

**Antitrust Modernization Commission Meeting<sup>1</sup>**  
**May 8, 2006**

*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 May 8, 2006, to consider issues relating to remedies: criminal, indirect purchaser and private treble damages. The meeting began at 9:30 and ended at 4:45, with all Commissioners present. AMC Chair Deborah Garza opened the session by noting that the AMC adopted an ambitious agenda 16 months ago. They have received comments from 108 entities and held 12 days of public hearings with 110 witnesses. Garza next outlined the process the Commission would follow in this meeting. She compared the process to jury deliberations—for each topic, an initial vote would be taken to determine areas of agreement and areas for discussion, then there would be discussion of the possible options, and a final vote. She stated that the purpose of the hearing was to develop broad concepts, and that wordsmithing would occur later. AMC reports will reflect minority views.

**Criminal Remedies**

The Commission began with criminal remedies. They considered all of the Criminal Remedies options simultaneously, but this memorandum will break them up for ease of discussion. Issue 1.A. on the Discussion Outline, reads:

*1. In setting corporate fines for criminal Sherman Act violations, should there be a means for differentiation based on differences in the severity or culpability of the behavior?*

*A. Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability? For example, should the Sentencing Guidelines provide distinctions between different types of antitrust crimes (e.g., price fixing versus monopolization)?*

The Commissioners' vote on the options was as follows:

- No change to the Sentencing Guidelines is needed with respect to distinguishing between different types of antitrust crimes because the Guidelines already apply only to “bid-rigging, price-fixing, or market allocation agreements among competitors,” and the Department of Justice (“DOJ”) limits criminal enforcement to hard-core cartel activity as a matter of both historic and current enforcement policy. **(Litvack, Jacobson, Cannon)**

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<sup>1</sup> The Section thanks Emily Myers, Antitrust Counsel, National Association of Attorneys General, for preparing this summary.

- No change to the Sentencing Guidelines is needed with respect to distinguishing between different types of antitrust crimes for the reason stated above, but the AMC should endorse and recommend continued discretionary limitation of criminal prosecution by DOJ to hard-core cartel activity. **(Burchfield, Garza, Warden, Yarowsky, Delrahim, Valentine, Carlton, Shenefield, Kempf)**
- Recommend amending the Sentencing Guidelines to add a statement clarifying that the Guidelines apply only to hard-core cartel activity.
- Recommend amending the Sentencing Guidelines to add an upward adjustment in the culpability score for organizations that take a leadership role in a cartel. **(Delrahim)**

Litvack, Jacobson and Cannon stated that they viewed any directive to the Department of Justice as unnecessary. The Commission reached consensus on option 2, and the three Commissioners agreed to work with the staff to accurately reflect their position.

The Commissioners spent a long time discussing a proposal by Makin Delrahim that there be a statutory change to require a mandatory minimum for leadership role in a cartel. Several Commissioners expressed concern about the difficulty of determining who is a ringleader—the largest firm in the market may not be suggesting or directing it, but the largest firm may have the most impact. Commissioner Delrahim suggested that DOJ already makes this calculation when considering amnesty requests, and they should simply apply the same standard. Some Commissioners believe that this was adequately addressed in the culpability factors. After a lot of discussion, the Commission voted not to adopt Commissioner Delrahim’s proposal.

*B. The Sentencing Guidelines use 20% of the volume of commerce affected as the basic method of distinguishing the severity of antitrust violations. See United States Sentencing Commission, Guidelines Manual § 2R1.1 (2004). Does the volume of commerce provide an adequate measure for distinguishing the severity of offenses? If not, what other measure(s) would provide a more appropriate method for the Guidelines to distinguish the severity of violations?*

- Recommend that the 20 percent proxy (or presumption) and volume of commerce measure provide a reasonable basis for reflecting the severity of antitrust violations, and no change to the Sentencing Guidelines is needed. **(Garza)**
- Recommend that the 20 percent proxy should be eliminated from the Sentencing Guidelines, and the government should be required to prove the actual amount of pecuniary loss in setting the base fine.
- Recommend that the Sentencing Guidelines should be amended to make explicit that the 20 percent proxy may be rebutted by proof that the overcharge was lower or higher. **(Warden, Litvack, Burchfield, Yarowsky, Delrahim, Valentine, Jacobson, Cannon, Kempf, Shenefield)**
- Recommend that the 20 percent proxy should be reduced.
- Recommend that the 20 percent proxy should be increased. **(Carlton)**

- Recommend that the Sentencing Commission should reevaluate and explain the rationale for the 20 percent proxy, including both the assumption of an average overcharge of ten percent of the amount of commerce affected and the difficulty of proving the actual gain or loss. **(Garza)**

The Commissioners seemed to generally agree that the 20 percent rule should be a rebuttable presumption. John Warden proposed, and most agreed that Option 3 above should be amended to read “Recommend that the Sentencing Guidelines should be amended to make explicit that the 20 percent proxy may be rebutted by proof (by a preponderance of the evidence) that the overcharge was materially lower or higher.”

