

**AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW**

THE STATE OF FEDERAL ANTITRUST ENFORCEMENT -- 2004

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 should not be construed as representing the policy of the American Bar Association.

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SECTION OF ANTITRUST LAW**

The Section of Antitrust Law (“Section”) of the American Bar Association (“ABA”) appreciates the opportunity to present its views on the current state of federal antitrust enforcement and future directions of antitrust policy. These views are expressed only on behalf of the Section of the ABA. 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.

THE STATE OF FEDERAL ANTITRUST ENFORCEMENT -- 2004

The Chair of the Section appointed this Task Force on the Federal Antitrust Agencies to evaluate and report on the state of federal enforcement of the antitrust laws.¹ We are advised by the Chair that this Report should be designed for the purpose of providing the federal agencies and the White House with the Section’s views regarding current and prospective federal enforcement practice and policy initiatives. Accordingly, this Report is organized as follows: after an Executive Summary, Section I provides a brief overview of the state of U.S. antitrust law

¹ The Task Force consisted of senior members of the Section with a diversity of experience, including prior agency service, and a diversity of political affiliations (with Republicans, Democrats, and Independents all represented): Robert Pitofsky (co-Chair); James F. Rill (co-Chair); William J. Baer; Ilene Knable Gotts; Joseph Kattan; Janet L. McDavid; Daniel L. Rubinfeld; Joseph J. Simons; Joe Sims; Robert P. Taylor; and Marcy E. Wilkov. Participating *ex officio* were Section Chair Richard J. Wallis, Section Chair-Elect Donald C. Klawiter, and Immediate Past Chair Kevin E. Grady. The views expressed in this Report reflect the general collective views of the Task Force, as informed by the Council, rather than the views of any particular Task Force members and the views should, therefore, not necessarily be attributed to any member.

today, focusing on its bipartisan nature; Section II provides the Section's views of the performance of the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") during the first term of the current Administration; and Section III presents a more detailed statement of the Section's recommendations.

EXECUTIVE SUMMARY

This is the fifth report of the Section to evaluate and report on the state of federal antitrust enforcement of the antitrust laws in the United States. As this Report reflects, a broad consensus exists today among the enforcement agencies, the bar, and the business community regarding the core objectives and principles underlying the antitrust laws. As a result, although there are some differences on the margin in the enforcement decisions reached by a particular administration, the differences are largely not partisan in nature.

The federal antitrust agencies have generally done an admirable job in continuing the enforcement of the antitrust (and consumer protection) laws in a manner consistent with mainstream bipartisan principles. In addition, due to the decrease in merger activity, the agencies devoted significant resources to policy initiatives and procedural improvements. We believe that continued work on these initiatives is important and that the agencies should be provided with adequate funding to permit them to pursue such projects in addition to their specific enforcement activities. To achieve the ultimate objectives of consumer welfare and efficiency, such projects should foster the development of enforcement agendas that reflect the most advanced legal and economic thinking.

The federal antitrust agencies should be commended for the open dialogue that they have fostered through hearings on intellectual property, health care, and merger analysis, and the Task Forces on Noerr-Pennington and State Action Doctrines. Similarly, their active *amicus curiae* and competition advocacy programs as well as leadership in international fora have promoted the development of antitrust law domestically and internationally that is consistent with sound economic principles. The agencies are also to be commended for their efforts to increase transparency in decision-making, including in decisions not to take action. Transparency provides important guidance to the bar and the business community to make the appropriate business decisions that are required to compete globally.

Accordingly, given what appears to be a balanced, moderate, and bipartisan enforcement program, major changes in antitrust enforcement do not appear to be in order. Rather, the Section offers certain modest recommendations that it believes would advance the core antitrust objectives and the competitiveness of U.S. businesses globally:

1. International Initiatives -- The antitrust enforcement relationships between the U.S. and other jurisdictions in this increasingly global economy should be one of the very highest priorities of the Administration. The federal agencies should continue their international initiatives -- on a global basis through international fora, such as the International Competition Network (“ICN”) and the Organization for Economic Cooperation and Development (“OECD”), with individual jurisdictions through formal bilateral discussions and working groups, and through regional organizations -- to adopt comity principles on important issues such as mergers and the intellectual property (“IP”)/antitrust interface and remedies, as well as procedural merger

review convergence, in the short-term, and to promote substantive convergence in these areas in the long-term.

2. Intellectual Property/Antitrust Interface -- The agencies should continue to provide a forum for dialogue on the important and complex issues raised by the IP/antitrust interface. In addition, the agencies should continue their important and effective advocacy work in the filing of *amicus* briefs in intellectual property cases to ensure that the state of the law reflects the learning of the past two decades; failure to do so could have broad international ramifications that could adversely impact U.S. companies in their dealings abroad.

3. Scope of Section 2 of the Sherman Act -- The agencies should proactively seek to clarify the appropriate scope of Section 2 of the Sherman Act, particularly concerning exclusionary conduct and “bundled” prices and rebates. Such clarification could be fostered through a combination of appropriate enforcement activities, *amicus* advocacy, speeches and public statements.

4. Policy and Education Initiatives -- The agencies should continue their active *amicus*/advocacy programs on important areas of the law, including, as mentioned above, the scope of Section 2 of the Sherman Act and the IP/antitrust interface. In addition, the agencies should continue to develop appropriate policy objectives and dissemination of cutting-edge legal and economic learning in the competition field, including the role of efficiencies in merger review, single-firm exclusionary conduct, and the treatment of non-horizontal mergers. Adequate training resources within the agencies are a priority item and should remain so to ensure that all staff (and, at the FTC, the administrative law judges as well) maintain the

appropriate level of expertise to ensure that decisions are consistent with the legal and economic principles being adopted by the federal courts.

5. Transparency -- The agencies should continue their practice of increased transparency in decision-making, both in the policy context and in individual enforcement decisions.

6. Cartels -- Criminal enforcement against hard-core cartel behavior has been and should remain a key priority of the DOJ. With the new legislation authorizing steeper fines, the DOJ should use public statements to reiterate and, if necessary, clarify which categories of conduct and defendants will be prosecuted under these more severe penalties, as well as how the detrebling provisions of the statute will be interpreted. The DOJ should also address promptly the ambiguities and potential deficiencies in the sections of the legislation limiting the civil exposure of amnesty applicants.

7. Mergers -- Despite improvements in recent years, the merger review process continues to impose significant costs and delays upon the parties to transactions. Greater effort is needed to limit the substantial burdens, costs and delays associated with merger review. In addition, the merger review process could be improved substantially by the adoption of a clearance process that provides greater certainty and eliminates delay in the investigation process for most transactions by having a predetermined allocation of industries between the FTC and the DOJ.

8. Federal/State Cooperation -- Joint investigation and enforcement action by federal and state antitrust agencies, particularly relating to mergers, can result in significant costs both to the public and private sectors. The Section encourages the agencies, possibly through the Executive Working Group, to continue a dialogue with state attorneys general to adopt methods for allocating responsibilities in matters with shared jurisdiction to avoid duplicative efforts.

9. Legislative Reforms -- The Section encourages initiatives and support that the agencies could bring to reform two discrete areas of federal legislation: (1) the inequities and inconsistencies that result from the disparity between federal and state law in the aftermath of *Illinois Brick*; and (2) the repeal or reform of certain provisions of the Robinson-Patman Act.

I. State of Antitrust Law: Harmonization and Consensus Exists in U.S. on Core Principles Today

This is the fifth report of the Section offering views to a new administration on the state of federal enforcement of the antitrust laws in the U.S.² The Section has consistently recognized and applauded the contribution of sensible and balanced antitrust enforcement to the health of a vigorous free market economy. The Section's 2004 Report to the Antitrust Modernization Commission captures concisely the Section's views of antitrust enforcement:

² The predecessors of this Report are the following the 1989 Report of the ABA Antitrust Section Special Committee to Study the Role of the Federal Trade Commission (1989 FTC Report); the 1989 Report of the ABA Antitrust Section Task Force on the Antitrust Division of the U.S. Department of Justice (1989 DOJ Report); the 1991 Report of the ABA Antitrust Section Special Committee on International Antitrust (1991 International Report); the 1993 Report of the ABA Antitrust Section Special Task Force on Competition Policy (1993 Report); and ABA Antitrust Section Report of the Task Force on the Federal Antitrust Agencies -- 2001 (2001 Report).

The Antitrust Section supports strong effective antitrust enforcement and believes that antitrust law has contributed substantially to preventing restraints on competition that interfere with “the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress.” *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958).³

During the last third of the 20th century, the U.S. witnessed profound changes in the nature of antitrust enforcement and, in the past 16 years, a remarkable bipartisan convergence of enforcement policy to incorporate tools of industrial organization economics. Modifications and improvements can certainly be introduced, and several are discussed in Sections II and III of this paper, but the extraordinary differences of views that raged in the 1960s and later in the 1980s have almost disappeared.

