita on health care, up from \$2,400 in 1980 and \$800 in 1960 (all in 2006 dollars)."

¹¹² A "primary factor that tends to drive health care expenditure growth is the development and diffusion of new technologies.. Rising incomes are a second important factor because as income increases, a greater proportion of income is typically spent on health care." 2008 Economic Report of the President, at 100-101, available at <http://www.gpoaccess.gov/eop/>. According to the National Coalition on Health Care (NCHC), "[t]otal spending as \$2.3 Trillion in 2007, or \$7600 per person." This is projected to reach \$3 trillion in 2011 and \$4.2 trillion in 2016. The United States spent "16 percent of its gross domestic product (GDP) on health care. It is projected that the

costs include hospital care (\$648.2 billion), physician and clinical services (\$447.6 billion) and prescription drug spending (\$216.7 billion) as of 2006.¹¹³

The steep rise in healthcare expenditures in the United States is attributable to several factors. Most significant are the costs associated with improved treatment via new technologies and the increased costs associated with providing more intensive care. In addition to the direct cost increases from these improvements, there are also significant indirect costs. For example, improved care creates a larger population of individuals requiring care for longer periods of time by expanding life expectancy.¹¹⁴

Healthcare is one of the most complex areas of the American economy. It is characterized by extensive third party insurance (both public and private), substantial regulatory obligations for providers and participants that affect their cost of service and the types of services required to be offered, extensive regulation of entry in sectors such as pharmaceuticals and medical devices,¹¹⁵ as well as a substantial role for intellectual property and patents.¹¹⁶ With health care costs and insurance expenses among the fastest growing types of employer costs,¹¹⁷ there is increased pressure to find market-based solutions to provide greater incentives for consumers and suppliers to take price into account more affirmatively in healthcare decision-making and to provide closer connections between quality and the compensation for quality.¹¹⁸ Other pressures include the significant number of uninsured Americans and the growing need for providers to charge privately insured individuals more to make up for losses from government programs such as Medicare. Both major presidential candidates are committed to changing the

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percentage will reach 20 percent by 2016.” National Coalition on Health Care, “Health Insurance Costs,” available at <http://www.nchc.org/facts/cost.shtml>.

¹¹³ CMS, “National Health Expenditure Accounts 2006 Highlights,” available at <http://www.cms.hhs.gov/NationalHealthExpendData/downloads/highlights.pdf>.

¹¹⁴ “Inpatient hospital care and pharmaceuticals are the key drivers of recent increases in expenditures. These trends are likely to continue – and even accelerate – as new technologies are developed and the percentage of the population that is elderly increases.” Fed. Trade Comm’n & Dept. of Justice, “Improving Health Care: A Dose of Competition,” (2004) at 3, available at <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf> (hereinafter FTC/DOJ HEALTHCARE REPORT).

¹¹⁵ In certain geographical areas, service provider entry also is regulated through certificate of need (“CON”) requirements for hospitals and or licensing requirements for physicians.

¹¹⁶ “The extensive regulatory framework, developed over decades, at both the federal and state levels of government affects where and how competition takes place in health care markets. Much of the regulatory framework arose haphazardly, with little consideration of how the pieces fit together, or how the pieces could exacerbate anticompetitive tendencies of the overall structure.” *See supra* note 114, at 4.

¹¹⁷ “The annual premium that a health insurer charges an employer for a health plan covering a family of four averaged \$12,100 in 2007. Workers contributed nearly \$3,300, or 10 percent more than they did in 2006. The annual premiums for family coverage significantly eclipsed the gross earnings for a full-time, minimum-wage worker (\$10,712).” *Id.* at 104.

¹¹⁸ According to the FTC/DOJ Healthcare Report, “Insured consumers are insulated from most of the costs of their decisions on health care treatments. The result is that insured consumers have limited incentive to balance costs and benefits and search for lower cost health care with the level of quality that they prefer.” *Id.* at 5.

healthcare system, so these issues are likely to be on the national agenda in the new Administration.

The healthcare sector has been the subject of substantial antitrust review and enforcement activity in recent years, and the federal agencies are likely to confront complex antitrust issues during the next Administration. Merger and non-merger enforcement activity in this industry spans providers, insurers, and pharmaceuticals (which are addressed in the intellectual property section of this Report, *see supra* Part X. In particular, DOJ and the FTC should continue their advocacy efforts and actual enforcement actions to reduce government-erected barriers to entry such as “certificate of need” laws. The agencies should also support efforts to reduce the overly expansive scope of the state action and *Noerr* exemptions that hinder effective antitrust enforcement in this industry.