2. *The Sherman Act provides for a maximum fine of \$100 million (or, previously, \$10 million). The government may seek criminal fines in excess of that maximum pursuant to 18 U.S.C. § 3571(d).*

*A. Should “twice the gross gain or twice the gross loss” as provided in Section 3571(d) be calculated based on the gain or loss from all coconspirator sales or on only the defendant’s sales?*

- Recommend no change to the statute; the interpretive question should be left to the courts. **(Burchfield, Litvack, Valentine)**
- Recommend amending Section 3571(d) to provide that it applies to loss caused by an entire antitrust conspiracy. **(Delrahim, Carlton, Yarowsky, Shenefield, Cannon, Garza)**
- Recommend amending Section 3571(d) to provide that it applies to loss caused by the particular antitrust defendant. **(Jacobson, Warden, Kempf)**

There was no consensus as to 2.A. The Commission decided to seek additional public comment and defer a decision on this issue.

*B. Should fines above the statutory maximum, and thus limited by Section 3571(d), be based on 20% of gross sales as provided for in the Sentencing Guidelines, as they are for fines below the statutory maximum, or should they be calculated differently? If differently, how should they be calculated?*

- Recommend no change to the statute or Sentencing Guidelines; the interpretive question should be left to the courts. **(Garza, Warden, Jacobson, Yarowsky, Litvack, Burchfield, Valentine)**
- Recommend amending the Guidelines to require use of actual gain or loss, if proven under Section 3571(d), for calculation of the Guidelines fine range. **(Kempf, Shenefield, Delrahim)**

Commissioner Jacobson proposed that section 3571(d) be repealed, since it is being used in an unconstitutional way. The Sherman Act should be amended to include a higher

maximum—perhaps \$500 million. He described his reasoning as follows: The only way that DOJ can get a fine over \$100 million is under section 3571(d). They must prove a gain or loss beyond a reasonable doubt. However, damages are typically proven by expert analysis, and hotly contested—they are rarely, if ever, proven beyond a reasonable doubt. DOJ says it will not negotiate with anyone who will contest the gain or loss numbers. Why are companies agreeing to settlements? Scott Hammond stated at the ABA meeting that if the company agrees to a plea agreement, individuals in the company will get better deals. They are basically trading people for money and surrendering basic rights they have under *Booker*. If left to the courts, there will be no decisions in the next decade, because no one will challenge this. For this reason, the AMC should recommend that 3571(d) be repealed for antitrust cases.

Several Commissioners expressed interest in this proposal, but felt they did not have sufficient information about DOJ's actual actions. Some were concerned about increasing the limit from \$100 million—that was a hard enough change to get through. They agreed to seek additional public comment on the issue.

### **Government Civil Remedies**

The Commission next turned to civil remedies available to the federal government. They considered the following options:

*1. Should the DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?*

- No additional authority should be given to either DOJ or the FTC to obtain civil fines for substantive antitrust violations. **(Warden, Kempf, Cannon, Garza, Litvack, Carlton, Delrahim, Yarowsky, Burchfield, Jacobson)**
- Recommend the creation of civil fine authority for the Department of Justice that would add to existing available remedies (such as penalties and monetary equitable remedies) **(Shenefield, Valentine)**.
- Recommend the creation of civil fine authority for the Federal Trade Commission that would add to existing available remedies (such as penalties and monetary equitable remedies). **(Shenefield, Valentine)**

If civil fine authority is created for either or both the DOJ or FTC

A.

- Fines should be payable to the U.S. government, with no compensation to victims of anticompetitive conduct. **(Warden, Kempf, Shenefield, Cannon, Garza, Litvack, Carlton, Delrahim, Yarowsky, Burchfield)**
- Fines should be distributed to victims of the anticompetitive conduct where possible. **(Valentine)**

B.