In the 1960s, emphasis was on populist values, hostility to “bigness,” protection of competitors (especially small business as opposed to the competitive process), neglect or outright hostility toward efficiencies and the adoption of remedies of little or no deterrent value. During a brief segment in the late 1980s, there was exceptionally modest antitrust enforcement outside the area of hard-core cartels (price-fixing, market division, and output limitations) and challenges to only a few horizontal mergers, with little federal antitrust enforcement occurring in other areas of the law.

³ Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission (Sept. 30, 2004), available at <http://www/amc.gov/comments/abaantitrustsec.pdf>. We believe the work being undertaken by the Antitrust Modernization Commission is important and refer throughout this Report to topics we have previously urged the Commission to study.

More recently, efforts in the enforcement agencies and in academia have been directed at finding a middle ground reflecting moderately aggressive enforcement, accompanied by sensitivity to efficiencies, preservation of incentives to innovate, and global competition considerations.

In the past 16 years, there has been a remarkable convergence of thinking about antitrust principles in the U.S. A bipartisan consensus formed during the administrations of Presidents George H.W. Bush, William J. Clinton, and George W. Bush so that enforcement priorities in many areas of antitrust are roughly the same whether the U.S. enforcement agencies -- the DOJ and the FTC -- are led by Democrats or Republicans.

We believe that a principal reason for relative consistency of antitrust enforcement over the past 16 years was general acceptance by those within the federal agencies charged with carrying out the mission that their work be guided by core values, including the following:

1. in establishing priorities and goals, the primary concern should be the welfare of consumers -- not shareholders of corporations or competitors;
2. enforcers devote primary attention to horizontal cartel activity and to horizontal restraints in merger and nonmerger cases;
3. agency recognition of an essential role for economic analysis to inform the design and application of legal rules;
4. continued enforcement against practices, not horizontal in themselves, that can

- facilitate horizontal restraints; these include minimum resale price maintenance agreements, a narrow range of boycotts, and intellectual property cross-licensing;
5. increased sensitivity and concern about private restraints achieved through state action; and
 6. a far more modest role for challenges to price and service discrimination under the Robinson-Patman Act; to conglomerate mergers based on theories of raising barriers to entry; and to vertical distribution arrangements that have no significant horizontal effect.

Because there has been general agreement on these core values throughout the last 16 years, enforcement priorities have converged. There will continue to be disagreements about particular enforcement decisions, but, as before, they will frequently reflect legal complexity and uncertain factual situations rather than significant doctrinal differences.

The federal agencies have also played a crucial role in harmonizing the substantive standards and policies applied by antitrust enforcement agencies in jurisdictions around the world. The proliferation of antitrust regimes and globalization of commerce means that antitrust policy is no longer an American phenomenon. Many jurisdictions have followed the U.S. in enacting and enforcing competition laws. Over 100 countries now have antitrust laws of one kind or another. Both federal antitrust agencies work cooperatively with many of these foreign competition policy regimes on a regular basis, and have been involved in fostering their development. Also, both agencies have played an important leadership role in the establishment and activities of the ICN and the activities of the OECD. The OECD and the ICN can provide

useful platforms for procedural and substantive convergence, as can formal and informal bilateral discussions and agreements to avoid disparate outcomes, particularly in conduct/cartel matters and remedies, which can have serious unintended consequences.

II. Agency Scorecard⁴

The broad consensus that exists on most fundamental antitrust principles means that, even among administrations of different parties, there have been only modest changes at the margins of enforcement actions. Set forth below are the Section's evaluations of agency initiatives in several critical areas.

1. Policy Development and Analysis. The agencies should be commended for continuing the practice of hearings and policy analysis that began during prior administrations. The hearings on intellectual property,⁵ health care,⁶ and merger analysis,⁷ as

⁴ This Report focuses on the enforcement of the antitrust laws and does not cover the consumer protection laws and functions of the FTC. The Section applauds the significant initiatives that the FTC has undertaken in the consumer protection area, both domestically and internationally, during the most recent Administration, including the adoption of the "do not call" registry, privacy workshop, health care fraud, and the OECD Security of Information Systems Report. We hope that these initiatives will continue during the next term.

⁵ FTC/DOJ Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Feb. 2002–Oct. 2002, *available at* <http://www.ftc.gov/opp/intellect/index.htm>.

⁶ FTC/DOJ Report and Hearings on Health Care and Competition Law and Policy, Feb. 2003–Sept. 2003, *available at* <http://www.ftc.gov/ogc/healthcarehearings/index.htm>.

⁷ Department of Justice and FTC Issue Merger Challenges Data, Announce Upcoming Merger Enforcement Workshop (Dec. 18, 2003), *available at* http://www.usdoj.gov/atr/public/press_releases/2003/201899.htm.

well as FTC task forces on the Noerr-Pennington and state action doctrines,⁸ exemplify the commendable efforts by the agencies to analyze the current state of antitrust law, and consider the appropriate course of future enforcement policies. The FTC in particular has used hearings and reports to build an analytical foundation for future enforcement policy and activity.

2. Economic Analysis. The agencies should be commended for their recognition that sound economic analysis is critical to antitrust enforcement. Both agencies regularly involve economists in investigations and enforcement matters from the beginning, and economic analysis is critical to decision-making within the agencies. The FTC has also undertaken significant economic studies that underlie agency policies.⁹

3. Active *Amicus Curiae*/Competition Advocacy Program. Both agencies should be commended for their active efforts to promote competition and sound antitrust doctrine by offering their views on legislation and other government actions or proposals and through effective use of *amicus curiae* briefs. We encourage them to continue the full range of their competition advocacy, both within executive and legislative branches, and at both the

⁸ Report of the State Action Task Force: Recommendations to Clarify and Reaffirm the Original Purposes of the State Action Doctrine to Help Ensure Robust Competition Continues to Protect Consumers (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>; Noerr-Pennington Task Force, described at <http://www.ftc.gov/os/2003/07/antitrustoversighttest.htm>.

⁹ See, e.g., Bureau of Economics Staff Report on “The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement,” available at <http://www.ftc.gov/os/2004/08/040813mergersinpetrolcomst.pdf>.

federal and state levels.¹⁰ We also encourage them to continue the filing of *amicus* briefs in judicial cases, including in Courts of Appeals. The agencies' *amicus* advocacy in *Empagran*¹¹ and *Trinko*¹² clearly influenced the U.S. Supreme Court's opinions in those cases. We believe all of these efforts have been substantial and important and should be continued.

4. Agency Transparency. In the past four years, both agencies have provided transparency about enforcement decisions, and especially decisions not to bring enforcement actions, to a greater degree than ever before.¹³ The Section has previously urged the agencies to provide such transparency,¹⁴ and applauds those efforts that were undertaken despite the fact that, as one Commissioner explained, "they impose additional burdens on limited resources and . . . there always is the fear that explanations for non-action in some situations will provide

¹⁰ See, e.g., FTC Staff and Justice Department Urge Massachusetts Legislature to Allow Nonlawyers to Compete with Lawyers for Real Estate Closing Services (Oct. 12, 2004), available at <http://www.ftc.gov/opa/2004/10/nonlawyers.htm>.

¹¹ United States as *Amicus Curiae*, *Verizon Comm., Inc. v. Law Offices of Curtis and Trinko* (U.S. Sup. Ct. No. 02-682) (filed Dec. 13, 2002 and May 23, 2003), available at <http://www.usdoj.gov/atr/cases/f20100/201048.htm>; <http://www.usdoj.gov/atr/cases/f200500/200558.htm>.

¹² United States as *Amicus Curiae*, *F. Hoffmann-LaRoche v. Empagran, S.A.* (U.S. Sup. Ct. No. 03-724) (filed Feb. 3, 2004), available at <http://www.usdoj.gov/osg/briefs/20032003-0724>.

¹³ See, e.g., Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and *Carnival Corporation/P&O Princess Cruises plc*, FTC File No. 021 0041 (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>; Statement by Assistant Attorney General R. Hewitt Pate Regarding the Closing of the Digital Music Investigation -- Investigation Reveals the Major Record Labels' Joint Ventures, pressplay and MusicNet, Have not Harmed Consumers or Reduced Competition (Dec. 23, 2003), available at http://www.usdoj.gov/atr/public/press_releases/2003/201946.htm.

¹⁴ See, e.g., *Report of the Section's Special Task Force on Competition Policy*, 61 Antitrust L.J. 977, 989 (1993).

ammunition for parties who are resisting action in other situations that may superficially appear comparable.”¹⁵ Transparency aids the bar and business community in understanding the parameters of likely future agency actions and provides for better and stronger enforcement.