A. Healthcare Reform

Recommendation 57: The agencies should coordinate their competition advocacy efforts in the upcoming healthcare reform debate, focusing on: (1) mechanisms for enhancing quality and cost containment, including clinical integration; (2) standards involved in quality; and (3) mechanisms better to align incentives among providers and consumers.

There are likely to be detailed legislative and executive branch proposals for health care reform during the next Administration, particularly involving health insurance coverage and policies (both Medicare and insurance for those under 65). Reform proposals are likely to raise a variety of complex issues with regard to regulation, market incentives, and market failure issues. A variety of stakeholders will be involved. Meaningful healthcare reform would be a huge development with tremendous implications¹¹⁹ for competition in the health care sector, and the antitrust enforcement agencies should be actively involved. Moreover, beyond the issue of market-based solutions vs. expanded regulation, the specific nature of the reforms and how they are implemented is crucial. Because of the unforeseen circumstances of market-based solutions (e.g., entry barriers) and the likelihood that many health care policymakers may not have competition expertise, the antitrust agencies can play an important role in shaping the scope and nature of the contemplated reform.

On a related note, the agencies should be more actively engaged with other parts of the government — particularly the Center for Medicare and Medicaid Services (“CMS”) — in trying to understand where there may be market failures because of the special characteristics of health care delivery and payment or because of government policies.¹²⁰ Antitrust enforcers need to build up and retain their own expertise on healthcare competition issues, and must work proactively with other government agencies to ensure that they take into account the competitive effects of their actions.

¹¹⁹ The implications could be positive or negative, for competition in the health care sector, depending upon the nature of the reforms and how successfully they are implemented.

¹²⁰ One example may be “reverse payments” in settlements of pharmaceutical patent disputes. *See* FTC Commissioner Thomas Leary, “Antitrust Issues in the Settlement of Pharmaceutical Patent Disputes, Part II” (May 17, 2001), available at <http://www.ftc.gov/speeches/leary/learypharmaceuticalsettlement.shtm>.

B. Antitrust Review of Mergers in the Healthcare Industry

Recommendation 58: The antitrust agencies should provide more transparency and guidance regarding several areas of substantive merger review in the healthcare industry, including the role of quality improvements (and other similar non-cost based efficiencies), “customers” other than health plans, and unique issues related to consolidations of single specialty physician practices.

There has been substantial recent antitrust activity in the healthcare sector, including merger review and hearings or policy statements on a variety of matters (e.g., clinical integration). While these actions have provided helpful guidance to practitioners and their clients, several important issues deserve further explication. Clarity is particularly important in the healthcare industry, where many merger reviews involve complex coordinated efforts with state regulators and many stakeholders involved. The agencies should provide greater transparency in revealing the theories and rationale for approving or challenging healthcare mergers, emulating the degree of transparency found in other sectors.

First, it would be useful for the agencies to address and resolve any conflicting approaches on merger enforcement actions. The majority of healthcare merger investigations have been at the FTC, although there have been some investigations at the DOJ in the health insurance and hospitals areas. Increased pressures on hospitals and other providers to achieve efficiencies and cost savings – and the likelihood of additional future mergers in that space – would make such guidance particularly valuable. Similarly, there will likely continue to be substantial political pressure in reaction to consolidation among health insurance providers. DOJ has brought several merger cases in this area on a monopsony theory, and it also has challenged MFNs. More should be done to ensure that the FTC and DOJ have consistent views on these issues, and that they are fully analyzed and explained. If health plans have monopsony power, then close scrutiny of mergers and conduct is warranted, and the rationale for challenging the transaction should be articulated clearly. However, if they lack monopsony power, then that needs to be better explained to providers and legislators, or there will continue to be calls for exemptions or more vigorous enforcement against transactions involving health insurance plans. More clarity and guidance in this area would be beneficial.

Second, guidance would be especially useful regarding the extent to which the agencies take into account quality improvements (either ability to provide higher level services or provide same services at a higher quality) are in addition to more typical cost-side efficiencies.

Third, the agencies should evaluate whether their narrow focus on one subset of “customers” (i.e., health plans) in provider mergers is appropriate. This approach may lead to both an over-emphasis on what these customers tell the agencies and an under-emphasis on the potential for a lessening of non-price competition for other types of patients.

Fourth, there has been increasing number of very large consolidations of single specialty physician practices. In some cases, there may be questions as to whether the mergers are real in substance as opposed to just form. In others, the mergers likely create the potential of some significant efficiencies, but also increased market power. Assessing such mergers may raise difficult issues, including product and geographic market definition and entry barriers. So far, there have been few decisions or reported investigations, but it is an area that will likely warrant close attention by the agencies down the road. Further guidance on these issues is important.

