

Antitrust Modernization Commission Meeting
July 13, 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 interaction among the Commissioners and the shift in position during discussions, the votes recorded below may not be entirely accurate.

The Antitrust Modernization Commission met on Thursday, July 13 beginning at 9:30 a.m. All Commissioners except Commissioner Litvack were present. Chairman Garza gave her customary explanation of the “straw vote” process. She stated that the Commission would take up Commissioner Shenefield’s proposal to “revoke” the Commission’s agreement to take up patent issues at its next meeting.

For each portion of the discussion, I have provided the votes within the “Discussion Outline” As is frequently the case, 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.

Exclusionary Conduct

I. *Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under either Section 1 or Section 2 of the Sherman Act be revisited?*

[1] In general, standards for applying the Sherman Act’s broad proscriptions against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize both over-deterrence and under-deterrence, both of which impair long-run consumer welfare. **[Shenefield, Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Delrahim, Cannon, Yarowsky, Kempf]**

[2] Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. In particular, while it is possible to disagree with the decisions of particular cases, in general, the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors is not generally improper, even for a “dominant” firm and even where competitors might be disadvantaged. **[Shenefield, Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Yarowsky,**

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.

Kempf (with change described below)]

[3] While existing standards are generally appropriate, additional clarity and improvement is desirable, particularly with respect to [I] bundling, and/or [ii] whether and under what circumstances (if any) a monopolist has a duty to deal with rivals, where there is currently a lack of clear and consistent standards. The Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), for example, neither accepted nor rejected the profit sacrifice or any other test for distinguishing lawful from unlawful single-firm conduct. The lack of clarity means that firms must decide either to forego practices that would improve their competitive standing (and benefit consumers) or risk becoming embroiled in costly litigation. **[Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Delrahim, Yarowsky, Cannon]**

If so:

[a] Such additional clarity and improvement is best achieved through the continued evolution of the law in the courts, rather than through legislation. **[Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Delrahim, Yarowsky, Cannon]**

[b] Public discourse (such as occurred in the Commission hearings) and continued research will also aid in the development of sound and clear standards. The U.S. Department of Justice and Federal Trade Commission are commended for and encouraged to continue their efforts to further the development of the law in the United States as well as in other jurisdictions the laws of which may affect U.S. companies. They should continue to look for opportunities to improve the law through the filing of *amicus* briefs in appropriate cases, particularly cases involving [I] duty to deal and/or [ii] bundling. **[Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Delrahim, Yarowsky, Cannon, Kempf (with changes described below)]**

[4] Existing standards for determining whether single-firm conduct is unlawfully exclusionary are too permissive. **[Shenefield]**

[5] Existing standards regarding bundling, as expressed in cases such as *LePage's*, prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare. **[Kempf, Garza (with change described below), Valentine, Burchfield, Warden, Carlton, Cannon]**

[6] Existing standards regarding unilateral refusals to deal prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare. **[Delrahim, Kempf, Carlton, Cannon]**

II. *Should there be a presumption of market power in tying cases where 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?*

[7] The Supreme Court's decision in *Independent Ink v. Illinois Tool Works*, 126 S. Ct. 1281 (2006), appropriately held that market power should not be presumed from a patent in antitrust tying cases. **[Kempf, Shenefield, Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Delrahim, Yarowsky, Cannon]**

[8] Courts similarly should not assume market power from a copyright. [Kempf, Shenefield, Garza, Valentine, Burchfield, Jacobson, Warden, Carlton, Delrahim, Yarowsky, Cannon] [add trademark: Delrahim, Jacobson]

[9] Contrary to the Supreme Court's holding in *Independent Ink*, there should be a rebuttable presumption in antitrust tying and other cases that a patent or copyright confers market power.

Discussion

At the outset, Chairman Garza noted that the Exclusionary Practices outline was different from prior discussion outlines. This one is less action-oriented, and is rather oriented toward general principles. The outline doesn't list all the standards discussed in the discussion memo (e.g., essential facilities.)