5. Recruiting and Retaining Professional Staff. A successful antitrust agency necessarily relies on the skills and talents of its professional staff. As the Section has indicated previously,¹⁶ we believe both agencies should pay greater attention to developing and maintaining a strong corps of attorneys and economists. During the first term of the Administration, both agencies took steps to provide more training to their lawyers. The FTC’s Bureau of Competition created a trial litigation unit, and the DOJ now has a staff member dedicated to training. However, even greater attention to training is needed. The leadership of both agencies should continue and increase their training efforts. Better training will likely increase the agencies’ ability to carry out their law enforcement missions -- they may win more cases in court -- and help them recruit and retain talented attorneys, who, absent good experience and training, may seek the financial rewards available in the private sector. The Section remains committed to providing to both the private sector and to agency personnel a full array of programs and publications that may be of use to the agencies in their training initiatives. We welcome continuing discussions with the agencies regarding how the Section can assist them to achieve this important goal.

¹⁵ Commissioner Thomas B. Leary, *The Muris Legacy*, ABA Section of Antitrust Law, Annual Meeting (Aug. 7, 2004), available at <http://www.ftc.gov/speeches/leary/041206murislegacy.pdf>.

¹⁶ See *The State of Antitrust Enforcement 2001*, available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>.

6. Strengthening Agency Litigation Capacity. Unless the agencies can be successful in a significant percentage of the cases they bring, they may be perceived by the bar and business community as “paper tigers.” One risk is that the agencies will be unable to secure settlements that they believe are necessary to protect competition because parties will be reluctant to settle and will be more inclined to put the agencies to their proof in court. This issue is not new,¹⁷ but it has become a more serious problem in recent years as both agencies have lost many of their more experienced trial lawyers. The DOJ also appears to have returned to a practice of using its career attorneys to litigate its cases, as opposed to bringing in outside trial lawyers as in the *Microsoft* case. Accordingly, both agencies must devote substantial effort to strengthening their internal litigation capabilities.

7. International Cooperation. Both agencies have continued the efforts of prior administrations to foster international cooperation through multilateral and bilateral relationships. For example, the agencies have played critical roles in the creation and development of the ICN,¹⁸ which has produced valuable results, in the OECD, and in bilateral

¹⁷ For example, this concern was identified in the Report of the Section’s Special Task Force on Competition Policy in 1993, 61 Antitrust L.J. 977, 983 (1993).

¹⁸ See, e.g., U.S. and Foreign Antitrust Officials Launch International Competition Network -- New International Venue Will Assist in Global Convergence on Important Antitrust Enforcement Issues (Oct. 25, 2001), available at <http://www.usdoj.gov/atr/public/pressreleases/2001/9400.htm>; International Competition Network Conference Adopts Recommended Practices to Improve Merger Review Process, Establishes Cartel Working Group -- Assistant Attorney General R. Hewitt Pate Promotes Antitrust Convergence at Seoul Conference (April 22, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/203380.htm.

cooperation with foreign enforcement agencies.¹⁹ These efforts have been extremely positive. Through close working relationships, the DOJ and the FTC and their foreign counterparts have achieved convergence on many issues. Some divergence in outcomes is inevitable, partly due to historical differences in market performance as well as different substantive and procedural standards. The Section believes that a constructive dialogue among competition authorities on prospective policies can be useful in continuing the convergence process among jurisdictions.

8. Cartel Enforcement. Hard core cartels merit tough prosecution both in the U.S. and overseas.²⁰ The DOJ has continued to view cartel behavior -- “the supreme evil of antitrust” -- as its principal mission, and it has pursued criminal prosecutions vigorously and effectively. In addition to its aggressive domestic cartel enforcement efforts, the DOJ has devoted substantial resources to promote cartel enforcement activities around the world through the ICN, the OECD, certain bilateral arrangements, and through efforts to work cooperatively with other foreign agencies on cartel issues. We applaud the DOJ’s activities in cartel enforcement, and encourage the DOJ to continue those activities.

¹⁹ See, e.g., United States and European Union Antitrust Agencies Issue “Best Practices” for Coordinating Merger Reviews (Oct. 30, 2002), available at http://www.usdoj.gov/atr/public/press_releases/2002/200407.htm.

²⁰ The DOJ successfully supported recently enacted legislation in this area. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 increases the maximum Sherman Act corporate fine to \$100 million, the maximum individual fine to \$1 million, and the maximum Sherman Act jail term to ten years. The Act also enhances the incentive for corporations to self-report illegal conduct by limiting the damages recoverable from a corporate amnesty applicant, which also cooperates with private plaintiffs in their damage actions against remaining cartel members, to actual damages.

9. Merger Process Reforms. Both agencies sought to reform the merger review process during the past four years.²¹ The Section has been a regular advocate of such initiatives,²² and believes that recent efforts have been positive, although we continue to believe that a far greater effort is required to limit the substantial burdens, costs, and delays associated with merger review.

10. Clearance of Matters Between the Agencies. In early 2002, the agencies announced an agreement to allocate industry sectors between the agencies to achieve greater efficiency through industry experience and to eliminate the inefficiencies that resulted from protracted clearance disputes.²³ The Section supported the concept of such an agreement,²⁴ and understands that during its limited duration it worked well. However, the effort failed as a result of political pressure. As the Section stated in 2002, “a publicly announced agreement allocating responsibility by industry will lead to a more expeditious, efficient and transparent review

²¹ See, e.g., Antitrust Division Releases Details of Merger Review Process Initiative -- Program Stresses Early Identification of Issues and Negotiation of Investigative Plans (Oct. 12, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/9305.htm; FTC Report on Best Practices in Merger Investigations, available at http://www.ftc.gov/opa/2002/10/mergerbest_practices.htm.

²² ABA Antitrust Section, The State of Antitrust Enforcement 2001, *supra*; ABA Antitrust Section, Guidance for Federal Merger Investigations, available at http://www.abanet.org/antitrust/guidelines_for_mergers_12_00.pdf.

²³ DOJ and FTC Announce New Clearance Procedures for Antitrust Matters -- Memorandum of Agreement Allocates Industry Sectors Between Agencies (March 5, 2002), available at http://www.usdoj.gov/atr/public/press_releases/2002/10171.htm.

²⁴ See Letter from Roxane Busey to Charles A. James and Timothy J. Muris (Jan. 23, 2002), available at <http://www.abanet.org/antitrust/comments/2002/jamesmuris.doc>.

process at least with respect to the allocated industries.”²⁵ The current system of allocating cases between the agencies is inefficient and should be addressed.

11. Revival of Administrative Litigation and Judicial Education. Given the significant increase in administrative litigation at the FTC,²⁶ it is important that the FTC focus on achieving the highest caliber of substantive and procedural trial management. The Section has two specific recommendations consistent with this objective. First, we recommend that the rules and regulations governing the selection of administrative law judges be amended to provide the Commission with greater flexibility in selection, consistent with the ultimate goal of selecting the most qualified individuals to serve in this capacity. Second, the agencies should facilitate providing administrative law judges with access to the latest economic and empirical developments that would ensure that they are able to perform their role effectively.

III. Specific Recommendations

The Section believes no broad sweeping reforms are needed at this time. Rather, we take this opportunity to provide our views of specific actions that would be consistent with, and further, the competition objectives and mandate of the agencies.

²⁵ *Id.*

²⁶ There have been more than 22 cases brought or decided in recent years, with about a dozen cases currently pending.

1. The International Initiatives Now Under Way Should Be a High Priority.

The end of the Cold War intensified not only the globalization of commerce but also the adoption of free market principles by countries around the world, accompanied by a vast proliferation of competition regimes. Today, over 100 countries have competition laws. In many cases, these laws claim jurisdiction based on an “effects” test, which means that multiple countries have jurisdiction over the same commerce, often with conflicting substantive and procedural rules.

In our increasingly international economy, mergers in particular affect multiple jurisdictions, and merging parties are confronted by a variety of different, expensive, time-consuming, and potentially inconsistent merger regulations. In 1990, fewer than 20 nations had a merger review system in place; today over 70 do, with more considering such systems every day. At the same time, the globalization of commerce has made an increasing number of transactions subject to review in multiple jurisdictions. In 1991, the Report of the Section of Antitrust Law’s Special Committee on International Antitrust recommended, *inter alia*, that the U.S. and other sovereigns “should strive for greater harmonization regarding the timing and content of their premerger reporting requirements,” cooperate with one another in coordinating merger investigations, enforcement actions, and relief (being duly cognizant of the separate interests of the respective nations), and remove statutory barriers to the sharing of “confidential information, subject to appropriate safeguards.”²⁷ The enforcement agencies and their

²⁷ See <http://www.abanet.org/antitrust/1991intlreport.pdf>.

counterparts abroad have taken positive steps bilaterally on particular transactions to coordinate merger enforcement. We commend the federal agencies for their creation and implementation of bilateral agreements that facilitate cross-border cooperation and foster greater convergence.²⁸ The development of effective working relationships with other major jurisdictions, such as the EU, are also important to the achievement of convergence and transparency. In this regard, the significant progress that has been made through the U.S.-EU working groups in the mergers and intellectual property areas, and the consultative role of the U.S. antitrust agencies in the EU's modernization legislation, merger process and guidelines, and Technology Transfer Block Exemption have demonstrated significant cooperation among competition authorities around the world.