Finally, the FTC should provide guidance in the form of a report on its hospital merger retrospectives initiative. Any such report should address the factors that distinguished the many investigations that were closed from the one case the FTC brought.¹²¹

C. Joint Activity by Competitors in the Healthcare Industry

Recommendation 59: The agencies should provide guidance on potentially procompetitive joint activity in the healthcare industry, particularly (1) collaboration among physicians, among hospitals, among health plans, and across these various players to promote quality, (2) standard setting efforts, and (3) physician network collaboration.

The FTC/DOJ joint healthcare hearings and subsequent 2004 FTC/DOJ Healthcare Report stressed the importance of quality and improvements in quality and cost controls as key trends in the healthcare sector. These trends have subsequently accelerated, with regulations from CMS requiring providers to report on specific quality metrics. Moreover, both private and public sector insurers and providers are developing reimbursement methodologies linked to quality so as to better align incentives. In addition, there is greater pressure to seek solutions that increase the proportion of care that is paid for by the ultimate patient (such as co-pays) in order to encourage more cost-sensitive use of medical services. These trends give rise to the following areas of enforcement or guidance that likely will confront the agencies in the near term.

First, initiatives involving collaboration among physicians, among hospitals, among health plans, and across these various players to promote quality without risking antitrust enforcement action need additional guidance and transparency. The Section commends the agencies for proposing additional hearings on these issues, including those recommended for the fall of 2008.¹²² The agencies should consider expanding their policy guidance in this area either through written guidelines or detailed speeches abstracting from case-specific examples. This type of guidance would provide information on antitrust standards to a broader audience than individual case decisions. Any such guidelines should specifically describe appropriate price and conduct coordination that is consistent with antitrust policy.

Second, another area of collaboration that requires more guidance is the practice of competitors conducting “quality initiatives” that typically involve reporting and compliance with specific metrics. In many other industry sectors, the agencies have promoted competition to set standards as a mechanism to ensure that no one company can dictate the specific standards. It will be important for DOJ and FTC to consider whether such competition to set standards (e.g., standard setting for health care information) leads to efficient and best outcomes in healthcare or whether increased collaboration and a national standard based on scientific consensus is more appropriate for certain quality metrics. If the latter, the agencies should set out clear policy via speeches or other policy pronouncements.

¹²¹ In 2002, the FTC initiated a retrospective review of consummated hospital mergers to assess empirically their competitive effects. As a result of a retrospective review of the Evanston/Highland Park Hospital merger, the FTC filed an administrative complaint against Evanston in 2004 — four years after the transaction had closed. For more details on the issue of agency retrospectives, see *supra* Part VII.

¹²²The FTC Workshop will focus on: 1) competition provided by developing an abbreviated regulatory pathway for follow-on biologic drugs; and 2) competition among health care providers based on quality information. See Fed. Trade Comm’n, *supra* note 110.

Third, the agencies should consider whether to weigh in on strategies undertaken by hospitals to combat efforts by physicians to create surgicenters, imaging centers, or specialty hospitals that compete with them (or which arguably unfairly skim the cream of the best-paying, least sick patients from the hospitals). This is a complicated area, with both sides having credible arguments. While this issue arises primarily in the context of private litigation, the agencies could provide some guidance to help shape the application of the antitrust laws to this complex fact pattern.

Fourth, physician cartel enforcement is another area in which more guidance is warranted. While there is broad agreement that aggressive enforcement is appropriate against true hardcore cartel activity, this is a controversial and relatively murky area. In some cases, physician networks may offer significant transactional efficiencies – particularly if the network is arranged in a non-coercive fashion or on non-price terms and it clearly lacks market power.

Finally, the states have been very active recently in health care matters – sometimes because they involve very local competitive issues such as hospitals and doctors; in other cases, such as pharmaceutical cases, the states have been seeking substantial monetary recoveries. This is one area in which federal/state cooperation is particularly important and potentially very valuable.

XIII. FEDERAL, STATE, AND PRIVATE PLAINTIFFS COOPERATION

Each state and the District of Columbia, through its attorney general (collectively, “State AGs”), may enforce both state and federal antitrust laws. The state can sue under federal law on its own behalf as an injured consumer, or it can do so on behalf of state consumers under its powers of *parens patriae*. 15 U.S.C. §15c. Under its *parens patriae* powers, a state can recover treble damages for the injuries sustained. Private plaintiffs also can sue to recover treble damages under Section 4 of the Clayton Act, thus providing yet another level of U.S. antitrust enforcement. 15 U.S.C. § 15c(a)(2). Further, both the states and private plaintiffs may seek injunctive and other equitable relief for violations of the federal antitrust laws. Finally, Section 16 of the Clayton Act (among other provisions) grants State AGs the authority to challenge allegedly anticompetitive mergers or acquisitions.