Commissioner Jacobson recalled that he had originally thought this topic too broad for the Commission's consideration, but now that the Commission had decided to take the plunge, he will vote on the options. It is difficult to make a general statement about what to do on bundling and refusals to deal. Additional clarity is needed. It is hard to vote for 3 and 3(a) and 4, 5 and 6. Commissioner Jacobson has publicly criticized *LePage's* as standardless. He believes there was a working consensus at the hearing that we should apply the incremental cost/incremental revenue standard. Except for Tim Muris, all witnesses agreed. He would like to see the Commission say something favorable about the incremental cost standard. Commissioner Jacobson does not think it makes sense to talk about unilateral refusals to deal as a whole. There should be distinctions based on the market and who the person is refusing to deal with.

Commissioner Carlton said that the options were very general, but he thinks the Commission needs to articulate its reasons for supporting them. In #3, the Commission needs to talk about the "profit sacrifice" test. He does not agree with it, and thinks the Commission should say why it does not support that test. With respect to *LePage's*, there are many criticisms raised about it. The Commission should carefully articulate those criticisms. Turning to the incremental cost v. incremental revenue test, he said that if it is adopted, the Commission needs to carefully define the term. For example, if there's a discount, the incremental revenue test, if applied to all units, might require the firm to price at marginal cost. The Areeda test does not contemplate that. One formulation might be "Given the quantity produced, incremental revenue covers incremental costs." With respect to refusal to deal, Commissioner Carlton characterized the law as "clouded." He thinks the Commission should say what it believes is the standard for refusals to deal. He has a hard time imagining a case where he would require a firm to deal with a rival. Commissioner Carlton would abandon the essential facilities doctrine, and would instead apply ordinary section 2 jurisprudence. It would be a case where the defendant had lots of market power. Commissioner Kempf asked about the classic "railroad hub" case where the facility is an accident of geography, rather than superior skill. Commissioner Carlton stated that he would look at concerted refusals to deal (in a railroad joint venture) differently.

Commissioner Burchfield said that he has a general predisposition that more harm is caused by too strict standards on unilateral conduct than by too lenient standards. He is more concerned about false positives deterring procompetitive activity. He agrees with Commissioner Carlton with respect to bundling. If the company selling the two products is giving discounts that an efficient competitor can match at a break even price, then the conduct shouldn't be challenged. There may be situations where that is too forgiving, but he prefers not to interfere with discounting. He has serious reservations about *LePage's*.

Commissioner Warden urged caution when addressing bundling and price tests. He cited Microsoft for the proposition that the company may not even view the situation as two products, but rather as an enhancement to the first product.

Chairman Garza said that she thinks it would be useful for the Commission's report to articulate what the guiding principles should be. She prefers to speak generally about this and then appraise the many suggested tests against those guiding principles. She suggested that all the Commissioners might agree to the *Brooke Group* standard. She does not believe the Commission is in a position to say this test or that test is right. She is reluctant to assume the Commission can proscribe certain tests.

Commissioner Shenefield stated that he voted against #3 to make the point that he believes section 2 is in danger of being whittled away to nothing. He is unhappy with the *Trinko* decision—he does not want to do away with leveraging and essential facilities claims. He would, however, agree to a report along the lines suggested by Chairman Garza.

Commissioner Jacobson recommended that the Commission say that incremental costs v. incremental revenues be one component of the analysis of unilateral conduct. It does not make sense to have a rule that does not factor in recoupment. There must be some monopolizing behavior. He does not favor the “equally efficient competitor” test because he thinks the analysis should focus on the defendant's, rather than the plaintiff's, costs. Defendant's costs tell you whether it is an efficient competitor. Most section 2 cases can be analyzed using the incremental cost test as a guideline, rather than a standard. He would join in a statement that said that the profit sacrifice test was not appropriate.

