

Antitrust Modernization Commission Hearing
June 16, 2006¹

In an effort to provide a more timely report, the Section has not sought confirmation from the Antitrust Modernization Commission of the information reported in this summary; nor has the Section verified the information against the transcript of the meeting, which was not available when this summary was prepared. In particular, due to the continuing interaction among the Commissioners and the shift in positions during the discussion, the votes that are recorded below may not be entirely accurate.

The Antitrust Modernization Commission held a meeting on June 16, 2006 at 9:30 a.m. at the FTC Conference Center at 601 New Jersey Ave. NW. All Commissioners except for Commissioner Burchfield were present at the beginning of the meeting. Chairman Garza noted that staff memos had been prepared on each topic and that as is the Commission's usual procedure, Commissioners would cast a "straw vote" and then discuss the topics. For each portion of the discussion, I have provided the votes within the "Discussion Outline" At this meeting, it was occasionally quite difficult to determine Commissioner votes, so I have described their statements as to their votes immediately after the Discussion Outline. The vote statements and the outline should be read together.

Merger Enforcement-Substance

I. *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?*

[1] Find that there is a general consensus that, while there may be disagreement over specific merger decisions, and policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound. **[Delrahim, Cannon, Valentine, Shenefield, Jacobson, Warden, Garza, Carlton, Litvack, Yarowsky],**

In particular:

[a] Find that the Commission was not presented with evidence that current policy is materially hampering the ability of companies to operate efficiently and compete in global markets. **[Cannon, Delrahim, Valentine, Shenefield, Jacobson, Warden, Garza, Carlton, Litvack, Yarowsky],**

[b] Recommend that DOJ and FTC continue to seek to ensure that enforcement policy is appropriately sensitive to the needs of U.S. companies to innovate and obtain scope and scale needed to compete in global marketplaces while protecting

¹This summary was prepared by Emily Myers, Antitrust Counsel at the National Association of Attorneys General. This summary was made from notes taken at the meeting and is intended to provide a general overview, rather than a transcription. The AMC will make available a transcript of the meeting at a later date.

the interests of U.S. consumers, including business consumers. [**Cannon, Delrahim, Valentine, Shenefield, Jacobson, Warden, Garza, Carlton, Litvack, Yarowsky, Kempf**],

[c] Do not recommend legislative change. [**Litvack, Valentine, Shenefield, Jacobson, Warden, Garza, Carlton, Yarowsky**].

[d] Recommend that DOJ and FTC give greater consideration to efficiencies, as specified below. [**Litvack, Delrahim, Shenefield, Kempf, Garza**]

[e] Recommend that DOJ and FTC give greater consideration to arguments that a merger will increase innovation, as specified below. [**Garza, Delrahim**]

[f] Recommend that DOJ and FTC rely less on concentration presumptions in predicting competitive effects of a merger, given the relative lack of an empirical evidence on the relationship between increased concentration and market performance. [**Warden, Delrahim, Kempf, Garza, Carlton**]

[g] Recommend that DOJ and FTC deemphasize the importance of market definition and focus more on a direct assessment of the ability and incentives of a merged firm to increase prices unilaterally in appropriate cases. [**Delrahim, Carlton**]

[2] Find that U.S. merger enforcement policy has been lax in allowing anticompetitive mergers to proceed or to proceed without restructuring. [**Jacobson**]

[a] Recommend that the agencies and courts enforce the antitrust merger law more aggressively. [**Jacobson**]

[b] Recommend that the agencies enforce more closely the HHI thresholds in the *Merger Guidelines* and/or strengthen the presumption that mergers exceeding the existing thresholds will be challenged.

[3] Find that current U.S. merger enforcement policy has been overly restrictive in blocking or inhibiting lawful transactions or requiring unnecessary relief. [**Kempf**]

[a] Recommend that the agencies and courts enforce the antitrust laws with respect to mergers less aggressively.

[b] Recommend that the agencies should give greater consideration to efficiencies, as specified below. [**Kempf**]

[c] Recommend that the agencies should give greater consideration to arguments that a merger will increase innovation, as specified below. [**Kempf**]

[d] Recommend that the agencies rely less on concentration presumptions in predicting competitive effects of a merger given the relative lack of an empirical evidence on the relationship between increased concentration and market performance. [**Kempf**]

[4] Make no findings with respect to U.S. merger enforcement policy because the evidence as to its efficacy is inconclusive.

[5] Find that merger enforcement policy would benefit from further study of agency enforcement activity and/or economic understanding of the foundations of merger policy. [**Cannon, Delrahim, Shenefield, Jacobson, Warden, Kempf, Garza, Carlton, Litvack, Yarowsky**],

In particular:

[a] Recommend that DOJ and the FTC increase their use of retrospective studies of merger enforcement decisions (which should be released to the public) to assist in determining the efficacy of merger policy. [**Cannon, Delrahim, Shenefield, Jacobson, Warden, Kempf, Garza, Carlton, Litvack, Yarowsky**],

[b] Recommend that the agencies periodically conduct internal reviews of data relating to their merger enforcement activity and publish the results. DOJ and the FTC should attempt to coordinate their collection and maintenance of internal data for this purpose. [**Cannon, Delrahim, Shenefield, Jacobson, Warden, Kempf, Garza, Carlton, Litvack, Yarowsky**],

[c] Recommend that the agencies conduct or commission further study of the relationship between concentration and market performance to provide a better basis for assessing the efficacy of current merger policy. [**Cannon, Shenefield, Jacobson, Warden, Garza, Carlton, Delrahim, Litvack, Yarowsky**],

II. *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?*

Should antitrust law be concerned with “innovation markets”? If so, how should antitrust enforcers analyze innovation markets?