Given the significant but differing and sometimes overlapping roles played by those charged with enforcing the antitrust laws, coordination among public and private interests is essential to effective antitrust enforcement. In light of the Antitrust Division’s unique criminal enforcement responsibilities and its interest in promoting effective enforcement, as well as the responsibilities of both DOJ and the FTC in merger and civil non-merger enforcement, both agencies should play a leading role in ensuring proper coordination and cooperation with their state counterparts and private plaintiffs.

A. Federal/State Cooperation

Recommendation 60: The federal agencies should assess the effectiveness of federal/state coordination, work with the State AGs to formulate consistent merger guidelines and coordination protocols that reflect current enforcement practice, and implement training at the federal and state levels to insure uniform application.

States are independent enforcers of federal and state antitrust laws. In the context of merger review, this overlap in jurisdiction creates the potential for simultaneous investigations of a transaction and differing and/or inconsistent enforcement outcomes at both the state and federal levels. In light of the potential conflicts that could arise between the states and the federal government, coordination and early communication among the various government enforcers is critical.

The federal agencies and State AGs currently coordinate their efforts with respect to joint or parallel merger reviews. That effort generally works well, but there still is room for improvement. The Section believes that more can be done to facilitate early communication between the federal agencies and the states to ensure a proper understanding of their respective roles in a proposed transaction. This early communication can take place at the behest of both the respective enforcers and the merging parties, and would help to minimize the burdens on merging parties from investigations at both the federal and state levels. It also would reduce the opportunity for conflicting or differing results.

Currently, the federal and state agencies use two different sets of guidelines to analyze mergers. The federal agencies use the Guidelines. The State AGs, on the other hand, use the National Association of Attorneys General Horizontal Merger Guidelines.¹²³ There are substantive differences between the two guidelines, particularly in the areas of market definition, timely entry, and the role of efficiencies.¹²⁴ The agencies and the State AGs should work to resolve these differences to the extent possible.

The Section recommends, therefore, that the new Administration (1) encourage the agencies and the State AGs to make it a greater priority to establish formal state-federal coordination protocols that either better reflect the current approach to enforcement or set forth more streamlined procedures for ensuring the most efficient coordinated merger review, and (2) encourage the parties to work to resolve the substantive differences between their guidelines.

Further, when states choose to exercise their independent merger review authority, as opposed to deferring to the federal agencies, it is important that their enforcers have the training required to perform an effective and efficient review of the merger. It is equally important that they be able to coordinate closely with federal enforcers. The Section recommends, therefore, that the new Administration conduct an assessment of current federal/state coordination in the area of merger reviews and encourage federal and state-level antitrust training to make sure that there is uniform and consistent enforcement.

Recommendation 61: In light of the increasing role State AGs play in seeking treble damages on behalf of the citizens of their respective states and the continuing active role of private enforcement, the federal agencies should examine, in cooperation with the states and private litigants, whether the existing federal/state protocols are adequate.

¹²³ See NAAG Horizontal Merger Guidelines (1987, rev. 1993) (“NAAG Guidelines”).

¹²⁴ See NAAG Guidelines § 3A (identifying the Federal Merger Guidelines’ approach to market definition as the “Alternative Method for Defining Markets”); compare NAAG Guidelines § 3.3 (referring to entry into the market within *one year*) with Federal Merger Guidelines § 3.2 (referring to timely entry as occurring within *two years*); compare NAAG Guidelines § 5.3 (referring to clear and convincing evidence of efficiencies that produce cost savings that will be passed on to consumers) with Federal Merger Guidelines § 4 (referring to efficiencies in general and not necessarily tied to cost savings for consumers).

State AGs are the only government entities that can recover treble damages for federal antitrust violations under their powers as *parens patriae*.¹²⁵ Moreover, State AGs today are more actively involved in bringing treble damages actions under their *parens patriae* powers than at any time in the past.¹²⁶

The states' increased use of *parens patriae* has implications for current federal and state cooperation. For instance, as government entities, State AGs often seek federal cooperation and access to information that would not be available to private civil plaintiffs. The question therefore arises as to whether State AGs, when acting in their role as *parens patriae*, should receive a greater level of federal access and cooperation than typically provided to private plaintiffs, or whether a different model of cooperation and coordination needs to be developed for those circumstances. The agencies should examine this issue in conjunction with the State AGs and private litigants to determine whether existing protocols are adequate or whether change might be necessary.

