

and Idaho Panhandle Zone is adjusting the forest plan revision process from compliance with the 1982 land and resource management planning regulations to compliance with new regulations published in the **Federal Register** of January 5, 2005 (70 FR 1062).

This adjustment will result in the following:

1. The Responsible Official will now be the Forest Supervisors.
2. Each National Forest will establish an Environmental Management System prior to a decision on the revised forest plans.
3. The emphasis on public involvement will shift from comment on a range of alternative plans, to iterative public-Forest Service collaboration, intended to meld a single option into a broadly supported plan.

For additional information on public meeting, other public involvement and collaborative opportunities, procedural differences between the 1982 and 2004 planning rules, timelines, reasoning behind our decision to transition to the new planning regulations, information on plan revision elements we have already completed before making this transition, and other details, consult the Kootenai, Idaho Panhandle Web site: [www.fs.fed.us/kipz](http://www.fs.fed.us/kipz).

Dated: May 12, 2005.

**Bob Castaneda,**

*Forest Supervisor, Kootenai National Forest.*  
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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Bitterroot, Flathead and Lolo National Forests Land and Resource Management Plan Revision**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Adjustment.

**SUMMARY:** Bitterroot, Flathead and Lolo National Forests here referred to as the Western Montana Planning Zone in Ravalli, Missoula, Mineral, Sanders, Lake, Flathead, Lincoln, Lewis and Clark, Granite, and Powell Counties, Montana, and Idaho County, Idaho. A Notice of Intent to prepare an environmental impact statement to revise Land and Resource Management Plans was published in the **Federal Register** of January 20, 2004 (69 FR 2699). The Western Montana Planning Zone is adjusting the forest plan revision process from compliance with the 1982 land and resource management planning regulations to compliance with

new regulations published in the **Federal Register** of January 5, 2005 (70 FR 1062).

**Public Involvement:** Scheduled meetings and details of other public involvement opportunities will be posted on the Western Montana Planning zone Web site, at <http://www.fs.fed.us/rl/wmpz/>. To get on the mailing list contact Claudia Narcisco at (406) 329-3795, or e-mail, [cnarcisco@fs.fed.us](mailto:cnarcisco@fs.fed.us). People currently on the mailing list will remain.

**FOR FURTHER INFORMATION CONTACT:** Lee Kramer, Interdisciplinary Team Leader, Lolo National Forest, Fort Missoula, Bldg., 24, Missoula, MT 59084, (406) 392-3848 or e-mail, [lkramer@fs.fed.us](mailto:lkramer@fs.fed.us); or see the Web site at <http://www.fs.fed.us/rl/wmpz/>.

**Responsible Officials:** David Bull, Supervisor, Bitterroot National Forest, 1801 North 1st St., Hamilton, MT 59840. Catherine Barbouletos, Supervisor, Flathead National Forest, 1935 Third Ave., Kalispell, Mt 59901. Deborah Austin, Supervisor, Lolo National Forest, Building 24, Fort Missoula, Missoula, MT 59804.

**SUPPLEMENTARY INFORMATION:** A Notice of Intent to prepare an environmental impact statement to revise Land and Resource Management Plans was published in the **Federal Register** of January 20, 2004 (69 FR 2699). The Western Montana Planning zone is adjusting the forest plan revision process from compliance with the 1982 planning regulations, to compliance with new regulations published in the **Federal Register** of January 5, 2005 (70 FR 1062).

This adjustment will result in the following:

1. The Responsible Official(s) will be each Forest Supervisor.
2. Each National Forest will establish an Environmental Management System prior to completion of the revised forest plans.
3. The emphasis on public involvement will shift from public comment on a broad range of alternative plans, to iterative public-Forest Service collaboration on a single option to arrive at a broadly supported plan for each Forest.