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?

[6] Find that no substantial changes to merger enforcement policy are necessary to account for dynamic, innovation-driven industries, because the current *Merger Guidelines* and merger policy as it has been developed by the agencies and courts are sufficiently flexible to address these features. [**Cannon, Valentine, Shenefield, Jacobson, Warden, Carlton, Litvack, Yarowsky**],

[7] Recommend that the agencies update the *Merger Guidelines* to explain how they evaluate impacts on innovation. [**Delrahim, Valentine, Jacobson, Warden, Carlton, Litvack, Yarowsky**]

[8] Recommend that the agencies continue to use innovation-market analysis in appropriate merger cases. [**Cannon, Valentine, Shenefield, Jacobson, Yarowsky**]

[9] Recommend that the agencies abandon the use of innovation-market analysis in merger cases. [**Delrahim, Carlton**]

[10] Find that the two-year time horizon for entry is applied flexibly by the agencies, and should not be changed. [**Valentine, Shenefield, Jacobson**]

[11] Recommend that the agencies be more flexible in lengthening the two-year time horizon for entry where appropriate to account for innovation that may change competitive conditions beyond two years. [**Delrahim, Cannon, Warden, Carlton, Litvack, Yarowsky**]

III. *Do the U.S. courts and federal antitrust enforcement agencies adequately consider efficiencies in merger analysis?*

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?

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

[12] Find that the U.S. enforcement agencies and courts adequately consider efficiencies in merger analysis and recommend no change to current policy. **[Litvack, Cannon, Valentine]**

[13] Find that the agencies may give insufficient credit to some claims of efficiencies, and recommend that the agencies place increased weight on efficiencies of the following type(s):

[a] The agencies and courts should give greater credit for efficiencies in R&D and innovation. **[Delrahim, Kempf, Garza, Carlton]**

[b] The agencies and courts should give greater credit for fixed-cost efficiencies, particularly in dynamic, innovation-driven industries where marginal costs are low relative to typical prices. **[Delrahim, Yarowsky, Warden, Garza, Carlton]**

[14] Recommend that the agencies revise their policy with respect to efficiencies to adopt a “total welfare” standard. **[Delrahim, Kempf, Garza, Carlton]**

IV. 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)?

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

[15] Find that the current *Merger Guidelines*, in conjunction with agency policy statements, commentary, and enforcement activity, provide informative guidance to merging parties and accurately reflect current enforcement policy. Encourage DOJ and the FTC to continue to work towards increasing transparency and heightening understanding of the basis for enforcement policy. **[Delrahim, Cannon, Valentine, Yarowsky, Jacobson, Warden, Garza, Carlton, Litvack]**,

[16] Find that the current *Merger Guidelines* do not reflect current enforcement policy with respect to the concentration threshold levels and recommend that the agencies modify the *Guidelines* to increase the concentration thresholds to reflect current and recent practice. **[Litvack, Warden]**

[17] Recommend that the agencies increase transparency by:

[a] Issuing “closing statements” to explain the rationale for taking no enforcement action in a matter after a significant investigation. **[Delrahim, Valentine, Jacobson, Warden, Garza, Carlton]**

[b] Periodically reporting statistics on merger enforcement efforts, including such information as was reported by the FTC in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. **[Delrahim, Cannon, Valentine, Yarowsky, Jacobson]**

Warden, Carlton]

[18] Recommend that the agencies revise the *Merger Guidelines* to include an explanation of how the agencies evaluate non-horizontal mergers. **[Delrahim, Cannon, Valentine, Yarowsky, Jacobson, Warden, Garza, Carlton, Litvack]**

Voting

Commissioner Carlton opened the voting on substantive merger issues. He noted that he believes that the antitrust agencies are already giving greater consideration to efficiencies and to arguments that a merger will increase innovation, and are relying less on concentration presumptions (items (1)(d),(e) and (f)). He stated that he would vote for (1)(g) (deemphasize the market definition and focus on assessment of the ability and incentives of merged firm to increase prices) if the word “unilaterally” is removed. In item 5(c), he recommended a change from “concentration” to “characteristics.” In item 9, Commissioner Carlton recommended that the agencies replace “innovation market analysis” with “future product analysis” where possible. Pharmaceutical markets are one area where this would be possible. Turning to item 14, Commissioner Carlton stated that you cannot simultaneously have a “consumer welfare” standard and ban monopsony. He also noted that in most transactions, there are corporations on both sides.

Chairman Garza stated that with regard to items 1(d) and (e), she agreed that the agencies are already doing this, but sees nothing wrong with urging them to do it more. She agreed with Commissioner Carlton’s proposed changes to items 1(g) and 5(c).

Commissioner Kempf stated that with regard to item 1(g), he believes the statute requires analysis of product and geographic markets. He thinks the agencies need to get their analysis right, rather than de-emphasizing it. With regard to item 3 (current U.S. merger enforcement policy is overly restrictive in blocking or inhibiting lawful transactions), Commissioner Kempf said he was leaning toward voting for it. He does not favor 3(a), because he does not believe the issue is aggressiveness, but rather thoughtfulness. With regard to item 5, he favors further study, but thinks it should possibly be outsourced, rather than done internally. He is inclined to support item 5(c) (study of relationship between concentration and market performance). He would add a subsection (c) to item 13, stating that the agencies and courts should give greater credit for all efficiencies. On item 15, he would vote no on the first sentence, because he does not believe they give informative guidance. However, he would vote yes on the second sentence, which encourages the agencies to work towards increasing transparency. On item 16, he would vote yes on the first part of the sentence, finding that the Merger Guidelines do not reflect current enforcement policy, but no on the second part of the sentence, because he doesn’t believe increasing the concentration levels will help the Guidelines.

