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Comparison of AMC, AAI, and ABA Antitrust Section Recommendations

- AMC Report: Antitrust Modernization Commission, Report and Recommendations, Apr. 2, 2007
Available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm
- AAI Report: American Antitrust Institute, Transition Report on Competition Policy to the 44th President, Oct. 6, 2008
Available at <http://www.antitrustinstitute.org/archives/transitionreport.ashx>
- ABA Report: American Bar Association Section of Antitrust Law, 2008 Transition Report, Nov. 25, 2008
Available at <http://www.abanet.org/antitrust/at-comments/2008/11-08/comments-obamabiden.pdf>

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* (Number) = (Page of the either Report)

** Henceforth, “Federal Trade Commission and the Antitrust Division of the Department of Justice” = “agencies”, “Federal Trade Commission”= “FTC”, “the Antitrust Division of the Department of Justice = “DOJ”

*** This comparison generally follows the order of the AMC recommendations with some exceptions.



1. General view

Subject	AMC	AAI	ABA Antitrust Section
Assessment on Current Enforcement	<p>“On balance, however, the Commission believes that U.S. antitrust enforcement has achieved an appropriate focus on (1) fostering innovation, (2) promoting competition and consumer welfare, rather than protecting competitors, and (3) aggressively punishing criminal cartel activity, while more carefully assessing other conduct that may offer substantial benefits.”(1)</p>	<p>“We believe that, as a generalization, today’s government bends over backward to avoid making an intervention that might turn out to be mistaken, at the price of creating a system in which there is too little enforcement.” (12)</p>	<p>“The Section’s overall assessment of the current state of antitrust and consumer protection enforcement is that the agencies generally have been effective in their efforts to pursue their missions in a manner consistent with mainstream bipartisan principles.” (2)</p> <p>“One particularly troubling concern, however, as discussed elsewhere in this Report, is an actual or perceived divergence between the agencies regarding enforcement standards.” (3)</p>
New Economy	<p>“1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.” (38)</p> <p>“2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.” (39)</p>	n/a	n/a



2. Substantive Merger Laws

Subject	AMC	AAI	ABA Antitrust Section
Assessment on Current Enforcement	<p>“Nonetheless, there does not appear to be a systematic bias toward either overenforcement or underenforcement.” (55)</p> <p>“3. No statutory change is recommended with respect to Section 7 of the Clayton Act.” (48) * 3a & 3b omitted</p> <p>“4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.” (49) * 4a omitted</p>	<p>“conservative antitrust enforcers and courts have tended too readily to accept – on inadequate evidence – economic arguments available under the Merger Guidelines that favor allowing mergers, and have tended too quickly to dismiss economic arguments for enjoining acquisitions. The result has been a decline in antitrust merger enforcement at the agencies, particularly the DOJ, and courtroom losses in some cases where the merger probably should have been stopped.” (140)</p>	n/a
Overall Policy Directions	<p>“5. The agencies should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.” (54)</p>	<p>“The challenges for the new administration are to correct the systematic tendency of the federal enforcement agencies, (omitted) , to allow mergers that should be stopped and to encourage the courts to do the same. Both of those tasks can be accomplished by developing, applying, and advocating a series of presumptions clarifying the line where enforcement should generally occur and the factual showing that merging firms must make in rebuttal.” (140)</p>	n/a



Subject	AMC	AAI	ABA Antitrust Section
Efficiencies in Merger Review	<p>“6. The agencies should give substantial weight to evidence demonstrating that a merger will enhance efficiency.</p> <p>7. The agencies should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.</p> <p>8. The agencies should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.” (56)</p>	<p>“Many mergers are motivated by the prospect of efficiencies. Firms may seek to reduce costs by combining complementary assets or realizing greater economies of scale. In other cases, firms may seek to obtain other synergies, such as the spread of “best practices” across firms.</p> <p>But studies show that merging firms frequently fail to obtain the efficiencies that they anticipate.”(152)</p>	<p>“36. The agencies’ merger analysis should give additional weight to certain efficiencies, such as research and development expenses.”</p> <p>“In the context of a transaction involving high-technology companies, the merger often will benefit consumers primarily by making innovation more likely or less costly – not by reducing marginal costs, which typically are already very low in such industries.”(33)</p>
Time Horizon for Entry	<p>“9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.” (56)</p>	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
Market Concentration	<p>“10. The agencies should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.</p> <p>10a. The agencies should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.” (61)</p>	<p>- “base those strong presumptions on careful analysis of the contemporary economic literature and merger enforcement history, with attention to the significance of high and increasing market concentration, and incorporate those presumptions into the Merger Guidelines or a guidance document that would supplement the Merger Guidelines;”</p> <p>- “amend the Merger Guidelines to say, as do the National Association of Attorneys General Merger Guidelines, that as HHI levels increase beyond the levels giving rise to a presumption of anticompetitive effects, the less likely it is that other factors will overcome the presumption, and, to clarify the strength of the presumption, indicate by way of example that when the HHI exceeds 2500 and the change exceeds 200, the presumption should rarely be overcome;”(141)</p>	n/a
Quantitative Evidence	n/a	n/a	“39. The use of quantitative evidence must fit with other aspects of the case and must be robust.” (35)



Subject	AMC	AAI	ABA Antitrust Section
<p>Retrospective Merger Studies</p>	<p>“10b. The agencies should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.” (61)</p> <p>“Such studies may also be informative about such things as what levels of concentration or market share give rise to competitive issues and the effectiveness of entry. More important, such studies may shed light on why a particular decision was later shown to be erroneous, thereby allowing the agencies to modify the models and approaches they use in conducting merger analysis.” (62)</p>	<p>“improve the effectiveness of merger analysis by conducting studies of merger enforcement;</p> <ul style="list-style-type: none"> - analyze the competitive effects of consummated those that the agencies challenged, but that because of court rulings, to assess merger review - analyze consent settlements to assess effectiveness - systematically analyze successes and failures lessons about how to argue competitive effects, other issues more effectively in the future;” <p>(142)</p>	<p>“30. The agencies should select a sample of prior merger decisions and assess whether subsequent developments in the markets involved justified the decisions.” (27)</p> <p>“A key means of increasing confidence in enforcement decisions is to evaluate past efforts – including in the merger area, deals that were blocked, deals that were approved with significant conditions, and deals that were approved without conditions – to determine whether the decision accomplished the intended effect and enhanced consumer welfare.” (28)</p>
<p>Unilateral Effects</p>	<p>n/a</p>	<p>“clarify the information needed to demonstrate unilateral competitive effects and explain when unilateral effects can be demonstrated through direct evidence without need for market definition;” (41)</p>	<p>“37. The agencies should improve application and understanding of unilateral effects theories.” (33)</p> <p>38. The agencies should clarify the role of market definition in unilateral effects cases.” (34)</p>
<p>Coordinated Effects</p>	<p>n/a</p>	<p>n/a</p>	<p>“40. The agencies should continue actively to pursue coordinated effects cases, try to improve understanding as to when coordinated effects concerns may exist, and seek to improve the economic basis for the theories.” (35)</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>Transparency</p>	<p>“11. The agencies should work toward increasing transparency through a variety of means.</p> <p>11a. The agencies should issue “closing statements,” when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies’ merger enforcement policy.</p> <p>11b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the FTC in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the agencies. To facilitate and ensure the high quality of such reviews and reports, the agencies should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.” (50)</p>	<p>“demonstrate how the agency applies its merger guidelines and the underlying presumptions by increasing the transparency of agency decision-making in individual cases;”(142)</p> <p>“The agencies should issue statements at the close of every prolonged or high visibility merger investigation that results in no agency challenge. One possible triggering mechanism would be whether the investigation involved a second request for documents by the federal agency. These statements should be more than perfunctory, describing not only issues involving definition of markets but also additional information, such as entry and efficiencies, whether favorable or unfavorable to the agency’s decision, that was considered in determining whether or not to challenge the transaction.”(187)</p>	<p>“4. The agencies should continue their transparency efforts, including specifically new merger guidelines, while improving the quality of the information they make publicly available.” (8)</p> <p>“8. The agencies’ staff should be open and forthcoming with parties on a timely basis.” (10)</p> <p>“41. The agencies should provide greater transparency regarding the U.S. approach to vertical mergers, and should consider using revisions to the Guidelines to do so.” (36)</p> <p>“42. The agencies should provide greater transparency on potential competition /innovation theories through possible revisions to the Guidelines, speeches, commentary, and workshops.” (37)</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>Merger Guidelines</p>	<p>“11c. The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.</p> <p>11d. The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.” (67-68)</p>	<p>“clarify other aspects of merger analysis by revising or supplementing the Merger Guidelines;</p> <ul style="list-style-type: none"> - clarify the information needed to demonstrate unilateral competitive effects and explain when unilateral effects can be demonstrated through direct evidence without need for market definition; - highlight the significance of mergers’ nonprice effects, particularly the effects of mergers on variety, choice, quality, and innovation - explain how the agencies analyze conglomerate mergers that would reduce potential competition; - update agency guidance on vertical mergers;”(141-142) 	<p>“35. The agencies should consider revisions to the Merger Guidelines, and ensure that they remain up-to-date on an ongoing basis.” (32)</p> <p>“41. The agencies should provide greater transparency regarding the U.S. approach to vertical mergers, and should consider using revisions to the Guidelines to do so.” (36)</p> <p>“42. The agencies should provide greater transparency on potential competition /innovation theories through possible revisions to the Guidelines, speeches, commentary, and workshops.” (37)</p>
<p>Investigative Timing</p>	<p>n/a</p>	<p>n/a</p>	<p>“6. The speed of non-HSR investigations should be addressed.” (9)</p> <p>“7. The agencies should require timelines for non-HSR investigations.” (9)</p> <p>“8. The agencies’ staff should be open and forthcoming with parties on a timely basis.” (10)</p>
<p>Remedy</p>	<p>n/a</p>	<p>n/a</p>	<p>“43. The agencies should gather more information regarding the effectiveness of remedies and improve the remedies process.” (37)</p>



