

**Antitrust Modernization Commission Hearing**  
**May 23, 2006<sup>1</sup>**

*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 23, 2006 at 9:30 a.m. in the offices of Morgan Lewis at 1111 Pennsylvania Ave., NW in Washington DC. All Commissioners except for Commissioner Delrahim were present.

AMC Chair Garza opened the meeting by stating that the purpose of the meeting was to get tentative conclusions. There will be a meeting on July 13 to refine those conclusions before staff is directed to prepare a report.

For each topic, this memorandum will provide the final vote tallies for each option, then summarize the discussion among the Commissioners.

**Civil Remedies–Damages**

1. *Are treble damage awards appropriate in civil antitrust cases?*
2. *Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (e.g., per se unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?*

- No statutory change is appropriate; treble damages should be available in all antitrust cases. (**Yarowsky, Litvack, Cannon, Jacobson, Valentine, Burchfield, Kempf, Shenfield**)

- Recommend statutory change that would provide that treble damages remain available in antitrust cases, except in specified circumstances, in which only single damages would be awarded.

If so, those circumstances are:

- When the conduct giving rise to the alleged violation is evaluated under the rule of reason, and is not *per se* unlawful.
- When the conduct giving rise to the alleged violation is single-firm conduct(**Warden**).
- When the conduct giving rise to the alleged violation was part of a joint venture

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<sup>1</sup>This 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, as well as minutes of the meeting.

with pro-competitive justifications. **(Carlton)**

- When the conduct giving rise to the alleged violation has not been clearly established as unlawful under the antitrust laws and the defendant therefore could not have known or reasonably be expected to have known that its conduct was unlawful.

- When the conduct giving rise to the alleged violation is overt.**(Carlton)**

- When the conduct giving rise to the alleged violation would not be appropriate for criminal sanctions.

- When the action is brought as a follow-on to a U.S. government criminal prosecution or investigation.

- Recommend statutory change that would keep treble damages potentially available in all antitrust cases; but, in a given antitrust case they would be available only if:

- A court in its discretion, exercised with regard to statutorily specified

- considerations, awards treble, as opposed to single, damages. **(Warden, Garza)**

- A plaintiff proves that the defendant's conduct violated the antitrust laws by clear and convincing evidence.**(Warden)**

- Recommend statutory change that would “de-couple” actual and multiple damages, awarding single damages to the plaintiff and multiple damages to the government.

- Recommend statutory change that would make treble damages available only to purchasers from or sellers to a defendant found liable under the antitrust laws.

- Recommend statutory change that would retain treble damages in antitrust cases, and provide a higher multiplier for antitrust cases involving covert, hard-core, cartel conduct.**(Warden)**.

Commissioner Warden spoke first, and put forward a new proposal, a copy of which is attached to this summary. In brief, Commissioner Warden proposed that in all cases where the federal government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains and prejudgment interest thereon shall be disgorged in that proceeding, along with whatever fines and penalties the government decides to seek. The disgorged amount will be divided among direct and indirect purchasers by the criminal court in a summary proceeding. Classes of direct and indirect purchasers may participate through counsel in this proceeding. Claims of less than \$100 will be disregarded and returned to the Treasury. The fines and penalties will also go to the federal Treasury, but the court may compensate from those amounts any private plaintiff who was a “material factor” in the instigation or successful conduct of the case. Guilt must be proved by clear and convincing evidence. There is much more to Commissioner Warden's proposal, but the discussion focused on this first item.

Commissioner Warden summarized his proposal and described it as an attempt to eliminate “excess and unproductive” social overhead associated with antitrust actions. His goal is to simplify proceedings. He stated that relief would be only under federal law except for conduct with its principal effects in a single state. He favors the recovery of attorneys fees except in cases where the court has increased the amount to be disgorged by more than the

amounts claimed for fees. Prevailing defendants would be able to recover fees in competitor cases, unless there would be a manifest injustice (e.g., a tiny competitor).

Chairman Garza asked for clarification that where the federal government had not already brought a case, private plaintiffs could bring a case and recover single damages unless the conduct was proven by clear and convincing evidence and the court found the conduct to be clearly illegal. The court would have discretion to increase the recovery up to treble damages. Commissioner Warden stated that “clear and convincing evidence” is something between a preponderance of the evidence and beyond a reasonable doubt. This will make the finder of fact think harder. The preponderance standard is still available for single damage actions.