Commissioner Warden stated that while he believes that efficiencies and innovation deserve great weight in analysis of mergers, there is no evidence that insufficient weight is being given to them. He believed that fixed costs need to be emphasized in merger analysis. He agreed with Commissioner Carlton’s votes on all items up to item 14. With regard to item 14, he does

not favor a change because there is no evidence that the difference between a “consumer welfare” standard and a “total welfare” standard is outcome determinative. The “consumer welfare” standard is well-established and is frankly good public relations for the antitrust laws, as opposed to putting more money in the pockets of capitalists—people who he does not usually oppose. He also noted that the consumer welfare standard applies to antitrust issues other than mergers. He supports item 17(a) with respect to significant investigations only.

Commissioner Jacobson stated that he would dismiss this entire topic as “improvidently granted.” The complexity of issues is too great and the AMC’s views are unlikely to have an effect. Commissioner Litvack agreed with Commissioner Jacobson, pointing to the voting by the Commissioners as illustrating that they have bitten off more than they can chew.

Commissioners Yarowsky and Cannon stated that they agreed that any studies should be outsourced.

Commissioner Valentine stated that she supported Item 1(b), but did not want to create a “national champion” situation. With respect to Item 5, Commissioner Valentine stated that she was concerned about confidentiality issues and time constraints. Commissioner Valentine stated that she wanted those who voted for items 13(a) and (b) to re-read the Guidelines and the recent guidance on the issues. What needs to be added? She thinks they are good as they are. She agrees with Commissioner Warden on Item 14 (“consumer welfare” standard). The bipartisan acceptance of the antitrust laws is based on the consumer welfare standard. One company that has a total welfare standard, Canada, has an economy that is more subject to competition by foreign trade. They recently allowed a merger to monopoly and are not happy with it.

Discussion

After all Commissioners had voted, they began a general discussion. Chairman Garza stated that she believe it was worthwhile to discuss these issues because there is currently no consensus on merger policy. On the one hand, the Wall Street Journal has been taking potshots at enforcement, while on the other, there is a move on Capitol Hill to change merger policy with respect to oil mergers. Even if the Commission believes that the standard is generally correct, it should simply say that and reaffirm the status quo. Chairman Garza stated that her vote for item 1 was qualified by her vote for item 5. She does not believe there is an empirical basis to say that current policy is wrong, but there is a need for the agencies to continue to study it. She noted that when the first Merger Guidelines were issued, in 1968, everyone thought things were fine, and she likes where we are now better than where we were then.

Commissioner Carlton suggested that forward looking empirical studies be done which would demonstrate the effect of antitrust policy on the general economy, e.g., how do industry participants react to merger policy. He suggested adding a subsection on a prospective study. He noted that he did not understand item 1(b) and thought it should be sharpened to reflect consumer benefit in the long run. The U.S. economy is efficient and will eventually pass on benefits.

Commissioner Jacobson agreed that the U.S. has come a long way in antitrust policy—that has been done through established structures within our system, with appropriate checks and balances. He stated that despite the Chairman’s concerns, there still seems to be a broad consensus that what the agencies are currently doing is correct. The rule the Commission should apply is “first, do no harm.”

Chairman Garza responded that it is not clear that the business community, as opposed to the antitrust bar, believes this policy is right. So, the Commission should help explain why we think it is right. The Commission is not looking at it because it must be changed, but rather to have a dialogue about it. Commissioner Valentine said that the problem is that there will not be “clarity” if there are votes with some commissioners on one side, some on the other side. There will be no clarity for the public in that situation. The Commission should concentrate on areas where there is a consensus. She also stated that too many of the panelists and Commissioners are part of “inside baseball” on these matters, so that the Commission may not have a “real world” view of the real world.

Commissioner Kempf stated that he views the Merger Guidelines as a trap for the unwary. If the agencies were really applying them, they wouldn’t have allowed Whirlpool/Maytag. He will never sign on to saying that the Guidelines are okay.

Commissioner Warden stated that he thinks we have a degree of consensus. With respect to mergers, people consult competent counsel—this is not some “Do Your Own Will” project. Item 15 lists the items considered in merger policy. With respect to Commissioner Carlton’s prospective study, it would be difficult, since it would require absolute candor from the business community. Studying it at a “macroeconomic” level would take a lot of regressing, including the cost of money and societal affluence at the time of the transaction.

Commissioner Delrahim stated that the language is so fluffy in most of these recommendations that it is not objectionable and could be used to achieve consensus. Commissioner Shenefield stated that merger policy is basically to prevent the merged parties from raising prices. When this is explained to businesses, they understand it. In the Commission’s report, it should say something like “there is a debate, but we think merger policy is on the right track, provided we can have more transparency.” The main benefit would be to tell people on Capitol Hill what the Commission found and let them know what the Commission thinks.

Commissioner Kempf stated that he strongly dissented from the idea that merger policy is on the right track and that the Guidelines are useful. The Staples/Office Depot merger analysis indicated that there was a market for superstores. The superstores could have gone out and purchased all their smaller rivals, and the agencies wouldn’t have been able to do anything. He stated that it is not sufficient to say that most parties will have a lawyer. He stated that the consumer welfare standard doesn’t make any sense, especially if it is just a p.r. stunt. Chairman Garza stated that no one had called it a stunt.