B. Cooperation and ACPERA

Recommendation 62: The Antitrust Division should not object to cooperation by amnesty applicants with civil plaintiffs under ACPERA in circumstances where there is no prejudice to the Antitrust Division's law enforcement objectives.

In 2004, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA").¹²⁷ ACPERA permanently enhanced the Sherman Act's criminal penalties for both corporations and individuals -- increasing both the maximum criminal fines that can be imposed and prison time. ACPERA also temporarily provided enhanced incentives for firms to seek amnesty under the Antitrust Division's Leniency Program -- a program that offers complete immunity from criminal prosecution to qualifying applicants and their employees (where applicable).

ACPERA's enhanced incentives include limiting an amnesty applicant's civil liability to single, rather than treble, damages in those civil suits that frequently follow criminal antitrust investigations. ACPERA also protects the amnesty applicant from joint and several liability in civil cases. These ACPERA incentives are intended to encourage early *voluntary* reporting of criminal antitrust activity, which otherwise might go undetected by federal and state authorities and private civil plaintiffs. Early detection of criminal antitrust violations benefits consumers in the United States and elsewhere.

¹²⁵ 15 U.S.C. § 15c ("Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* ... [and the court] shall award the State ... threefold the total damage sustained ... and the cost of suit, including a reasonable attorney's fee.").

¹²⁶ Although not discussed in detail here, we note that overall antitrust enforcement may benefit from having state enforcers focus their resources on local price fixing activity. There likely is significant local price fixing activity that goes unaddressed, and consumers (and local governments as purchasers) would benefit from state enforcement in that area at least as much as they benefit from state involvement in national/international merger and conduct matters.

¹²⁷ Antitrust Criminal Penalty and Enhancement Act of 2004, Pub. L. No. 108-237, § 213(b), 118 Stat. 665, 666-67.

To qualify for ACPERA’s liability cap, amnesty applicants must provide “satisfactory cooperation to the claimant with respect to the civil action,” defined in the statute to include:

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3)(A) in the case of a cooperating individual—

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action;
or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).¹²⁸

Timely, truthful and complete cooperation by amnesty applicants with civil plaintiffs may allow civil plaintiffs to receive detailed information regarding operative facts of the antitrust violation at an earlier stage of the litigation. This, in turn, may reduce the time and costs associated with plaintiffs building their case, and also may facilitate earlier civil settlements.

There is the potential, however, for friction between the ongoing Antitrust Division criminal investigation and the timing of disclosure of certain information to civil plaintiffs. During the pendency of a criminal investigation, there are complex and difficult issues regarding constitutional rights, particularly with respect to individuals, that may affect both the Antitrust Division’s investigation and cooperation with civil plaintiffs under the ACPERA. Thus, the ability of civil defendants to cooperate with civil plaintiffs under the ACPERA must be balanced against the needs of the Antitrust Division to prosecute criminally. To the extent that civil cooperation under the ACPERA does not interfere with the Antitrust Division’s investigation or

¹²⁸ *Id.* § 213(b). In cases where an amnesty applicant’s initial contact with the Antitrust Division occurs *after* civil litigation has been instituted or a State AG has issued compulsory process, then the court is also instructed to consider the “timeliness” of the amnesty applicant’s “initial cooperation with the claimant.” Pub. L 108-237, § 213(c), 188 Stat. 661, 667.

prosecution criminally, the Antitrust Division should not object to such cooperation. But the Antitrust Division's mission to prosecute is the first priority.

Recommendation 63: Prior to the expiration of the ACPERA, the Antitrust Division (with cooperation from the Section) should study whether the Act has achieved its stated purposes.

ACPERA's provisions intended to provide incentives for leniency applicants to cooperate with civil plaintiffs will sunset in June 2009 unless renewed by Congress. How often these provisions have been employed, how effective they have been, and whether changes to the statute are warranted are issues that should be studied in connection with Congress' consideration of reauthorization.

The new Administration should encourage the Antitrust Division, in cooperation with the Section and members of both the plaintiffs' and defense antitrust bar, to study whether ACPERA has achieved its stated purposes. By the time the provisions sunset in 2009, ACPERA will have been in operation for 5 years. The collective experience of private litigants (plaintiffs and defendants) and government enforcement agencies should be assessed in explaining whether ACPERA should be renewed and in evaluating whether ACPERA's stated objectives have been met and whether any changes in the law are warranted.¹²⁹

XIV. SUBSTANTIVE REFORM RECOMMENDATIONS

The new Administration will enter office facing many recommendations for reform of the antitrust and consumer protection laws. Already on the table is the Antitrust Modernization Commission's report, which provides a rare official and comprehensive assessment of the antitrust laws and proposes several major changes in the law. Likewise, the American Bar Association and prior transition reports of the Section have recommended significant substantive reforms. The Section offers recommendations in three areas: (1) the Robinson-Patman Act; (2) exemptions and immunities; (3) resale price maintenance.