3. Exclusionary Conduct

Subject	AMC	AAI	ABA Antitrust Section
General	<p>“12. In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.” (88)</p>	<p>“We agree with commentators who suggest that the test for monopolization should be a flexible one, and that different tests may be appropriate for different categories of conduct, depending in part on the potential costs of false positives and false negatives associated with the type of conduct.”(67)</p>	<p>“Sherman Act Section 2, which prohibits the creation or maintenance of monopoly power through exclusionary conduct, is perhaps the most amorphous aspect of antitrust law. The antitrust agencies can play a valuable role in providing clarity and transparency to this uncertain area of the law, both in the U.S. and internationally.” (42)</p>
Assessment for Current Enforcement	<p>13.“Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.” (89)</p>	<p>“The Supreme Court and DOJ have apparently adopted the Schumpeterian hypothesis, which views monopoly, rather than competition, as being most conducive of innovation. This perspective naturally implies tolerant monopolization standards.” (62)</p> <p>The next administration should take a more aggressive enforcement posture towards exclusionary conduct by dominant firms and renew antitrust’s historic skepticism of durable monopolies.”(58)</p>	<p>“Unfortunately, rather than providing this leadership, the agencies have recently been engaged in a public dispute over the proper application of Section 2.” (...omitted...)</p> <p>“However, such highly publicized disagreements between the agencies do not foster clarity; rather, they exacerbate the already difficult task for practitioners and courts that must evaluate unilateral conduct under Section 2.” (42-43)</p>



Subject	AMC	AAI	ABA Antitrust Section
Standard	<p>“14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.”(90)</p> <p>“15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.”(94)</p>	<p>“We agree with commentators who suggest that the test for monopolization should be a flexible one, and that different tests may be appropriate for different categories of conduct, depending in part on the potential costs of false positives and false negatives associated with the type of conduct. However, the best default framework is the consumer-welfare balancing test articulated by the D.C. Circuit in <i>Microsoft</i>.” (67)</p> <p>“Abandon efforts to promote a single test for exclusionary conduct under Section 2, such as the profit sacrifice or “no economic sense” test.” (56)</p> <p>“The FTC should take the lead in developing structured rules of reason for particular recurring situations. To create these, the agencies should draw on relevant hearings, workshops, and sectoral studies.” (185)</p>	<p>“48. The agencies should provide more clarity regarding truncated rule of reason analysis, determine whether their staffs are performing such analysis consistently, and obtain input from the legal, economic, and business community regarding the appropriate analytical framework.” (42)</p> <p>“49. The agencies should continue to devote resources through hearings, amicus briefs, and enforcement actions where appropriate to improvements in the standards used to identify anticompetitive conducts under Section 2, so that the standards are clear and predictable, administrable, and minimize both under- and over- enforcement.” (44)</p>
Bundling	<p>“16. The lack of clear standards regarding bundling, as reflected in <i>LePage’s v. 3M</i>, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.”(94)</p>	<p>“Retain the current modified per se rule for tying, as articulated in <i>Jefferson Parish</i>, with certain caveats.”(57)</p>	n/a



Subject	AMC	AAI	ABA Antitrust Section
<p>Bundled Discounts or Rebates</p>	<p>“17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim):</p> <p>(1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product;</p> <p>(2) the defendant is likely to recoup these short-term losses; and</p> <p>(3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.”(99)</p>	<p>“The next administration should reject cost-based safe harbors for loyalty and bundled discounts by dominant firms and support a structured rule of reason that would allow plaintiffs to establish that such discounts are prima facie exclusionary under certain conditions.”(71)</p> <p>“To rebut the plaintiff’s prima facie case, a dominant firm would be required to establish a legitimate business or efficiency justification for conditioning the discount. This in turn would shift the burden of proof to the plaintiff to demonstrate that the anticompetitive effects of the exclusionary condition outweigh any of its procompetitive benefits.”(74)</p>	<p>n/a</p>
<p>Refusal to Deal with a Rival</p>	<p>“18. In general, firms have no duty to deal with a rival in the same market.” (101)</p>	<p>“Support <i>Aspen Skiing</i> and <i>Kodak’s</i> holdings that a monopolist’s refusal to deal that results in significant exclusionary effects may be actionable when the monopolist fails to establish a legitimate procompetitive justification, at least where the monopolist has previously dealt with the competitor or discriminates between the competitor and other customers.” (56)</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
Market Power in Tying	“19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.” (105)	“Where significant information or other market imperfections exist, therefore, the agencies and the courts should be wary of relying on market share safe harbors or defining markets broadly to include products that are not effective substitutes because, for example, customers may be unaware of them, face high search costs, or are locked into expensive existing systems.” (85)	n/a
Essential Facility Doctrine	n/a	“Revitalize the essential facilities doctrine as an independent theory of liability for purposes of injunctive relief to ensure competitor access to infrastructure or networks when such access is essential for competition in adjacent markets that produce important public benefits.”	n/a
Refusal to deal vertically	n/a	Treat a vertically integrated monopolist’s refusal to sell or license its intellectual property to a downstream competitor the same as a refusal to sell or provide access to physical property.	n/a



Subject	AMC	AAI	ABA Antitrust Section
Predatory Pricing	n/a	“Look for opportunities to bring predatory pricing cases and encourage courts to develop a structured rule of reason that is more consistent with modern economic thinking about predatory pricing strategies than is current law.”(57)	n/a
Exclusive Dealings	n/a	“Sharpen the analysis of exclusive dealing arrangements.” (57)	n/a
Intrabrand Competition	n/a	“Give more recognition to the importance of intrabrand competition to the economy, particularly with respect to multibrand retailers, and be attentive to the insights of the dual-stage model of product distribution.” (57)	n/a
Study & Case Enforcement	n/a	n/a	“51. The agencies should devote substantial resources to providing intellectual leadership and increasing transparency through policy research and development. When appropriate, the agencies also should bring enforcement actions in area where there is a likelihood that the case will be an important precedent that goes beyond its specific circumstances or where necessary to restore competition or prevent a significant reduction in competition.” (46)



Subject	AMC	AAI	ABA Antitrust Section
RPM	n/a	<p>“Support legislation to overturn the Supreme Court’s decision in <i>Leegin CreativeLeather Products, Inc. v. PSKS, Inc.</i> and restore the <i>per se</i> rule for minimum RPM.</p> <p>Alternatively, develop a structured rule of reason for courts to use in applying <i>Leegin</i> that would treat RPM as “inherently suspect” in most circumstances under the framework suggested by <i>Polygram Holding</i> and consider adopting guidelines setting forth a structured rule of reason for nonprice intrabrand restraints as well.” (58)</p> <p>“• Support repeal or reform of the <i>Colgate doctrine</i> legislatively or judicially insofar as that doctrine treats RPM coerced by a manufacturer’s threatened refusal to deal as unilateral conduct.</p> <p>• Renew efforts to bring challenges to vertical nonprice distribution restraints where powerful incumbent distributors seek to restrict distribution to innovative retailers, as in <i>Toys “R” Us.</i>”(58)</p>	<p>“66. The agencies should provide guidance regarding minimum resale price maintenance analysis post-<i>Leegin</i>, and should oppose legislation proposals to overturn <i>Leegin</i>”. (62)</p> <p>“The <i>Leegin</i> decision is consistent with the ABA’s official position, adopted in February 2007, that resale price maintenance should not be <i>per se</i> illegal under Section 1 or comparable state laws.”</p> <p>“If Congress follows through on suggestions that legislation should overturn the <i>Leegin</i> decision, the agencies should oppose such proposed legislation.” (63)</p>



Subject	AMC	AAI	ABA Antitrust Section
Remedy	<p>“48. There is no need to give the antitrust agencies expanded authority to seek civil fines.” (287)</p> <p>“49. There is no need to clarify, expand, or limit the agencies’ authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission’s policy governing its use of monetary equitable remedies in competition cases.”(288)</p>	<p>“Seek to employ structural remedies in appropriate cases, give more serious consideration to equitable monetary remedies, and support legislation to allow both agencies to obtain civil penalties in Section 2 cases.” (57)</p>	n/a
Assessment of Civil non-merger	n/a	n/a	<p>“31. The agencies should develop metrics to assess the value of recent civil non-merger cases, as well as the potential cases in areas where resources are currently devoted to investigations.” (28)</p>
International Cooperation	n/a	n/a	<p>“50. With the increasing number of antitrust enforcers around the globe, it is essential that the agencies work with other agencies around the world formally and informally to fashion consistent antitrust approaches for analyzing specific types of exclusionary conduct.” (45)</p>

* AMC Recommendations 48, 49 were moved from the “Government Civil Monetary Remedies” chapter in the original report.