With respect to item 1(e), Commissioner Warden stated that it is difficult to decide on it because we don't know what more weight needs to be given by the agencies. He doesn't want to just chastise the agencies. With respect to item 5, commissioner Delrahim suggested that GAO could undertake a study and that Congress could require certain data-keeping by the agencies.

Commissioner Litvack stated that the Commission is now beyond deciding whether to decide—there is a consensus to address these issues.

Commissioner Carlton stated that his “prospective” study could study aggregate effects over time. This has been done with respect to the economy around 1900, when a stock bust arguably followed from the Supreme Court's decision in Northern Securities.

Turning to the consumer welfare standard, Commissioner Carlton stated that the agencies should require, for example, long-term contracts to protect consumers. DOJ and the FTC should be more flexible. Some consumers will be harmed, some benefitted. Chairman Garza stated that she believed consumer welfare has been useful from a public relations perspective, particularly with regard to cartel enforcement. Total welfare isn't anti-consumer, just total. It is difficult to make assessments, but we don't want a trade-off. Commissioner Jacobson stated that this debate should be resolved along the lines of the AAI proposal. He agrees it can't apply in monopsony cases. Buying side-effects need to be viewed differently. Fixed costs should be looked at. This is not inconsistent with a consumer welfare standard. He suggests that the Commission vote to continue with the consumer welfare rubric, but consider fixed costs that will be passed through, and analyze things differently in buyer power cases.

Commissioner Kempf stated that total welfare is the better standard. A company could take its savings, buy a new plant or renovate an old one, lower its per unit costs over time, or use the money to discover a cure for cancer. In fact it logically follows that whatever a company wants to do with the surplus helps consumer welfare. So, blocking a merger where the total welfare is a plus but the consumer welfare is not actually hurts consumers. Where fixed cost savings are pocketed by a firm, producers have wealth, rather than consumers, but there is more money all around. He agrees that it is possible that politically it may not be a good idea to say we're applying a total welfare standard.

Commissioner Warden stated that he agreed with Commissioners Carlton and Kempf. He does not think that an acquisition neutral as to price harms consumer welfare. One must look to the long term in assessing consumer welfare.

Commissioner Valentine stated that creating an antitrust policy entirely by logic is not the way it has been done in the past. The Guidelines already say what the Commissioners want. She would like to stick with a standard that has weathered the test of time. The Staples/Office Depot merger mentioned by Commissioner Kempf was done before the efficiencies guidelines (Commissioner Kempf believes it was at about the same time.)

Commissioner Jacobson stated that he would personally be skeptical if Staples developed a cure for cancer. He thinks that some state Attorney General agreements regarding hospital merger cases show by the very fact of the conduct prescribed in the agreement that there's market power on the part of the merging parties.

Chairman Garza said that the Commission needs to tell the agencies what the Commission thinks. If the agencies are already doing it, they will say "Great." This is not a normative issue—the Commission is not scolding the agencies. Commissioner Carlton suggested that the Commission vote for a total welfare standard and explain why its really a consumer welfare standard. Commissioner Kempf stated that he would support re-labeling the total welfare standard as the consumer welfare standard.

Turning to the series of questions on the Horizontal Merger Guidelines, Commissioner Kempf stated that he agrees with item 16 that the Guidelines do not reflect current policy. But, he doesn't want to amend them, but rather get rid of them. With regard to item 17, he is concerned that any agency reporting on statistics will not be useful—bad decisions can result from seeking to achieve good statistics.

Commissioner Warden asked how anyone could disagree with item 16. The agencies do not now use the HHI. Commissioner Jacobson agreed that the Guidelines aren't applied. He noted that the Guidelines have been treated by at least one court (Judge Winter in *Waste Management*) as admissions by the agencies. He does not believe any damage is being done except for the totally unwary who are handling larger mergers *pro se*.

Chairman Garza stated that the agencies have said, as clearly as possible, that the HHI is used as a screen. If the concentration levels are modified, to what level will they be changed? The public would misunderstand that change in the HHI and think the Commission was recommending a lessening of scrutiny. There is no reason to think that lots of mergers are currently being subjected to undue scrutiny. Commissioner Carlton agreed that the HHI is a screen, not necessarily a determining factor. There is no economic data on which to base new limits.

Commissioner Litvack stated that if the agencies put this information in there, they should be stuck with it. Although the Chairman has said they are just a screen, the Guidelines do not reflect current practice. Commissioner Kempf stated that the Guidelines affirmatively mislead people. The agencies should provide appropriate guidance. Use of HHI threshold is intellectually bankrupt. Commissioner Warden stated that he was not going to fall on his sword over this one, but if it is a screen, it should be called one. Ordinarily, statements by public officials should conform to reality. Commissioner Cannon stated that the answer cannot be "Go get yourself a lawyer." He stated that he was changing his initial yes vote on item 16 (change reflected in Discussion Outline votes). Commissioner Carlton asked jokingly why no one ever recommended that the merging parties "go get an economist."

Chairman Garza stated that the staff will revise the questions in this outline with the help of the study group and it will be further discussed at the July meetings.

Mergers-HSR

I. *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?*

[1] Recommend no changes to the current HSR reporting thresholds. **[Valentine, Carlton, Delrahim, Yarowsky, Shenefield, Cannon, Litvack]**

[2] Recommend that current HSR reporting thresholds be increased. **[Kempf, Warden]**

[3] Recommend that current HSR thresholds be decreased.