- Fines should have no effect on damages payable by defendants in parallel actions by states and private parties. **(Carlton, Delrahim, Yarowsky, Burchfield, Valentine, Kempf, Shenefield, Cannon, Garza, Litvack)**

- Fines should offset damages payable by defendant in parallel actions by states and private parties.

2. *Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b)?*

- Recommend statutory change to clarify authority of FTC to seek monetary equitable remedies pursuant to Section 13(b), 15 U.S.C. § 53(b).

- Recommend statutory change to bar FTC from seeking monetary equitable remedies in competition cases pursuant to Section 13(b). **(Delrahim, Warden, Carlton, Kempf, Shenefield, Burchfield)**

- No change to Section 13(b) is appropriate, but the Commission should urge the FTC not seek monetary equitable remedies under Section 13(b) in competition cases.

- No change to Section 13(b) is appropriate, and the Commission should endorse the FTC's current policy governing the circumstances in which it will seek monetary equitable relief. (With clarification as to exactly what FTC's current policy is).

**(Valentine, Jacobson, Litvack, Warden, Yarowsky, Garza, Cannon, Kempf, Carlton, Delrahim, Shenefield, Burchfield)**

Commissioner Warden opened the discussion by proposing that he voted this way because he understood that the FTC and DOJ did not want additional authority. He thinks that the federal agencies should seek disgorgement, distribute the proceeds to the public, and all private actions should be barred, the *parens patriae* having acted. He views the current treble damages regime as inefficient. At a minimum, the money distributed should be credited towards the damages. Commissioner Valentine stated that she might support this. Commissioner Kempf noted that the SEC has this situation and there is much debate about its effectiveness.

Commissioners Valentine and Shenefield made clear their preference that the two agencies be on par with one another in their ability to use civil remedies—in other words, if one can do it, the other should be able to, or if one cannot, the other should not be able to. Commissioner Shenefield stated that he has long wondered why parties should be subject to different treatment just because they are in an industry that is under the jurisdiction of one of the agencies. Commissioner Valentine stated that she would vote for option 1 on the understanding, as conveyed by Chairman Majoras and AAG Barnett, that they did not want additional authority, although she wondered why they did not. She was concerned about the effect of several of the options under heading 2 on the Commission's consumer protection operations.

Commissioner Yarowsky described former Commissioner Tom Leary as being satisfied with the current standards used by the FTC—that is they only use these remedies when the violation is

clear and there is not other likely plaintiff.

There was discussion about the extent of DOJ's authority to seek such penalties. Apparently they have claimed such authority in the RICO context, but not in any great detail. Commissioner Delrahim suggested a letter to DOJ asking them if they have this authority and if they intend to use it. Commissioner Kempf suggested that since courts typically base this authority on the inherent equitable ability of the government to obtain complete relief, DOJ would probably make the same claim. The following Commissioners voted to ask DOJ for a statement of their views on this matter: **Delrahim, Shenefield, Valentine, Carlton, Warden, Yarowsky, Kempf, Cannon, Litvack, Jacobson, Garza)**

### **Indirect Purchaser Remedies**

The Commission took up the issue of indirect purchaser remedies after lunch. The voted on the following options:

*2. What actions, if any, should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish Illinois Brick as the uniform national rule by preempting Illinois Brick repealer statutes, or should it overrule Illinois Brick? If Congress were to overrule Illinois Brick, should it also overrule Hanover Shoe, so that recoveries by direct purchasers can be reduced to reflect recoveries by indirect purchasers (or vice versa)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?*

- No statutory change is appropriate, and law should be allowed to develop subsequent to passage of the Class Action Fairness Act.
- Recommend statutory change to preempt state laws that permit indirect purchasers to recover in a manner inconsistent with the federal rule on indirect purchaser recoveries set forth in *Illinois Brick*, and retain the current *Illinois Brick* rule under federal law. **(Carlton, with proviso that if no direct purchaser has sued within a set period, indirect purchasers and state AGs could sue.**

If so:

- Recommend preemption only with respect to private actions, but allow state attorneys general to recover on behalf of indirect purchasers to the extent permitted by state law.
- Recommend preemption of all actions except those regarding *per se* unlawful offenses such as price fixing and other cartel conduct.
- Recommend preemption of all actions, both private and those brought by state attorneys general.
- Recommend that *Illinois Brick* be overruled by statute so that indirect purchasers may sue under federal law to recover damages. **(Delrahim, Garza, Litvack, Kempf, Warden)**

If so:

A.