Commissioner Litvack asked whether it was intended that the opinion of counsel would block a finding that the conduct was clearly unlawful—a situation similar to patent cases. Commissioner Warden stated that those decisions should come through the jurisprudence of the courts.

Commissioner Litvack stated that he did not favor doing away with treble damages except in cases where there’s already a government action. Commissioner Kempf asked whether this would apply to a case that is filed at the same time as the government has acted? Chair Garza remarked that those cases are sometimes filed even before the government has acted.

Commissioner Cannon stated that there are already carve-outs requiring only single damages in current law (e.g., NCRA) The proposal as to no statutory change is intended to reflect that current status quo. Commissioner Cannon’s initial reaction is to make no change to the current system. In contrast to Commissioner Litvack’s desire to do away with treble damages in cases where the government has already acted, he stated that those cases are often the most hard-core and egregious ones.

Commissioner Jacobson noted that treble damages had been on the books for 116 years. He believes that given that long history, the burden to show the need for change is heavy. There were no examples of serious injustices resulting from improvident treble damages, so he believes there is not sufficient evidence to make any change. Having an efficient private remedy and an inducement to use it is the key factor favoring treble damages (not punishment of the wrongdoer). There are lots of factors weighing against bringing antitrust suits. He stated that he was worried about the message a de-trebling of damages would send. We are in an era of less than aggressive federal antitrust enforcement and the states are running scared to some extent. Reducing the damages would send a bad message about the Commission’s faith in the antitrust laws as a regulator of our economy. Although he agrees with Commissioner Litvack that there is no reason to give free riders help, in some cases, the work has been done by indirect purchaser plaintiffs. It will be difficult to determine who is investigating ahead of time. He concluded with a strong vote for no change.

Commissioner Carlton believes that the justification for treble damages is deterrence, not

punishment. The point is to deprive a person engaged in illegal action of their gain. The reason that we impose treble damages is that we don't see all illegal acts. The distinction to be drawn is therefore between covert and overt actions. For overt actions, there should be no treble damages. For covert actions, there should be treble damages. He deprecated the lack of empirical evidence in this area and would like to determine the effect on innocent parties in the industry, as well as guilty parties. For hard-core conspiracies, the court should be able to impose more than treble damages. The increase in international conspiracies, where only a small fraction of the whole can be addressed in U.S. courts, also argues for treble damages.

Commissioner Burchfield commended the staff for their hard work on the papers addressing the issues. He asked Commissioner Warden if, under his proposal, the prosecutor could enter into a plea deal for less than the full amount of the gain? Commissioner Warden said that the prosecutor could, although private plaintiffs would be another party pressing the prosecutor to stand firm, although they would not be "exactly at the table." Commissioner Burchfield said he was troubled by treble damages in competitor cases, where competitors could be gaming the system. He is also troubled by the availability of treble damages in non per se cases, where the defendant doesn't necessarily know that the conduct is illegal. Despite these doubts, he doesn't know whether the Commission has enough evidence to justify this change. He is persuadable, but needs to see much more evidence.

Commissioner Yarowsky stated that damages are a central pillar of the antitrust laws, and an important part of their structure. Senator Sherman wanted a "first person enforcer" to detect violations that the federal government might not see. The staff has done an excellent job of listing all possible options in the outline. The vast spectrum of witnesses came down on the side of no change. He cautioned against equating treble damages with punitive damages, which are extraordinary in nature. He noted that Commissioner Warden's proposal used the standard of proof for fraud cases and that the Anglo-Saxon system purposely provided a higher burden of proof for fraud. He believes that the detrebling under the National Cooperative Research Act (NCRA) takes care of Commissioner Carlton's concern about treble damages in joint venture situations.

Commissioner Kempf stated that he was interested in Commissioner Warden's proposal, but wants to get DOJ's views on whether they want to run a disgorgement proceeding. The resources to do so must come from somewhere, and he would not like them to have to reduce their cartel enforcement by 50 percent in order to do these new proceedings. He is not sympathetic to Commissioner Litvack's proposal for follow-on cases because the conduct at issue there is hard-core conduct.