We also commend the agencies for their leadership role in advancing the international convergence dialogue on a global level, including their leadership role in international fora, and their continuous efforts to clarify and foster the policy objectives through speeches, workshops and roundtables. These initiatives have achieved tangible results. In our 2001 Report, the Section recommended that, as a priority matter, the U.S. work with other nations toward reducing the compliance burden, cost and time delays of multi-jurisdiction pre-

²⁸ See, e.g., 1999 U.S.-Japan Cooperation Agreement, *available at* <http://www.usdoj.gov/atr/public/international/docs/3740.htm>; 1999 U.S.-Israel Cooperation Agreement, *available at* <http://www.usdoj.gov/atr/public/international/2296.htm>; 1999 U.S.-Brazil Cooperation Agreement, *available at* <http://www.usdoj.gov/atr/public/international/3776.htm>; 1999 U.S.-Australia MLAT, *available at* <http://www.usdoj.gov/atr/public/international/docs/usaus7.htm>; 2000 U.S.-Mexico Agreement, *available at* <http://www.usdoj.gov/atr/icpac/5134.htm>; 2003 U.S.-Japan Criminal MLAT; and 2004 U.S.-Canada Positive Comity Agreement, *available at* <http://www.usdoj.gov/atr/public/international/docs/205732.htm>.

merger review, particularly for the vast majority of transnational mergers which are not anticompetitive. More broadly, the Section advocated the creation of a platform for harmonization efforts. We commend the agencies for their role in establishing the ICN as such a platform and for advancing the various agenda items of the ICN that seek to build capacity in less developed regimes, as well as to adopt best practices, both substantive and procedural, among the participating jurisdictions in both mergers and conduct matters. The Section has supported these efforts through attendance at these meetings as well as financially.

We also recognize the significant work that the agencies have undertaken in their participation in the efforts of the OECD, most particularly in the area of cartel enforcement.²⁹ The DOJ's efforts to increase and enhance international cooperation on cartel matters while at the same time protecting appropriate confidentiality is commendable. Efforts to organize the international cooperation process, such as the OECD's efforts regarding international cooperation, must continue and be governed by clear and transparent procedures. The Section presented a proposal to the OECD Working Group 3 that sought to define and set such guidelines in October 2003.

The Section supports the DOJ's ongoing efforts to secure better cooperation and coordination of cartel enforcement with other competition enforcement authorities. These actions have enhanced both detection and prosecution of hard-core anticompetitive activity. The

²⁹ We also encourage continued participation in WTO working groups because of their potential for future constructive developments.

Section supports the DOJ's efforts to harmonize the leniency programs that have proliferated in other jurisdictions. The success of the DOJ's leniency program is increasingly dependent upon leniency applicants receiving comparable assurances of nonenforcement or limited penalties in other jurisdictions. Incentives to cooperate in the U.S. will be adversely affected if other competition authorities establish cooperation requirements or procedures that may be harmful to leniency applicants in U.S. proceedings. The DOJ should continue to advocate strongly international norms that can enhance the effectiveness of all leniency programs and provide every incentive for individuals and corporations to self-report illegal conduct.

We suggest that, with the platform that is in place, the time is ripe for further bilateral and global initiatives to advance international convergence objectives. The international initiatives include expanding and fostering the bilateral relationships of the U.S. antitrust agencies with other countries, including less developed countries. For jurisdictions with more established competition regimes, such as South Korea and South Africa, such efforts could include cooperation agreements. For emerging competition regimes, such as China and India, technical assistance programs might be more appropriate. It has appeared that, at some points in recent years, U.S. authorities may have had a less significant role in providing technical assistance. Although technical assistance needs should be shared among authorities, we encourage the U.S. to take the lead through new outreach initiatives with the major emerging regimes to ensure that the expertise and history that inform U.S. policy is included in the capacity-building process. We recognize that the ability of the agencies to undertake an appropriate range of technical assistance activities has been limited by funding constraints, and

we hope that both Congress and other Executive Branch agencies will take steps to accommodate technical assistance to developing economies, as well as to developed economies with emerging competitive regimes.

This renewed outreach effort should include: (1) practical program objectives and flexibility to work within existing legal parameters at the outset (*e.g.*, willingness to work within the “dominant firm” construct that may currently exist in some of these competition paradigms); (2) identification of core competition principles, with appropriate deference to the specific competition environment; and (3) hands-on assistance in applying sound economic analysis, effective enforcement initiatives, and competition advocacy. The U.S. should encourage and facilitate the participation of competition officials of developing countries in bilateral and regional enforcement coordination and cooperation efforts, as well as in the international policy convergence dialogue. Funding should be made available to such agencies through external sources, such as AID, or through liberalized authority for the agencies to allocate existing funds.

We also strongly urge the agencies to continue their leadership role in the OECD’s and the ICN’s activities and policy initiatives. AAG Pate’s appointment as the head of the OECD Competition Committee’s Working Party on International Cooperation provides the agencies with a unique opportunity to ensure that the OECD continues its role as a testing ground for initiatives that can then have a wider dissemination. In addition, the discussion papers prepared by the OECD members, which the OECD Secretariat synthesizes into an issues paper, provide a useful contribution to transparency for the business community. Thus, the agencies should use the platform provided by the OECD to continue the debate on important competition

policy issues. We would suggest that the agencies also expand the working groups of the ICN to include intellectual property and dominant firm exclusionary conduct as topics of primary importance. The ICN's mandate should also involve the periodic review of the ICN's recommendations to determine what progress is being made in their adoption, possibly with the appropriate participation in these reviews by the nongovernmental advisors ("NGAs"). We urge the agencies to use their leadership positions within the ICN: (1) to provide NGAs with an enhanced and meaningful role at all stages; (2) to ensure that the working groups adopt an agenda and timetable that will continue the convergence process, especially relating to harmonization of the merger review process, on an expedited basis; and (3) to provide more effective management and oversight of the progress being made by each of the respective working groups.

We discuss in further detail below the important issues arising in the IP/antitrust interface. These issues are without national borders, however. The international initiatives should include the long-term objective of convergence of the standards applicable to the IP/antitrust interface and, in the short term, the adoption of comity principles to minimize the potential for unintended consequences through the disparate treatment of these objectives, particularly in the remedy stage. Divergent enforcement approaches are of particular concern to multinational companies with global products, especially those with products protected by intellectual property rights ("IPRs"). IPRs and innovation are of critical importance to future growth. Differences in law and remedial approach can undermine business planning and adversely impact investment decisions by diminishing the competitive rewards of innovation and

by creating uncertainty. Differing applications of antitrust and IP law principles in some countries can create inefficiencies for multinational corporations; result in antitrust violations in some countries for the use of IPRs that are legal in others; and even lead to the loss of IPRs in certain jurisdictions.

Divergent standards between jurisdictions can encourage “forum shopping” or “checkerboarding” by competitors seeking the jurisdiction that will impose the broadest requirements upon a competitor, creating a situation in which the most restrictive enforcement approach prevails, thereby potentially depriving consumers worldwide of the benefits of competition. We would encourage the agencies to take the lead in ensuring that these issues are discussed in the appropriate international settings and to encourage the development of the global consensus required to reduce the discrepancies currently existing in the treatment of antitrust and intellectual property among jurisdictions.

Also, as discussed in greater detail below, the agencies currently play an important role in promoting and preserving competition policy objectives through active *amicus* and advocacy programs. Such initiatives must include important judicial matters that have broad domestic and international implications. We commend the agencies for undertaking to clarify the jurisdictional issues arising under the Foreign Trade Antitrust Improvements Act (“FTAIA”) provisions, including their participation in the *Empagran* case and urge the agencies to continue their efforts in this area, including continued *amicus* participation on this and other cases involving extraterritorial application of the U.S. antitrust laws, and, if necessary, after the U.S.

Court of Appeals decision on remand in the *Empagran* case, support of legislation that will close any remaining ambiguities regarding the scope of the FTAIA.

