Summary of

Major Recommendations

Chapter One: CARTELS

The AAI proposes the following set of recommendations for consideration by the leaders of the Division, the U.S. Sentencing Commission (Sentencing Commission), appropriate committees of Congress, and the new administration. We have limited ourselves to suggestions that are both feasible and relatively low cost relative to their benefits.

Increase the Certainty and Severity of U.S. Price Fixing Penalties

- 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.

- 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.

- 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.

- 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. More such suits would assist deterrence.

- 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.

- 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.

- 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.

- 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.

- The Division has imposed very few individual fines for cartel conduct above $100,000. 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.

- The Division has indicted many foreign cartel managers who escape justice by remaining abroad, many of them in Japan. 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.

- 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.

Introduce Innovative Cartel Detection Procedures

- 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.

Public Cartel Enforcement Information

- EU, U.K., Korean, and Canadian enforcers release far more details about the conduct and harm caused by cartels than does the Division. The information released by the Division rarely, if ever, includes data about unindicted coconspirators, affected sales, conduct, and injuries caused by cartels. The Division should reveal more of what it knows about these matters, either in plea agreements, informations, 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.

- 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. The ultimate test of a successful conviction is the post-cartel trend in prices, especially several years

after conviction, because cartel firms often learn how to collude informally as a result of belonging to an explicit cartel. 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.

- Price fixing and mergers are handled by separate units in the Division, yet the two may be related. A single horizontal merger in the United States or abroad can make formation of a cartel feasible. It is frequently the case that cartel convictions are followed by spin-offs and other industry restructuring. 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.

- To assist disinterested parties in assessing cartels' conduct, cartel enforcement, and optimal deterrence, 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: (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.

- 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 full-

time-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.

- 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 who commercially benefit from early possession of knowledge of an investigation. We suggest that, like the EU competition authority, the Division consider announcing the opening of its formal investigations. These announcements can be very brief, mentioning only the industry and whether international cooperation is involved. Targeted companies' identities should of course be confidential. Knowledge about closed investigations is currently handled on a case by case, haphazard basis. 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.

Help Improve Cartel Detection and Deterrence Internationally

- 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.

- 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.

Expand the Division's Budgetary Resources

- 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.

- 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.

Chapter Two: MONOPOLY

- Take a more aggressive enforcement posture towards exclusionary conduct by dominant firms and renew antitrust's historic skepticism of durable monopolies.

- Take seriously *Kodak*'s post-Chicago recognition that information deficiencies and other "consumer protection" market imperfections may give a firm market power, regardless of conventional market share analysis, and may make markets susceptible to opportunistic conduct with exclusionary and other anticompetitive effects.

- Be more open to the views and experience of foreign enforcement agencies with respect to the prosecution of abusive conduct by dominant firms.

- Abandon efforts to promote a single test for exclusionary conduct under Section 2, such as the profit sacrifice or "no economic sense" test.

- Support *Aspen Skiing* and *Kodak's* 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.

- 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.

- 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.

- 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.

- 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.

- 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.

- Sharpen the analysis of exclusive dealing arrangements.

- Retain the current modified per se rule for tying, as articulated in *Jefferson Parish*, with certain caveats.

With respect to intrabrand vertical restraints, the next administration should:

- 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.

- Support legislation to overturn the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* and restore the per se rule for minimum RPM.

- Alternatively, develop a structured rule of reason for courts to use in applying *Leegin* that would treat RPM as "inherently suspect" in most circumstances under the framework suggested by *Polygram Holding* and consider adopting guidelines setting forth a structured rule of reason for nonprice intrabrand restraints as well.

- Support repeal or reform of the *Colgate* doctrine legislatively or judicially insofar as that doctrine treats RPM coerced by a manufacturer's threatened refusal to deal as unilateral conduct.

- Renew efforts to bring challenges to vertical nonprice distribution restraints where powerful incumbent distributors seek to restrict distribution to innovative retailers, as in *Toys "R" Us*.

Chapter Three: BUYER POWER

Antitrust Enforcement

Naked Collusion

- Criminal prosecution of cartels and other naked collusion by buyers should remain a high priority of the Department of Justice.

Mergers

- 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.

- 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.

Exclusionary Behavior

- The enforcement agencies should continue to bring cases like *Toys "R" Us* in which a firm, without justification, uses its buying power to raise rivals' costs, increase its market power, and injure consumers.

- 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.

Downstream Effects in a Monopsony Case

- 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,

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.

Price and Promotional Discrimination

- The Federal Trade Commission (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.