Commissioner Kempf stated that he believes *Trinko* was decided that way because the Supreme Court believes it got *Aspen Skiing* wrong. He proposed several changes to the outline topics, as follows:

- [2] ~~Standards currently employed by U.S. courts for determining whether single firm conduct is unlawfully exclusionary are generally appropriate. In particular,~~ while it is possible to disagree with the decisions of particular cases, in general, the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors is not generally improper, even for a “dominant” firm and even where competitors might be disadvantaged.
- [3] While existing standards are generally appropriate, additional clarity and improvement is

~~desirable, particularly with respect to [i] bundling, and/or [ii] whether and under what circumstances (if any) a monopolist has a duty to deal with rivals, where there is currently a lack of clear and consistent standards. The Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), for example, neither accepted nor rejected the profit sacrifice or any other test for distinguishing lawful from unlawful single firm conduct. The lack of clarity means that firms must decide either to forego practices that would improve their competitive standing (and benefit consumers) or risk becoming embroiled in costly litigation.~~

~~[b] Public discourse (such as occurred in the Commission hearings) and continued research will also aid in the development of sound and clear standards. The U.S. Department of Justice and Federal Trade Commission are commended for and encouraged to continue their efforts to further the development of the law in the United States as well as in other jurisdictions the laws of which may affect U.S. companies. They should continue to look for opportunities to improve the law through as well as the filing of *amicus* briefs in appropriate cases, particularly cases involving [i] duty to deal and/or [ii] bundling.~~

[6] Existing standards regarding unilateral refusals to deal may at times prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare.

Commissioner Kempf noted that he is less concerned with the positions taken by the FTC and DOJ in their amicus filings, which he considers to be wrong sometimes, than with the fact that they are teeing up the issues for decision.

Commissioner Valentine endorsed Chairman Garza's comments, noting that it was going to be hard for the staff to write it up. Literally prescribing standards is not what the Commission should do. Since development of the law in this case is best done by courts, the Commission could offer them guidance on where they might want to go. Commissioner Valentine would not want to amend #3 as suggested by Commissioner Kempf.

In response to a question from Commissioner Burchfield, Commissioner Carlton stated that his problem with using incremental costs v. incremental revenues is that it promulgates a standard that requires profit maximization. This would require judges and juries to second-guess businesses as to what the maximum profit is. He agrees with Commissioner Jacobson that it should be considered, but he just doesn't want it to be the standard.

Commissioner Burchfield asked how the efficient competitor standard can be done without using plaintiff's costs. Commissioner Jacobson stated that the courts actually look at both plaintiff and defendant costs. There is a respected view (Salop) that even an inefficient competitor that constrains a monopolist benefits consumers. Commissioner Warden said that this was a truism, not a test. What matters is what drove them out of the market.

Commissioner Delrahim stated his view that there should be no legislation in this area, but

the law should develop judicially. He proposed adding “trademark” to #8 as follows: [8] Courts similarly should not assume market power from a copyright or trademark. He agrees with Commissioner Jacobson’s criticism of *LePage’s* and he thinks it sends the signal that whatever may have gone on there is okay. He would suggest a test that applies all discounts at all market levels to the product in which the monopolist has market power and sees if the price is at an appropriate level. Commissioner Delrahim feels strongly about unilateral refusals to deal in the IP area. He believes an unconditional unilateral refusal to deal in licensing of IP is lawful. If it is conditional, then that is a different story.

Commissioner Yarowsky stated that he likes the idea of setting out general principles. He was hesitant to ascribe to any specific test, because we don’t know whether this is the dawn of a new era of economic truth or just the best learning we have to date. He noted that other things are happening, outside the courts. Congress weighed in the patent area and gave the Supreme Court an anchor for its recent decisions.

Commissioner Carlton agreed that the Commission should articulate general principles, rather than specific tests. He favors safe harbors, as protecting procompetitive conduct. He noted that there is a wide variety of conduct addressed under section 2. It is hard to have one rule apply to all conduct, and he’d rather have flexibility. A safe harbor for predatory pricing might be different than that for other monopolistic behaviors. He also stated that there is a distinction between market power and monopoly power.

Commissioner Jacobson stated that he would agree to adding trademarks to #8. He also agreed with Commissioner Carlton that there shouldn’t be one rule for all conduct addressed by section 2. With respect to refusals to deal, if the Commission says anything more than “Let the courts develop the law,” it needs to distinguish between several types of refusal: 1) refusals to deal with dealers (*Dentsply*); 2) refusal to deal with rival in same market (*Olympia Equipment* or *Aspen*) and 3) refusal to deal with a rival that transfers market power from one market to another (*AT&T* or *Otter Tail*).