4. Antitrust and Patents

Subject	AMC	AAI	ABA Antitrust Section
Standard Setting	<p>“20. Joint negotiations with intellectual property owners by members of a standard setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.” (121)</p>	n/a	<p>“52. The Section continues to believe that standard-setting conduct may merit enforcement action in appropriate cases, and continues to urge the agencies to take a case-by-case approach to these issues. In addition, the Section recommends that the FTC study whether certain types of problematic standard-setting conduct are appropriately addressed pursuant to Section 5 of the FTC Act.” (48)</p>
FTC and NAS Recommendations	<p>“21. Congress should seriously consider recommendations in the FTC and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition. In particular:</p> <p>21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.</p> <p>21b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.</p> <p>21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.” (123)</p>	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
Study, Communication with PTO	n/a	n/a	“53. The agencies should devote resources to studying further the implications of patent quality on competition, and continue to explore ways to establish avenues of communication with the PTO.” (49)
Pharmaceutical Patent Settlement	n/a	n/a	“54. The agencies should continue to provide guidance regarding pharmaceutical patent settlement through <i>amicus</i> briefs, other public for a such as hearings, and where appropriate, carefully-considered enforcement actions.” (49)
Generic Drugs	n/a	n/a	“55. The agencies should provide a unified message regarding a potential legislative abbreviated pathway for generic companies to obtain approval for biologics. The agencies should provide input to ensure that such a statute will not be implemented in ways that could have unintended anticompetitive results.” (50)
International Cooperation	n/a	n/a	“56. The Section encourage the agencies to continue to play a leadership role regarding the IP/Antitrust interface on a global basis, including participation in bilateral and multilateral working groups with established and emerging competition regimes.” (51)



5. Premerger Review Process

Subject	AMC	AAI	ABA Antitrust Section
Clearance Agreement	<p>“22. The agencies should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.”(134)</p>	<p>“Usually industry expertise prevails in the clearance process; the problems arise when industry boundaries are changing or antitrust issues arise in industries that have not recently been under anyone’s particular focus.</p> <p>We urge the adoption of a procedure under which, when the agencies cannot agree within a defined but brief time, assignment is determined on a random basis. To the extent that relevant expertise is available within the agency not randomly assigned to a particular investigation, the agencies should experiment with temporary personnel swaps.”(192)</p>	<p>“1. The agencies should fix the merger clearance process.”</p> <p>“The Section recommends that if the agencies cannot determine within a ten-day period which one will review a particular transaction, then they should resolve clearance through a simple coin flip.” (6)</p>
Time-limit for Clearance	<p>“23. Congress should enact legislation to require the agencies to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.” (137)</p>		

* The AMC report’s original chapter title on this section is “Dual Federal Enforcement.”



Subject	AMC	AAI	ABA Antitrust Section
<p>FTC Preliminary Injunction</p>	<p>“24. The FTC should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.” (139)</p>	<p>“It should be affirmed that the 13(b) standard for FTC preliminary injunctions in merger cases is not based on a traditional “balance of hardships” evaluation; rather, it involves a more lenient “public interest” analysis. If a legislative effort is made to make the FTC and DOJ operate identically in premerger injunction cases, the appropriate model is the FTC rather than DOJ, such that preliminary injunctions would be somewhat easier to obtain, while merger trials would benefit from more complete investigation and case presentation.” (185-186)</p>	<p>n/a</p>
<p>Amendment of FTC Act 13(b) (1)</p>	<p>“25. Congress should amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.” (140)</p>	<p>“We disagree, however, with the AMC’s proposal that the FTC give up its special attributes as an administrative agency, especially its ability to pursue administrative litigation in HSR merger cases even when a preliminary injunction is denied, in order to be more like the DOJ. Instead, we believe that the FTC Act is presently better structured to deal with mergers generally and that it is the DOJ’s situation that should be modified to give its merger regime greater similarity to the FTC’s regime.” (204)</p>	<p>“33. The FTC should continue to assess and address challenges with Part III litigation, but revise its recent proposed rule revisions, which have fundamental flaws.” (29)</p> <p>“The effect of these proposed rule changes would be to undermine the legitimacy of the FTC’s decision making process and possibly the FTC’s prospects for success on appeal. In short, the FTC’s impulse to expedite its proceedings is commendable, but the agency needs to rework the NPRM to streamline the adjudicative process without unnecessarily disadvantaging respondents or undercutting the legitimacy of the Commission’s decisions.” (31) * NPRM: Notice of Proposed Rulemaking</p>



Subject	AMC	AAI	ABA Antitrust Section
Amendment of FTC Act 13(b) (2)	<p>“26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the agencies by amending Section 13(b) of the FTC Act to specify that, when the FTC seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the FTC is subject to the same standard for the grant of a preliminary injunction as the DOJ” (141)</p>	<p>“Congress established the “public interest” standard in lieu of the traditional “equity” standard of irreparable damage, probability of success on the merits and balance of hardships favoring the petitioner.”(204) (...omitted...)</p> <p>“As AAI argued in its amicus brief in support of the FTC in <i>Whole Foods</i>, Congress intended that injunctive relief be “broadly available” to the FTC and that the FTC, not the court, was to be the principal arbiter of a challenged merger.”(204)</p>	n/a
HSR Act	<p>“27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.”(159)</p>	n/a	n/a
Filing Fee	<p>“28. Congress should de-link funding for the agencies from Hart-Scott-Rodino Act filing fee revenues.” (161)</p>	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
<p>Burdens of H-S-R Process</p>	<p>“29. The agencies should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.” (162)</p> <p>“30. The agencies should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.”(167)</p>	<p>n/a</p>	<p>“2. The agencies should assess the impact of the merger process reform initiatives.” (6)</p> <p>“the Section recommends that the agencies undertake an assessment of the impact of their merger reform efforts. Particular attention should be paid to options like the timing agreements to determine why they are so under-utilized and to determine whether they should be maintained as is, amended, or abandoned altogether.</p> <p>The agencies also should consider whether their efforts to be transparent with parties in merger investigations are providing the parties adequate information regarding remedies, imminent Commission action, or the competitive issues most of interest to staff, the Bureau, and the Commissioners (or the deputies and the Assistant Attorney General at DOJ).” (7)</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>Second Requests</p>	<p>“31. The agencies should evaluate and consider implementing several specific reforms to the second request process.”(168)</p> <p>- “31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.” (168)</p> <p>- “31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.” (171)</p> <p>- “31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies’ economic analysis and facilitate dialogue including the agency economists.” (171)</p> <p>- “31d. The agencies should reduce the burden of translating foreign-language documents.” (172)</p> <p>- “31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.” (172)</p>	<p>n/a</p>	<p>“3. The scope and burden of electronic production should be addressed.”</p> <p>“The escalating volume of electronic data production imposes significant time and financial costs on the agencies and parties alike.” (7)</p>



Subject	AMC	AAI	ABA Antitrust Section
Transparency	n/a	<p>“The federal agencies should adopt rules providing for disclosure of every reported transaction at the outset of premerger investigations. The purpose of such disclosure would be to provide public notice in a manner that allows any interested party to inform agency staff of its perspective on the proposed acquisition. The FTC and DOJ could consolidate notice announcements on a single Web site operated by one of the two agencies. To the extent that federal legislation is required to provide this notice, amending legislation should be promptly sought from the Congress.” (187)</p> <p>“To address concerns about inside information and unfair stock trading, DOJ and the FTC should immediately announce every decision to make a second request for documents under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.” (187)</p> <p>“The agencies should issue more comprehensive statements in connection with merger cases settled by consent. In connection with this change, the administration should also consider advocating changes to the Tunney Act that would make compliance less costly. The goal should be to provide more meaningful information to interested members of the public at the least possible cost to DOJ.” (187)</p>	<p>“8. The agencies’ staff should be open and forthcoming with parties on a timely basis.”</p> <p>“Much of the success of the merger process reform initiatives has been driven by the increase in early and frequent interaction between transaction parties and agency staff regarding the process and theories of the investigation. Regular interaction encourages transparency, reduces likelihood of overly broad requests for information, and increases the efficiency of the parties’ searches and productions.” (10)</p>