- Recommend that the rule in *Hanover Shoe*, barring the pass-on defense, also be overruled by statute, and include a mechanism to allocate damages between direct and indirect purchasers. **(Delrahim, Garza, Litvack, Kempf, Warden)**

- Recommend that the rule in *Hanover Shoe*, barring the pass-on defense, be retained.

B.

- Recommend that such legislation also preempt state laws permitting indirect purchasers to recover so that any claim for damages by an indirect purchaser must be brought in federal court. **(Delrahim, Garza, Litvack, Kempf, Warden)**

- Recommend that such legislation not preempt any state laws regarding indirect purchaser recoveries, so that indirect purchasers may continue to recover under state law.

C.

- Recommend that indirect purchasers be able to sue under federal law for damages only if no direct purchaser has sued regarding the same conduct. **(Litvack)**

- Recommend that indirect purchasers be able to sue under federal law to recover damages without regard to direct purchaser lawsuits. **(Delrahim, Garza, Kempf, Warden)**

- Recommend a statute containing multiple elements to improve the existing indirect purchaser regime, as proposed by the American Bar Association, including:

- (1) an overruling of the *Illinois Brick* rule to allow indirect purchaser lawsuits under federal antitrust law;

- (2) no preemption of state laws allowing for indirect purchaser recovery;

- (3) resolution of all claims in a single forum;

- (4) changes to federal rules regarding diversity jurisdiction, removal, and consolidation; and/or

- (5) allowing pre-judgment interest to plaintiffs.

**(Shenefield, Yarowsky, Burchfield, Valentine, Jacobson)**

If so:

A.

- Recommend that the statute provide for “trifurcated” proceedings. **(Shenefield, Valentine, Warden)**

- Make no specific recommendations in this regard. **(Burchfield, Jacobson)**

B.

- Recommend adjustments in the treatment of class action certification decisions to reduce the difficulty in certifying classes in indirect purchaser cases. **(Shenefield)**

- Make no specific recommendations in this regard. (Burchfield, Valentine, Warden)

The Commissioners had a long discussion about indirect purchaser remedies. Commissioner Carlton stated his preference for eliminating indirect purchaser actions except in cases where direct purchasers have not sued within a certain period of time. He stated that direct purchasers have the most incentive to sue, and that we should concentrate all incentives with them. It may seem unfair that those who are harmed further down the distribution chain will not recover for their loss, but deterrence is the primary goal, and the fact is that direct purchasers are most likely to sue, and suits will deter this behavior.

Commissioner Burchfield stated that he supported option 4, with the addition of 1) repeal of Hanover Shoe, no mention of prejudgment interest, which is too difficult to calculate in an indirect situation. Commissioner Valentine also stated her support for option 4, but urged the Commission to make it “as mandatory as possible” the all claims will be resolved in federal court. Commissioner Warden suggested total preemption of all state laws that provide recovery to indirect purchasers except in “principally local” matters (There was a brief discussion of whether the matters had to be “wholly,” “predominantly” or “principally” intrastate. The Commissioners settled on “principally.”) Commissioner Yarowsky stated that CAFA has a fairly strict scheme, with, among other things, a carve-out for state AGs, into which this preemption may not fit. He noted that the Commission earlier determined that it was not going to address *Lexecon*. Congress is currently grappling with it, the current proposal is consolidation for trial, then return to referring court for damages phase.

Commissioner Jacobson opined that most of the Commissioners were actually quite close to one another on these issues. The difference is preemption. He stated that preemption is a hot-button issue for many, and including it will diminish the chances of any proposal. He suggested that enhanced removability of cases to federal court could deal with the issues of state law claims, and would result in one decision and one recovery at the end of the day without the baggage of preemption.

Commissioner Burchfield stated that his opinion was shaped by the AMC’s hearings. He believes there is judicial inefficiency and potential for multiple liability in the current system, as well as differences in recovery based on where you live. He believes that *Lexecon* should be overruled. He does not favor preemption of state law for several reasons: first, the sources of state law on this matter are quite varied, and would be difficult to preempt. He also thinks that we should try a system where there is a federal cause of action, waiting to see how it works, and allowing judges to develop appropriate procedures.