Chairman Garza summed up the Commission’s next steps. She stated that there seemed to be a consensus on #1, #2, #3(a) and (b), #7 and #8. With regard to #4, #5 and #6, she suggested that the staff should collect and state what the Commission gathered in its hearings, and how those tests measure against general overarching principles. The staff will prepare a document that takes #5 and #6, outlines the approaches and elaborates on the Discussion Memo. The Exclusionary Conduct working group will be involved. The staff’s document will form the basis for further discussion.

State Action Discussion

Because the Exclusionary Conduct discussion finished early, the Commission turned next to the portion of the State Action discussion that had been continued from the last hearing. The Commission discussed a proposal by Commissioner Jacobson to eliminate the state action doctrine and replace it with a form of the foreign sovereign compulsion doctrine, which exempts a private party from liability for acts or failures to act compelled by a foreign government. Commissioner Jacobson said that the proposal was for Congress to reform the state action doctrine to say that action compelled by an act of government would be protected. This would apply equally to federal or to state action. The corollary is that an action authorized, but not compelled, By state law would not be protected. The pros of this approach are ease of administration, narrowing of scope of state action immunity, which has expanded with each case decided. He acknowledged that it would be a wholesale overruling of many cases, including *Southern Motor Carriers*. In response to a question from Commissioner Kempf, Commissioner Jacobson said that he would give the states a grace period of three years to change their state statutes.

Commissioner Shenefield strongly opposed this change. He stated that we operate in a federal system. He cited his long tenure as head of the Virginia Racing Commission and opined that 80 percent of state regulation is “authorizing” rather than “compelling” action. He is in favor of making the prongs of the state action doctrine clearer and crisper.

Commissioner Yarowsky stated that all the Commissioners would like to see the state action doctrine narrowed. This is a laudable and elegant attempt because it is clear, but Commissioner Yarowsky has conceptual problems with it. The origins of the doctrines are very different. *Parker* is the Supreme Court’s attempt to navigate between federalism and the antitrust laws. The foreign sovereign compulsion doctrine is more in the nature of regulating behavior of individuals. It is difficult to reach in and tell the states what to do because of the 10th Amendment. He believes state laws could be in complete turmoil for decades. On the flip side, this might make for even broader immunity, as states realize they could immunize lots of conduct by using the “magic words.”

Commissioner Valentine questioned the Constitutionality of such a provision. Chairman Garza stated that this was an interesting area. She believes there would be a number of states with regimes that would need to be redone. The potentially broader effects cited by Commissioner Yarowsky could have more spill over into other states. Commissioner Kempf stated that he did not favor the sovereign compulsion proposal. Commissioner Cannon said that he had always thought the purpose of the foreign sovereign compulsion doctrine was to keep US executives out of jail. He also does not support the sovereign compulsion proposal.

Commissioner Delrahim strongly endorsed the proposal. He noted that the Commission can suggest that Congress preempt states from merger enforcement, so why can’t the Commission suggest this change. Congress doesn’t have to do it. Commissioner Delrahim stated that he saw no 10th Amendment problem. There might be an 11th Amendment problem, but he anticipates only suits

by the federal agencies for injunctive relief, with no private remedies or treble damages, so that would likely pass muster. Commissioner Warden also supported the proposal. He said that the Commission should recommend it even if it would not be enacted.

The Commissioners voted on the proposal. Commissioners Jacobson, Warden, Delrahim and Valentine voted for it. The remaining Commissioners voted against it. Commissioner Jacobson stated that he still believes it is anomalous that Rhode Island can immunize anticompetitive behavior, but England cannot. He and other Commissioners stated that they would continue to favor the other provisions they had voted for on state action.