Public collaboration will begin in late spring of 2005, with each Forest using some combination of the following methods: (1) Posting draft desired conditions and supporting maps on the Web site; (2) open houses; (3) invited presentations; (4) newsletters; and (5) on-going collaborative dialogue in community-based working groups. The initial focal points of the collaborative process will be: (1) Desired conditions;

(2) suitability of areas for various purposes; and (3) objectives to help move toward the desired conditions. This phase of collaboration is expected to be completed by fall of 2005.

**Time Schedule:** The remaining forest plan revision schedule will be approximately as follows:

- Fall 2005: Release proposed forest plans and start 90-day public comment period.
- Summer 2006: Release final forest plans and start 30-day public objection period.
- Fall 2006: Issue final decision and start plan implementation.

The web site provides additional information regarding the decision to transition to the new planning regulations, discussion of plan revision elements already completed before making this transition, and other details.

Dated: May 12, 2005.

**David T. Bull,**

*Supervisor, Bitterroot National Forest.*

Dated: May 12, 2005.

**Catherine Barbouletos,**

*Supervisor, Flathead National Forest.*

Dated: May 12, 2005.

**Deborah L. R. Austin.**

*Supervisor, Lolo National Forest.*

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## ANTITRUST MODERNIZATION COMMISSION

### Request for Public Comment

**AGENCY:** Antitrust Modernization Commission.

**ACTION:** Request for public comment.

**SUMMARY:** The Antitrust Modernization Commission requests comments from the public regarding specific questions relating to the issues selected for Commission study.

**DATES:** Comments are due by June 17, July 1, or July 15, 2005, as specified below.

**ADDRESSES:** By electronic mail: [comments@amc.gov](mailto:comments@amc.gov). By mail: Antitrust Modernization Commission, Attn: Public Comments, 1120 G Street, NW., Suite 810, Washington, DC 20005.

**FOR FURTHER INFORMATION CONTACT:** Andrew J. Heimert, Executive Director & General Counsel, Antitrust Modernization Commission. Telephone: (202) 233-0701; e-mail: [info@amc.gov](mailto:info@amc.gov). Internet: <http://www.amc.gov>.

**SUPPLEMENTARY INFORMATION:** The Antitrust Modernization Commission was established to "examine whether

the need exists to modernize the antitrust laws and to identify and study related issues." Antitrust Modernization Commission Act of 2002, Public Law 107-273, § 11053, 116 Stat. 1856. In conducting its review of the antitrust laws, the Commission is required to "solicit the views of all parties concerned with the operation of the antitrust laws." *Id.* By this request for comments, the Commission seeks to provide a full opportunity for interested members of the public to provide input regarding certain issues selected for Commission study. From time to time, the Commission may issue additional requests for comment on issues selected for study.

Comments should be submitted in written form. Comments may be submitted on more than one topic area, but comments on each topic should be submitted in a separate document. Each comment should identify the topic to which it relates. Comments need not address every question within each topic. Comments exceeding 1500 words on a particular topic should include a brief (less than 250 word) summary. Commenters may submit additional background materials (such as articles, data, or other information) relating to the topic by separate attachment.

Comments should identify the person or organization submitting the comments. If comments are submitted by an organization, the submission should identify a contact person within the organization. Comments should include the following contact information for the submitter: An address, telephone number, and email address (if available). Comments submitted to the Commission will be made available to the public in accordance with Federal laws.

Comments may be submitted either in hard copy or electronic form. Electronic submissions may be sent by electronic mail to [comments@amc.gov](mailto:comments@amc.gov). Comments submitted in hard copy should be delivered to the address specified above, and should enclose, if possible, a CD-ROM or a 3-1/2 inch computer diskette containing an electronic copy of the comment. The Commission prefers to receive electronic documents (whether by email or on CD-ROM/diskette) in portable document format (.pdf), but also will accept comments in Microsoft Word format.

The AMC has issued this request for comments pursuant to its authorizing statute and the Federal Advisory Committee Act. Antitrust Modernization Commission Act of 2002, Public Law 107-273, § 11053, 116 Stat. 1758, 1856; Federal Advisory Committee Act, 5 U.S.C. app., 10(a)(3).