Commissioner Kempf stated that he could accept Commissioner Burchfield’s proposal, which he called “3 prime.” He urged the Commission to include fewer bells and whistles, for example, dropping the proposal for pre-judgment interest and trifurcation. Commissioner Warden stated that he took Commissioner Jacobson’s point about the difficulty of enacting preemption, but he

believes that state laws could call for recovery where federal law would not. Commissioner Litvack asked, on a philosophical level, whether the Commissioners should be recommending what “should” be done or what “can” be done. He suggested alternative recommendations: Preemption is our preference, but if that is not possible, we recommend removal.

Commissioner Shenefield applauded this suggestion of alternatives. He suggested a formulation such as “the Commission is united in wanting to reverse Illinois Brick and Hanover Shoe. All possible preemption of conflicting state laws should be sought. As far as possible, all claims should be resolved in a single court.” Commissioner Valentine stated that this is one area where the Commission can make a difference. She suggested that there not be complete preemption, in particular, not where there is intrastate commerce. Instead, removal should be encouraged.

Commissioner Jacobson suggested a four-part proposal: 1) overrule Illinois Brick; 2) overrule Hanover Shoe; 3) propose removal language that covers “all state causes of action involving overcharges attributable to facts that would constitute an antitrust violation” 4) try all claims in one forum (implicitly overrule *Lexecon*). No mention of trifurcation. Commissioner Kempf agreed that removal could be a solution. He urged that *Lexecon* not be mentioned, however. Commissioner Garza stated that although she really supported option 2 (get rid of all indirect purchaser litigation) for the reasons stated by Commissioner Carlton, she doesn’t think it is feasible, so will support “3 prime”

Commissioner Jacobson noted that while he thinks deterrence is important and consumer redress is important, the most important thing is fairness. You are more likely to get compliance with a law that is perceived as fair.

Commissioner Burchfield stated that he would be much less likely to support a proposal that preempted state Attorneys General from bringing these cases. He just believes that the AG, representing a sovereign state, should be able to choose the forum. These are not the cases that we are seeking to deter. Commissioner Jacobson thinks state AGs should be “in federal court with anyone else.”

Commissioner Cannon stated that he agrees with Commissioner Carlton that indirect purchaser actions should be eliminated. The further you get away from the harm that’s been caused, the less incentive there is to sue. Those who are harmed the most have the most incentive.

In response to a question, Commissioner Jacobson stated that removal differs from preemption in that the claim can still be put forward—just in federal court. There are emotional aspects to eliminating state authority to bring claims that states have had since the 1870s. Commissioner Shenefield said that he didn’t care about states’ feelings—states have swallowed preemption before and they will again.

Commissioner Warden said he would only agree to repeal to get all cases in one court. Commissioner Yarowsky was leery about broad preemption, especially where there could be

pure state claims.

The Commissioners took a vote on overruling Illinois Brick and Hanover Shoe—only Carlton and Cannon opposed it. Commissioners supporting preemption of state laws were: Shenefield, Litvack, Delrahim, Warden and Garza. Those supporting removal were Shenefield (in the alternative), Valentine, Jacobson, Kempf, Delrahim (in the alternative), Burchfield, Yarowsky and Garza (in the alternative). With regard to getting all claims in a single forum, Commissioners Yarowsky, Kempf and Cannon were opposed. With regard to trifurcation, Shenefield would require it, Valentine, Warden and Jacobson would recommend it, and Carlton, Kempf, Cannon, Litvack, Delrahim, Burchfield, Yarowsky and Garza would say nothing about it. All Commissioners agreed that there was no need to modifications in the class action procedures.

Commission staff were directed to prepare working papers reflecting the Commission's decisions, and put them out for public comment. Staff will also contact federal and possibly state trial judges for their opinions on trifurcation.

### **Damages and Liability**

The Commission next turned to some parts of the Damages and Liability outline. They discussed Joint and Several Liability, Contribution and Claim Reduction. The options were as follows:

*7. Should Congress and/or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?*

- No statutory change is appropriate; leave rules on joint and several liability, contribution, and claim reduction as they are. **(Carlton)**
- Recommend statutory change to eliminate joint and several liability; an antitrust defendant would be liable only for damages attributable to it.
- Recommend retention of joint and several liability, but recommend statutory change that would allow claims for contribution against other defendants. **(Valentine, Kempf, Cannon, Garza, Jacobson, Yarowsky, Warden, Burchfield, Litvack)**
- Recommend retention of joint and several liability, but recommend statutory change that would provide for claim reduction, such that the remaining liability of the non-settling defendants would be reduced, before trebling, by the amount of the settlement. **(Shenefield, Valentine, Kempf, Cannon, Garza, Yarowsky, Jacobson, Warden, Burchfield, Litvack)**

