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

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On April 2, the Antitrust Modernization Commission (the “Commission”) issued its Final Recommendations on how antitrust law and enforcement can be improved to “best serve consumer welfare in the global, high-tech economy that exists today.”

The Commission’s Final Recommendations are generally consistent with its Tentative Recommendations released earlier this year in January. Our prior summary and analysis of the Commission’s Tentative Recommendations can be accessed at:
<http://www.mofo.com/news/updates/files/update02318.html>

There is, though, at least one new proposal in the Commission’s Final Recommendations that is noteworthy. In its analysis of Exclusionary Conduct doctrine, the Commission now advocates the use of a specialized legal test for monopolization cases under Section 2 of the Sherman Act involving the use of bundled discounts. In January, the Commission criticized contemporary bundling jurisprudence (specifically, the *LePage’s* decision), but stopped short of recommending alternative standards. In the Final Recommendations, however, the Commission advocates that courts require plaintiffs to satisfy a three-part test, as well as the traditional elements of a Section 2 claim, to determine whether bundled discounts or rebates are unlawful. The recommended test is as follows:

To prove a violation of Section 2 . . . a plaintiff should be required to show: (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.

Now that the Commission has issued its Final Recommendations, it remains to be seen whether Congress will enact any of them. If Congress does make any changes to the U.S. antitrust laws, we will provide an update and analysis.

The Commission’s Final Recommendations (and related documents) may be accessed at:

http://www.amc.gov/report_recommendation/toc.htm

Our analysis of the *LePage’s* decision regarding the use of bundled discounts may be accessed at:

<http://www.mofo.com/news/updates/files/update999.html>