2. The Agencies Should Provide Further Guidance Regarding the IP/Antitrust Interface.

The Antitrust Guidelines for the Licensing of IP were promulgated jointly by the agencies in April 1995. These Guidelines memorialized the remarkable change in the attitude of the enforcement agencies toward the restrictive licensing of intellectual property that occurred after 1980. The Section believes that the IP Guidelines are working well and have brought an important measure of stability to an area of law where predictability is critical. Intellectual property licensing, over the past decade, has acquired greater importance than at any time in history, whether measured by the number of licenses, by the aggregate value of license revenues, or by the sheer volume of investment in new technologies based in whole or in part on the expectation of having such rights. Thus, the need for clear guidance and greater enforcement stability, as reflected by the IP Guidelines, has never been greater than at present. Accordingly, the Section has consistently urged the agencies to examine the complex relationships that exist between intellectual property protection and competition policy and to continue to provide a forum for dialogue on these issues.³⁰ We encourage the agencies to continue their practice of soliciting the input of various interested constituencies, including the Patent and Trademark

³⁰ See, e.g., Letter from Roxane C. Busey to Charles A. Jones and Timothy J. Muris (June 28, 2002) (testimony in connection with hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy), available at <http://www.abanet.org/antitrust/comments/2002/testimony.pdf>.

Office and Undersecretary of Commerce, on policy considerations relating to the interplay between antitrust and intellectual property.

In 2002, the agencies jointly commenced exhaustive hearings on IP, its acquisition and enforcement, its impact on innovation, and the manner in which IP principles should be reconciled with competition policy.³¹ Over a period of two years, some 200 academics, lawyers and business executives representing a broad and well-balanced cross section of interests offered anecdotal evidence, academic studies and widely divergent views on these issues. The aggregate effort is an extremely useful compendium of information.

The FTC released a report in October 2003, entitled “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy,”³² that presents a thoughtful distillation of thousands of pages of testimony and documentary evidence received during the hearings. Several of the concluding recommendations in the FTC report -- particularly one suggesting a new procedure by which issued patents can be challenged more effectively in the Patent and Trademark Office -- generated significant dialogue regarding the work of the Patent and Trademark Office and ways of maintaining patent quality, which has long been a major concern of the intellectual property community. The FTC report represents the first significant effort by an antitrust enforcement agency to examine the competitive impact of patent quality itself.

³¹ See <http://www.usdoj.gov/atr/hearing.htm>.

³² See <http://www.gov/05/2003/10/innovationrpt.pdf>.

A primary theme of the FTC report, as suggested by its title, is the need for a proper “balance” between patent exclusivity and competition. The FTC report thus acknowledges the tension that sometimes exists between the patent laws -- which grants exclusivity for a limited period of time as an incentive for invention and disclosure of invention - - and the antitrust laws -- which render unlawful certain exclusive business practices that have adverse market effects. The FTC report identifies a number of the principal areas in which these tensions are most pronounced and reconciliation of the two systems of law most difficult. An important subtext of the FTC report, with which it is difficult to find fault, is that the “incentives” created by patent protection are not universally aligned in the promotion of innovation. Uncertainties in the scope of patent protection owned by others, as an example, may sometimes exert a negative influence on the willingness of investors to commit capital to new ventures.

The Section believes that a joint report, or in the event that a joint report is not feasible, then two separate reports, reflecting the views of both antitrust enforcement agencies on the IP/antitrust interface, would be useful. Inquiry into the nature and economic impact of intellectual property protection must necessarily be framed in terms of its impact on competition. The existence of competition in and of itself creates incentives to invest in new technology. Just how and when the incentives fostered by competition operate as fully and efficiently as those created by IP does not reduce easily to rules of general application. The pathways through which economic incentives operate can be highly complex, differ widely from one industry to another, and are broadly affected by myriad other factors.

Furthermore, reasonable people may differ sharply over how to assess the data that bear on these issues. Skepticism about specific aspects of the patent system is sometimes grounded in a simple preference for short-term competition over longer term incentives, focusing more closely on the exclusionary process of patent enforcement and its economic fallout than on the beneficial longer term economic effects that flow from governmentally enforced protection of inventions. Diminished consumer welfare is often used as a touchstone for determining whether restrictive business practices rise to the level of unlawful restraints of trade. That test, however, is difficult to apply when used as the basis for analyzing the relationship between patent policy and antitrust policy. The short-term effects of patent enforcement are almost always to diminish consumer welfare, while the offsetting longer term incentives and benefits to consumer welfare are diffuse and far more difficult to demonstrate or to link directly to patent protection. Not only are such incentives to innovate realized in the future, if at all, the incentives do not necessarily flow from a specific relationship to the subject matter of any particular patent or group of patents. In addition, the economic benefits from patent protection are likely to vary from industry to industry and to vary over time within a given industry. The Section would welcome further guidance from the agencies on this complex topic.

As in other areas involving IP and antitrust, we would suggest that the agencies tread carefully when the subject involves IPRs in standard-setting situations. During the last few years, much has been said and written about situations in which standard-setting bodies have adopted interoperability standards with the participation of interested companies, only to learn that one of the companies had obtained patent coverage necessary to practice the particular

standard. This conduct may merit enforcement action in appropriate cases. In fact, antitrust case law and enforcement actions are replete with examples of conduct whereby firms and organizations have gamed the standards-development process to produce clear antitrust offenses.³³ But the Section urges a careful case-by-case approach to these issues. No two situations are alike and there are many considerations that must be weighed in evaluating whether such conduct should be dealt with under the antitrust laws or in some other fashion.

As in other areas, we applaud the efforts of the agencies, through their participation in the filing of *amicus* briefs in particular cases, in shaping IP law where it has a significant potential to affect competition.³⁴ The Section supports the use of agency resources to appear as *amicus* in other situations in which the standing law does not reflect the sea changes of the last two decades. The body of outdated but still effective legal precedent in this country also has international ramifications by exposing the U.S. unnecessarily to criticism and outright refusals to protect the property rights of U.S. companies. This problem is likely to intensify as other countries, such as China and India, follow our lead in the adoption of antitrust laws and begin to analyze how we have dealt with such issues.

³³ See, e.g., *Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 (1988).

³⁴ Examples include the *amicus* briefs filed: (1) in the U.S. Supreme Court in *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1077 (2001) (DOJ expressed the view that the decision of the Federal Circuit was factually inappropriate for granting *certiorari*); (2) in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002) (addressed the proper role of the ancient patent law “Doctrine of Equivalents”). The brief in *Festo* appears to have been useful to the U.S. Supreme Court.

The Report of the DOJ Task Force on Intellectual Property, published in October 2004,³⁵ emphasizes many of the same goals advocated by the Section. For example, the Report acknowledges the potential for inefficiency and abuse if other countries were to adopt legal theories on the interface between antitrust law and IP law that are significantly different from our own. In addition, the DOJ Task Force Report recognizes the need to maintain great freedom and flexibility for the owner of IP to exploit such property as it chooses.

3. The Agencies Should Proactively Seek to Clarify the Scope of Section 2 of the Sherman Act.

It is important that an active enforcement policy be applied with predictability. Unfortunately, the appropriate scope of Section 2 of the Sherman Act -- one of our country's most fundamental provisions of antitrust law -- is in a state of flux in the context of exclusionary conduct. In addition, the Third Circuit's recent *LePage's* decision has cast significant doubt on the heretofore common business practice of offering customers "bundled" pricing and other discounts. The current level of uncertainty created by inconsistent and ambiguous decisions regarding the obligations of a single firm in its dealings with competitors and customers is detrimental both to consumer welfare and to the business community, and is potentially a source of discord with other jurisdictions. The federal agencies should play a proactive role -- through *amicus* briefs in private actions, selection of appropriate enforcement actions as well as

³⁵ Report of the U.S. Department of Justice's Task Force on Intellectual Property (Oct. 2004) available at http://www.usdoj.gov/ag/speeches/2004/ip_task_force_report.pdf.

statements regarding reasons enforcement action was not taken in specific cases, and speeches and other public statements -- in developing the parameters for lawful unilateral conduct.

4. The Agencies Should Continue Their Competition Advocacy Activities.

Overall, the agencies should be commended for their recent competition advocacy efforts. In particular, the DOJ's decision to recommend *certiorari* in *Trinko* -- even in the absence of a request by the U.S. Supreme Court for its views -- reflects the type of vigilant protection of sound jurisprudence that this Administration should continue. Certainly such recommendations will necessarily be made sparingly, but some court decisions are so important to core antitrust principles as to warrant this unusual step.

When the Court does ask for the agencies' input, the agencies should take full advantage of each opportunity to protect competition. *Empagran* is an excellent example -- the U.S.'s *certiorari* recommendation and AAG Pate's oral argument coherently communicated just how the D.C. Circuit's interpretation of the FTAIA impaired law enforcement, particularly the DOJ's ability to deter, detect, and destabilize international cartels. The agencies declined to recommend *certiorari* in *LePage's*, however, citing, among other reasons, the absence of a circuit conflict regarding bundled rebates, the desirability of permitting the case law and economic analysis to develop further, and the poor suitability of the record in that case for the development of an appropriate legal standard.³⁶ In the opinion of this Section, *LePage's* represents a missed opportunity, and the agencies should be more aggressive going forward.

³⁶ See generally United States as *Amicus Curiae*, *3M Co. v. LePage's Inc.* (Sup. Ct. No. 02-1865) (filed May 2004).