[4] Recommend no change to the current HSR report form. **[Warden, Litvack]**

[5] Recommend that the agencies adopt an optional “long form” initial filing that would allow merging parties to elect to make a more comprehensive initial filing in exchange for which the agencies would commit to concluding an investigation within a set period of time, e.g., five months.

[6] Recommend that the agencies adopt a “short form” initial filing that would allow the merging parties to submit less extensive information initially than currently required, but with an obligation to make a fuller filing upon the request of the agencies, with an extension of the applicable waiting period. **[Carlton, Kempf (yes and no)]**

[7] Recommend statutory change that specifically allows the merging parties voluntarily to extend the thirty-day waiting period. **[Shenefield]**

II. *Should any changes be made to the HSR “Second Request” process currently used by the FTC and DOJ?*

[8] Recommend no changes to the HSR Second Request process.

[9] Recommend that the agencies adopt reform(s) to reduce the burdens placed on parties by the HSR Second Request process they currently use. **[Carlton, Yarowsky, Warden, Garza, Shenefield, Cannon, Litvack, Kempf, Valentine]**

If so, those reforms should include:

[a] Recommend that DOJ adopt limits on the number of the custodians required to be searched and the time period covered by the request similar or identical to those adopted by the FTC in its 2006 Merger Process Reforms. **[Delrahim, Yarowsky, Warden, Garza, Shenefield, Kempf, Valentine, Cannon, Carlton, Litvack]**

[b] Recommend that the agencies limit the number of specifications in a second request to a predetermined number (e.g., 20). **[Kempf, Delrahim, Warden, Cannon, Litvack]**

[c] Recommend that the agencies adopt a fixed time within which to complete their second-request investigation, or that Congress amend the HSR Act to establish a fixed time. **[Kempf, Shenefield, Cannon]**

[d] Recommend that the agencies adopt a procedure or a standardized agreement

by which the parties and the agencies could agree to terminate a second-request investigation without certifying substantial compliance, and proceed to litigation in district court with a reasonable discovery schedule, or that Congress amend the HSR Act to establish such a procedure. **[Kempf, Carlton, Delrahim, Yarowsky (w/out last sentence), Garza, Shenefield, Cannon, Litvack, Valentine]**

[e] Recommend that the agencies promulgate a policy or regulation establishing a standard for “substantial compliance.” **[Carlton, Delrahim, Yarowsky, Warden, Cannon, Litvack]**

[f] Recommend that DOJ adopt limits on back-up tape retention similar or identical to those adopted by the FTC in its 2006 Merger Process Reforms. **[Carlton, Delrahim, Yarowsky, Warden, Garza, Shenefield, Cannon, Litvack, Kempf, Valentine]**

[g] Recommend that the agencies implement procedural reforms to reduce the burdens of complying with requests for data that are not kept by the parties in the ordinary course of business. **[Carlton, Shenefield, Litvack, Kempf]**

[h] Recommend that DOJ implement procedural reforms to reduce the burden of complying with requests for data like those adopted by the FTC in its 2006 Merger Process Reforms. **[Valentine, Delrahim, Yarowsky, Warden, Garza, Shenefield, Kempf]**

[i] Recommend that the agencies implement procedural reforms to reduce the burden of translating foreign language documents. **[Carlton, Delrahim, Yarowsky, Warden, Garza, Shenefield, Litvack, Cannon, Valentine, Kempf]**

[j] Recommend that the agencies, when issuing a second request, provide the parties with a statement as to the competitive concerns about the transaction that led the agency not to close the investigation and to issue a second request. **[Kempf (provided it doesn't hamstring agency), Delrahim, Warden, Garza, Valentine]**

[k] Recommend that the agencies implement procedural reforms that allow the parties' economists to have improved access to the agencies' staff economists' models and data. **[Kempf, Carlton, Delrahim, Yarowsky, Warden, Garza, Valentine (provided confidential info is protected)]**

[10] Recommend that the HSR Act be amended to permit parties to appeal directly to a federal district court magistrate judge any claims of unreasonable burden in a second request. **[Valentine(?), Kempf, Delrahim, Cannon, Litvack, Jacobson]**

[11] Recommend that the HSR Act be amended to permit the agencies to make public the fact that a transaction has been notified as well as subsequent significant milestones in the investigation. **[Delrahim]**

Commissioner Jacobson put forward a HSR reform proposal, the provisions of which are as follows:

1. If the notifying party checks a box on the HSR form, the following will apply. If the box is not checked, there is no change from current practice.
2. The party checking the box must (1) provide or create, and submit with the

form, complete and accurate organization charts, and (b) provide the name, and make available, a responsible officer to provide an interview about company structure.

3. If this is done, then, depending on the size of the transaction, the agencies will be limited to documents in the files of 15 employees (at the low end) up to 30 (at the high end).

4. If the agency wants more, it must get a court order.

Chairman Garza stated that with respect to items 1 through 7 of the Discussion Outline, she supports “Other.” She stated that given the statistics on mergers, many filings are not getting a look by the agencies. The Commissioner could indicate that unnecessary filings should be reduced, perhaps using overlap in industry codes. The agencies should go back periodically and review the filings and recommend filing threshold changes.