6. State enforcement

Subject	AMC	AAI	ABA Antitrust Section
Overall Assessment	<p>“The Commission was not persuaded that the costs of state enforcement—such as companies’ being required to deal with multiple enforcers—outweigh the benefits of state enforcement or could not be substantially mitigated by means short of eliminating the authority of the states to enforce the federal antitrust laws. Rather, to address the concerns that have been raised, state antitrust enforcers should continue to focus on their areas of comparative advantage, such as local markets, and should coordinate with the federal antitrust agencies and each other to find additional ways to reduce the costs to businesses of state merger review.” (186-187)</p>	<p>“Our view is that the states properly occupy an important place in the antitrust enforcement community, and their role should be strengthened.” (206)</p> <p>“To do so, funding should be increased, which could be accomplished in part by congressional “seed money” or by a revision of the Clayton Act to grant states a portion of recovery funds in <i>parens patriae</i> cases.” (186)</p>	<p>“60. The agencies should assess the effectiveness of federal/state coordination, work with the State AGs to formulate consistent merger guidelines and coordination protocols that reflect current enforcement practice, and implement training at the federal and state levels to insure uniform application.” (56)</p>
Non-merger Civil Enforcement	<p>“32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.” (192)</p> <p>“33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.” (192)</p>	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
Merger Review	“34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.” (198)	n/a	n/a
Coordination Among Public enforcers (1)	“35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent proceedings.”(198)	“As part of this effort, the FTC, DOJ, and NAAG should collaborate at the outset to discuss shared goals and possible coordination. Planning efforts should include identifying key metrics to measure institutional performance. Such metrics should be flexible enough to accommodate change.” (184)	“61. In light of the increasing role State AG’s play in seeking treble damages on behalf of the citizens of their respective states and the continuing active role of private enforcement, the federal agencies should examine, in cooperation with the states and private litigants, whether the existing federal/states protocols are adequate.” (57)
Collaboration Among Public enforcers (2)	<p>“36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations:</p> <p>36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.</p> <p>36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.</p> <p>36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.”(200-203)</p>	“As part of this effort, the FTC, DOJ, and NAAG should collaborate at the outset to discuss shared goals and possible coordination. Planning efforts should include identifying key metrics to measure institutional performance. Such metrics should be flexible enough to accommodate change.” (184)	n/a



Subject	AMC	AAI	ABA Antitrust Section
NAAG	n/a	“To encourage multistate-coordinated antitrust actions and improve the ability of states to analyze competition issues and prosecute cases, NAAG should serve as an enhanced vehicle to provide resources to the states.” (186)	n/a
Advocacy Role	n/a	“State attorneys general should undertake policy advocacy efforts similar to those of the federal agencies to oppose anticompetitive state legislation.” (186)	n/a
Appointing Highest-ranking specialist	n/a	“permit the highest-ranking antitrust specialist within the attorney general’s office to represent the state’s interest in competition when there are intrastate conflicts.” (207)	n/a



7. International Enforcement

Subject	AMC	AAI	ABA Antitrust Section
Cooperation, Convergence	“37. The agencies should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.”(216)	“with global anticompetitive problems (such as global cartels and global oligopolies), there is urgency in improving cooperation among nations to keep global markets free, competitive, and open to all. We support the movement toward informal harmonization through regular conversation and the development of best practices documents by the International Competition Network (ICN).” (18)	16. “continued and increased active involvement by both U.S. agencies in their leadership role in international bodies (especially the ICN and OECD), with adaptation of those roles as antitrust agencies and regimes around the world evolve and develop, and devotion of agency resources to those bodies’ work in high-priority areas like unilateral conduct, merger review procedure and analysis, and cartels.” (17) 17.”encourage all members of the ICN to implement recommendations on “best practices” substantive and procedural approaches, and to continue to improve their institutional infrastructures in a way that supports the implementation of competition laws and adequate due process.” (18)
Pre-merger Notification system	“38. As a matter of priority, the agencies should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.”(217)	n/a	n/a
International Antitrust Enforcement Assistance Act	“39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.”(218)	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
<p>Technical Assistance</p>	<p>“40. Congress should provide budgetary authority, as well as appropriations, directly to the agencies to provide international antitrust technical assistance.” (215)</p>	<p>“The Division should receive a budget increase earmarked to its program that helps educate foreign antitrust authorities in how to design effective leniency programs, impose appropriate monetary sanctions, criminalize their antitrust laws, and improve their anticartel enforcement generally.”(27)</p>	<p>“24. Technical assistance should cover government-related restrictions on competition, as well as mergers, cartels and other anticompetitive agreements, and unilateral conduct” (22) “25. The U.S. agencies should develop staff exchanges internationally with other authorities. These can be a particularly effective form of technical assistance (and have been fairly extensively used between European antitrust agencies).” (22)</p>
<p>Bilateral and Multilateral Antitrust Cooperation Agreements & Comity Principles</p>	<p>“41. The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements. 41a. Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language. 41b. Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and “benchmarking reviews.” (219)</p>	<p>“The agencies should continue to support the International Competition Network (ICN) as well as other multinational efforts, and should work with other competition agencies abroad to create a secretariat with permanent staff to house the ICN.”(184)</p>	<p>“18. The agencies should encourage ICN members, where appropriate, to develop agreements incorporating the principle of comity whereby one or more agencies could defer to another in resolving a case.” (18) “26. The agencies should consider whether more bilateral and multilateral agreements should be negotiated with both the established and developing antitrust law jurisdictions.” (22)</p>



Subject	AMC	AAI	ABA Antitrust Section
Foreign Trade Antitrust Improvements Act	“42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.” (228)	“Congress should either repeal the Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a (2000)) or clarify its intent in passing it, specifically on the questions of whether foreign buyers from international cartels have standing to qualify for private rights of action in U.S. courts and whether those courts have subject matter jurisdiction over such claims.”(27)	n/a
Coordination Between Economists	n/a	n/a	“19. The agencies should consider whether efforts to increase formal coordination among senior economists within the various antitrust agencies around the world would be an appropriate way to encourage economic convergence. The agencies should also consider whether technical assistance programs should include a greater focus on economics.” (19)
Soft Cooperation	n/a	n/a	“23. The agencies should seek to coordinate internationally and expand upon the United States’ role in “soft” cooperation (e.g., policy formulation, advice, case handling and judicial training) to maximize the impact of such assistance on global harmonization and avoid duplication among agencies.” (21)



Subject	AMC	AAI	ABA Antitrust Section
Transparency and International Leadership	n/a	n/a	“20. The agencies should increase transparency through more press releases, guidelines, speeches and closing statements, particularly regarding mergers and unilateral conduct, which will help maintain the U.S. agencies’ international leadership.” (19)
Unilateral Conduct	n/a	n/a	“21. The agencies should devote further resources to dialogue with other jurisdictions over legal tests for unilateral conduct.” (20)
Translation	n/a	n/a	“22. The agencies should consider providing translations of some key guidelines or statements to assist the work of the developing competition jurisdictions.” (22)
Cooperation in Investigation	n/a	n/a	“27. The Antitrust Division should be encouraged to continue to exchange information in pending investigations with other antitrust regimes where possible.” (27)



8. Private enforcement

Subject	AMC	AAI	ABA Antitrust Section
Overall Assessment	<p>“Private antitrust enforcement plays a critically important role in implementing the U.S. antitrust laws. From the outset, Congress contemplated that private parties would play a central role in enforcement of the Sherman Act.” (243)</p>	<p>“Restore balance to the agencies’ competition advocacy and amicus programs by educating the public and the courts about the virtues of vigorous private antitrust enforcement, dispelling the myths about widespread abusive antitrust litigation, and supporting efforts by courts to strengthen their use of existing case management tools to reduce the expense of litigation.”(220)</p>	<p>n/a</p>
Treble damages	<p>“43. No change is recommended to the statute providing for treble damages in antitrust cases.” (245)</p>	<p>“Treble damages are critical for deterrence because “some anticompetitive conduct is likely to evade detection and challenge,” and therefore antitrust violations would be profitable <i>ex ante</i> if violators were liable only for single damages or the amount of their overcharges.”(223)</p>	<p>n/a</p>
Prejudgment Interest	<p>“44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.”(249)</p>	<p>“Support legislation to provide for an automatic award of prejudgment interest to prevailing plaintiffs.” (220)</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
Attorneys' fees	<p>“45. No change is recommended to the statute providing for attorneys’ fees for successful antitrust plaintiffs. In considering an award of attorneys’ fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.” (252)</p>	n/a	n/a
Settlement Claim Reduction	<p>“46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs’ claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.” (252)</p>	<p>“Oppose legislation proposed by the AMC for settlement claim reduction and contribution.”(221)</p>	n/a
Class action	n/a	<p>“Support efforts to make waivers of class actions or class arbitration of antitrust claims unenforceable.” (221)</p>	n/a
Doctrine of Antitrust Injury	n/a	<p>“Participate as an amicus in appropriate cases to encourage the courts to clarify the limited nature of the doctrine of antitrust injury.”(221)</p>	n/a



Subject	AMC	AAI	ABA Antitrust Section
<p>Indirect Purchaser</p>	<p>“47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:</p> <ul style="list-style-type: none"> • Overrule <i>Illinois Brick</i> and <i>Hanover Shoe</i> to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered. • Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III. • Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings. • Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.” (267) 	<p>“Study the practical effects of the Class Action Fairness Act on antitrust cases, adhere to certain principles in considering any <i>Illinois Brick</i> reform proposal –including the principle that the current level of deterrence should not be undermined – and oppose the specific legislation proposed by the AMC for reforming <i>Illinois Brick</i>.” (220)</p> <p>“The next administration should adhere to the following principles in considering any <i>Illinois Brick</i> reform proposal:</p> <ol style="list-style-type: none"> (1) the current level of deterrence should not be undermined; (2) consumers should be compensated for their harm to the extent practicable; (3) the calculation of potential damages to any class of purchasers should be reasonably predictable so as to provide clear incentives for private lawyers to take on cases; (4) administrative costs should be minimized to the extent this would not interfere with any of the other goals in this area; (5) procedural hurdles, particularly in the class certification process, should not undermine the effectiveness of direct or indirect purchaser actions; (6) state attorneys general should retain the option of bringing <i>parens patriae</i> actions under state law in state court, without removal.” (238) 	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
Support for Int'l effort	n/a	“Actively support efforts by the European Union and other foreign jurisdictions to develop effective private rights of action.” (220)	n/a
Study on the effects of <i>Twombly</i> Case	n/a	“Undertake a comprehensive investigation into the effects of <i>Bell Atlantic Corp. v. Twombly</i> , the extent to which it has impaired Rule 8’s notice pleading standard, and possible remedial measures.” (220)	n/a
<i>Daubert</i> and Federal Rule of Evidence 702	n/a	“Undertake an investigation into the effects of <i>Daubert</i> and Federal Rule of Evidence 702 on private and government antitrust litigation and consider drafting guidelines for courts to use in evaluating the reliability of economic testimony in antitrust cases.” (220-221)	n/a