Few, if any, cases will present optimal conditions -- the ideal record, a developed body of case law, and consensus in the economic literature. Some opinions are so confused, so antithetical to protection of consumer welfare, and so dangerous that they warrant the agencies weighing in -- even if there is some risk that the resulting U.S. Supreme Court opinion will not provide perfect guidance.

Of course, the agencies also submit their views to the lower courts and should continue to do so often. An aggressive *amicus* program is a cost-effective way to protect the appropriate construction of the antitrust laws, to improve the quality of antitrust jurisprudence and to provide guidance to the bar and the business community. As the agencies are aware, federal and state appellate and lower courts issue a not insignificant number of wrong or misguided decisions each year. These decisions adversely impact competition within their own jurisdictions, and frequently have ripple effects beyond their jurisdiction. Participation in these proceedings can sometimes sufficiently educate the lower court to prevent the need for U.S. Supreme Court review.

The agencies must also be vigilant, outspoken advocates on behalf of competition before independent federal and state agencies, the Congress and state legislatures, and within the Executive Branch itself. Over the past four years, perhaps in part due to the decline in merger activity, the agencies have increased their competition advocacy efforts in the states with good results. A few examples are illustrative. The FTC recently commented on a California bill designed to reduce the cost of pharmaceuticals and health insurance premiums that likely would

have had the opposite result.³⁷ Governor Schwarzenegger cited the FTC's input when he vetoed the bill.³⁸ The DOJ offered comments on a Department of Transportation ("DOT") proposed rulemaking, which would have extended and expanded computer reservations systems rules scheduled to sunset.³⁹ Consistent with the DOJ's recommendation, the DOT permitted the ineffective or outdated rules to lapse while maintaining two other rules for a limited period. Working together, the agencies have urged entities such as a committee of the Georgia State Bar and the Rhode Island legislature to reject proposals that would prevent competition between lawyers and nonlawyers to provide real estate closing services.⁴⁰

This robust level of competition advocacy should continue and, to the extent possible, increase in this Administration. In particular, the agencies should become even more vigilant and aggressive in their role as competition advocate with independent regulatory agencies and within the Executive Branch. Independent and Executive Branch agencies have defined authority under their statutes to enforce antitrust principles, and often do so in ways that are different -- sometimes radically so -- from the approach of the agencies or informed antitrust

³⁷ Letter to Assemblyman Greg Aghazarian (Sept. 7, 2004), *available at* <http://www.ftc.gov/be/v040027.pdf>.

³⁸ *See* Governor's Veto Message for the PBM Disclosure Bill, *available at* http://www.healthlawyers.org/hlm/issues/041001/Terminator_1960_veto.pdf.

³⁹ Reply Comments of the Department of Justice, *Notice of Proposed Rulemaking in Computer Reservation System Regulations* (DOT Dkt. OST 97-2881) (filed June 9, 2003), *available at* <http://www.usdoj.gov/atr/publiccomments/201081.htm>.

⁴⁰ Letter to Speaker and Members of the House of Representatives of Rhode Island (March 28, 2003), *available at* <http://www.ftc.gov/be/v020013.htm>.

practitioners. For example, these agencies may impose “remedies” that are not needed to maintain competition and could actually have anticompetitive results. The federal agencies should use every means available to them -- including comments on rulemaking, non-public written guidance, meetings, phone calls, sharing information (subject to confidentiality constraints) in matters both agencies are investigating, and Memoranda of Understanding -- to influence and educate independent agencies like the Federal Communications Commission and the Federal Energy Regulatory Commission, and fellow Executive Branch agencies such as the DOT and the Department of Agriculture. Furthermore, as we recommended in the 2001 Report, the AAG should be an active voice in White House economic policy decisions affecting competition policy. Finally, the agencies should continue to offer sound competition policy input to Congress as it considers legislation that may have significant consumer impact.

During the first term of this Administration, both agencies used the merger downturn constructively to reassess and reinvigorate certain institutional procedures and missions. Specifically, antitrust policy research and development (“policy R&D”), transparency, and staff training all received increased attention. To improve the effectiveness of their law enforcement efforts, the agencies should continue to focus on increasing the capability and credibility of their operations. Such policy initiatives by the federal antitrust enforcement agencies offer key benefits for the institutions and for the public. Policy R&D educates the agencies themselves, as well as the bar and the business community. Through interaction with executives and scholars during public hearings or workshops, agency staff learns about business realities and the latest academic developments. Understanding both will be necessary to reach

the right result in particular investigations. Based on such learning, the staff can refine enforcement priorities and techniques as needed. The agencies and the public have a rare opportunity to interact and educate each other in a nonadversarial environment.

The FTC, for instance, continued and accelerated the return to its prior role as an institution well-established and well-suited for research and education of the public. Policy initiatives for the next administration are already under way. In 2005, the FTC will co-sponsor with the National Academy of Sciences and the American Intellectual Property Association four workshops -- in four cities -- on patent reform. The Section applauds these efforts and hopes both agencies will continue to provide such support to policy R&D. These efforts typically are most beneficial to staff, the bar, and the business community when the agencies produce and release a timely written work product. The Section would encourage the agencies to consider as topics for workshops and roundtables other key areas in which there is uncertainty, including the role of efficiencies in competition analysis, the treatment of non-horizontal mergers, and single firm exclusionary practices. In addition, the Section recommends that the agencies continue their *ex post* review of prior mergers to ensure that enforcement activity is informed and as efficacious and consistent with core antitrust principles as possible.

5. Transparency Should Continue to Be a Goal at Both Agencies.

We commend the initiatives undertaken by both agencies to increase transparency in both the policy context and individual case decisions. We applaud, for example, the announced plans of the agencies to produce “Commentary on the Guidelines,” which we understand will provide an annotated version of the Horizontal Merger Guidelines that more

systematically explains the historic practice of the agencies.⁴¹ We believe that effective antitrust enforcement must begin with a positive enforcement agenda so that the agencies have issues that they want to pursue proactively, while recognizing, of course, that much enforcement is necessarily reactive. We encourage both agencies to be transparent regarding their enforcement objectives. In this section, we offer a few additional suggestions on how this transparency objective can be further implemented.

We suggest that the agencies evaluate their internal recordkeeping and data collection and to the extent feasible make process improvements that will permit the release of more informative and comprehensive data in the future. While the closing statements on specific investigations have generally been useful, we recommend that they present greater detail, particularly regarding the reviewing agency's analysis, consistent with confidentiality concerns. Even when closing statements are not feasible or practical -- in the case of an investigation that is nonpublic or has attracted little public attention, for example -- decision-making should be more transparent to the parties involved and their counsel, particularly when they are "repeat players." We commend the agencies' steps to adopt a policy of forthright discussions by the staff regarding all stages of the investigation including why they are closing investigations, and encourage all efforts for ensuring that staff comply with this policy to the greatest extent possible. Giving both more insight into why a particular transaction or conduct did not warrant a challenge could allow

⁴¹ FTC Chairman Deborah Platt Majoras, *Looking Forward: Merger and other Policy Initiatives at the FTC*, Remarks Before the ABA Antitrust Section Fall Forum Washington, D.C. (Nov. 18, 2004), available at <http://www.gov/speeches/majoras/041118abafallforum.pdf>.

firms to make more procompetitive business decisions going forward and counsel to advocate more efficiently and effectively in the future, in both cases reducing the toll on the agencies' resources. We also encourage the continued use of speeches of agency officials to deliver guidance, and urge the speakers to publish more of their presentations online.

The non-horizontal merger guidelines have become obsolete and should be officially withdrawn by the agencies to eliminate any confusion by the bar or the business community. In our view, however, it would not be productive to update or supplement those guidelines at this time, for at least two reasons. First, the economic literature in this area, although it continues to evolve, is not yet sufficiently developed to provide new policy guidance. It is clear from the economic literature that some vertical transactions can be problematic, but the existing models do not yet seem to provide adequate general guidance. Second, and related to the first point, the agencies' recent analysis of vertical merger issues has been highly fact-driven, making distillation into clear, bright-line principles difficult.⁴² We recommend that the agencies initiate hearings and studies specifically relating to vertical transactions to facilitate the development of this important area of law and economics.⁴³

⁴² See <http://www.ftc.gov/os/caselist/0210049.htm>; http://www.ftc.gov/opa/2002/06/cytyc_digene.htm.

⁴³ We understand that the EU may be considering issuing non-horizontal merger guidelines in the near term; we encourage the agencies to work closely with the EU.

6. The DOJ Should Provide Clear Guidance Regarding Criminal Penalties and Leniency Policies.

Criminal enforcement against hard-core cartel behavior has been and should remain a key priority of the DOJ. The DOJ's enforcement record over the last four years, its expanding use of the leniency program, the increased criminal sanctions for corporate offenders and the growing international commitment to cartel enforcement merit praise and encouragement. But challenges remain both here and internationally.

