

Antitrust Modernization Commission Proposes Significant Antitrust Reforms

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On April 3, 2007, the bipartisan Antitrust Modernization Commission (the “AMC”) released its report assessing the current state of the antitrust laws in the United States and proposing several reforms.¹ If these reforms are adopted, they could have an important impact on business. For example, price discrimination would not be as tightly restricted, affording sellers greater flexibility while creating anxiety among some smaller retailers. Indirect purchasers would be able to sue nationwide, but defendants could consolidate all of their cases in a single forum. Changes to pre-merger notification could make it simpler and cheaper to file for approval of mergers and acquisitions, and should speed the process of review. The following are some of the key elements of the report.

- **Repeal Robinson-Patman.** The AMC recommended that Congress repeal the Robinson-Patman Act in its entirety. The report stated: “The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. 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.”
- **Allow Indirect Purchaser Suits, but Limit Duplicative Recovery.** The AMC suggested that Congress pass legislation to overturn the Supreme Court’s decisions in *Illinois Brick* and *Hanover Shoe*, allowing indirect purchasers to sue under the antitrust statutes. However, the AMC would limit damages to three times the actual overcharge paid by direct purchasers, and would leave it to the courts to apportion the amount paid among the damaged parties according to actual harm suffered. The

AMC also suggested that indirect purchaser cases brought under state laws be removed to federal court and consolidated with cases brought by direct purchasers.

- **Allow Joint and Several Defendants to Apportion Liability.** The AMC also suggested that Congress enact a statute permitting non-settling defendants in cases involving joint and several liability to reduce plaintiffs’ claims by the amount of the settlements or the allocated shares of liability of the settling defendants, whichever is greater. The AMC’s proposed statute would also allow claims for contribution among non-settling defendants.
- **Merger Reform.** The AMC recommended that no statutory change be made with respect to Clayton Act §7. However, the AMC suggested that Congress authorize the DOJ and FTC to implement a new merger clearance agreement in order to prevent turf battles and to resolve clearance disputes in a shorter period of time. In addition, the AMC recommended that Congress amend §13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR Act merger cases.
- **Reduce HSR Filing Fees.** The AMC recommended that Congress de-link agency funding from the Hart-Scott-Rodino (HSR) Act filing fee revenues and reduce HSR filing fees, which the Commission believes to be an unnecessary tax on mergers.

The AMC’s report is also significant for what it did not recommend. In particular, the report was silent on whether there should be revisions to the antitrust laws with respect to industry-specific issues. Indeed, the AMC suggested that statutory immunities should be disfavored and rarely if ever granted, which in turn would cut back on industry-specific regulation.

¹ Established by Congress in 2002, the Commission’s mandate was “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.”

The report also failed to take a firm position on the McCarran-Ferguson Act insurance exemption reform. The AMC expressed disapproval of the McCarran-Ferguson Act, but could not come to a consensus on whether it should be repealed. It suggested, however, that the Act should rarely be applied.

While the impact of the AMC's report remains to be seen, several members of Congress have stated that now that the report has been issued, they would consider antitrust reform. Senate Antitrust Subcommittee Chair Herb Kohl (D-WI) and Ranking Member Orrin Hatch (R-UT) previously had issued a joint press release identifying as a priority any AMC-recommended legislation.

However, none of the specific legislative recommendations in the AMC report have yet been listed as priorities. Indeed, the antitrust legislation that has been introduced this term has focused on industries such as pharmaceutical, petroleum, energy and insurance, rather than on global antitrust reforms contemplated by the AMC. For example, the Senate Judiciary committee has sent legislation to the floor that would amend the antitrust laws to ban certain patent lawsuit settlements by pharmaceutical companies. (S. 316). Bills have been introduced that would prohibit price gouging of petroleum prod-

ucts (H.R. 1252) and shift the burden of proof in petroleum mergers (S. 878). Legislation has been introduced in both chambers of Congress, and the Senate has held hearings on repealing the McCarran-Ferguson Act's insurance industry's antitrust exemption (S. 618, H.R. 1081).

While many of the reforms recommended by the AMC appear to have solid grounding in antitrust law and policy, it is unclear whether the Democratic-controlled Congress will prioritize cutting back on protections to small business by repealing the Robinson-Patman Act or reducing damages available through litigation.

*If you have any questions about these developments, please feel free to contact **Carolyn Osolinik**, (202) 263-3265, cosolinik@mayerbrownrowe.com, **David McIntosh**, (202) 263-3281, dmcintosh@mayerbrownrowe.com or **John Roberti**, (202) 263-3428, jroberti@mayerbrownrowe.com, in our Washington, DC office, or **Richard Steuer**, (212) 506-2530, rsteuer@mayerbrownrowe.com, in our New York office.*

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