9. Cartel

Subject	AMC	AAI	ABA Antitrust Section
Criminal Remedies	“50. While no change to existing law is recommended, DOJ should continue to limit its criminal enforcement activity to “naked” price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.” (295)	n/a	n/a
Fine	“51. No change should be made to the current maximum Sherman Act fine of \$100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.”	<p>“It is time to begin imposing more fines closer to the current \$1 million statutory maximum. Moreover, in egregious cases, the Division should begin extracting individual fines using the more-generous alternative sentencing law. In addition, Congress should raise the Sherman Act maximum fine for individuals to \$10 million.” (24)</p> <p>“Because of recent Supreme Court decisions about proof in sentencing decisions, the efficacy of the “alternative fining provision” (fines up to double the harm or double the gain) for criminal price fixing is in doubt. Congress should raise the Sherman Act maximum corporate fine to \$1 billion.” (23-24)</p>	n/a

* AMC Recommendations 48, 49 were moved to the Exclusionary Conduct chapter (15p).

* The AMC report’s original title on this section is “Criminal Remedies.”



Subject	AMC	AAI	ABA Antitrust Section
Harm Proxy (1)	“52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.” (300)	“The Sentencing Commission should study the assumption in its Organizational Guidelines that cartel overcharges are typically 10% of affected sales or, indeed, total market sales. We believe that the presumption should be raised to at least 20% for North American cartels and 30% for international cartels.”(23)	n/a
Harm Proxy (2)	“53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.” (302)	n/a	n/a
Punishments	“54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to “bid-rigging, price-fixing, or market allocation agreements among competitors,” and the DOJ limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.” (303)	“The Division has the authority to recommend corporate fines for international cartels by calculating the base fine using global affected sales, instead of domestic sales. In many cases this would significantly and appropriately increase the fines for members of international cartels. The Division should make this its standard practice.” (22)	n/a



Subject	AMC	AAI	ABA Antitrust Section
Trials of Cartelists	n/a	“The low number of trials of cartelists over the past 15 years is a cause of concern. If guilty defendants believe that the Division’s threats to bring them to court are empty bluster, the Division’s ability to extract meaningful fines through negotiation is severely compromised. The Division should bring at least one or two well conceived cases targeting large firms to trial each year.”(23)	n/a
Section 4A of Clayton Act	n/a	“Congress amended Section 4A of the Clayton Act to permit the federal government to obtain treble damages on the overcharges it pays. However, the Division rarely sues under Section 4A for damages incurred by the federal government as a purchaser from cartels.” (23)	n/a
Guilty Plea	n/a	“The Division should revise its normal practice of starting guilty plea negotiations from the bottom of the federal Sentencing Guidelines range rather than from the top or the middle. If it does not do so, Congress should hold hearings on the practice and offer guidance that clarifies the appropriate starting point and discounting criteria.” (22-23)	“28. The new Administration should review the Antitrust Division’s policy of insisting the public naming of ‘carve outs’ at the time of entering into a corporate plea agreement.” (25) “Publicly disclosing the identity of carved-out individuals can have a deleterious effect on those individual’s social and professional reputations” (26)



Subject	AMC	AAI	ABA Antitrust Section
Discounts in Guilty Plea	n/a	“There are probably sound reasons for granting 50% or even higher discounts from the Sentencing Guidelines’ maximum fine for the first two cartelists to plead guilty, but cooperation discounts of more than 20% for later-arriving companies ought to be exceptional.” (23)	n/a
Extradite Foreign Criminals	n/a	“Congress needs to prod the State Department to clarify and strengthen the ability of the Division to extradite foreign residents guilty of criminal cartel conduct.” (24)	n/a
Recoveries	n/a	“As criminal fines rise, there may come a point where they begin to affect the amount of compensation available to those who have been injured by the wrongful conduct. This may happen if bankrupt defendants are prepared to pay a certain amount in total, content to let the government and private plaintiffs fight it out. Congress or the Sentencing Commission should provide guidance to the judiciary to insure that large fines do not translate into diminished recoveries for the real victims.” (24)	n/a



Subject	AMC	AAI	ABA Antitrust Section
Prejudgment Interest	n/a	“The absence of prejudgment interest in monetary penalties cuts against basic financial and deterrence concepts and only encourages cartelists to delay pleading guilty. The Sentencing Commission should revise the Sentencing Guidelines to include prejudgment interest in the corporate fines.” (23)	n/a
Individual Leniency Programs	n/a	“The Division’s individual leniency policy for criminal matters appears to be underutilized. It may be time for the Division to revise it. One promising innovation that ought to be considered is offering bounties to whistleblowers, as is already the case for qui tam civil suits. As a first step, the Division should study the effectiveness of cartel bounty policies in Korea and the U.K.” (24)	n/a
Public Cartel Enforcement Information (1)	n/a	“The Division should reveal more of what it knows about these matters, either in plea agreements, information, sentencing agreements, or in follow-up studies using anonymous data. It should publish all sentencing agreements, whether submitted to courts or not, on its Web page. This could be done in a manner that would not interfere with the Division’s law enforcement efforts” (25)	n/a



Subject	AMC	AAI	ABA Antitrust Section
Public Cartel Enforcement Information (2)	n/a	<p>“After securing criminal convictions, the Division should also inquire, and publicly report details on, how cartels were able to collude and sustain their collusion. Rigorous empirical analysis of the dynamics of cartels will help foster antitrust policymakers’ and the greater antitrust community’s understanding of the factors leading to successful explicit and tacit collusion.” (...omitted...)</p> <p>“The Division could require in sentencing agreements that defendants turn over simple post-conviction reports for five years on their production costs, sales, and prices in the affected market. For a representative sample of successful cartel prosecutions, the Division should report on the state of competition in the affected industries.” (25)</p>	n/a
Public Cartel Enforcement Information (3)	n/a	<p>“A history of collusion in an industry may signal that a rise in coordinated effects is likely after a proposed merger is consummated. The Division should study whether there is a pattern of cartel members’ acquiring rivals, large customers, or suppliers in the affected industry anywhere in the world before, during, or immediately after, the violation. Any negative findings should be incorporated into the Division’s enforcement decisions.” (25)</p>	n/a



Subject	AMC	AAI	ABA Antitrust Section
Public Cartel Enforcement Information (4)	n/a	<p>“the Division should also make publicly available on an annual basis a computerized database identifying all antitrust consent decrees, pleas, and litigated actions under Section 1 of the Sherman Act. The database should include certain industry characteristics, such as its best information on:</p> <ul style="list-style-type: none"> (i) the number of conspirators (including its best estimate of their market shares); (ii) the duration of the conspiracy; (iii) the product or services market in which collusion occurred; (iv) the number of competitors (and their market shares) who were not part of the conspiracy; (v) the number of entrants (and their market shares) during the period of the conspiracy; (vi) the nature of the conspiracy; and (vii) the types and degree of sanctions recommended and accepted by the courts.” (26) 	n/a



Subject	AMC	AAI	ABA Antitrust Section
Public Cartel Enforcement Information (5)	n/a	“We suggest that the Division’s workload statistics be expanded to give greater insight into its cartel enforcement over time, including full-time-equivalents of assistance from the FBI and other investigative agencies, the number of fulltime-equivalents used to assist other agencies or foreign antitrust authorities, number of amnesty applications received and accepted, other reasons for opening investigations (complaints, Amnesty Plus, tips from sister antitrust authorities, screening evidence, etc.), and the number of investigations closed and general reasons for such.” (26)	n/a
Public Cartel Enforcement Information (6)	n/a	<p>“We are concerned that knowledge about empanelling grand juries in cartel cases sometimes may be leaked by defense counsel for targeted corporations to small numbers of privileged parties” (...omitted...) “We suggest that, like the EU competition authority, the Division consider announcing the opening of its formal investigations.”</p> <p>“Investigated organizations that have been cleared – but are concerned about lingering unfavorable rumors – ought to have the option of having the closing of an investigation announced by the Division.” (26)</p>	n/a



Subject	AMC	AAI	ABA Antitrust Section
Foreign Trade Antitrust Improvements Act	“42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.” (228)	“Congress should either repeal the Foreign Trade Antitrust Improvements Act (15 U.S.C. § 6a (2000)) or clarify its intent in passing it, specifically on the questions of whether foreign buyers from international cartels have standing to qualify for private rights of action in U.S. courts and whether those courts have subject matter jurisdiction over such claims.”(27)	n/a
Institutional Enhancement	n/a	<p>“We believe there is plausible evidence of significant, binding resource restraints on the anticartel activities of the Division. We recommend that the Division’s inflation-adjusted budget be increased significantly, and that it grow at a rate of at least 10% per annum through fiscal years 2009 – 16.” (27)</p> <p>“The growing gap between the compensation of private-sector antitrust lawyers and economists and that of their counterparts in the Division is an issue that must be addressed. A way should be found to permit salaries of these highly demanded civil servants to escape the rigid limits set by civil service regulations.” (27)</p>	n/a