A. Effective Application of Increased Criminal Penalties.

The June 2004 Antitrust Criminal Penalty Enhancement and Reform Act authorized higher corporate fines, individual fines, and prison sentences for criminal Sherman Act violations.⁴⁴ As the penalties increase, so does the importance of targeted enforcement. The Section believes penalties of this severity should continue to be reserved for corporations and high-level individuals engaged in clear-cut, egregious, knowing behavior. Assistant Attorney General Pate, and his senior officials, have made clear public statements that criminal enforcement will not occur in ambiguous situations, but only where the conduct involves "clear knowledge ... of the wrongful nature of the behavior."⁴⁵ We believe the DOJ should continue to use public statements to clarify which categories of conduct and defendants qualify for these

⁴⁴ Comments of the ABA Section of Antitrust Law on H.R. 1086: Increased Criminal Penalties, Leniency Detrebling and Tunney Act Amendment, *available at* <http://www.abanet.org/antitrust/comments/increasedpenalties.pdf>.

⁴⁵ R. Hewitt Pate, *Vigorous and Principled Antitrust Enforcement: Priorities and Goals*, August 12, 2003, at 6, *available at* <http://www.usdoj.gov/atr/public/speeches/201241.pdf>.

penalties and which do not. To be effective and transparent, the DOJ's enforcement actions must be consistent with its statements.

B. Effective Use of Leniency Provision.

The new statute also presents companies that participate in the DOJ's leniency program with the opportunity to decrease significantly their follow-on civil exposure. The Section supported the effort to allow leniency applicants to limit liability to single damages and avoid joint and several liability in return for cooperating with the civil plaintiffs. These provisions are intended to enhance the attractiveness of cooperation with DOJ criminal investigations and to destabilize cartel efforts without compromising restitution to victims.

The Section is concerned, however, that the statute as drafted may make these benefits more theoretical than real. The statute requires the DOJ leniency applicant to cooperate with civil plaintiffs, but it fails either to define what constitutes satisfactory cooperation or to provide guidance on the timing or the detrebling determination. Leaving individual district judges with the discretion to determine the level of cooperation that will qualify a defendant for leniency, and allowing this determination to be made *post facto* greatly reduces -- or at least does not enhance -- a defendant's incentive to participate in the program. If "cooperation" is left undefined, then the leniency applicant may be at the mercy of plaintiff's counsel, who will have every incentive to demand cooperation that even exceeds the cooperation that the amnesty applicant has provided the DOJ, including demands for waiver of privilege or provision of expert analysis at the defendant's expense -- cooperation the DOJ would not request of a leniency applicant. Plaintiffs' counsel also could face a conflict with their duty to the clients if they

concede that detrebling is appropriate at a large financial cost to their clients. As the statute is written, defendants may not know until the end of the case whether their cooperation was sufficient. This uncertainty risks transforming the program from the carrot it was designed to be into an unattractive gamble. If this provision of the law remains subject to uncertainty, it could have an adverse impact on the very leniency program that it was intended to enhance.

In the absence of an amendment defining cooperation under the leniency program, and establishing a procedure for granting detrebling to a leniency applicant and particularly given the sunset provision, the DOJ should clearly articulate a position in speeches and possibly through enforcement guidelines and submission of *amicus* briefs in civil cases in which the leniency provision is applied. There seems to be no reason why satisfactory cooperation cannot be equated with the level of assistance provided to the DOJ by the leniency applicant in conjunction with the grand jury investigation. Failure to clarify the standard and to assist the courts in the application of the detrebling provisions will diminish the value of these provisions considerably and adversely affect the incentives of a defendant seeking leniency in the first place.

7. Additional Action is Required to Address Merger Process Concerns.

We recognize the significant efforts that have been made during the course of the Administration's first term to address concerns raised by the bar regarding the merger review process. For instance, both legal and economic staff typically will discuss the issues throughout the investigative process. We commend the agencies for their increased transparency. Nevertheless, the process continues to impose significant costs and delays upon transaction

parties and consistency between the agencies should be a useful objective. We have the following specific suggestions for the agencies, which we believe appropriately recognize the interests of both the public and private sectors arising from M&A activity.

A. The Scope and Burden of the Second Request Should Be Addressed.

It is axiomatic that the proper approach to drafting a second request is to include specifications that will obtain documents and information reasonably necessary to enable the agency to assess the competitive effects of a transaction. The agencies should not, however, be drafting second request specifications with the intent of discovering every conceivable, potentially relevant fact. This approach results in the type of massive, overbroad and unduly burdensome requests that are issued too often. We recognize the concern of agency staff that in the event that they have to challenge a potentially anticompetitive transaction, they will need to provide evidence in support of their claims. To challenge a transaction, however, staff is not required to produce the equivalent of a complete trial record. Moreover, if the reviewing agency challenges the transaction, staff will then have the opportunity to seek whatever additional discovery and to supplement any lacking document or information that the judge deems appropriate.

We have four specific recommendations regarding the second request process that we believe could mark significant improvements. First, we would suggest the imposition of a front-end limit of the staff's ability to seek documents and information. Just as in many federal district courts the number of document requests and interrogatories that the staff can request as a

matter of practice could be limited, and only expanded with the express written approval of the FTC's Chairman or a designated Commissioner or the AAG or a designated DOJ Deputy AAG, as applicable. Perhaps more importantly, the number of custodians to be searched in any given second request should be limited to a predetermined number of custodians, and only expanded in a specific second request if the staff is able to make a showing of necessity to the FTC Chairman or a designated Commissioner or the AAG or Deputy AAG, as applicable.

Second, the scope of mandated electronic searches in and of itself should be limited. The limitation on number of custodians searched would impact the burdensomeness of electronic searches. In 2002, the FTC shifted its approach to encourage the production of documents from hard copy to electronic productions, presumably believing that such a change would decrease the logistical burdens on both the parties and the agency. In reality, however, electronic files have to be searched whether or not the parties produce documents to the agencies in electronic form, and companies' electronic files generally contain much larger volumes of documents than are kept in hardcopy form. The search and production of electronic files has become the most expensive and burdensome part of most second request productions and should be limited. Just as the vendor fees incurred to put electronic files in a form that can be reviewed by counsel can exceed hundreds of thousands of dollars for relatively small second requests, and the enormous volume of documents that must then be reviewed by counsel (even if search terms are used as an initial screen) can make the production of electronic files in the context of even a small second request quite staggering.

Third, the agencies should focus on streamlining their interrogatory and data requests. Interrogatory requests by the agencies often ask firms to generate information and data that are beyond what is kept by the company in the ordinary course of business. These typically boilerplate specifications can be extremely burdensome and often not even useful in terms of evaluating the specific industry, transaction or competitive concerns involved. We understand that the FTC is in the process of developing model second requests tailored to specific industries;⁴⁶ we encourage the FTC to continue with that project and to make those models publicly available and encourage the DOJ to undertake a similar project.

Fourth, despite the repeated efforts of the agencies and the bar, the second request process remains flawed, imposing significant time and financial costs upon both private and public sectors without necessarily achieving the optimal results. It should be a top priority of the agencies, perhaps with assistance from the private bar, to reexamine the process and to focus collectively on meaningful ways in which the respective public and private interests can be balanced within the original intent of Congress. The Section is committed to working with the agencies to achieve that result.

B. The Agencies Should Harmonize Approaches to Merger Remedies and Litigation.

Although there is disagreement about the magnitude of these issues, there is a perception that the remedies and enforcement process that a transaction is exposed to may differ significantly depending on which agency reviews the transaction. With respect to remedies, the

⁴⁶ See <http://www.ftc.gov/speeches/other/040420bcreport.pdf>.

most notable difference concerns the use of buyer up-front remedies by the FTC, versus “fix-it-first” remedies at the DOJ. In a number of situations -- particularly those where merging parties divest less than an entire, ongoing business -- the FTC has frequently required a government-approved up-front buyer for divested assets before approving the merger. In contrast, the DOJ’s “fix-it-first” practice enables the parties to make appropriate structural changes before the consummation of the deal, and to complete their modified transaction without the need for an order. Many practitioners have questioned the costs of the buyer up-front policy relative to the benefits to competition. Requiring government oversight and approval for an up-front buyer adds costs for negotiating, entering, and operating under a consent decree, delays consummation of a transaction, and creates an added opportunity for strategic behavior by potential purchasers and competitors. We accordingly recommend a careful evaluation of the situations in which such a remedy is necessary.