The Robinson-Patman Act

Congress should not repeal the Robinson-Patman Act. 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.

Power Requirement in Price Discrimination Cases

- 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. If neither type of power is present, the market is competitive and the challenged discrimination is likely to be cost justified. This change would not entail a showing that the discriminating seller had monopoly power or that the favored customer had a large degree of buyer power. All that would be required is proof that competition was sufficiently imperfect that a seller had the incentive and ability to undertake significant, persistent, unjustified favoritism.

Reasonable Relationship Test for Cost Justification

- 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. The defense should not be denied simply because of minor defects in the defendant's cost study.

Competitive Injury Requirement in Promotional Discrimination Cases

- In a challenge to promotional discrimination, a plaintiff should be required to prove that the discrimination is likely to cause competitive injury. At present, plaintiffs challenging price discrimination must show competitive injury, but plaintiffs challenging favoritism in promotional allowances or services need not. This disparity is unwarranted and counterproductive.

Criminal Penalties

- 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.

Chapter Four: MERGERS

- systematically identify various factual showings from which harm to competition from horizontal mergers should be strongly presumed and the factual showings that would rebut those harms;
    - 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;
    - in recognition of both the legislative history of the Clayton Act, with its emphasis on incipiency and of the reality that current HHI thresholds are not followed in a meaningful way, 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;

- clarify other aspects of merger analysis by revising or supplementing the Merger Guidelines;
    - 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;

- demonstrate how the agency applies its merger guidelines and the underlying presumptions by increasing the transparency of agency decision-making in individual cases;

- encourage the courts to adopt the agencies' approach to merger analysis, through agency guidance, research reports, speeches and briefs;

- improve the effectiveness of merger analysis by conducting more retrospective studies of merger enforcement;
    - analyze the competitive effects of consummated mergers, including those that the agencies challenged, but that were allowed to proceed because of court rulings, to assess merger review standards;
    - analyze consent settlements to assess effectiveness of relief;
    - systematically analyze successes and failures in merger litigation to draw lessons about how to argue competitive effects, entry, efficiencies, and other issues more effectively in the future;

- 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.

Chapter Five: INSTITUTIONS

Improving the Enforcement Agencies – In General

- 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.

- Congress should be encouraged to increase funding to the federal antitrust agencies, phasing in a substantial funding increase over several years.

- 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.

- Even with increased pay levels, retention of staff requires additional attention to planning for career paths, cross-training, and management training.

- 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.

- 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.

- 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.

- 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.

The FTC

- 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.

- The FTC's research agenda should include general studies on the competitive landscape in particular industries.

- 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.

- 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.

- 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.

- 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.

The States

- The role of state attorneys general as antitrust enforcers should be strengthened. 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 *parens patriae* cases.

- 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.

- State attorneys general should undertake policy advocacy efforts similar to those of the federal agencies to oppose anticompetitive state legislation.

Educating the Public

- 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.

- 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.

- 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.

- 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.

Increasing Transparency

- 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.

- 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.

- 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.

- 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.

Chapter Six: PRIVATE ENFORCEMENT

We believe that the next administration should make it a priority to:

- Restore balance to the Justice Department (DOJ) and Federal Trade Commission's (FTC) 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.

- Actively support efforts by the European Union and other foreign jurisdictions to develop effective private rights of action.

- Undertake a comprehensive investigation into the effects of *Bell Atlantic Corp. v. Twombly*, the extent to which it has impaired Rule 8's notice pleading standard, and possible remedial measures.

- Support legislation to provide for an automatic award of prejudgment interest to prevailing plaintiffs.

- Study the practical effects of the Class Action Fairness Act on antitrust cases, adhere to certain principles in considering any *Illinois Brick* reform proposal – including the principle that the current level of deterrence should not be undermined – and oppose the specific legislation proposed by the Antitrust Modernization Commission (AMC) for reforming *Illinois Brick*.

- Undertake an investigation into the effects of *Daubert* 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.
- Support efforts to make waivers of class actions or class arbitration of antitrust claims unenforceable.

- Oppose legislation proposed by the AMC for settlement claim reduction and contribution.

- Participate as an amicus in appropriate cases to encourage the courts to clarify the limited nature of the doctrine of antitrust injury.

Chapter Seven: MEDIA

- 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. Aside from political and ideological concerns about lax or zealous antitrust enforcement, conventional antitrust policy is not easy to apply in media markets, 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.

Chapter Eight: FOOD

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.

Chapter Nine: HEALTH

- **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.

Chapter Ten: ENERGY

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 market-based 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.