Subject	AMC	AAI	ABA Antitrust Section
International Cooperation	n/a	<p>“The most harmful cartels are those that operate across multiple countries and continents. Most global cartels negatively affect the welfare of U.S. companies and consumers. One reason they are formed is that when operating in jurisdictions with weak anticartel enforcement, they face insignificant probabilities of detection or disgorgement of their monopoly profits. The Division should receive a budget increase earmarked to its program that helps educate foreign antitrust authorities in how to design effective leniency programs, impose appropriate monetary sanctions, criminalize their antitrust laws, and improve their anticartel enforcement generally.” (27)</p>	<p>“27. The Antitrust Division should be encouraged to continue to exchange information in pending investigations with other antitrust regimes where possible.”</p> <p>“The Antitrust Division should continue to exchange information regarding pending investigations and cooperate with foreign enforcement agencies on a case-by-case basis to the extent feasible and consistent with applicable law (grand jury secrecy, treaties, etc.) To encourage amnesty applications, however, the Antitrust Division should continue its present policy of sharing information received from amnesty applicants with foreign enforcement agencies only upon consent of the amnesty applicant.” (25)</p>
ACPERA	n/a	n/a	<p>“62. The Antitrust Division should not object to cooperation by amnesty applicants with civil plaintiffs under ACPERA in circumstances where there is no prejudice to the Antitrust Division’s law enforcement objectives.” (58)</p> <p>*ACPERA: Antitrust Criminal Penalty Enhancement and Reform Act</p> <p>“63. Prior to the expiration of the ACPERA, the Antitrust Division (with cooperation from the Section) should study whether the Act has achieved its stated purposes.” (60)</p>



10. Robinson Patman Act and Buyer power

Subject	AMC	AAI	ABA Antitrust Section
<p>Robinson-Patman Act</p>	<p>“55.Congress should repeal the Robinson-Patman Act in its entirety.” (312)</p> <p>“The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.”(312)</p> <p>“The Act prevents or discourages discounting that could enable retailers to lower prices to consumers. “The chief ‘evil’ condemned by the Act [is] low prices, not discriminatory prices.” The Act thus reflects “faulty economic assumptions” and a significant “misunderstanding of the competitive process.”(317)</p>	<p>“Congress should not repeal the Robinson-Patman Act.</p> <p>If Congress is interested in limiting its adverse effects, it should adopt the following reforms, which would reduce the number of anticompetitive Robinson-Patman cases while preserving the Act’s ability to reach discrimination that poses a substantial threat to small business and consumers.</p> <ul style="list-style-type: none"> • In a challenge to price discrimination among customers, the plaintiff should be required to prove either that the discriminating seller had market power or that the favored customer had buyer power. • A defendant should be allowed to establish the cost justification defense if it can show that its discriminatory price was reasonably related to cost savings generated by the favored buyer. • In a challenge to promotional discrimination, a plaintiff should be required to prove that the discrimination is likely to cause competitive injury. • Section 3 of the Act, which makes it a crime to engage in certain types of price discrimination, should be eliminated. This section is no longer enforced and should not be.”(98-99) <p>“The FTC should look for and, if warranted, bring a Robinson-Patman case in which the challenged discrimination both favors a powerful buyer over its smaller rivals and threatens to harm consumers.”(98)</p>	<p>“64. The Section recommends that the agencies support reform or repeal of the Robinson-Patman Act.”</p> <p>“The Section agrees that certain portions of the statute should be repealed, while others should at least be modified to achieve more internal consistency within the RPA and to promote greater harmony with the antitrust principles expressed in the Sherman and Clayton Acts.” (61)</p> <p>“The agencies have not been actively enforcing the statute for some time, which the Section believes is the proper position given the RPA’s current form. Although the agencies can be commended for resisting the temptation to enforce the Robinson-Patman Act in situations where its effect could be to reduce competition, inactivity and silence is not enough to lift the interference that the Act can impose on competitive markets.” (62)</p>



Subject	AMC	AAI	ABA Antitrust Section
Buyers Cartel	n/a	“Criminal prosecution of cartels and other naked collusion by buyers should remain a high priority of the Department of Justice.” (97)	n/a
Horizontal Buyer Merger	n/a	“The enforcement agencies should continue to review mergers of competing buyers to determine whether the combination is likely, without offsetting justification, to create or enhance classic monopsony power. Indeed, because the agencies have historically challenged few mergers on this ground, they should be especially vigilant in the future to ensure that they do not allow acquisitions that subject small sellers like farmers or fishermen to monopsonistic exploitation.” (97)	n/a
Exercise of Monopsony Power	n/a	“Since the exercise of classic monopsony power can cause harm even when it does not reduce output, in evaluating mergers of buyers the agencies should consider whether the transaction is likely to cause adverse effects beyond an immediate reduction in output, such as a transfer of wealth from suppliers to the merged firm.” (97)	n/a



Subject	AMC	AAI	ABA Antitrust Section
Exclusionary Behavior	n/a	<p>“The enforcement agencies should continue to bring cases like <i>Toys “R” Us</i> in which a firm, without justification, uses its buying power to raise rivals’ costs, increase its market power, and injure consumers.” (97)</p> <p>“The agencies should also challenge behavior like predatory bidding, overbuying, or exclusive dealing that enables a buyer, without justification, to create, maintain, or increase classic monopsony power.” (98)</p>	n/a
Downstream Effects in Monopsony Case	n/a	<p>“In any case in which an enforcement agency shows that the conduct of one or more buyers was likely to create, maintain, or increase classic monopsony power,</p> <p>the agency should take the position (1) that it need not show that such conduct was likely to harm consumers; and (2) that the defendant(s) cannot justify the conduct on the ground that the lower prices extracted from suppliers would be passed on to consumers.” (98)</p>	n/a



11. Immunities and Exemptions, Regulated Industries, and State Action Doctrine

Subject	AMC	AAI	ABA Antitrust Section
<p>General Standpoint on Immunities</p>	<p>“56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.” (334)</p>	<p><Electricity Industry> “Impediments to the ability of the federal antitrust laws to reach anticompetitive conduct involving wholesale electricity rates, such as the filed rate doctrine, and overbroad application of judicially created exemptions from the antitrust laws, such as the state action doctrine, implied immunity doctrine (as applied in <i>Credit Suisse</i>), and primary jurisdiction doctrine should be removed.” (351)</p>	<p>“65. The Section recommends that the agencies continue their opposition to exemptions and immunities from the antitrust laws, study and report on the economic effect of exemptions, and continue their efforts to challenge anticompetitive activity that fails to qualify for the exemptions.” (62)</p>
<p>Statutory Immunities</p>	<p>“57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability <i>and</i> is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.” (335)</p>	<p>n/a</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>Consideration Factors For <u>Evaluating Immunities</u></p>	<p>“58. In evaluating the need for existing or new immunities, Congress should consider the following:</p> <ul style="list-style-type: none"> • Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability; • The likely adverse impact of the existing or proposed immunity on consumer welfare; and • Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.” (336) <p>“59. The following steps are important to assist Congress in its consideration of those factors:</p> <ul style="list-style-type: none"> • Create a full public record on any existing or proposed immunity under consideration by Congress. • Consult with the agencies about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity. • Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.” (336-337) 	<p>n/a</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>Consideration Factors For <u>designing</u> New Immunities</p>	<p>“60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:</p> <ul style="list-style-type: none"> • Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages). • Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed. • Adopt a requirement that the FTC, in consultation with the DOJ, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.” (337) 	<p>n/a</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
Interpretation	“61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.”(337)	n/a	n/a
General Standpoint on regulations	“62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry.” (...omitted...) “In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.” (338)	n/a	n/a
Application of Antitrust Law	“63. antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.” (338)	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
Statutory Regulatory regimes	<p>“64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.”</p> <p>“65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.” (339)</p>	n/a	n/a
Immunity From Antitrust	<p>“66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as <i>National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City</i>.”(340)</p>	n/a	<p>“65. The Section recommends that the agencies continue their opposition to exemptions and immunities from the antitrust laws, study and report on the economic effect of exemptions, and continue their efforts to challenge anticompetitive activity that fails to qualify for the exemptions.” (62)</p>
	<p>“67. <i>Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP</i> is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.” (340)</p>	n/a	n/a



