Memorandum

TO: Gary P. Zanfagna, ABA Antitrust Section Vice Chair  
Long Range Planning Committee

FROM: Insurance and Financial Services Committee  
Co-Chairs: Eric J. Stock and Gary W. Kubek  
Vice Chairs: Jason S. Dubner, Deidre Johnson, Jonathan R. Lutinski,  
Amanda Norton, Deborah Salzberger, John Snyder  
YLR: Joseph Vardner

DATE: March 20, 2019

RE: Long Range Plan, 2019-21

I. Current State of Your Committee
   A. Scope of Charter

Our current Charter describes the scope of the Committee’s activities as follows:¹

“The Insurance and Financial Services Committee is dedicated to providing a forum for the discussion of a wide range of competition and consumer protection issues that affect insurance and financial markets and institutions. We strive to be a valuable resource for members with a variety of perspectives, including that of antitrust, competition, and consumer protection lawyers and that of lawyers and business people involved in the insurance and financial services industries, including the securities and commodities markets, banking, payment systems, and a broad array of other financial services.

Our Committee programs and publications seek to address the wide variety of competition and consumer protection developments that affect insurance and financial services, including civil and criminal enforcement proceedings, litigation, competition and consumer protection policy at the regulatory agencies, and legislation. We aim to present the views not only of industry participants and private practitioners, but also of representatives of a wide variety of government agencies including the Antitrust Division of the Department of Justice, the Federal Trade Commission, State Attorneys General,

¹ We believe this (or at least the first paragraph, possibly also the second) is the current version of the Charter, based on the last Long Range Plan (which included several proposed revisions), but we have not found a definitive version on the Section website.
the Consumer Financial Protection Bureau, the Securities and Exchange Commission, the Federal Reserve Board, the Office of the Comptroller of the Currency, and state consumer protection and insurance regulators.”

B. Description and Reflective Evaluation of Membership Levels, Diversity and Growth

The Committee currently has 298 members, essentially unchanged from 297 reported in our last Long Range Plan in 2016. A review of our roster shows that the committee’s membership is relatively diverse, with about 25-30% women and a significant representation of minorities. The majority of members are U.S.-based private defense-bar practitioners, but our membership also includes economists, in-house lawyers, federal and state enforcers, plaintiff-side private practitioners, law students and professors. While the largest group of international members is from Canada, we also have members from Europe (particularly Belgium), Australia, Korea, and other countries. We are working to increase membership and to increase the number of members actively engaged in the Committee’s activities. One way we are seeking to do so is by offering a diverse set of programming. For example, we recently had a program with a representative from the New York Attorney General’s office speaking about consumer protection issues, and we have an upcoming program in New York aimed at attracting significant in-house attendance. The latter program is being run by our two in-house leadership members, one who is our YLR and the other a Vice-Chair.

C. Level of Interaction with Other Committees

The Committee works cooperatively and effectively with many other Section committees and co-sponsors in developing programs. These activities include:

- The upcoming Spring Meeting program on Antitrust Issues with Common Ownership, co-sponsored with the Joint Conduct and Mergers and Acquisitions Committees;

- A fall 2018 committee program on the same topic with the Mergers & Acquisitions Committee;

- A March 2018 program on blockchain technology with the Compliance & Ethics, Consumer Protection and Trade, Sports & Professional Associations Committees;

- A program we are currently planning together with the M&A committee on obtaining merger clearance for transactions that require the approval of state regulatory agencies (which is common in the insurance industry).
D. Top 3 Accomplishments Since Last Long Range Plan

- Publications: The Committee completed a new publication, the *Private Equity Antitrust Handbook*. We also have maintained a twice a year schedule for our newsletter, *The Exchange*, and are seeking to publish a third issue this Section year. We have included summaries of several of the Committee’s programs, to make this valuable content available to a much larger audience that those who actually attended the programs.