Immunities and Exemptions

I. *In what circumstances, and with what limitations, should Congress provide antitrust immunities and exemptions? What generally applicable methodology should Congress use to assess the costs and benefits of immunities and exemptions? Should the proponents of an immunity or exemption bear the burden of proving that the benefits exceed the costs?*

[1] In general, immunities and exemptions from the antitrust laws should be disfavored. They should be granted rarely, if ever, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general. **[Jacobson, Burchfield, Cannon, Garza, Shenefield, Yarowsky (with edits described below), Kempf, Delrahim, Carlton, Valentine, Warden]**

[2] Recommend that courts construe all immunities and exemptions narrowly and against the beneficiary claiming protection by the immunity or exemption. **[Jacobson, Burchfield, Cannon, Garza, Shenefield, Warden (only in declaratory judgment and government actions), Valentine, Carlton, (Yarowsky and Kempf if sentence ends after “narrowly”)] “narrowly”]**

[3] Recommend that Congress employ an approach to immunities and exemptions similar to that of the ABA Antitrust Section Proposal: **[many Commissioners voted for combining some parts of 3 and 4. I list all those who voted for that combination under both items. Jacobson, Burchfield, Cannon, Garza, Shenefield, Kempf, Warden, Valentine, Carlton]**

- Apply three principles: grant only (1) narrow immunities, (2) after considering their likely impact on consumers, (3) when a particular social, political, or other goal trumps the goals of antitrust;
- Use two procedural safeguards: (1) the proponents of an immunity should be required to submit evidence to show that competition has less value than the goal promoted by the immunity, and that the immunity is the least restrictive means to achieve that goal; (2) Congress should consult with FTC and DOJ about the competitive effects of the immunity and the justification for an immunity under existing antitrust standards.

[4] Recommend that Congress employ an approach to immunities and exemptions similar to that of the Framework Proposal by AMC Consultants Bush, Leonard, and Ross. **[many Commissioners voted for combining some parts of 3 and 4. I list all those who voted for that combination under both items. Jacobson, Burchfield, Cannon, Garza, Shenefield, Carlton, Warden]**

- Initial information gathering, consisting of hearings and creation of a full record;
- Identification of all justifications for the immunity. Proponents of an immunity should bear the burden of explaining why the proposed immunity is both in the public interest and possibly in violation of antitrust law under existing standards, addressing the ancillary effects of the immunity on consumer welfare, and demonstrating that the proposed immunity is both necessary and the least restrictive means to achieve the desired outcome;
- Balancing of the costs and benefits of the immunity;
- Tailoring the immunity to minimize anticompetitive effects; and
- Creating renewal requirements (or sunset provisions) to ensure periodic reevaluation by Congress.

[5] Recommend that Congress direct the FTC to study (and provide sufficient funds for such study) the competitive effects of and justifications for all immunities and exemptions and report on whether they appear to meet the standards set forth in option 1, above. **[Burchfield, Garza, Shenefield, Yarowsky, Delrahim, Carlton, Warden, Valentine, Kempf]**

[6] Recommend that Congress delegate oversight of all immunities and exemptions not associated with particular regulatory agencies to the Federal Trade Commission, which should have the power to terminate an immunity or exemption if it is not serving its stated goals. **[Jacobson, Carlton]**

II. *Should Congress analyze different types of immunities and exemptions differently? Are there other helpful alternative approaches to blanket exemptions?*

[7] Recommend that, if Congress determines a particular immunity or exemption may be justified, that Congress first consider limited forms of immunity, such as a limitation of damages available in private civil actions to actual damages, and/or a disclosure requirement similar to that of the National Cooperative Research and Production Act. **[Burchfield, Cannon, Garza, Shenefield, Delrahim, Carlton, (Jacobson and Kempf would join if items ends after “forms of immunity.”)]**

[8] Recommend that Congress adopt a rule of statutory construction that makes competition the fundamental economic policy of the United States and requires statutes that grant an immunity or exemption to be construed consistently with that policy to the maximum extent possible. **[Warden, Shenefield, Carlton]**

III. *Should Congress subject immunities and exemptions to a “sunset” provision?*

[9] Make no recommendation regarding sunset provisions. **[Garza, Burchfield]**

[10] Recommend that Congress include a sunset provision on all immunities and exemptions, pursuant to which the provision would terminate at the end of some period of

time unless specifically renewed. [Valentine, Cannon, Shenefield, Yarowsky, Kempf, Cannon, Warden, Delrahim, Jacobson]

If so, the default sunset period should be:

[a] 5 years. [Valentine (for rapidly developing industries)]

[b] 10 years. [Warden, Cannon, Jacobson]

[Proposal by Commissioner Delrahim: [11] Congress should adopt a general provision that says unless explicitly excepted, antitrust laws will apply.]