A. Reform or Repeal of the Robinson-Patman Act

Recommendation 64: The Section recommends that the agencies support reform or repeal of the Robinson-Patman Act.¹³⁰

¹²⁹ If ACPERA is renewed, Congress should reassess the presumption in the Sentencing Guidelines that twenty percent of the volume of commerce is an appropriate proxy for the gain or loss in a conspiracy. As the Section explained in its 2004 comments on the proposed increased criminal penalties legislation, "This presumption is unique in the U.S. Sentencing Guidelines for antitrust crimes and produces disproportionate effects under existing sentencing that result in either higher or lower sentences than would be appropriate if the gain or loss were actually calculated." Am. Bar Ass'n Section of Antitrust Law, Comments of the ABA Section of Antitrust Law on H.R. 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunney Act Amendment (2004), available at <http://www.abanet.org/antitrust/at-comments/2004/01-04/increasedcriminalpenalties.pdf>.

¹³⁰ A record supporting this recommendation already resides in the proceedings and report of the AMC. Should the agencies believe additional information would assist in the Robinson-Patman Act repeal or reform effort, we reiterate the recommendation we made in 2005: "One possibility would be for the FTC to conduct a major set of hearings, with opportunities for participation by a varied set of business and consumer interests, to consider whether these provisions of the statute, particularly as now drafted, do more harm than good. A recommendation to Congress, an authority and responsibility that the FTC has under Section 6 of its enabling statute, could then be

Since 1986, as the Section observed in the last transition report, both the Section and the ABA have supported revisions of the Robinson-Patman Act to make it consistent with the broader antitrust laws. The Section proposed repeal of Sections 2(c) and 3, and would add a “lessening of competition” standard to Sections 2(d) and 2(e).

The Antitrust Modernization Commission has recommended outright repeal of the Act. The AMC argued that the Act “has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would.”¹³¹ The Section agrees that certain portions of the statute should be repealed, while others should at least be modified to achieve more internal consistency within the RPA and to promote greater harmony with the antitrust principles expressed in the Sherman and Clayton Acts.¹³²

The basis for these recommendations is that where the RPA is not redundant of the other antitrust laws, it can impede competition by inhibiting pricing and promotional creativity. For at least 25 years, the statute has been virtually unenforced by the federal agencies, which have used the Sherman Act and the FTC Act to attack allegedly anticompetitive discrimination in pricing and promotions. Instead of a tool of antitrust enforcement, the Robinson-Patman Act has been turned against the agencies; it has been asserted as a defense to allegations of antitrust violations.¹³³

The FTC, the courts, the AMC and numerous commentators have recognized the anticompetitive potential of the Robinson-Patman Act.¹³⁴ A law that allows competitors to

(continued...)

submitted. If hearings support those views, the Section recommends that the FTC discuss with Congress the repeal of Sections 2(c) and 3 of the Act and possibly adding a substantial lessening of competition standard to Sections 2(d) and 2(e) of the Act.” ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement* (2004) at 51, available at http://www.abanet.org/antitrust/at-comments/2005/02-05/state_of_fed_enforc.pdf.

¹³¹ AMC REPORT, *supra* note 8, at 311.

¹³² See Am. Bar Ass’n Section of Antitrust Law, *Comments of the Section of Antitrust Law of the Am. Bar Ass’n in Response to the Antitrust Modernization Commission’s Request for Public Comment Regarding Robinson-Patman Act Study Issues*, April 2006, available at <http://www.abanet.org/antitrust/at-comments/2006/04-06/comments-AMC-RP.pdf> (supporting the repeal of Sections 2(c) and 3; advocating the amendment of Sections 2(d) and 2(e) by integrating into them that part of the language of Section 2(a) describing the secondary line competitive injury requirement).

¹³³ See, e.g., Fed. Trade Comm’n, “FTC Charges That Country’s Largest Zipper Manufacturer Tried To Limit Discounts; Consent Agreement Would Settle Complaint,” March 25, 1993, available at <http://www.ftc.gov/opa/predawn/F93/ykk.htm>.