- Connect Updates: We have maintained and enhanced our bi-weekly posting of recent developments in the insurance and financial services industries, to provide a handy summary for Committee members and others. We have heard from members that these updates are of value to them.

- Programming: We sponsored committee and Spring Meeting programs during 2017-18 on the then-pending *Amex* case and are sponsoring two programs at this year’s Spring Meeting: one on the *Amex* decision’s open issues, and one on the hot issue of minority investments in competitors.

II. Major Competition/Consumer Protection Policy or Substantive Issues within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Minority Ownership of Competitors

The possible anticompetitive consequences of ownership of minority interests in multiple competitors in an industry by various types of institutional investors – ranging from usually passive investors such as index funds and actively managed mutual funds to more active investors such as hedge funds and even private equity firms – have attracted increasing attention in recent years, and such attention is likely to continue and possibly increase. The Committee has sponsored programs examining these issues, including the extent to which various challenged activities are subject to regulation under our existing antitrust laws. We will continue to address these matters, which are the subject of one of our two programs at this year’s Spring Meeting, through our additional programs and publications.

B. Antitrust Treatment of Two-Sided Platforms

As will be explored during the Committee’s upcoming Spring Meeting program, the Supreme Court’s *Amex* decision left numerous open questions about its application to other arrangements that are claimed to be two-sided platforms. The Committee intends to continue reporting on the lower courts’ treatment of these issues and to provide a forum for discussion of the legal and economic issues raised by *Amex* and these future decisions.
C. Cartel Matters in the Financial Services Industry

There continues to be a significant number of government investigations and class action lawsuits brought against financial institutions alleging manipulation of financial benchmarks. Many of these matters involve claims of collusion in violation of Section 1 of the Sherman Act. We intend to continue to follow these cases and keep our membership up to date on the latest developments, and what they mean for those who practice in the financial services sector and other industries.

D. Developments at the CFPB

Consistent with the consumer protection part of our mission, we have held programs on the latest developments at the CFPB. Given that the CFPB remains a significant political issue, we expect to continue programming on this topic and will our members updated on the latest developments and enforcement actions coming out of this agency.

III. Specific Long Term Plans to Strengthen the Committee

A. Potential Modifications to Charter

The scope of our charter is narrow because of its industry focus, but it appears generally appropriate. While the narrow charter limits the breadth of our focus, it does allow us to provide a depth of treatment that is of interest to our members who tend to focus on our industries. We do not suggest any changes in the charter.

B. Ongoing Activities and Plans for Growth

a. Expansion of Membership

The narrow scope of our charter limits our ability to expand the Committee’s membership. However, as noted, it also helps ensure that the members that we do have are interested in the programming we are offering. We will continue to try to take advantage of the Committee’s deep expertise in two highly specialized but important industries to attract new members. Issues encountered in those industries, such as two-sided markets and benchmark pricing, are also often encountered in other industries, and we will continue to work with other industry committees to sponsor programs on those and other issues of common concern. In addition, we will re-double the efforts of Committee leadership to reach out to others involved in our industries to encourage them to take advantage of, and help us expand, our resources, including our bi-weekly Connect postings, Committee programs and our newsletter, The Exchange.

b. Diversification of Membership

We will continue our efforts to increase gender diversity (about 25-30% of our members and three of our vice chairs are women), while also attempting to increase diversity along
numerous other metrics, including minorities, young lawyers, LGBTQ and disabled lawyers, and plaintiffs’ lawyers. Our efforts will include networking events (when permitted); continuing to develop programming that is of interest to a diverse audience; and proactively reaching out to diverse candidates for membership in the financial services and insurance industries.

c. CLE/Committee Programs

We will continue our focus on delivering high quality committee programs. In addition to informing our members about developments in the industries we cover, these programs can also help expand our membership by dealing with important issues in areas where our industries interact with others, such as health insurance. Some of these programs will be based on proposals that were judged too narrow for a Spring Meeting, but others will address timely issues that arise during the rest of the year.

d. Publications and Newsletter

- **Insurance Industry Handbook.** The Long Range Publication Plan calls for an update of this publication, which was last updated in 2016. We are looking for a leader for this project and will then work with that individual to review whether a sufficient number of developments have occurred justifying this update. Assuming the answer is yes, we will then move this project forward.