Commissioner Warden noted that the HSR Act was originally intended to reach just 150 transactions a year. He suggested that the threshold be over \$500 million, reportable, between \$150-\$500 million generally reportable with persons of \$250 million and \$100 million. He also stated that under the current rules, block trades of securities are reportable. He favors the Jacobson proposal and especially likes #4. Commissioner Shenefield stated that he did not favor the Jacobson proposal because of #4. Commissioner Jacobson asked him for an alternative, and Commissioner Shenefield stated that it could be a certification from the AAG for Antitrust. Commissioner Litvack stated that he liked the Jacobson proposal but was concerned about the “depending on size” language. He does not believe that a certification by the AAG is sufficient—a magistrate is more appropriate.

Commissioner Yarowsky stated that he was leaning toward no on item 10 because it would cause delays and would present a serious policy issue with regard to prioritizing of these appeals vis-a-vis others (including criminal appeals).

Commissioner Delrahim stated that he would add to item 1 that adjustments should be done to the threshold every other year. He stated that this indexing is important, because Congress does not want to change the threshold and lose the revenue from fees. He does not think merger review should be based on fees. Commissioner Delrahim moved that the Commission consider recommending that the agencies not be funded by HSR fees. Commissioner Valentine seconded the motion and Chairman Garza also supported it. The Commission took several votes on this measure. First, they voted as to whether the agencies should be funded fully without the fees [**in favor: Shenefield, Litvack, Cannon, Garza, Delrahim, Kempf, Valentine, Yarowsky, Warden, Jacobson (initial no vote changed to yes)**]. Next, they voted on whether fees should be abolished altogether [**in favor: Delrahim, Garza**]. Next, they voted on whether to waive the fees for small businesses [**in favor: Delrahim, Yarowsky, Shenefield**]. Because there were insufficient votes for the latter two proposals, they were tabled. Commissioner Kempf then made a proposal to reduce filing fees to cover the actual costs of merger review activities. [**in favor, Warden, Kempf, Delrahim,**

Garza].

Commissioner Jacobson stated that he is very concerned that antitrust enforcement would be subject of enormous Congressional pressure if the steady source of funding (the filing fees) were removed. He fears that the antitrust enforcement regime would be altered through threats of funding cut-off. He believes the merger fees make the agencies less vulnerable to political influence than they have been in the past. It is a stable source of funding.

Commissioner Yarowsky stated that once user fees came into effect, there was less interest in oversight on the part of Congress. He does not think that that is a good thing. He is cautious about the Jacobson proposal because the original HSR Act was designed to shift merger analysis away from courts and toward the agencies. He is therefore cautious about injecting the courts into this process.

Commissioner Delrahim stated that politicization of agency decision making is a valid concern. However, as it stands now, the money is raised and goes into a fund from which it still needs to be appropriated. This started as a budget balancing measure and now it's like crack cocaine for Congress—they are addicted. Commissioner Shenefield stated that it never happens that individual Senators or Representatives interfere in a merger investigation.

Commissioner Garza stated that she favors the FTC's proposal, where the FTC and the parties go to court and ask for a discovery schedule. At the last International Competition Network meeting, many countries had substantially raised the threshold. She is concerned about recommending specific numbers, however.

Referring to the Jacobson proposal, Commissioner Cannon asked, "Who wouldn't check the box?" Commissioner Jacobson stated that people who don't have competition issues or think the agencies will miss any issues they have, will not check it. This makes the parties decide—is this something the agencies are likely to review? This proposal is trying to be fair to the agencies and the parties. There need to be some limits on custodians interviewed.

Commissioner Valentine stated that item 10 makes no sense because no magistrate can determine whether the number of specifications is reasonable or unreasonable from the "outside." Commissioner Warden stated that he would hope that after there have been several recourses to magistrates who support the parties when the parties show they have sent 6 moving trucks, that will encourage the agencies to ask better questions. Currently, there is not structural parity. There have been some inappropriate second requests, perhaps to buy more time.

Returning to the Jacobson proposal, Commissioner Shenefield stated that if the AAG must certify a request, that would impose serious discipline on the staff. Commissioner Litvack stated that although he doesn't mean to diminish the AAG certification, a court would have a better disciplining effect. With respect to Commissioner Valentine's concern about a magistrate's inability to determine whether the requests were reasonable, Commissioner Litvack

said that this is no different from the many other activities undertaken by magistrates. Commissioner Yarowsky stated that he believes all sides need disciplining in this area. He doesn't want to create a structural tool that can be used to manipulate the process.

Commissioner Valentine stated that everyone was trying to get at the same thing in items 9(d) to (g), item 10 and the Jacobson proposal. There is a need to balance burden on each side and going forward quickly. The fact that the merger will drag on is an incentive not to go to court. Chairman Garza stated that she was sympathetic to the idea of the "threat" of a magistrate. Presumably the magistrate's orders would be appealable.

With respect to the Jacobson proposal, Commissioners Yarowsky and Litvack stated that they would vote yes on it with AAG certification. Chairman Garza stated that Commissioner Jacobson would revise his proposal and it would be discussed again.

New Economy-Patents Discussion Outline

I. Are the concerns or problems regarding the operation of the patent system identified in the reports of the National Academies' Board on Science, Technology, and Economic Policy and the Federal Trade Commission¹ (the "NAS-STEP and FTC Reports") well-founded?

[1] Find that the concerns and problems with the patent system identified in the NAS-STEP and/or FTC Reports are well-founded. **[Jacobson, Valentine, Warden, Carlton, Garza]**

[2] Find that the concerns and problems with the patent system identified in the NAS-STEP and/or FTC Reports are not well-founded [and specify in what respects the reports are inadequate or ill-founded].

[3] Make no findings regarding the patent system.