¹³⁴ Critics of Robinson-Patman repeal efforts suggest that the Act’s repeal would have little practical effect on price discrimination because of existing state antitrust legislation. Most states’ comparable statutory provisions reflect the provisions of Sections 1 and 2 of the Sherman Act, but a small number of states have counterparts to the Robinson-Patman Act. While many states have so-called “harmonization statutes,” requiring varying degrees of deference to federal precedent in applying state antitrust law, states without harmonization statutes or decisional law could fill the void left from Robinson-Patman with a patchwork of conflicting state price discrimination laws. This patchwork of laws would almost certainly lack uniformity of application in the absence of an overarching federal framework.

impede discounts or promotions without showing any harm to competition is fraught with the potential to undermine competition. Aside from its competitive consequences, restrictive precedents remain on the books, private litigation is common, and most companies try to comply with the statute's provisions, though burdensome and expensive practices, if only to avoid private treble-damage exposure.

The agencies have not been actively enforcing the statute for some time, which the Section believes is the proper position given the RPA's current form. Although the agencies can be commended for resisting the temptation to enforce the Robinson-Patman Act in situations where its effect could be to reduce competition, inactivity and silence is not enough to lift the interference that the Act can impose on competitive markets. The Section encourages the agencies to join the chorus calling for the reform or repeal of the RPA.

B. Exemptions and Immunities

Recommendation 65: The Section recommends that the agencies continue their opposition to exemptions and immunities from the antitrust laws, study and report on the economic effect of exemptions, and continue their efforts to challenge anticompetitive activity that fails to qualify for the exemptions.

The Antitrust Section has consistently stated its general skepticism of exemptions and immunities from the antitrust laws, and has addressed a number of them in prior reports, sometimes recommending repeal, other times urging closer cooperation among agencies with overlapping jurisdiction. Recent litigation and legislation have brought certain exemptions back into the public eye, including those relating to state action, its federal equivalent (the doctrine of "implied repeal"), *Noerr-Pennington*, and various industries (e.g., McCarran-Ferguson, Capper-Volstead).

Although some exemptions stem from judicial decisions, far more numerous are those created by legislation. The Antitrust Modernization Commission recommended systematic assessments of legislative exemptions by limiting their terms – a system resembling the regulatory review that the FTC performs under the Regulatory Flexibility Act. The Section sees merit in this recommendation, but also believes that the agencies can accomplish a great deal in the absence of a systematic review by continuing their long-standing practice of examining the state of competition throughout the economy and assessing whether antitrust exemptions are contributing to competitive problems in any sectors.

Exemptions with the most significant effects should command the attention of the limited resources of the agencies. A wide variety of options remain available to the agencies – including reports to Congress, economic studies, workshops, amicus briefs, and targeted law enforcement. The agencies have taken advantage of all these in the past. The Section commends them for this approach and recommends that they continue pursuing it.

C. Resale Price Maintenance Post-*Leegin*

Recommendation 66: The agencies should provide guidance regarding minimum resale price maintenance analysis post-*Leegin*, and should oppose legislation proposals to overturn *Leegin*.

In June 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹³⁵ the Supreme Court overruled a 1911 case¹³⁶ by holding that the rule of reason, not the *per se* rule, applies to agreements between a supplier and its distributor or retailer regarding minimum resale price. Both the Federal Trade Commission and the U.S. Department of Justice favored the result the majority reached. Indeed, the United States filed an amicus curiae brief in the case on behalf of the petitioners.¹³⁷

The *Leegin* decision is consistent with the ABA's official position, adopted in February 2007, that resale price maintenance should not be *per se* illegal under Section 1 or comparable state laws.¹³⁸ For a variety of reasons, the ABA believes that "minimum resale price maintenance, like other vertical resale restraints, can stimulate interbrand competition and is not so inevitably pernicious as to warrant per se illegality."¹³⁹ The ABA considered, and ultimately rejected, arguments supporting continued per se illegality for minimum resale price maintenance, such as suggestions that rule of reason treatment would necessarily lead to less competition or higher prices for consumers, or facilitate collusion or coordination among sellers or buyers.¹⁴⁰

The Court made clear that it was not, in effect, concluding that minimum resale price maintenance is *per se* legal, acknowledging that it "does have economic dangers."¹⁴¹ How the rule of reason will be applied to minimum resale price maintenance is unclear, however. While the business community and the antitrust bar will monitor lower court developments, both would benefit from guidance from the agencies through speeches, closing statements, and perhaps a workshop regarding the agencies' intended post-*Leegin* analytical framework.¹⁴²

If Congress follows through on suggestions that legislation should overturn the *Leegin* decision, the agencies should oppose such proposed legislation.

¹³⁵ 127 S. Ct. 2705 (2007).