Discussion

Commissioner Garza announced that the Commission may have an additional hearing later on exemptions.

Commissioner Yarowsky recommended a combination of #3 and #4. He stated that the limited immunity described in #7 would make a “half-loaf” which it would be easier for people to obtain.

Commissioner Burchfield stated that he is concerned with the sunset provisions. He views them similarly to Commissioner Yarowsky’s views on limited immunity—the AMC should not be recommending exemptions even with these conditions. Even with these limits, once exemptions are in place, it is difficult to get rid of them. With respect to the duration of any sunset, Commissioner Burchfield pointed out that the shorter it is in duration, the less beneficial it is to the exempted industry.

In response to a question from Commissioner Garza, there was a long discussion about the mechanics of enacting exemptions and of enforcing sunset provisions. Commissioner Delrahim stated that sunset provisions can reduce opposition by other parties, because they think it is limited. The campaign against re-enactment will begin 18 months before the sunset date, based on his experience with the Patriot Act. Commissioner Yarowsky pointed out that the reenactment after sunset could just be put into an Omnibus Budget bill. Commissioner Cannon described the two different paths taken by the NCRA and the Local Government Antitrust Act. For the former, it was originally proposed, then a number of members proposed limits—that is why it is just a reduction to single damages. For the Local Government Act, a court decision imposing an \$18 million judgment on a small town with a \$5 million annual budget got Congress moving and they passed it within two months. Commissioner Yarowsky stated that Congress would probably welcome a procedural framework they could use when creating immunities. It would be good behavior modification if Members, staff and industry thought that exemptions were harder to get and harder to retain.

Turning to #6, Commissioner Delrahim opined that there is a Constitutional problem with the proposal because the FTC is an independent agency and only Congress can make positive law. Chairman Garza proposed that the FTC and/or DOJ be asked to opine on the exemption before its sunset review, and make their report to Congress.

Commissioner Valentine summed up the Commission's opinion as follows. There is agreement on #1, agreement on #2, up to the word "narrowly," agreement on the first part of #7, without specifying the types of limited immunity, and agreement the #3 and #4 should be consolidated in some way. There is agreement on #5 if it says that the FTC and DOJ may "sponsor" a study (leaving their options open). There is agreement on #10, with the addition that the FTC or DOJ be asked to "certify" the usefulness of the exemption and report to Congress.

Commissioner Burchfield stated that he would be more inclined to support the sunset provisions if the AMC included in its report that Congress should rarely grant exemptions, that they should apply the reasoning in items 3 and 4, that they should be narrowly drafted and that they should receive a thorough review from the agencies before re-authorizing the exemption. He noted that in his view, a five-year sunset was unrealistically short and would cause the proposal to fail. Commissioner Kempf stated that the AMC's report should say that the AMC is concerned about creation of additional immunities. Commissioner Cannon concluded the discussion by saying that although he liked the proposal, he does not know how far it "comports with reality."

Regulated Industries

I. What role should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation?

[1] ~~The role of antitrust versus regulation will depend on the industry. Until there is a workably competitive context, for example, regulation may be superior to traditional antitrust rules in reshaping the structure of a regulated industry and limiting the incentives for incumbents to engage in strategic conduct that may frustrate the development of competition.~~ **[Kempf, Shenefield, Jacobson, with marked language deleted]**

New [1a](introduced at meeting, changes proposed by Commissioner Kempf) ~~In general,~~ competition is the fundamental economic policy of the United States ~~and~~ statutes that create regulatory regimes ~~(including any savings clauses)~~ should be construed consistently with that policy to the ~~maximum~~ extent possible. **[Cannon, Yarowsky, Warden, Valentine, Carlton (maybe), Shenefield, Burchfield, Garza, Jacobson, Kempf]**

