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Antitrust Modernization Commission Issues Tentative Recommendations for Significant Changes to U.S. Antitrust

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On January 22, the Antitrust Modernization Commission (the "Commission") published its Tentative Recommendations. The Commission was created by Congress and charged with examining whether the U.S. antitrust laws should be modernized.

The Commission's final report is due in April 2007. Congress will then decide whether to enact the Commission's recommendations.

Key Tentative Recommendations

- ***Robinson-Patman Act***

The Commission recommends that Congress repeal the Robinson-Patman Act, which prohibits various forms of price discrimination.

This statute has long been criticized by antitrust scholars as limiting the ability of many businesses to offer lower prices to customers.

- ***Indirect Purchaser Litigation***

The Commission recommends that Congress enact a statute to facilitate the consolidation of direct and indirect purchaser cases in one federal court for all purposes, including trial.

Under the current legal framework, businesses often face multiple direct and indirect purchaser claims under federal and state antitrust laws that result in undue burdens on parties and the courts, as well as the possibility of duplicative recoveries.

- ***Federal Merger Enforcement and Hart-Scott-Rodino Reform***

The Commission recommends that Congress enact legislation requiring the federal agencies to assign transactions reported under the HSR Act within a short time period (e.g., no more than nine calendar days) to either the DOJ or the FTC.

The Commission also recommends that the DOJ and the FTC implement a new agreement to facilitate faster assignment, and a series of measures to reduce the burdens of compliance with requests for additional information under the HSR Act. These recommendations are designed to diminish the delays and burdens associated with many HSR reviews.

- **Monetary Remedies and Liability Rules**

The Commission recommends that Congress enact a statute permitting non-settling defendants to obtain reduction of a plaintiff's claim (before trebling) by the amount of the settlement or the allocated share of liability of the settling defendant(s), whichever is greater.

The Commission also recommends that the statute permit claims for contribution among non-settling antitrust violators. Although the Tentative Recommendations do not contain a specific proposal, the Commission is considering recommending that each defendant's allocated share of liability equal its market share or the gain from the violation.

- **Immunities & Exemptions, Regulated Industries, and State Action**

The Commission recommends that courts construe any existing immunities as narrowly as possible, and that future statutory immunities from the antitrust laws be disfavored and rarely granted.

According to the Commission, Congress should grant exemptions only if it finds that (i) the relevant conduct would subject the parties to antitrust liability and (ii) the immunity is necessary to satisfy a specific societal goal that trumps the benefit of a free market.

The Commission states that the antitrust laws should apply wherever regulation relies on competition or market forces to achieve competitive goals, and recommends that Congress evaluate whether the filed-rate doctrine should continue to apply in regulated industries where the agency no longer specifically reviews the proposed rates.

The Commission recommends that courts apply the state action doctrine more precisely to avoid granting antitrust immunity when not required by federalism concerns.

The full Tentative Recommendations and a related Executive Summary can be accessed by clicking on the links below:

- http://www.amc.gov/pdf/meetings/list_of_recommendations_jan_11v3.pdf
- http://www.amc.gov/pdf/meetings/Rep-ExecSum_070110circ.pdf.