Subject	AMC	AAI	ABA Antitrust Section
Filed-rate doctrine	<p>“68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.” (341)</p>	<p><Electricity Industry> “Impediments to the ability of the federal antitrust laws to reach anticompetitive conduct involving wholesale electricity rates, such as the filed rate doctrine, and overbroad application of judicially created exemptions from the antitrust laws, such as the state action doctrine, implied immunity doctrine (as applied in <i>Credit Suisse</i>), and primary jurisdiction doctrine should be removed.”(351)</p>	<p>n/a</p>
<p>Merger Review In Regulatory Regime (1)</p>	<p>“69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.” (341)</p> <p>“70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.”</p> <p>“71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.” (342)</p>	<p><General> The agencies should continue to perform a policy advocacy role with Congress, state legislatures and other agencies, attempting to stop rules or laws with unintended or unacceptable anticompetitive effects from being enacted. (184)</p> <p><Electricity Industry> “The federal antitrust agencies should take major responsibility for determining if a merger is likely to adversely affect competition and for crafting appropriate remedies for anticompetitive combinations. The Federal Energy Regulatory Commission (FERC) should cite to or incorporate the antitrust merger analysis in its merger orders.”(351)</p>	<p>“5. The agencies should expeditiously review mergers involving regulated industries, and regulatory agencies should not duplicate the agencies’ competition analysis.” (8)</p> <p>“In particular, the Section encourages the agencies to fulfill their mandate expeditiously, even when review by another regulatory agency, such as the Federal Communications Commission (“FCC”) is pending, and not to use the fact of review by another agency and the ensuing delay in consummation to extend the antitrust review. Finally, while DOJ and FTC staff should communicate regularly with other regulatory staff and work together consistent with their confidentiality obligations, the antitrust agencies must not use the fact of multi-agency review to delay.” (9)</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>Merger Review In Regulatory Regime (2)</p>	<p>“72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.”</p> <p>73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.”</p> <p>74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency’s “public interest” standard to determine whether in fact such regulatory review is necessary.”(342)</p>	<p>n/a</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>State Action Doctrine (1)</p>	<p>“75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.”(344)</p> <p>“76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless</p> <p>(1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and</p> <p>(2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.”</p> <p>“77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions:</p> <p>(1) whether the conduct at issue has been authorized by the state, and</p> <p>(2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.” (345)</p>	<p><Electricity Industry></p> <p>“Impediments to the ability of the federal antitrust laws to reach anticompetitive conduct involving wholesale electricity rates, such as the filed rate doctrine, and overbroad application of judicially created exemptions from the antitrust laws, such as the state action doctrine, implied immunity doctrine (as applied in <i>Credit Suisse</i>), and primary jurisdiction doctrine should be removed.”(351)</p>	<p>n/a</p>



Subject	AMC	AAI	ABA Antitrust Section
<p>State Action Doctrine (2)</p>	<p>“78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.”</p> <p>“79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.” (346)</p> <p>“80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.”(347)</p>	<p><Electricity Industry></p> <p>“Impediments to the ability of the federal antitrust laws to reach anticompetitive conduct involving wholesale electricity rates, such as the filed rate doctrine, and overbroad application of judicially created exemptions from the antitrust laws, such as the state action doctrine, implied immunity doctrine (as applied in <i>Credit Suisse</i>), and primary jurisdiction doctrine should be removed.”(351)</p>	<p>n/a</p>



12. Institutions [AAI & ABA Antitrust Section -only]

Subject	AMC	AAI	ABA Antitrust Section
Improving the Enforcement Agencies - In General	n/a	“The agencies should initiate a focus on long-term planning. As part of this effort, the FTC, DOJ, and NAAG should collaborate at the outset to discuss shared goals and possible coordination. Planning efforts should include identifying key metrics to measure institutional performance. Such metrics should be flexible enough to accommodate change.” (184)	n/a
Funding	n/a	“Congress should be encouraged to increase funding to the federal antitrust agencies, phasing in a substantial funding increase over several years.” (184)	“10. The enforcement agencies must continue to receive sufficient funding to perform their missions effectively.” (12)
Pay Levels	n/a	“To aid recruitment and retention of talented staff, pay should be increased for lawyers and economists. In particular, the agencies should support legislation to allow legal staff to be paid on the same schedule as SEC lawyers.” (184)	n/a
Career Path & Training	n/a	“Even with increased pay levels, retention of staff requires additional attention to planning for career paths, cross-training, and management training.” (184)	n/a



Subject	AMC	AAI	ABA Antitrust Section
Improving the Enforcement Agencies – In General	n/a	“The federal government should be prepared to go to trial more frequently. Therefore, the agencies should focus on developing internal litigation expertise. Rather than hiring outside attorneys for individual trials, outside litigation specialists should be hired for two- or three-year periods, be involved in investigations from an early stage, and help train permanent staff in litigation skills.”(184)	<p>“13. In exceptional circumstances and on a case-by-case basis, the agencies should consider the retention of outside antitrust counsel to prepare or try cases.” (15)</p> <p>“15. The agencies should devote sufficient funding to trial capabilities, and seek additional funding as needed.” (15)</p>
Litigators	n/a	“review systematically whether sufficient resources are devoted to litigation preparation, with a particular emphasis on whether the agencies successfully attract experienced litigators and train staff attorneys in litigation skills.”(142)	“12. The agencies should consider designating as “senior trial counsel” a limited number of experienced staff lawyers who would actively supervise trial preparation.” (14)
Advocacy	n/a	“The agencies should continue to perform a policy advocacy role with Congress, state legislatures and other agencies, attempting to stop rules or laws with unintended or unacceptable anticompetitive effects from being enacted.” (184)	“32. Each agency should assess whether it is devoting appropriate resources to advocacy.” (29)
Retrospective Studies	n/a	“The agencies ought to undertake more post hoc evaluations a few years after closing investigations or the completion of enforcement actions to determine the accuracy of, and thereby improve, enforcement predictions with respect to price increases, output reductions, quality changes, and such key structural features as entry.” (185)	“11. The agencies should consider implementing a “best practices” standard to prepare lawyers to try cases and to remain trial-ready through the sharing of information and programs.” (13)



Subject	AMC	AAI	ABA Antitrust Section
FTC	n/a	<p>“The administration should select Administrative Law Judges with prior experience in economics and antitrust law. Additionally, the agencies should provide training to build these judges’ knowledge of antitrust and consumer protection and skills in overseeing complex litigation.”</p> <p>“The FTC’s research agenda should include general studies on the competitive landscape in particular industries.”</p> <p>“The FTC should continue to sponsor public workshops on issues of particular importance to competition policy. These should include, for example, a workshop on the impact of behavioral economics insights on antitrust.”</p> <p>“The FTC should take the lead in developing structured rules of reason for particular recurring situations. To create these, the agencies should draw on relevant hearings, workshops, and sectoral studies.” (185)</p>	n/a
FTC Act Section 5	n/a	<p>“The FTC should continue and expand on its recent initiatives to develop Section 5 as a tool for addressing anticompetitive threats and conditions that may not be effectively reachable by the Sherman or Clayton Act.” (185)</p>	<p>“44. The new Administration should not depart from the FTC’s long-standing restraint in bringing antitrust enforcement actions based exclusively on Section 5 of the FTC Act without (1) identification of a compelling need for increased standalone enforcement; (2) creation of sufficient competition-based limiting principles; (3) development of an understanding of the implications of the resulting greater divergence in enforcement standards between the two agencies; and (4) creation of a plan for addressing such implications.” (38)</p>



Subject	AMC	AAI	ABA
Educating Public	n/a	<p>“To increase support for the antitrust mission, the agencies should endeavor to educate the public on competition policy and its underlying rationale. The next administration should coordinate with NAAG to add antitrust education to high school curricula.”</p> <p>“The next administration should implement an American version of the EU’s Competition Day to provide an opportunity to coordinate statements of public officials and observers on the antitrust mission and garner media coverage.”</p> <p>“In general, the agencies should do all they can to stimulate media coverage for antitrust issues by providing journalists with relevant information, background briefings, and education related to antitrust.”</p> <p>“The Antitrust Section of the American Bar Association should consider forming a committee devoted to better educating the public about the meaning and value of the antitrust laws.” (186)</p>	n/a



Subject	AMC	AAI	ABA
Appointed Officials	n/a	n/a	“9. Appointed officials should have relevant substantive antitrust expertise and seek significant involvement with respect to the new Administration’s overall economic policy.” (11)
Outside Experts & Psychological Program For Jury	n/a	n/a	“14. The agencies should continue to consider in the ordinary course of each case whether any other outside consultants, such as economists, industry consultants, and technical consultants, are needed, and study the feasibility of developing a forensic psychology program for jury focus work in conjunction with a local university.” (15)
Self-Assessments	n/a	n/a	<p>“29. Both agencies should engage in formal self-assessments that address the key areas of their civil enforcement mission.</p> <ul style="list-style-type: none"> -Merger enforcement -Non-merger Civil enforcement -Competition Advocacy -“Part III” Administrative Litigation (FTC) -Consumer Protection (FTC)” (26)
Consumer Protection Policy	n/a	n/a	“34. The FTC should assess whether its consumer protection-based rulemaking and enforcement are in proper balance.” (31)



13. Health Sector [AAI & ABA Antitrust Section -only]

[ABA Antitrust Section] (51p-56p)

A. Healthcare reform

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

B. Antitrust review of mergers in the Healthcare industry

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

C. Joint activity by competitors in the healthcare industry

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

[AAI] (317p-319p)

• **Resources and Priorities.** The Federal Trade Commission (FTC) and Department of Justice (DOJ) have appropriately dedicated substantial resources to health care antitrust enforcement. However, lax or nonexistent enforcement has resulted in high concentration or cartelization in some sectors, such as pharmaceuticals, hospitals, and health insurance. The next administration should pay particular attention to preventing further erosion of competition in these areas while improving effectiveness in detecting, litigating, and obtaining remedies involving abuses by providers of health services.