[2] Antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals. **[Burchfield, Carlton, Valentine, Warden, Yarowsky, Cannon, Garza]**

[3] The federal antitrust enforcement and other regulatory agencies should consult on the effect of regulation on competition. **[Kempf, Shenefield, Carlton, Valentine, Warden, Yarowsky, Cannon, Jacobson, Garza, Burchfield]**

[4] Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all. **[Garza, Burchfield, Kempf, Shenefield, Carlton, Yarowsky, Cannon, Jacobson]**

[5] Antitrust enforcement agencies and courts should take account of the special circumstances of regulated industries, including the effect of regulation. **[Garza, Shenefield,**

Carlton, Warden]

[6] Courts should adopt a rule of joinder in antitrust cases that would make any relevant regulatory entity a compulsory party.

II. *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 and the relevant regulatory agency?*

[7] The federal antitrust enforcement agencies should have the exclusive authority to review and challenge mergers or acquisitions of regulated firms under the antitrust laws. **[Garza]**

[8] The federal antitrust enforcement agencies should have exclusive authority to review the competitive effects of mergers or acquisitions of regulated firms. The antitrust agency's findings or conclusions on competitive issues would be "binding" on the industry regulator as a part of its public interest determination. **[Carlton, Shenefield, Valentine, Yarowsky, Jacobson]**

[9] In making their public interest determinations, regulatory agencies should be required to give presumptive weight to the competitive analysis conducted by the federal antitrust enforcement agencies. **[Carlton, Warden, Yarowsky, Cannon, Burchfield]**

[10] The federal antitrust enforcement agencies should be required to provide a competitive analysis of a proposed merger to the industry regulator, but the regulator would not be required to give that analysis any particular weight in its public interest determination.

[11] The federal antitrust enforcement agencies and regulatory agencies should pursue "soft convergence" of merger review in order to harmonize substantive approaches to competition analysis and procedural requirements to reduce compliance costs. **[Carlton, Valentine, Warden, Yarowsky (maybe), Cannon, Shenefield, Burchfield]**

III. *In what circumstances should antitrust immunity be implied as a result of a regulatory structure?*

[12] Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied. **[Carlton, Valentine, Warden, Yarowsky, Cannon, Jacobson, Garza, Shenefield, Burchfield]**

[13] Recommend that courts should not imply an immunity unless active regulatory supervision makes it unlikely that anticompetitive conduct (or effects) will occur, and that courts should construe any implied immunity narrowly. **[Yarowsky, Cannon, Jacobson]**

[14] Recommend that Congress evaluate whether the filed-rate doctrine should continue to apply in regulated industries and legislatively overrule it where the regulatory agency no longer specifically reviews proposed rates. **[Kempf, Shenefield, Carlton, Valentine, Yarowsky, Garza, Jacobson]**

IV. *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?*

[15] Recommend that Congress craft savings clauses carefully to delineate clearly and specifically what antitrust claims remain in light of the regulatory regime. **[Kempf,**

Shenefield, Yarowsky, Cannon]

New [15a] (introduced at the meeting by Commissioner Kempf) Recommend that Congress pass a statute stating that, in statutes dealing with regulatory regimes, absent a provision expressly providing otherwise, the antitrust laws continue to apply. **[Yarowsky, Carlton, Jacobson, Kempf]**

[16] Recommend that courts interpret savings clauses to give deference to the antitrust laws. **[Burchfield, Kempf, Carlton, Valentine, Yarowsky, Cannon, Jacobson]**

[17] Confirm that *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act under the facts of the case, and that it does not displace the role of the antitrust laws in regulated industries. **[Garza, Burchfield, Shenefield, Valentine, Warden, Jacobson]**

New [17a] (introduced at meeting) *Trinko* was wrongly decided insofar as it can be read as holding that, as a matter of law, violations of Section 251(c) of the 1996 Telecommunications Act cannot be the basis for a violation of Section 2 of the Sherman Act. Such a holding is inconsistent with Congress' intent in enacting the antitrust savings clause in the 1996 Telecommunications Act and unduly limits the role of the antitrust laws in ensuring all the benefits of a competitive marketplace. **[Shenefield, Jacobson]**