## Topics for Comment

The Commission requests comment on the following nine topics. Comments are requested to be submitted by the date specified.

*Comments Requested by June 17, 2005*

### I. Remedies

#### A. Treble Damages

1. Are treble damage awards appropriate in civil antitrust cases? Please support your response, addressing issues such as inducements to private enforcement, evidence indicating that treble damage awards have led to either over-deterrence or under-deterrence, the probability of antitrust violations being detected, and how "optimal" deterrence levels can best be determined.

2. Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (*e.g.*, *per se* unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?

#### B. Prejudgment Interest

1. Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?

2. Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. 15(a)(1)-(3) appropriate? If not, how should they be changed?

#### C. Attorneys' Fees

1. Should courts award attorneys' fees to successful antitrust plaintiffs?

2. Are there circumstances in which a prevailing defendant should be awarded attorneys' fees?

3. In areas of law other than antitrust, how effective is fee shifting as a tool to promote private enforcement?

#### D. Joint and Several Liability, Contribution, and Claim Reduction

1. Should Congress and/or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?

2. Is the evolution of rules regarding joint and several liability, contribution, and claim reduction in other areas of the law instructive in the context of antitrust law?

#### E. Remedies Available to the Federal Government

1. Should DOJ and/or the FTC have statutory authority to impose civil fines

for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?

2. Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. 53(b)?

#### F. Private Injunctive Relief

1. Has the ability of states and private plaintiffs to seek injunctive relief under 15 U.S.C. 26 benefited consumers or caused harm to businesses or others? Please provide any specific examples, evidence, or analyses supporting this assessment. What would be the consequences if the availability of injunctive relief to states and private plaintiffs under 15 U.S.C. 26 were changed? Should standing to pursue injunctive relief under federal antitrust law be different for states than it is for private parties?

2. Are there currently sufficient safeguards (*e.g.*, judicial discretion and the Cargill requirement that private plaintiffs establish antitrust injury) to limit injunctions to appropriate circumstances?

#### G. Indirect Purchaser Litigation

1. What are the costs and benefits of antitrust actions by indirect purchasers, including their role and significance in the U.S. antitrust enforcement system? Please be as specific as possible.

2. What burdens, if any, are imposed on courts and litigants by the difficulty of consolidating state court antitrust actions brought on behalf of indirect purchasers with actions brought on behalf of direct purchasers, and how have courts and litigants responded to them? What impact, if any, will the Class Action Fairness Act of 2005 have in this regard?

3. Does Illinois Brick's refusal to provide indirect purchasers with a right of recovery under federal antitrust law serve or disserve federal antitrust policies, such as promoting optimal enforcement, providing redress to victims of antitrust violations, preventing multiple awards against a defendant, and avoiding undue complexity in damage calculations?

4. What actions, if any, should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish Illinois Brick as the uniform national rule by preempting Illinois Brick repealer statutes, or should it overrule Illinois Brick? If Congress were to overrule

Illinois Brick, should it also overrule Hanover Shoe, so that recoveries by direct purchasers can be reduced to reflect recoveries by indirect purchasers (or vice versa)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?

*Comments Requested by July 1, 2005*

## II. Robinson-Patman Act

1. What are the benefits and costs of the Robinson-Patman Act as currently enforced? Does the Robinson-Patman Act promote or reduce competition and consumer welfare? If so, how? What other benefits does it afford or costs does it impose, if any?

2. What purposes should the Robinson-Patman Act serve?

3. Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts altered? Please identify specific changes and explain why they should be adopted. For example:

a. Should private plaintiffs asserting Robinson-Patman claims be required to prove "antitrust injury," *i.e.*, proof of injury reflecting the anticompetitive effect of the challenged conduct?

b. Should the inference of harm to competition under recognized in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), be modified, *e.g.*, by requiring plaintiffs to make a showing of harm to competition similar to that required to establish a Sherman Act violation?

c. Does limiting the substantive provisions of the Robinson-Patman Act to the sale of commodities, not services, make sense in today's economy?

d. What role should buyer market power play in applying the Robinson-Patman Act?

