

Antitrust Modernization Commission Meeting

January 11, 2007¹

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.

The Antitrust Modernization Commission met on January 11, 2007 beginning at 9:38 p.m. Commissioners Carlton, Shenefield and Cannon were not present. The meeting ended at approximately 4:15 p.m.

Chairman Garza opened the meeting by stating that the purpose of this meeting is to make any necessary substantive changes to the draft recommendations which have been circulated to the Commissioners (available at www.amc.gov). She indicated that she would work to achieve consensus where possible. She also stated that a draft Executive Summary had been distributed (also available at www.amc.gov). The purpose of this draft Executive Summary is to indicate the conclusions, tone and level of detail that can be expected in the final report. Many changes may still be made.

The discussion of most issues took the form of specific word-smithing by various Commissioners, frequently with the goal of getting more votes for a recommendation, as well as discussion of various proposed changes. This report will therefore provide a red-lined version of the recommendations, with specific changes noted. The Recommendations include footnotes indicating which Commissioners had signed on to which recommendations. Changes to Commissioner votes in the footnotes are also indicated. Where there was discussion of a particular item, it is summarized after the revisions. Language that was deleted is indicated by ~~strikeout text~~, language that is added is indicated by underlined text.

At the conclusion of the meeting, there was a discussion about possible next meeting dates. Although the Commissioners had previously agreed on January 25, Chairman Garza determined that the date would not give the staff sufficient time to revise the recommendations as directed by the Commission at this meeting. One possible date for the next meeting is February 16 2007. Other dates to be considered are February 21 or 22.

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.

I. SUBSTANTIVE ANTITRUST ISSUES

A. NEW ECONOMY

ANTITRUST

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological ~~innovation~~ change or development are central features.
 - The economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property, and technological change are central features.
 - Antitrust analysis, guided by valid economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries. Over the years, antitrust analysis has been refined to incorporate new economic learning. This has improved the potential for a sound competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change. For example:
 - o In the analysis of joint firm conduct under Section 1 of the Sherman Act and the analysis of unilateral firm conduct under Section 2 of the Sherman Act, antitrust law has largely turned away from the application of *per se* rules toward a “Rule-of-Reason” type of analysis, which can accommodate the assessment of a greater variety of factors. ~~than *per se* rules.~~
 - o Likewise, the analysis of mergers has moved away from a ~~reliance primarily on~~ structural presumptions about concentration toward a more complex analysis that incorporates predictions of competitive effects using tools of modern economic analysis.¹
 - o The antitrust “Rule of Reason” and current merger analysis require consideration of, and according weight to, procompetitive efficiencies that may result from firms’ agreements, unilateral conduct, or proposed transactions. This is a significant positive change from the typical antitrust analysis of thirty years ago.
 - o In particular, the courts and the federal antitrust agencies have evidenced a greater appreciation of the importance of intellectual property in promoting innovation and, accordingly, the need to incorporate this recognition into a dynamic analysis

¹ Commissioners Cannon and ~~Delrahim~~ do not join.