Commissioner Valentine stated her preference for no change to the current laws. She believes treble damages have been the greatest deterrent and the witnesses before the Commission all said there was no reason to change them. To address Commissioner Litvack's issue, she would propose urging the courts to award attorneys' fees at the lower end of the multiple in follow-on cases.

Chairman Garza stated that she, like Commissioner Carlton, thought of treble damages as a deterrent. That deterrent effect points to a lesser need for them in vertical distribution, joint venture and monopolization claims. She agrees that there was originally a good rationale for treble damages. She is troubled by “line-drawing” between different types of cases, because it will be difficult to administer. Therefore, she looked for procedural fixes, specifically the provision allowing a court to de-treble based on a statutorily specified list of factors. The list might be included in the legislative history, and might include the factors listed in the outline. This would allow the court to act fairly where there might be strategic actions by competitors. Chairman Garza is interested in the Warden proposal because it eliminates the waste in follow-on actions, and would allow a bounty to helpful plaintiffs.

Commissioner Shenefield is intellectually troubled by treble damages, but hasn’t been able to think of a way to fix it, so he is inclined to vote for no change. He believe Chairman Garza’s suggestion to leave it to the court is too loose.

Commissioner Jacobson stated that in cases where the government can’t enforce criminally, they will seek injunctive relief, which is not much more than a slap on the wrist. A company could easily come to the conclusion that they will just be enjoined, which is not sufficient deterrence. The Visa/MasterCard situation was overt, a joint venture, but was still a flagrant violation. The Microsoft case also involved overt conduct. It is precisely in these types of cases that you need inducements for people to sue. Without treble damages, he thinks monopolization and joint venture offenses would increase. Looking at treble damages as an inducement to sue, rather than as a deterrent, Chairman Garza’s suggested discretion in the court would reduce that inducement.

Commissioner Warden said he would not speak about Microsoft, but believed that American Express did not need any inducement to sue Visa and Master Card other than its own business interests. He stated that he is not seeking to abolish treble damages, but just to fine tune the system. He shares Commissioner Kempf’s concern about DOJ resources, but believes there would be great savings from his proposal. He believed that whether or not single damages fully compensate victims was not the issue—they are supposed to do so. Congress could add additional penalties. With regard to the “clear and convincing” evidence standard, it could always be argued in a covert case that the evidence is in possession of the wrong-doer. He is looking at this from the perspective of a CEO who finds himself in a “Kafkaesque nightmare” when he had no idea that the course of action was even close to the line. He agrees that the witnesses before the Commission did not favor getting rid of treble damages.

Commissioner Litvack stated that his earlier proposal was directed to something not directly on point: attorneys bringing follow-on cases. He is interested in Commissioner Warden’s proposal, especially since Commissioner Warden stated that he is not ruling out an increase in penalties. From a deterrence perspective, it doesn’t matter where the money goes. Commissioner Litvack thinks the deterrent effect of treble damages is overstated—the real deterrent is jail time. But, the antitrust laws have been on the books a long time, and Congress

thought that private Attorneys General were useful. We currently have a perverted system that imposes costs unfairly.

Chairman Garza stated that private causes of action should be available for causes of action that aren't appropriate for criminal prosecution. Antitrust cases are different from business contract cases. There is harm to the market as a whole from the dead weight of the illegal conduct. NCRA's single damage scheme has been in place for some time and there is no empirical evidence that anticompetitive conduct is increasing.

Commissioner Yarowsky suggested that the Commission should perhaps be looking at the substantive violations rather than the remedies. He does not favor importing the Sentencing Guidelines, with their "nuances," into the antitrust law. He does not want to shift uncertainty into the message of the antitrust laws.

Commissioner Kempf stated that it doesn't seem "fair" for plaintiffs to get treble damages. He proposed amending Chairman Garza's suggestion as to discretion in the court to include the list of factors included in the second bullet point in the outline. Application of these factors by the court could eliminate this perceived unfairness. He believes that treble damages do deter defendants from having their claims resolved in court, rather than through settlement. He also suggested that Commissioner Warden's proposal be put out for comment from the public generally and from the DOJ specifically. Chairman Garza treated these proposals as motions, which were approved by the Commission. Chairman Garza stated that the staff would re-work the proposals and send them out. Copies of each proposal, as distributed at the meeting, are attached.