4. To what extent do state antitrust laws prohibit price discrimination that is also prohibited by the Robinson-Patman Act? Would repeal or reform of the Robinson-Patman Act affect the likelihood that states would adopt their own prohibitions on price discrimination? How, if at all, would repeal or reform of the Robinson-Patman Act affect the amount of litigation under such state laws?

*Comments Requested by July 15, 2005*

## III. Enforcement Institutions

### A. Dual Federal Merger Enforcement

1. Should merger enforcement continue to be administered by two different Federal agencies? What are the advantages and disadvantages resulting

from having two different federal antitrust enforcement agencies reviewing mergers? For example, does it result in bureaucratic duplication, inconsistency in treatment, more thorough enforcement, beneficial diversity in enforcement perspectives, or competition between antitrust enforcement agencies?

2. Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated? Please provide specific reasons for proposed reallocations.

3. Commenters have advised that disagreements between the FTC and DOJ concerning the clearance of mergers for review by one or the other agency have unreasonably delayed regulatory review in some cases. Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?

### B. Differential Merger Enforcement Standards

1. Does the standard the DOJ must meet to obtain a preliminary injunction to block a merger differ, as a practical matter, from that the FTC must meet? Has any such difference affected the outcome of a decision, or might it reasonably be expected to affect the outcome?

2. To the extent there is a difference in legal standards, should the different standards be harmonized? If so, how?

3. Should there continue to be a difference in the procedural aspects of Federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how should that be done?

4. What practical burdens are imposed on private parties by the FTC's policy of pursuing permanent relief through an administrative proceeding (in some instances) after failing to obtain a preliminary injunction?

### C. Allocation of Merger Enforcement Among States, Private Plaintiffs, and Federal Agencies

1. What role should state attorneys general play in merger enforcement? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved in multiple State and Federal merger reviews.

2. Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to

challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?

3. What role should private parties play in merger enforcement, and what authority should they have to seek to enjoin a merger? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved.

4. What lessons, if any, can be learned from Europe's referral (or "one-stop shop") system of allocating merger enforcement between the EC and Member States? How does the more regulation-oriented European tradition (as opposed to a more enforcement-oriented U.S. tradition) affect any comparison of the two systems?

### D. Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area

1. What role should state attorneys general play in non-merger civil enforcement? To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence, and analysis?

2. Should state and federal enforcers divide responsibility for non-merger civil antitrust enforcement based on whether the primary locus of alleged harm (or primary markets affected) is intrastate, interstate, or global? If so, how should such an allocation be implemented?

## IV. Exclusionary Conduct

1. What are the circumstances in which a firm's refusal to deal with (or discrimination against) rivals in adjacent markets violates Section 2 of the Sherman Act? Does the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), state an appropriate legal standard in this respect?

2. Should the essential facilities doctrine constitute an independent basis of liability for single-firm conduct under Section 2 of the Sherman Act?

3. What should be the standards for determining when a firm's product bundling or bundled pricing violates Section 2 of the Sherman Act?

4. How should the standards for exclusionary or anticompetitive conduct be determined (*e.g.*, through legislation, judicial development, *amicus* efforts by

DOJ and FTC), particularly if you believe the current standards are not appropriate or clear?

## V. Immunities & Exemptions

### A. General Immunities & Exemptions

1. In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions? In your response, please address the following questions:

a. What generally applicable methodology, if any, should Congress use to assess the costs and benefits of immunities and exemptions?

b. Should Congress analyze different types of immunities and exemptions differently? Are those that do not protect core anticompetitive conduct (e.g., price fixing) preferable to those that exempt all joint activities? Are those that eliminate, for example, treble damages, but retain single damage liability acceptable? For example, does the National Cooperative Research and Production Act, 15 U.S.C. 4301–06, provide a helpful alternative approach to blanket exemptions?

c. Should Congress subject immunities and exemptions to a “sunset” provision, thereby requiring congressional review and action at regular intervals as a condition of renewal?

d. Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?