- **Bank Mergers and Acquisitions Handbook.** The Long Range Publication Plan also calls for an update/revision of this book, which was last published in 2006. Based on what we understand to be its low sales, the absence of major developments in this area and the low attendance (only 8) for our recent October 2018 committee program on bank mergers, we recommend this publication not be updated at the present time.

- **Private Equity Handbook.** This book, which was first published in 2016, is not scheduled for an update until 2021.

- **Antitrust Law Development Updates.** The Committee will continue to contribute its sections to the Annual Review of Antitrust Law Developments. We regularly provide updates for the two chapters that address our industries.

- **The Exchange.** We are publishing our second issue of the year now and are hoping to have our first Section year with three issues. We have concluded that it is better to try to publish an additional issue, and to accept shorter (as well as longer) articles, including summaries of interesting Committee programs, in order to provide more frequent and timely output for Committee members and other readers. We will continue to publicize the opportunity to write articles to the membership as a whole and to young lawyers as a way of increasing involvement.
with the committee. *The Exchange* will also continue to be open to articles on developments outside the United States and to developments in consumer protection.

e. **Technology, CONNECT, and Innovative Content/Value Delivery**

We will continue to provide members with our informative biweekly updates on recent developments on the Connect platform, as well as occasional announcements of breaking news that we feel our membership would benefit from seeing promptly. We also use Connect to solicit contributions to our newsletter and participation in other Committee activities. However, we will focus on ways to increase our use of Connect and to make sure that our Committee webpage is kept up to date.

f. **Joint Activities with Other Committees/Entities**

As described above, we have pursued various opportunities to co-sponsor programs with other committees and organizations. Consistent with the Section’s advice on the benefits of increasing attendance through joint sponsorship with other committees, we will redouble our efforts to reach out to other appropriate committees when we plan a program and to offer our assistance in putting on or at least co-sponsoring other committees’ programs.

g. **Development of Future Leaders**

The Committee has been successful in grooming future members of Section leadership. Our YLRs have gone on to serve as vice chairs of other committees. The Committee Co-Chairs also believe that several of our current vice chairs would make excellent future chairs of this or another committee, if they are interested. In addition, it frequently occurs that individuals interested in joining the leadership start out by writing articles for our newsletter.

h. **Other Recommended Resources, Support or Initiatives**

We have no suggestions or requests other than to hope that the recent improvements in access to the Section’s website, including the leadership resources, will mark a turning point in the transition to the new platform, which will make carrying out and tracking the Committee’s activities much easier.

C. **Principal Challenges, Weaknesses, or Impediments to Operation of Your Committee – and Plans to Address**

- The challenges and limitations faced by the Committee largely result from our relatively narrow, industry-focused charter, which limits our ability to increase
our membership as much as some committees with broader scopes. We will continue to reach out to lawyers whom we know practice in these areas, but we have not yet found a method for consistently increasing our membership. We will also consider whether, and if so, how, to revive an Advisory Committee to increase the resources available for Committee activities and to suggest additional ways to make Committee membership attractive to more Section members.

- We need to ensure that we cover not only the antitrust issues but also the many important consumer protection issues that arise in our industries. We have been working with the consumer protection-oriented committees to develop programs in this area.

- As the interest rate benchmark and foreign exchange and other futures investigations and litigations begin to wind down, or at least attract less public attention, we need to focus on keeping abreast (or ahead) of new developing areas of attention in order to provide maximum value to our members, and hopefully attract new members. We believe we have done a good job of that with our programming (starting in 2015) on two-sided platforms and more recently on the effect of minority stock ownership in competitors. But we need to continue looking for developing areas of interest.