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

[18] Recommend that Congress and regulatory agencies decline to set industry-specific standards for particular antitrust violations. **[, Warden, Yarowsky, Cannon, Garza, Kempf, Burchfield, (Carlton, Valentine—only with respect to antitrust standards, not other public interest standards)]**

[19] Recommend that Congress establish industry-specific antitrust standards only after it has specifically considered the particulars of an industry and determined the most appropriate way to regulate it. **[Jacobson, Shenefield]**

Discussion

Commissioner Warden expressed his concern about #4 because foreseeability is an issue. With respect to #13, he noted that anticompetitive behavior may occur even if there is active supervision. He does not endorse #17(a), because 1) he does not believe this is what *Trinko* held; and 2) he agrees with the holding in *Trinko*. Commissioner Carlton stated that #13 would require an in-depth study in each case. He stated that he worked for Verizon, one of the parties in *Trinko*, but agrees that no decision should be seen as displacing the antitrust laws in regulated industries. Chairman Garza stated that her understanding of #1 was that it reflected the position of Peter Carstensen and AAI. She is voting for it on that basis. Commissioner Kempf reiterated his view that *Trinko* was a “soft overruling” of *Aspen Skiing*.

The Commission spent much of its time on this topic discussing the meaning of #7, #8 and #9. Commissioner Yarowsky stated that he agreed with #7 if it meant that the competitive effects analysis of a merger by DOJ or the FTC would be deferred to, although the agencies can take other

things into account in their “public interest” review. Chairman Garza stated that she read #7 to say that the antitrust agencies’ views were preclusive with regard to antitrust laws (e.g., if they believe there is a competitive problem, the merger will fail) but that other agencies can impose other fixes for problems within their authority). However, she does not want a situation where DOJ or the FTC says the merger is anticompetitive and the other agency permits it anyway.

Commissioner Valentine stated that she did not want to say competition trumps everything, but with respect to competitive issues, the antitrust agencies should decide. Where there are non-competition public interest issues, the other agencies should decide them. She supports #8 because she believes it says that competition doesn’t trump all other issues. Commissioner Shenefield supports #8 because it gives preclusive effect to the antitrust agencies determinations only on competition issues.

Commissioner Kempf said that he did not support any of options 7, 8, 9, 10 or 11. He does not see why the antitrust agencies should be given any greater weight than they are in a court of law. Each side should be given an opportunity to state their case from their perspective. Commissioner Warden noted that just giving the agencies weight in these proceedings doesn’t preclude judicial review. Commissioner Warden stated that in the abstract, he favored #8, but his experience with airlines leads him to #9. The antitrust authorities haven’t shown adeptness with systems that are emerging from regulatory constraints. Commissioner Burchfield also supported #9. He has more confidence in DOJ and the FTC to do competitive analysis. It is difficult to draw the line as to what is competitive analysis.

Commissioner Valentine asked about savings clause language. Commissioner Kempf suggested that the staff formulate language to replace #15, #16, 4 and #15a.

Commissioner Jacobson made a motion that the Commission adopt the standard from *National Gerimedical* as the “current legal standard” referred to in #12. He circulated language to the Commissioners from that decision. Although the language was not circulated to the audience, some or all of the following language from *National Gerimedical* would seem to be the language to which he is referring:

The antitrust laws represent a "fundamental national economic policy." . . . "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." . . . "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." . . . To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, . . . but this intent must be clear. Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. . . . Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct

under antitrust challenge. . .

National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 (1981) (citations omitted)

Chairman Garza concluded the discussion by stating that the staff will work further on language about savings clauses and the relationship between the antitrust agencies and other agencies addressed in items 7, 8, 9, 10 and 11. Commissioner Valentine suggested that the language state the Commission generally favors competition over regulation, and that in transition industries, some regulation maybe necessary, but competition is to be encouraged.

The meeting ended at 3:55.

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