There is also a potential difference in the way the agencies handle litigated merger cases. The DOJ litigates in federal court and must accept the determination of the district or appellate court that ultimately decides the fate of the transaction. If the FTC loses in federal court, it has the ability to retry the case in an FTC administrative proceeding. Thus, the hurdles that a transaction must ultimately clear are potentially much higher for those transactions reviewed by the FTC. Indeed, prior to 1995, the FTC maintained a policy that it would routinely pursue administrative litigation for any transaction in which a federal court denied the FTC a preliminary injunction. In 1995, the FTC issued a new policy stating that decisions on whether

to pursue administrative litigation would be made on a case-by-case basis.⁴⁷ But the threat of such litigation remains very real, and the Section believes the FTC should now consider changing its policy to be more consistent with the DOJ's process by adopting a strong presumption that the FTC will not institute administrative litigation in merger cases where it fails to secure preliminary relief in federal court, except in extraordinary cases. For instance, in cases where no important doctrinal issue is at stake or where the preliminary injunction proceeding was comprehensive in terms of evidence and arguments developed, a presumption against a Part III proceeding should apply. As a general rule, which agency handles the review of a transaction should not result in a materially different process, at least in the absence of very extraordinary circumstances.

C. The Agencies Should Fix the Clearance Process.

The 2001 ABA Task Force Report raised and reiterated long-standing concerns regarding delays in the clearance process. The Report noted that, in numerous transactions, the decision as to which agency has jurisdiction consumed the majority of the 30-day waiting period resulting in second requests being issued due to an agency's lack of review time. Alternatively, unnecessary refiling occurred to avoid such second requests. The 2001 ABA Task Force recommended that the agencies carefully monitor the duration of clearance conflicts and stressed that decisions whether or not second requests should be issued need to be fully informed and that the reviewing agency should be allocated the maximum amount of time possible to address

⁴⁷ See Press Release, *FTC Acts to Reduce Prior-Approval Burden on Companies in Merger Cases* (June, 22, 1995), available at <http://www.ftc.gov/opa/1995/06/mergppl.htm>.

potential anticompetitive concerns without resorting to a precipitous issuance of a second request.

In early 2002, the agencies formalized an agreement allocating regulatory jurisdiction on an industry-by-industry basis to overhaul the clearance process and to minimize lengthy agency disputes.⁴⁸ The Section supported these efforts as “good government.”⁴⁹ The agencies, however, abandoned this agreement due to Congressional pressure and the threat of budgetary consequences.⁵⁰ For the short time period the agreement remained in effect, both agencies appeared to be operating under improved communications and eliminated delays in the clearance process for almost all matters. Once the agencies withdrew the agreement, the process reverted to its prior suboptimal situation, with clearance of certain transactions being delayed by days critical to the initial review process.

The Section urges the agencies to adopt a new clearance process that is both transparent and effective as soon as possible. The agreement drafted in 2002 was a practical approach to restructuring the process. We advise, however, that at the onset of any restructuring discussions between the agencies, the agencies take steps to build a constituency concerning the need for such an agreement within the bar and business community, to build a consensus within

⁴⁸ See <http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

⁴⁹ Busey letter, *supra* n.24.

⁵⁰ See http://www.usdoj.gov/atr/public/press_releases/2002/11178.htm.

their respective agencies, and to anticipate and minimize political concerns by initiating a dialogue with relevant Congressional constituencies.

8. Federal/State Cooperation.

The state attorneys general and the federal agencies have generally cooperated in antitrust enforcement matters of mutual interest over the past two decades, particularly to further their shared consumer welfare objectives. The level of cooperation between the state attorneys general and each of the federal enforcement agencies in both civil merger and non-merger matters has continued to improve steadily during the current Administration. We strongly urge the federal agencies to build upon this positive relationship and continue their dialogue with the state attorneys general to establish specific and transparent procedures with the objective of avoiding duplication wherever possible and to use the Executive Working Group as a platform to facilitate, wherever feasible, convergence on substantive treatment of matters.

The state attorneys general and the federal agencies are to be commended for continuing their discussions regarding coordination of their efforts, since 1989, at the leadership levels through the Executive Working Group on Antitrust and, more recently, at the staff level through monthly teleconferences. But, due to the increasing number of matters that are being handled jointly by the respective federal agency and by one or more state attorneys general, the Section urges the federal enforcement agencies and the state attorneys general to continue their ongoing dialogue specifically for the purpose of coordinating joint and parallel investigations, merger reviews, and litigation. While the Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General was established in 1998

and is generally followed by the state attorneys general and the federal enforcement agencies, the Section respectfully submits that it simply does not go far enough and should be expanded to address cooperation in the non-merger context. The agencies and state attorneys general should continue to make it a priority to focus on means by which merger review and conduct investigations could be handled to reflect best practices in antitrust enforcement. The discussions could incorporate an approach whereby the states and federal agencies might allocate responsibilities between them to avoid duplication in the investigation and enforcement responsibilities in any particular matter to the extent possible. While disparity of results between federal and state enforcement agencies may be infrequent, the added cost of duplicative review when it occurs can be significant. We recommend that the enforcement agencies address the issue of shared jurisdiction, possibly through the Executive Working Group, perhaps with cooperation from the private sector, with the objective of providing more efficient administration and less uncertainty for the business community.

Although we do not propose in this Report to prescribe a detailed formulation, one approach that could be implemented specifically in the merger setting might be to allocate initial responsibility, wherever practicable, premised upon the same comity principles that the Section suggests apply among jurisdictions in the international arena. Comity is not preemption; it does not mean a loss of jurisdiction by the other party. If either party believes it will find the outcome to be unacceptable, that party would have the ability to take whatever action it has the legal right to take with regard to the transaction or conduct. Nevertheless, such action should be rare so as not to encourage forum shopping practices that seek to use the system as a way to

harm firms and competitors. We believe that the adoption of a process of allocated responsibilities between federal and state enforcement levels would result in quicker and more efficient resolution of matters and utilization of private and public resources.

9. Substantive Reforms.

We fully appreciate the process currently under way by the Antitrust Modernization Commission and do not wish to address here a “laundry list” of legislative reforms we would like to see adopted. Rather, we believe there are two discrete areas in which reform would be particularly useful and would urge that the federal agencies place on their agenda the adoption of such reforms.

A. Reform Connected with Repeal of *Illinois Brick*.

As a result of the bar on federal indirect purchaser lawsuits arising from *Illinois Brick*,⁵¹ direct purchasers may recover statutory damages in federal antitrust cases, regardless of whether they passed on any overcharge, while indirect purchasers are precluded from obtaining such damages in federal cases, regardless of whether they incurred any overcharge. In *Illinois Brick*, the U.S. Supreme Court sought to eliminate duplicative recoveries, lessen the burden on the court system, and enhance deterrence by simplifying direct-purchaser suits. Increasingly, however, indirect purchasers are able to recover under state antitrust statutes in jurisdictions that have passed laws permitting such suits. More than half of the states have now passed such statutes. This proliferation of state laws permitting indirect purchaser actions threatens to

⁵¹ *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

undermine the very principles underpinning *Illinois Brick* and *Hanover Shoe*.⁵² Rather than promoting judicial economy, the availability of indirect purchaser suits in various jurisdictions results in a multiplicity of related lawsuits in state and federal courts that are difficult to coordinate, and the very real specter of duplicative recovery.

The Section has presented an illustration of an approach that remedies the inequities and inconsistencies that result from the disparity between state and federal laws, as well as inconsistencies between the several states, by overruling *Illinois Brick* and permitting a private right-of-action for indirect purchasers in one federal forum, thereby minimizing the risk of duplicative recovery by facilitating consolidation of direct and indirect claims.⁵³ Diversity jurisdiction requirements would be relaxed to facilitate consolidation in federal court and the federal district courts would have removal jurisdiction where *any* plaintiff is a citizen of a state different from that of *any* defendant. The legislation would expressly provide that there “...will be no duplicative recovery of damages under this section.” In addition, the legislation would attack the problem of multiple litigation involving the same transaction and the attendant cost to the parties and the judicial system.⁵⁴ We urge the federal agencies to consider supporting such legislation.

⁵² *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

⁵³ See the ABA Section of Antitrust Law Report on Remedies (2004), available at <http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc>.

⁵⁴ The draft legislation does not preempt state law. A further component of the legislation allows for plaintiffs to collect prejudgment interest.

B. Repeal or Reform of the Robinson-Patman Act.

In 1986, the Section recommended revisions of the Robinson-Patman Act that would repeal Sections 2(c) and 3, and would add a “lessening of competition” standard to Sections 2(d) and 2(e). The ABA House of Delegates passed a resolution at that time supporting the recommendation.

The basis for these recommendations is consistent with the reasons why the statute has been virtually unenforced by the federal agencies for at least 25 years. Nevertheless, restrictive and often demanding precedent remains on the books, private litigation is common, and most companies try to comply with the statute’s provisions, though burdensome and expensive, if only to avoid private treble-damage exposure. Since the statute from the beginning has been enforced at the federal level almost exclusively by the FTC, we believe that that agency should take the initiative.

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 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 .

CONCLUSION

We trust that this contribution to the ongoing dialogue on antitrust enforcement and policy will be helpful.