If either or both contribution or claim reduction is recommended:

- Recommend that each defendant's allocated share of liability is equal, *pro rata* or *per capita*, for purposes of determining any contribution claims or reducing the plaintiff's remaining total claim.
- Recommend that each defendant's allocated share of liability is equal to its market share or gain from the violation for purposes of determining any contribution claims or reducing the plaintiff's remaining total claim. **(Litvack,**

**Burchfield, Warden, Jacobson, Yarowsky, Garza, Cannon, Kempf, Carlton, Valentine, Shenefield)**

- Recommend that each defendant's allocated share of liability be based on relative fault or culpability for purposes of determining any contribution claims or reducing the plaintiff's remaining total claim.

Commissioner Carlton stated that he favored the current system because it provides maximum deterrence, even if ex post it appears unfair. Commissioner Jacobson suggested that in some vertical cases, there would need to be a presumption of market share by market level and then a pro rata division within market level. Commissioner Burchfield asked about literature discussing the deterrence value of joint and several liability. There is an article by Easterbrook and others that concludes that no contribution does provide more effective deterrence than contribution. But, Commissioner Jacobson noted, the effect of the rule is to make defendants settle for more than the claim is worth. Commissioner Warden opined that the presence or absence of claim reduction has no greater deterrence effect than criminal penalties and treble damages.

Commissioner Delrahim noted that when he was at DOJ, there were repeat cartel offenders. He suggested that contribution and the ensuing passing of blame might disrupt the happy relationship between cartel participants. Commissioner Litvack said the focus should be on what's fair. Commissioner Garza stated that she did not care about fairness to defendants who had participated in a cartel. She only cares about if there's deterrence or settlement of non-meritorious claims. Figuring out the value that each participant added to the conspiracy is difficult, but perhaps the prospect of big liability will deter a small firm.

Commissioner Burchfield proposed amending the options above to say "other non-settling conspirators" rather than "defendants," and the other Commissioners agreed. The Commissioners also agreed that the recommendation as to contribution or claim reduction be amended make it clear that market share is the preferred measure, but if not possible, gain is to be used.

The Commissioners took initial votes on pre-judgment interest and attorneys fees. The votes were as follows:

*3. Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?*

*4. Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. § 15(a)(1)-(3) appropriate? If not, how should they be changed?*

- No statutory change is appropriate; prejudgment interest should be available only in the circumstances currently specified in the statute. **(Kempf, Litvack, Cannon, Jacobson, Burchfield, Yarowsky, Valentine)**

- Recommend that the statute be amended to provide for prejudgment interest in all antitrust cases.

- Recommend that the statute be amended to allow prejudgment interest, as well as pre-

complaint interest, and damages for costs of capital and opportunity costs, in all antitrust cases.(**Carlton, Warden, Garza, Shenefield**)

5. *Should courts award attorneys' fees to successful antitrust plaintiffs?*

6. *Are there circumstances in which a prevailing defendant should be awarded attorneys' fees?*

- No statutory change is appropriate; successful antitrust plaintiffs should continue to receive attorneys' fees.(**Kempf, Litvack, Cannon, Jacobson, Delrahim, Carlton, Burchfield, Yarowsky, Valentine, Garza, Shenefield**)

- Recommend statutory change to bar plaintiffs from recovering attorneys' fees in addition to treble damages.(**Warden, only to extent damages are greater than attorneys' fees**)

- Recommend statutory change to allow defendants to recover attorneys' fees for frivolous antitrust cases.(**Kempf, Delrahim, Carlton, Burchfield, Warden, Valentine (if standard is Rule 11), Garza, Shenefield**).

- Recommend statutory change to allow defendants to recover attorneys' fees in actions between major competitors.(**Burchfield, Warden**)

These votes were all contingent upon the resolution of other issues. For example, Commissioner Warden supported prejudgment interest so long as there were no treble damages.

The Commission meeting adjourned at 4:45. The Commission decided to consider the items not finished at this meeting at their next meeting on May 23. Because there will be much to work on, they decided not to consider New Economy issues at the May 23 meeting, and to put Robinson-Patman issues at the end of the agenda for that meeting.