2. The Commission intends to conduct a general evaluation of antitrust immunities and exemptions, and currently contemplates focusing, for illustrative purposes, on the first eight immunities and exemptions listed below (a.–h.). Please provide any relevant information about any of the immunities and exemptions below, including their costs, benefits, and impact upon commerce.

a. Capper-Volstead Act. 7 U.S.C. 291–92

b. Non-profit agricultural cooperatives exemption. 15 U.S.C. 17.

c. Agricultural Marketing Agreement Act. 7 U.S.C. 608b, 608c.

d. Fishermen’s Collective Marketing Act. 15 U.S.C. 521–22.

e. Webb-Pomerene Export Act. 15 U.S.C. 61–66.

f. Export Trading Company Act. 15 U.S.C. 4001–21.

g. McCarran-Ferguson Act. 15 U.S.C. 1011–15.

h. Shipping Act. 46 U.S.C. app. 1701 *et seq.*

i. Anti-Hog-Cholera Serum and Hog-Cholera Virus Act. 7 U.S.C. 852.

j. Airline flight schedule exemption. 49 U.S.C. 40129.

k. Air transportation exemption. 49 U.S.C. 41308–09.

l. Baseball exemption. See, e.g., *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972); Curt Flood Act, Pub. L. 105–297, 2, 112 Stat. 2824 (1998).

m. Charitable Donation Antitrust Immunity Act. 15 U.S.C. 37–37a.

n. Defense Production Act. 50 U.S.C. app. 2158.

o. Filed rate/Keogh doctrine. See, e.g., *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156 (1922).

p. Health Care Quality Improvement Act. 42 U.S.C. 11101–52.

q. Labor exemptions (statutory and non-statutory). See, e.g., 15 U.S.C. 17; 29 U.S.C. 52, 101–10, 113–15, 151–169; *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

r. Local Government Antitrust Act. 15 U.S.C. 34–36.

s. Medical resident matching program exemption. 15 U.S.C. 37b.

t. Motor transportation exemption. 49 U.S.C. 13703.

u. National Cooperative Research and Production Act. 15 U.S.C. 4301–06.

v. Natural Gas Policy Act. 15 U.S.C. 3364(e).

w. Need-Based Educational Aid Act. 15 U.S.C. 1 note.

x. Newspaper Preservation Act. 15 U.S.C. 1801–04.

y. Railroad transportation exemption. 49 U.S.C. 10706.

z. Small Business Act. 15 U.S.C. 638(d), 640.

aa. Soft Drink Interbrand Competition Act. 15 U.S.C. 3501–03.

bb. Sports Broadcasting Act. 15 U.S.C. 1291–95.

cc. Standard Setting Development Organization Advancement Act. 15 U.S.C. 4301–05, 4301 note.

dd. Television Program Improvement Act. 47 U.S.C. 303c.

ee. United States Postal Service exemption. See, e.g., *United States Postal Serv. v. Flamingo Indus. Ltd.*, 540 U.S. 736 (2004).

### B. State Action Doctrine

1. Should courts change or clarify the application of the state action doctrine?

a. Do courts currently interpret the “clear articulation” prong of the state action doctrine so as to immunize conduct only in circumstances in which the state intended to displace competition? Do courts unduly rely on “foreseeability” analysis in applying the “clear articulation” prong?

b. Should courts rely on the elements proposed by the FTC Staff’s State Action

Task Force (state authorization of conduct at issue and deliberate adoption of a policy to displace competition in the manner at issue) to determine whether the “clear articulation” prong is satisfied? See Federal Trade Commission Staff, Report Of The State Action Task Force 51 (Sept. 2003) (“FTC Report”).

c. Should there be other changes to interpretation and application of the “clear articulation” prong?