II. Which, if any, of the recommendations for changes to the patent system made in the NAS-STEP and FTC reports should be adopted?

III. 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?

[4] The Commission makes no specific recommendations with respect to changes to the patent system advocated in the NAS-STEP or FTC reports.

[5] The Commission recommends that Congress seriously consider recommendations in the NAS-STEP and FTC Reports for the purpose of encouraging innovation while avoiding abuse of the patent system that on balance will likely deter innovation, and unreasonably restrain competition, and thus reduce consumer welfare. **[Garza, Jacobson, Valentine, Warden, Yarowsky, Carlton, Delrahim]**

If so:

In particular, the Commission recommends that Congress consider NAS-STEP and FTC recommendations targeted at:

[a] Increasing the quality of patents (*i.e.*, reducing the number of patents issued that are likely invalid or cover "obvious" inventions). **[Garza, Jacobson, Valentine, Warden, Yarowsky, Delrahim]**

[b] Ensuring that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a

reasonable time period. [**Garza, Jacobson, Valentine, Warden, Yarowsky, Delrahim**]

[c] Reducing the length and cost of patent litigation. [**Garza, Jacobson, Valentine, Warden, Yarowsky, Delrahim**]

[6] The Commission endorses the following specific recommendations regarding patent law and possible reform as more fully described in the FTC and/or NAS-STEP Reports, as noted in brackets.

General

[a] Consider potential harm to competition in deciding whether to extend the scope of patentability to new areas. [FTC Rec. #6] [**Garza, Jacobson, Valentine**]

[b] Expand the consideration of economic learning and competition policy concerns in patent law decision making. [FTC Rec. #10] [**Jacobson, Valentine, Yarowsky, Delrahim**]

[c] Have PTO continue to implement the recognition that its patent review process is to benefit the public, not just patent applicants. [FTC Rec. #5.d][**Garza, Jacobson, Valentine, Warden**]

Filing and publication of patent applications

[d] Adopt the first-inventor-to-file priority rule. [NAS-STEP Rec. #7] [**Jacobson, Valentine, Warden, Delrahim**]

[e] Adopt a requirement that all patent applications be published within 18 months. [FTC Rec. #7; NAS-STEP Rec. #3] [**Jacobson, Valentine, Warden, Delrahim, Garza, Carlton**]

Review of patent applications

[f] Institute post-grant review procedures as an alternative to patent litigation in federal court. [FTC Rec. #1; NAS-STEP Rec. #2][**Jacobson, Valentine, Warden, Delrahim**]

[g] Modify certain PTO rules to strengthen its review of patent applications. [FTC Rec. # 5.a-c; NAS-STEP Rec. #4] [**Jacobson, Valentine, Warden**]

[h] Increase PTO funding to allow improvements in review process. [FTC Rec. #4; NAS-STEP Rec. #4] [**Jacobson, Valentine, Warden, Garza**]

[i] Courts should tighten or reinvigorate the non-obvious requirement. [FTC Rec. #3; NAS-STEP Rec. #2] [**Jacobson, Valentine, Warden, Delrahim, Garza**]

[j] Recommend that PTO adopt procedural rules to limit continuations in patent applications. [ABA IP Section] [**Valentine, Warden, Delrahim**]

Patent Litigation

[k] Enact legislation to modify or eliminate certain “subjective elements” in patent

litigation (enhancement of damages for willful infringement, defense of inequitable conduct defense, best mode requirement). [FTC Rec. #9; NAS-STEP Rec. #6] [**Warden**]

[l] Enact legislation to adopt a preponderance of the evidence standard for invalidity. [FTC Rec. #2] [**Jacobson, Warden, Delrahim (only for information not provided to the PTO)**]

[m] Create statutory protection for certain uses of patents from infringement claims. [FTC Rec. #8; NAS-STEP Rec. #5][**Valentine, Warden**]

[n] Enact legislation creating stricter limits on the circumstances in which patentees may obtain injunctive relief. **[Carlton]**

Commissioner Delrahim began the voting. He stated that he wanted to get rid of submarining, so would vote for items 6(d) and (e). There has been lots of movement in patent law since the Commission started this process. For example, the Supreme Court has addressed item 6(n).

Commissioner Carlton stated that he is concerned that the AMC is simply adopting recommendations from another committee. In essence, the AMC is saying “Those are smart people, do what they said.” He believes the AMC should focus on the intersection of Antitrust and intellectual property. He went through the testimony with an eye to this intersection, and believes there are four areas that warrant AMC action. patent settlements, standard setting, damages and injunctive relief and buy-outs in the pharmaceutical industry. He noted that the AMC had decided not to address standard setting, believing it could be handled by contract. That should be noted in the Commission’s report.

Commissioner Yarowsky stated that he agreed with Commissioner Carlton as to the possibly inappropriate reach of the AMC in this area. He is not comfortable with anything other than hortatory recommendations. The specificity level in the discussion outline is too great. Between recent and expected Supreme Court decisions, much will be determined.

Commissioner Delrahim stated that the AMC should recommend that the FTC study the copyright law in the same way it has studied the patent law.

