DEPARTMENT OF JUSTICE
Antitrust Division

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January 5, 2005

Deborah A. Garza, Chair
Antitrust Modernization Commission
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Re: Suggested Topics for Antitrust Modernization Commission Study

Dear Ms. Garza:

Thank you for your request that I share with members of the Commission my views on the task you have undertaken. Rather than focus itself on the routine issues that are repeatedly discussed in meetings of antitrust professionals, I suggest that the Commission focus on major issues of antitrust law that the courts, the agencies, and professional (or other) organizations cannot adequately address. I suggest the following topics for study:

- **Empirical Study of Antitrust Enforcement**

Some antitrust commentators contend that there is no empirical foundation for the conviction that antitrust enforcement benefits consumers and the economy. It seems plain to me that combating cartels and forestalling perceived needs for regulation have alone provided great benefits, but more empirical evaluation of the effects of antitrust enforcement would certainly be desirable. The Commission should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement. Data could be collected and evaluated, with case selection criteria and evaluation standards objectively designed in advance. Such a study might run for several years. Bolstering empirical evaluation of antitrust enforcement could be an important and lasting achievement for the Commission.

- **The Robinson-Patman Act**

Virtually every antitrust commentator who has examined this Act has concluded that it is inconsistent with effective competition policy and is anti-consumer. For decades, neither the Antitrust Division nor the Federal Trade Commission has devoted resources to enforcing the Act, because enforcement is harmful to consumers. Nonetheless, the Act continues to be the basis for private lawsuits seeking treble damages and attorney's fees. Burdensome and expensive litigation cannot be justified absent a strong showing of benefit to consumers. The Commission should study whether to recommend repeal of the Act.

- **Civil Fines for Federal Government Sherman Act Cases**

The prospect of injunctive relief alone may not be sufficient to deter or redress violations of the antitrust laws or consent decrees. Civil fine authority is a part of enforcement in many foreign jurisdictions. On the other hand, creating governmental civil fine authority in addition to existing private remedies in our system would be problematic. Our system's extreme weighting of the civil enforcement balance toward private lawsuits as opposed to federal government enforcement is not necessarily ideal. The Commission should study whether it makes sense to endorse federal government civil fine authority for violations of the Sherman Act in conjunction with adjustments to private damages remedies such as those discussed below.

- **Treble Damage Availability in Non-Cartel Sherman Act Cases**

Sherman Act section 2 cases are highly dependent on specific facts and economic analysis. Courts and legal commentators have struggled to articulate clear differences between legal and illegal conduct. A company may not even know it has violated section 2 until well after the fact. In such circumstances, given the fear of potential future treble damage exposure, companies may be reluctant to engage in conduct that would be procompetitive and beneficial to consumers. Section 1 cases not involving cartel activity can raise similar concerns. The Commission should study whether consumers would be better off in a system that excluded these difficult aspects of antitrust enforcement from the prospect of post-hoc private lawsuits in which damages payable to the plaintiff are automatically trebled.

- **Antitrust Immunities and Exemptions**

There are a number of immunities and exemptions that serve special interests to the detriment of consumers and should be studied for possible elimination. Such immunities and exemptions can perform a disservice to consumers and undermine our global leadership in advocating market-based approaches in other jurisdictions. Among the immunities and

exemptions that deserve to be studied are the Shipping Act, 46 U.S.C. § 813, the Export Trading Company Act, 15 U.S.C. §§ 4011-21, and the Webb-Pomerene Act, 15 U.S.C. §§ 61-66.

- **State Enforcement of the Federal Antitrust Laws**

Many antitrust commentators have taken the position that there should be no role for state enforcement of antitrust laws because, *inter alia*, it is duplicative, costly, burdensome, and unduly subject to political considerations. State enforcement with respect to multi-state conduct can present serious issues and concerns, especially in merger cases, while state enforcement can play a valuable role in detecting and deterring local misconduct. I would encourage the Commission to study the appropriate role of state antitrust enforcement and whether it makes sense to limit the States' ability to enforce antitrust laws in civil matters where conduct affects more than one State. This inquiry is particularly appropriate in the case of mergers of multi-state or national significance. As international transactions increase, it is difficult for the United States to champion measures to avoid duplication and divergence internationally without paying attention to multiple-enforcer issues in our own system.

- **The State Action Doctrine**

The line of cases that began with *Parker v. Brown*, 317 U.S. 341 (1943), has seen courts exempt from the fundamental national policy of competition various government-created market impediments. Government-created impediments to competition are the most durable and harmful, and state-created impediments that impose harm on consumers in other States can be especially pernicious. The Commission should study whether and how the *Parker* doctrine might be cabined to avert anticompetitive harm while preserving the doctrine's legitimate purposes. It might consider, for example, how to exclude from the doctrine's protection quasi-governmental self-regulatory organizations and the activities of States as market participants, how to narrow the circumstances in which the actions of private parties and non-sovereign state entities are found to be those of the State for purposes of the doctrine, and how to address anticompetitive state measures that affect citizens of other States.

- **The Ability of Indirect Purchasers to Recover Damages**

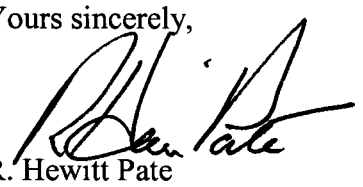
The Supreme Court has limited the remedies available to indirect purchasers under federal law, allowing injunctive relief but not damage claims. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In the aftermath of *Illinois Brick*, many States enacted legislation that allows indirect purchasers to recover damages for violations of state antitrust laws. Legislation authorizing such lawsuits raises serious concerns about appropriate damages for antitrust violations, including issues relating to multiple recoveries and over-recovery. The Commission should study whether federal legislation should be adopted to preempt such state laws.

- **The Fundamental Sherman Act**

There have been suggestions that the Antitrust Modernization Commission study revising the fundamental prohibitory language of the Sherman Act. The Sherman Act has served competition well for over 100 years. Changes to such a long-standing Act should be undertaken only with great caution, as it is almost certain that more harm than good would come from a change. The costs of the uncertainty and litigation entailed in casting aside 100 years of jurisprudence and putting new language into practice would be enormous. The basic Sherman Act language has proved flexible and adaptable over time. This has allowed antitrust enforcement to continue its role of protecting competition and forestalling perceived needs for regulation, while incorporating current economic thinking to avoid unintentional harm to market processes. None of the issues that I have presented as deserving this Commission's study would require changes to the basic Sherman Act language.

I hope you find these suggestions appropriate for study, and I look forward to the Commission's work product.

Yours sincerely,



R. Hewitt Pate

cc: Vice Chair Jonathan R. Yarowsky
Members of the Commission