2. Should courts change or clarify application of the active supervision prong?

a. Do courts currently interpret the “active supervision” prong of the state action doctrine so as to subject immunized activity to meaningful state oversight?

b. Should courts rely on the elements proposed by the FTC Staff’s State Action Task Force (development of adequate factual record, written decision, and specific assessment) to determine whether the “active supervision” prong is satisfied? Are these elements workable in practice? See FTC Report at 55.

c. Should courts make any other changes when interpreting and applying the “active supervision” prong?

3. Should courts require different degrees of “clear articulation” by legislators and different levels of “active supervision” by executive or regulatory entities depending upon the circumstances (a “tiered approach”)?

4. Do courts in applying the state action doctrine currently account for spillover effects (anticompetitive conduct immunized by one state that has a deleterious effect on consumers in other states)? If not, should courts address spillover effects under the state action doctrine? What standards should govern that analysis?

5. How should courts apply the state action doctrine to various governmental entities?

a. Should state agencies and departments be subject to the “active supervision” prong of the state action doctrine? If so, who should actively supervise these state entities?

b. When should courts treat “quasi-governmental” entities as a private actor (subject to the “active supervision” prong) or as a municipality (potentially not subject to the “active supervision” prong)?

c. Should courts apply the “active supervision” prong to a municipality or state entity when it acts as a “market participant”? If so, how should that entity’s activities as a regulator be distinguished from its activities as a “market participant”?

d. Should Congress repeal the Local Government Antitrust Act of 1984?

## VI. International

1. Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?

2. Are there technical or procedural steps the United States could take to facilitate further coordination with foreign antitrust enforcement authorities?

a. Are there technical amendments to the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA") that could enhance coordination between the United States and foreign antitrust enforcement authorities?

b. Are there technical changes to the budget authority granted U.S. antitrust agencies that could further facilitate the provision of international antitrust technical assistance to foreign antitrust authorities?

## VII. Merger Enforcement

### A. Federal Antitrust Merger Enforcement Policy Generally

1. Has current U.S. merger enforcement policy been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets? Please identify specific examples, evidence, or analyses supporting your assessment.

### B. Transparency in Federal Agency Merger Review

1. Several commenters in the first phase of the Commission's work advised that the Commission should address whether there is sufficient transparency in federal antitrust enforcement policy. Do the Horizontal Merger Guidelines provide informative guidance to merging parties regarding the likely antitrust treatment of their transactions, and do they appear accurately to reflect actual current FTC and DOJ enforcement practices (for example, with respect to market definition and concentration threshold presumptions of antitrust concern)? Please support your response with specific examples.

2. Should the federal antitrust enforcement agencies provide more guidance regarding their enforcement policies, including, for example, when they decide not to challenge a transaction?

### C. Efficiencies in Merger Analysis

1. Do the U.S. courts and federal antitrust enforcement agencies adequately consider efficiencies in

merger analysis? Please identify specific examples, evidence, or analyses supporting your assessment.

2. What types of efficiencies should be recognized in antitrust merger analysis and in what circumstances should they be considered or not considered in determining the legality of a merger? How should courts and agencies evaluate claims of efficiencies? What should be the burdens of production and proof for establishing efficiencies?

3. What is the appropriate welfare standard to use in assessing efficiencies—a consumer welfare standard, a total welfare standard, or some alternative standard?

### D. The Hart-Scott-Rodino Pre-Merger Review Process

1. Several commenters in the first phase of the Commission's work advised that the Commission should study the burden involved in responding to HSR "Second Request" merger investigations. The Commission invites companies and/or their counsel who have experienced Second Request investigations to comment on the burden involved, providing specific information on costs by type (e.g., attorneys' fees, economist and other expert fees, document and electronic information production costs, employee time, and costs associated with delay of closing) and length of the investigation.

2. Should changes be made to the HSR pre-merger notification system, e.g., with respect to HSR reporting thresholds or the information required to be included in the initial filing?