• **Intermediaries.** Despite significant competition problems involving healthcare intermediaries, including health insurers, pharmacy benefit managers (PBMs), and group purchasing organizations (GPOs), there have been no enforcement actions against these entities. In the absence of



federal enforcement, there has been a tremendous increase in consolidation in the health insurance and PBM markets and a significant number of state and private enforcement actions against all these entities. The health insurance market has experienced a rapid consolidation, and the vast majority of metropolitan markets have become highly concentrated. A similar trend has occurred in the PBM market. Abandoning enforcement in these key areas leads to significant harm to consumers.

- **Pharmaceuticals.** The FTC has brought some of the most significant cases in the history of antitrust enforcement against anticompetitive conduct in the pharmaceutical industry, involving efforts by brand name firms to divide markets and prevent entry by manufacturers of rival generic drugs. In spite of these efforts, anticompetitive conduct by brand name pharmaceutical companies continues, costing the public hundreds of millions of dollars in overpayments. The agencies should dedicate greater resources and bring more enforcement actions in this area. In particular, oversight of patent settlements between brand name and generic pharmaceutical firms has been confused by several questionable decisions of the appellate courts and the lack of support for the FTC's enforcement by DOJ. Congressional action is necessary to prevent the use of settlements to harm competition.
- **Physicians.** The FTC's numerous actions involving physician cartels have failed to secure compliance with the antitrust laws. The agency should target its cases against physician groups that knowingly violate the law and impose stiffer sanctions. It should also issue clearer guidance regarding permissible cooperative conduct, especially clinical integration.
- **Hospitals.** The FTC has appropriately renewed enforcement against hospital mergers and should continue to look for instances where hospital mergers lead to potential anticompetitive effects. In addition, where significant hospital consolidation has already occurred, the agencies should be alert to exclusionary conduct or conduct that raises rivals' costs, thus preventing entry by new entities (including specialty hospitals and ambulatory service providers).
- **Government Regulation.** Regulations and payment policies that inhibit competition must be closely examined. State and federal antitrust enforcers should actively advocate repeal or rejection of anticompetitive legislation, such as certificate of need laws and insurance mandates. In addition, the agencies should challenge overbroad application of the state action and Noerr doctrines where they permit monopoly-protecting regulation to trump antitrust law.
- **Government as a Purchaser.** Because the government is a major purchaser of health services, accounting for nearly half of all health care purchases, it exerts an extraordinary influence on the delivery of health services that spills over into the private sector. To the extent that these purchases rely on administered pricing, they can distort the market and strongly influence practice patterns that often undermine the benefits of competition in those markets. Through competition advocacy and involvement in the policy decisions of the Centers for Medicare and Medicaid Services, the agencies can exert influence that will improve the workings of competition in the private sector.



14. Energy Sector [AAI & ABA Antitrust Section -only]

[ABA Antitrust Section] (39p-41p)

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

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

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

[AAI] (351p-354p)

With respect to electricity:

- Impediments to the ability of the federal antitrust laws to reach anticompetitive conduct involving wholesale electricity rates, such as the filed rate doctrine, and overbroad application of judicially created exemptions from the antitrust laws, such as the state action doctrine, implied immunity doctrine (as applied in *Credit Suisse*), and primary jurisdiction doctrine should be removed.
- The federal antitrust agencies should take major responsibility for determining if a merger is likely to adversely affect competition and for crafting appropriate remedies for anticompetitive combinations. The Federal Energy Regulatory Commission (FERC) should cite to or incorporate the antitrust merger analysis in its merger orders.
- Ongoing collaboration between the FERC, the Department of Justice (DOJ) Antitrust Division, and the Federal Trade Commission (FTC) should be encouraged to ensure that the engineering-economic aspects of market analysis are adequately reflected in antitrust merger analysis.
- FERC should promote structurally competitive markets through its marketbased rate policies, ensure that its methodology accurately captures the dimensions of electricity markets, and avoid making grants of market-based rate authority in exchange for nonrelated concessions that promote its public interest agenda.



- Proposals for the establishment of new markets or regulatory “patches” to poorly functioning markets operated by Regional Transmission Organizations (RTOs) should be carefully scrutinized by the FERC, in conjunction with the federal antitrust agencies, to determine their effect on competition, efficiency and incentives for entry and innovation. RTOs should, in general, focus the bulk of their attention on management of the grid and transmission planning.
- FERC should attempt to address discrimination problems in bilateral electricity markets by considering more aggressive forms of unbundling (e.g.,structurally) generation from transmission, when it is reasonably likely that the benefits of unbundling exceed the costs.
- Major cost savings and environmental benefits can stem from giving economically appropriate standing for energy efficiency, conservation, and demand response to compete with generation. Entry conditions and the structure of electricity markets can be fundamentally more competitive if consumers can offer demand response in competition with generators.
- Energy policy must take steps to educate consumers and policy makers about the damage being done by flat retail electricity rates and the threat that they pose for society by distorting investment and innovation decisions in the energy sector. Flat rates should be replaced with rate structures that better reflect marginal costs.

With respect to carbon emissions:

- The design and implementation of carbon emissions allowance markets should involve a high degree of coordination between state and federal regulatory, antitrust, and reliability agencies that oversee all related and affected markets, including centralized and bilateral electricity markets, natural gas markets, and other markets for emissions allowances.
- As a precursor to addressing market design issues under a cap-and-trade approach, structural issues in carbon markets are worth investigating. It would be worthwhile to do a simple critical loss calculation to determine if any participant in a carbon market has a sufficiently large asset position that the losses it would take on purchasing and withholding allowances would be exceeded by increases in profits to its low carbon electricity assets. In broader carbon markets, market design is the first line of defense against anticompetitive strategies.
- The design of carbon emissions allowance markets should strive to prevent the exercise of market power and market manipulation. To prevent collusion,initial auctions for carbon emissions allowances should use single-round formats with restrictions on any one firm purchasing more than a specified percentage. Implementing frequent uniform-price auctions, equal treatment of allowances, and making future allowances available for auction in advance promote price discovery, low transactions costs, and long-term electricity capacity planning.
- Monitoring schemes for carbon emissions allowance markets should receive careful attention and draw from other experiences with allowance trading and even centralized electricity markets.



With respect to petroleum:

- Refining bottlenecks deserve continued attention in the FTC’s analysis of petroleum refining-marketing merger cases. Mergers that increase control of refinery capacity in congested, strategically located, or boutique fuel facilities should be carefully scrutinized to explore fully the possibility of unilateral withholding as a theory of competitive harm.
- More subtle mechanisms involving coordinated interaction in petroleum mergers should factor into FTC merger analysis, including the role of exchange agreements between refiners in facilitating coordination on price and output and the effect of mergers on the incentive to restrict or increase investment in refining capacity.
- The FTC should exhaustively consider vertical theories of harm in its merger review. High levels of refining and wholesale marketing integration and concentration emphasize the importance of adequately evaluating potential vertical effects.
- Natural gas serves as the fastest growing fuel source for electric power generation and potentially competes with electricity and gasoline in some major applications. The antitrust agencies would be well advised to look at convergence issues and loss of potential competition between fuels when they examine mergers. Such mergers should be viewed through the lenses of raising rivals’ costs and harm to actual or potential competition between electricity and natural gas.

With respect to new energy technologies:

- The federal government can play a useful role in hastening the development of new technologies for exploiting energy resources that produce little or no GHG emissions by designing regulatory, grant and direct subsidy, and tax incentive programs that promote competition in both innovation and energy production.
- Energy technology policy may need to include a large measure of up-front incentives to promote broad innovative effort. Goals should be defined in terms of research accomplishments that move in the right direction and reward the outputs and success from unrestricted competition.



15. Media / Food [AAI -only]

15-1. Media Sector (248p–249p)

More empirical analyses of how media markets work,

- that any antitrust policy toward media mergers be in furtherance of, and driven by, a national media policy, as set by Congress. Sole reliance on enforcement by the Federal Communications Commission (FCC) or federal antitrust agencies has proven to be too ad hoc, too haphazard, and not particularly effective.² Aside from political and ideological concerns about lax or zealous antitrust enforcement, conventional antitrust policy is not easy to apply in media markets,³ and

- a combination of new legislation and more informed antitrust enforcement to:

- (1) promote, or at least not diminish, the media’s contribution to the marketplace of ideas;

- (2) have antitrust merger policies complement FCC policy, which together should provide some of the necessary legal framework for a vibrant marketplace of ideas; and

- (3) understand from a 21st Century perspective, all of the values, including noneconomic values, such as localism and diversity, that are important to preserving a healthy marketplace of ideas. Antitrust will play only one part in implementing the overall media policy.”

15-2. Food Sector (283p)

Increased antitrust enforcement of merger and conduct rules including:

- Applying stricter standards to mergers in input markets
- Challenging anticompetitive, post-sale restraints in the sales of seed
- Developing agricultural market guidelines for assessing buyer mergers
- Challenging buyer mergers whenever they are likely to result in the exercise of buyer power
- Challenging collusive conduct by buyers that affects public market prices.



Employ and augment USDA authority to regulate market conduct to facilitate fair, efficient, and open competition by:

- Adopting regulations under the Packers and Stockyards Act (PSA) to control abusive buying practices
- Adopting regulations under the Agricultural Marketing Agreement Act of 1937 (AMAA) to control abuse of market orders
- Seeking expansion of the PSA to cover all agricultural commodities and clarify its standards.