Commissioner Warden stated that he thinks copyright is completely different. Intellectual property protection is founded in the Constitution, it has a worthy public objective, and it protects US inventors internationally. However, the patent law system is broken. In *John Deere*, the Supreme Court made rulings which the PTO has completely ignored. He thinks it is absurd that there are 180,000 patents. The whole system is nuts. He was involved with the Kodak/Polaroid litigation. Polaroid had patents on levers because they moved film out of the camera. Levers were invented in the Bronze Age. In our high tech economy, technology evolves. It becomes inevitable. Picking one person to receive a patent who is just taking the logical next step is absurd. With regard to submarine patents, if someone has been granted a patent, why are other people developing the same thing independently. It is obvious that the patent was inevitable. Commissioner Warden recognizes the justice of conferring on inventors the fruits of their labors. But, monopolies were anathema to the Founders.

With respect to specific items, Commissioner Warden will not vote for 6(a) or (b)—either an item is patentable or it is not. In item 6(e), all practices developed in the 18 months before publication should be deemed to be prior art. Item 6(I) is the heart of the matter. The PTO just has not listened. In item 6(n), Commissioner Warden does not know whether injunctive relief should be available for non-exploited patents.

Commissioner Valentine agreed with Commissioners Carlton and Warden. The current system is incapable of protecting what should be protected and protects what should not be protected. The AMC should focus recommendations on its strengths, the intersection of antitrust and intellectual property, so she favors items 5(a), (b) and (c). Item 6(e) is critical to enhancing the pro-competitive aspects of patent policy. With respect to item 6(l), the protection should be taken away the same way it was achieved—by a preponderance of the evidence.

Commissioner Jacobson stated that these issues put to question the AMC’s competence in dealing with what’s involved. He agrees completely with Commissioner Warden as to the weaknesses of the patent system. He would vote against item 6(k), because antitrust conduct rising to the level of inequitable conduct should still be a defense. With respect to item 6(n), the *E-Bay* case is a step in the right direction. He related an anecdote about a company seeking to patent the thick blob of plastic at the bottom of a plastic soda bottle—it is impossible to make the bottle without it, but patent counsel did not argue invalidity of the patent.

Commissioner Shenefield stated that Commissions like AMC are appointed because they are supposed to apply a lively intelligence to areas of their experience. He has insufficient experience in this area and therefore will cast no votes at all.

Chairman Garza stated that she could agree to a statement by the AMC which said here are the concerns raised in the patent system. We don’t favor encouragement of monopolies. We should be wary of abuse of the system and we should keep in mind the purpose of the system. She believes the AMC should stop at Item 5. She doesn’t want to erode people’s property rights, but she understands the concerns expressed.

Commissioner Kempf stated that he has greater reservations about these items than anyone else. He believes the AMC should not be cavalier in its treatment of patent laws. He has had much experience in trying patent-related cases. He doesn’t not agree to Item 1 because he believes the FTC study is disingenuous. The FTC hates patents. The reason that patents are granted with only a preponderance of the evidence is because the PTO is an expert body, rather than a jury or a judge. He agrees with the position stated by Carl Shapiro. The FTC report is trickery by the FTC, whom he characterized as “wolves in sheep’s clothing.” Commissioner Kempf stated that no one can oppose higher quality patents, but he is very uncomfortable wading into this thicket. There is wisdom in a system of experts. The FTC report involves lots of window-dressing, and the AMC should steer clear of it. It is being used as a tool to put forward positions on which the AMC has no expertise. He votes no on every item except 2, 3,4, 5(a),6(d) and 6(e), which he doesn’t know enough about.

Commissioner Delrahim stated that the Supreme Court will hopefully clear some of these issues up soon. He is concerned that the AMC hasn’t studied the two reports sufficiently. He would favor addressing cross-licensing and standard-setting in the Commission’s report. He would also be willing to put forward a motion to “de-certify” these questions. In response to a question from Commissioner Jacobson, Chairman Garza stated that most Commissioners voted

not to proceed with questions on standard-setting and cross-licensing.

Commissioner Jacobson then stated that he would also agree to a “de-certification” of these issues. He wished to strongly disassociate himself from the views of Commissioner Kempf. He had no reason to question the FTC’s bona fides on this issue, which started under Chairman Pitofsky and continued under Chairman Muris. He personally thinks the FTC did a great job. The fact that the FTC criticizes the patent system doesn’t make them suspect. He doesn’t want to de-certify the patent issues if it is taken as a criticism of the FTC’s report.

Commissioner Carlton expressed concern that the AMC heard testimony about standard setting and cross-licensing and thought it could be handled by contract. The amount of cross-licensing of patents is surprising to economists. It has created an issue about ability to enter certain industries. There is a tension between patents and antitrust. Patents are designed to stimulate invention and benefit consumers. The question is what is the cost (to society) of the patent. If you grant property rights to too many non-inventions, you are taking patentability away from real inventors.

Chairman Garza suggested that the AMC should keep it short, setting out principles as the first thing in the chapter about patents, why people think there is a tension, what good does the patent system do, where might it go awry. When the Commission chose not to look at some issues, it foreclosed testimony on those subjects. We don’t know what we might have heard. If the Commission wants to address additional things, someone should move for consideration of those things.

Commissioner Shenefield suggested that all the current issues be “de-certified,” and that the Commission should instead study settlements and cross-licensing. The Commission could make a general statement along the lines of item 5. Commissioner Valentine expressed concern about discarding all the work done so far and starting a big new project. Commissioner Carlton said that he believes the Commission knows enough to say there are problems in the patent system which give rise to anticompetitive concerns in the following areas, and list them. He does not believe the Commission needs more hearings.

The Commission no longer had a quorum (Commissioners Litvack and Cannon had left), so Chairman Garza stated that Commissioner Carlton would write up a statement of the patent issues, which would be one proposal without detailed recommendations.

The Commission adjourned at 4:05 p.m.