3. Should any changes be made to the HSR "Second Request" process currently used by the FTC and DOJ? Please address both the possibility of broad systemic change and of more limited changes within the existing system, being as specific as possible and considering, for example (and without limitation): (i) Whether the U.S. should adopt processes similar to those used by other jurisdictions, such as those employed by the European Union (e.g., the Form CO) or Canada (e.g., long and short-form reporting); (ii) the extent to which various types of information sought in a typical Second Request contribute to merger assessment; (iii) whether and how the burden associated with documents and data requests could be reduced without materially impeding the federal agencies' ability to execute their enforcement responsibilities; (iv) how merging companies can expedite the HSR process.

## VIII. New Economy

### A. Antitrust Analysis of Industries in Which Innovation, Intellectual Property, and Technological Change are Central Features

1. Does antitrust doctrine focus on static analysis, and does this affect its application to dynamic industries?

2. What features, if any, of dynamic, innovation-driven industries pose distinctive problems for antitrust analysis, and what impact, if any, should those features have on the application of antitrust analysis to these industries?

3. Are different standards or benchmarks for market definition or market power appropriate when addressing dynamic, innovation-driven industries, for example, to reflect the fact that firms in such industries may depend on the opportunity to set prices above marginal costs to earn returns? Or, are existing antitrust principles sufficiently flexible to accommodate the facts relevant to dynamic industries?

### B. Specific Issues at the Interface of Intellectual Property, Innovation, and Antitrust

1. Should there be a presumption of market power in tying cases when there is a patent or copyright? What significance should be attached to the existence of a patent or copyright in assessing market power in tying cases and in other contexts?

2. In what circumstances, if any, should the two-year time horizon used in the Horizontal Merger Guidelines to assess the timeliness of entry be adjusted? For example, should the time period be lengthened to include newly developed products when the introduction of those products is likely to erode market power? Should it matter if the newly developed products will not erode market power within two years? Is there a length of time for which the possession of market power should not be viewed as raising antitrust concerns?

3. Should antitrust law be concerned with "innovation markets"? If so, how should antitrust enforcers analyze innovation markets? How often are "innovation markets" analyzed in antitrust enforcement?

### C. Examination of the Reports on the Patent System by the National Academies Board on Science, Technology, and Economic Policy and the Federal Trade Commission

The National Academies Board on Science, Technology, and Economic Policy and the Federal Trade Commission have both recently

conducted extensive studies of patent-related activity and the operation of the patent system, and issued reports including recommendations for reform. See Stephen A. Merrill, Richard C. Levin & Mark B. Myers, *A Patent System for the 21st Century* (2004); Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003).

1. Do the reports fully capture the role of patents and developments in patent-related activity (e.g., applications, grants, licensing, and litigation) over the past 25 years?

2. Are the concerns or problems regarding the operation of the patent system identified in the two reports well-founded?

3. Which, if any, of the recommendations for changes to the patent system made in those two reports should be adopted?

4. Are there other issues regarding the operation of the patent system not addressed in either report that should be considered by the Antitrust Modernization Commission? Please be specific in identifying any issue and the reasons for its importance.

#### IX. Regulated Industries

1. What role, if any, should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation? How should authority be allocated between antitrust enforcers and regulatory agencies to best promote consumer welfare in regulated industries?

2. How, if at all, should antitrust enforcement take into account regulatory systems affecting important competitive aspects of an industry? How, if at all, should regulatory agencies take into account the availability of antitrust remedies?

3. What is the appropriate standard for determining the extent to which the antitrust laws apply to regulated industries where the regulatory structure contains no specific antitrust exemption? For example, in what circumstances should antitrust immunity be implied as a result of a regulatory structure?

4. How should courts treat antitrust claims where the relevant conduct is subject to regulation, but the regulatory legislation contains a "savings clause" providing that the antitrust laws continue to apply to the conduct?

5. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?