¹³⁶ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

¹³⁷ Br. for the United States as *Amicus Curiae* in Supp. of Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, No. 06-480 (U.S. Jan. 22, 2007), available at <http://www.usdoj.gov/atr/cases/f221000/221027.htm>.

¹³⁸ In 2007, the ABA's House of Delegates adopted the following resolution, which remains in effect: "RESOLVED, That the American Bar Association recommends that the Sherman Act, 15 U.S.C. § 1, and comparable state and territorial laws should not be interpreted to apply a rule of per se illegality to agreements between a buyer and seller setting the price at which the buyer may resell goods or services purchased from the seller." See Statement of Janet L. McDavid on Behalf of the Am. Bar Ass'n before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, July 31, 2007 [hereinafter LEEGIN TESTIMONY]. *Leegin* does not go as far as the ABA's recommendation: it does not alter state antitrust laws that might treat minimum resale price maintenance as a *per se* violation.

¹³⁹ For a more detailed description of the reasons for the ABA's support of the application of the rule of reason to minimum resale price maintenance, see LEEGIN TESTIMONY, *supra* note 138, at 7-11.

¹⁴⁰ *Id.* at 11-15.

¹⁴¹ 127 S. Ct. at 2719.

¹⁴² The FTC has proposed workshops on this issue in January through March 2009. See Federal Trade Comm'n, "FTC Announces Public Workshops for Next Year on Resale Price Maintenance," Oct. 28, 2008, available at <http://www.ftc.gov/opa/2008/10/rpmwksps.sthm>.

XV. CONCLUSION

The Section looks forward to continuing to work constructively with the Antitrust Division and FTC in the next Administration, including with respect to the issues discussed in this Report.

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Recommendation 36:	The agencies’ merger analysis should give additional weight to certain efficiencies, such as research and development expenses.	33
Recommendation 37:	The agencies should improve application and understanding of unilateral effects theories.	33

Recommendation 38:	The agencies should clarify the role of market definition in unilateral effects cases.	34
Recommendation 39:	The use of quantitative evidence must fit with other aspects of the case and must be robust.	35
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Recommendation 41:	The agencies should provide greater transparency regarding the U.S. approach to vertical mergers, and should consider using revisions to the Guidelines to do so.	36
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Recommendation 43:	The agencies should gather more information regarding the effectiveness of remedies and improve the remedies process.	37
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Recommendation 45:	The FTC should continue to devote sufficient resources to ensure vigilant, multifaceted enforcement that scrutinizes the energy sector for signs of anticompetitive behavior, and bring enforcement action only when warranted by the results of the investigation, rather than politics.	39
Recommendation 46:	The FTC should continue to speak out forcefully regarding the lack of a need for industry-specific legislation and price gouging legislation, and avoid implementing any industry-specific antitrust regulations itself unless required to do so by Congress.	41
Recommendation 47:	The FTC should retain the position of Associate General Counsel for Energy.	41
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Recommendation 52:	The Section continues to believe that standard-setting conduct may merit enforcement action in appropriate cases, and continues to urge the agencies to take a case-by-case approach to these issues. In addition, the Section recommends that the FTC study whether certain types of problematic standard-setting conduct are appropriately addressed pursuant to Section 5 of the FTC Act.	48
Recommendation 53:	The agencies should devote resources to studying further the implications of patent quality on competition, and continue to explore ways to establish avenues of communication with the PTO.....	49
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Recommendation 55:	The agencies should provide a unified message regarding a potential legislative abbreviated pathway for generic companies to obtain approval for biologics. The agencies should provide input to ensure that such a statute will not be implemented in ways that could have unintended anticompetitive results.	50
Recommendation 56:	The Section encourages the agencies to continue to play a leadership role regarding the IP/Antitrust interface on a global basis, including participation in bilateral and multilateral working groups with established and emerging competition regimes.....	51

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XIII. FEDERAL, STATE, AND PRIVATE PLAINTIFFS COOPERATION	56
Recommendation 60: The federal agencies should assess the effectiveness of federal/state coordination, work with the State AGs to formulate consistent merger guidelines and coordination protocols that reflect current enforcement practice, and implement training at the federal and state levels to insure uniform application.	56
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Recommendation 62: The Antitrust Division should not object to cooperation by amnesty applicants with civil plaintiffs under ACPERA in circumstances where there is no prejudice to the Antitrust Division’s law enforcement objectives.	58
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Recommendation 65: The Section recommends that the agencies continue their opposition to exemptions and immunities from the antitrust laws, study and report on the economic effect of exemptions, and continue their efforts to challenge anticompetitive activity that fails to qualify for the exemptions.	62

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XV. CONCLUSION 64

APPENDIX B: LIST OF TASK FORCE MEMBERS

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