

COMMITTEE TO SUPPORT THE ANTITRUST LAWS

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**Comments Regarding Commission Issues for Study Submitted to the Antitrust
Modernization Commission by the Committee to Support the Antitrust Laws**

The Committee to Support the Antitrust Laws ("COSAL") welcomes the opportunity to submit comments to the Antitrust Modernization Commission (the "Commission") regarding its choice of issues for study. COSAL is a nonprofit organization established in 1985 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws of the United States and its political subdivisions. As such, COSAL represents one of the "various points of view" that Congress mandated was to be provided with "fair and equitable representation" in connection with appointment of the members of the Commission. Section 11054 (h).

COSAL notes at the outset that composition of the Commission is heavily weighted toward attorneys in law firms which, while being very distinguished, most often represent defendants in antitrust cases. We would have preferred that the Commission include at least one representative of the plaintiffs' antitrust bar, to add balance to the group. We hasten to say, however, that the antitrust credentials of all of the Commissioners are truly outstanding and that COSAL has little doubt about the capabilities of each Commissioner to fulfill his or her responsibilities on the Commission faithfully and skillfully.

Antitrust has no shortage of knotty and important issues that could benefit from the Commission's study and attention. These issues include the appropriate scope of the Robinson-Patman Act; the secrecy of the merger review process; access by the states to Hart-Scott-Rodino data; a review of antitrust exemptions, such as the McCarran-Ferguson and Soft Drinks Acts; the Export Trading Act and Local Government Act procedures; establishing a false claims-type procedure for antitrust violations that involve government contracts; and looking at highly-concentrated industries, such as defense and media companies. To the extent such less politically-charged issues are chosen as the focus of Commission effort, we respectfully submit that the Commission will be correspondingly likely to make lasting contributions to antitrust that will not be unduly influenced by pressures from various interests or by transitory political forces and will rightly be regarded by all affected constituencies as positive improvements in antitrust law.

On the other hand, COSAL believes that the Commission would make a mistake by choosing subjects for study that would focus on remedies or on other subjects that would be aligned with the "tort reform" agenda that is so highly charged in the current polarized political environment. Astute observers have written about the distorting effects that such forces have recently introduced into the law generally. See, e.g., A. Miller, *The Pretrial Rush to Judgment: are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches*

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Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982 (2003). It would be a shame if similar distortion were to be introduced by the Commission's work into Antitrust law, which has appropriately been recognized by the Supreme Court for decades as the "Magna Carta of free enterprise" and as "important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972). As such, Antitrust is one area of substantive law in particular that deserves support even from the most free market-oriented political constituencies. COSAL respectfully submits that the first step toward such constructive work for the benefit of free enterprise and Antitrust would be to make choices of subjects for study that carefully avoid remedy questions and similar polarizing subjects that could be used by some to further a political agenda and would cast doubt on the analysis and political neutrality of the Commission.

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