6. When a merger or acquisition involves one or more firms in a regulated industry, how should authority for merger review be allocated between the antitrust agencies (DOJ and FTC) and the relevant regulatory agency?

a. Are there additional costs and delay when two agencies (one antitrust, one regulatory) both analyze the antitrust effects of the same merger? Are there benefits to such dual review?

b. Should regulatory agencies defer to antitrust analysis by the antitrust agencies, or should both the antitrust and regulatory agencies conduct separate antitrust analyses in performing merger reviews? Should the antitrust agencies have primary responsibility or simply an advisory role with respect to antitrust analysis in merger review?

In your response, please refer specifically to the following contexts:

i. Mergers or acquisitions involving financial institutions. See 12 U.S.C. 1467a, 1828, 1842.

ii. Mergers or acquisitions involving certain media companies (e.g., radio or television broadcasters, satellite, and cable companies) and common carriers. See 47 U.S.C. 214, 310.

iii. Mergers or acquisitions of rail carriers subject to approval by the Surface Transportation Board. See 49 U.S.C. 11321, 11323–24.

iv. Mergers or acquisitions involving motor carriers of passengers. See 49 U.S.C. 14303.

v. Pooling agreements among certain motor carriers. See 49 U.S.C. 14302.

vi. Certain agreements involving domestic and foreign airlines. See 49 U.S.C. 41308–09. vii. Acquisitions of assets of natural gas companies. See 15 U.S.C. 717f.

viii. Mergers or acquisitions of electric power companies. See 16 U.S.C. 824b.

ix. License applications subject to the approval of the U.S. Nuclear Regulatory Commission. See 42 U.S.C. 2135.

x. Issuance of federal coal leases. See 30 U.S.C. 184(l).

xi. Issuance or transfer of licenses for exploration of hard minerals in deep seabed sites. See 30 U.S.C. 1413(d).

xii. Issuance of oil and gas leases on submerged lands of the Outer Continental Shelf. See 43 U.S.C. 1337(c).

Dated: May 16, 2005.

By direction of the Antitrust Modernization Commission.

**Andrew J. Heimert,**

*Executive Director & General Counsel,  
Antitrust Modernization Commission.*

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#### DEPARTMENT OF COMMERCE

##### National Institute of Standards and Technology

[Docket No. 040602169–5002–02]

##### Announcing Approval of the Withdrawal of Federal Information Processing Standard (FIPS) 46–3, Data Encryption Standard (DES); FIPS 74, Guidelines for Implementing and Using the NBS Data Encryption Standard; and FIPS 81, DES Modes of Operation

**AGENCY:** National Institute of Standards and Technology (NIST), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Secretary of Commerce has approved the withdrawal of FIPS 46–3, Data Encryption Standard (DES); FIPS 74, Guidelines for Implementing and Using the NBS Data Encryption Standard; and FIPS 81, DES Modes of Operation. These FIPS are withdrawn because FIPS 46–3, DES, no longer provides the security that is needed to protect Federal government information. FIPS 74 and 81 are associated standards that provide for the implementation and operation of the DES. Federal government organizations are now encouraged to use FIPS 197, Advanced Encryption Standard (AES), which was approved for Federal government use in November 2001. FIPS 197 specifies a faster and stronger algorithm than the DES for encryption. For some applications, Federal government departments and agencies may use the Triple Data Encryption Algorithm to provide cryptographic protection for their information. This algorithm and its uses have been specified in NIST Special Publication 800–67, Recommendations for the Triple Data Encryption Algorithm (TDEA) Block Cipher, issued in May 2004. FIPS 197 and SP 800–67 are available on NIST's Web pages. The content of these withdrawn standards will remain available at <http://csrc.nist.gov/publications/fips/index.html> as reference documents and these three FIPS will be listed as withdrawn, rather than current FIPS.

**DATES:** These standards are withdrawn as of May 19, 2005.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Barker (301) 975–8443, [wbarker@nist.gov](mailto:wbarker@nist.gov), National Institute of Standards and Technology, 100 Bureau Drive, STOP 8930, Gaithersburg, MD 20899–8930.

**SUPPLEMENTARY INFORMATION:** In July 2004, a notice was published in the *Federal Register* proposing the withdrawal of FIPS 46–3, DES; FIPS 74,