Commissioner Carlton stated that if the Commission must have clear and convincing evidence that things need changing before proposing any changes, the Commission won't be able to do anything. Things have changed—we now have globalization of world trade, so international conspiracies have greater effect in the US. We need to rationalize multiple damages. He likes Commissioner Kempf's idea to list the factors for the court to consider in the statute.

Commissioner Yarowsky stated that requiring the court to consider a list of factors will result in diversity in the circuits and forum shopping. All these "balls in the air" dilute the message of antitrust enforcement. Commissioner Kempf agreed there would be diversity of decisions, but stated that it would be better than what we have now.

### **Prejudgment Interest**

*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. **(Litvack, Burchfield, Valentine, Kempf, Jacobson, Cannon).**

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

If so:

A.

- Prejudgment interest would be awarded in the discretion of the court.
- Prejudgment interest would be awarded in all cases. **(Carlton, Warden, Shenefield, Garza)**

B.

- Prejudgment interest would accrue from the time of injury, **(Carlton, Warden, Shenefield, Garza)**
- Prejudgment interest would accrue from the filing of the complaint.

### **Attorneys' Fees**

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. **(Shenefield, Valentine, Cannon, Carlton, Garza)**

- Recommend statutory change to bar plaintiffs from recovering attorneys' fees in addition to treble damages. **(Warden)**

- Recommend statutory change to allow defendants to recover attorneys' fees for frivolous antitrust cases. **(Burchfield, Warden, Kempf, Garza)**

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

- Proposal by Commissioner Valentine—When action is brought as a follow-on to U.S. Government action and is successful, the court should consider reducing attorneys' fees to take into account the effort made. **(Burchfield, Shenefield, Valentine, Carlton, Garza, Jacobson (in report only—not statute))**

- Proposal by Commissioner Kempf—"English rule"—attorneys' fees to prevailing party. **(Kempf, Warden, Carlton)**

- Proposal by Commissioner Litvack—eliminate attorneys' fees in follow-on cases except where otherwise provided by statute. **(Litvack, Warden)**

The Commissioner spent some time discussing three new proposals with regard to attorneys' fees, as described above. There was no consensus.

### **Enforcement Institutions-Federal**

1. *Should merger enforcement continue to be administered by two different federal agencies?*
2. *Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated?*

- [1] No statutory change is appropriate; substantive merger enforcement under the HSR Act should continue to be conducted by the two antitrust agencies. **(Valentine, Shenefield, Jacobson, Garza, Yarowsky, Burchfield, Litvack)**
- [2] All substantive merger enforcement authority under the HSR Act should be assigned exclusively to one agency or the other— *i.e.* , to the Federal Trade Commission (“FTC”) or the Department of Justice Antitrust Division (“DOJ”). **(Kempf, Warden, Litvack, Carlton)**

If so:

- [a] The FTC should have exclusive substantive HSR Act enforcement authority.
- [b] DOJ should have exclusive substantive HSR Act enforcement authority. **(Kempf, Warden, Litvack, Carlton)**

*Assuming dual federal enforcement authority continues to exist:*

3. *Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?*

- [3] No statutory or practice change is appropriate.
- [4] Recommend that the FTC and DOJ implement a new merger clearance process based on the principles contained in the 2002 clearance agreement or such other principles as the agencies deem appropriate, with the goal of clearing all mergers to one agency or the other within a short period of time. **(Valentine, Shenefield, Kempf, Jacobson, Garza, Yarowsky, Warden, Litvack, Burchfield, Cannon, Carlton)**
- [5] Recommend that the relevant committees in Congress encourage the FTC and DOJ to implement a new merger clearance process based on the principles contained in the 2002 clearance agreement or such other principles as the agencies deem appropriate, with the goal of clearing all mergers to one agency or the other within a short period of time. **(Valentine, Shenefield, Kempf, Jacobson, Garza, Yarowsky, Warden, Litvack, Burchfield, Cannon, Carlton)**
- [6] Recommend legislation requiring the FTC and DOJ to clear all mergers under the HSR Act to one agency or the other within a specified period of time ( *e.g.* , seven calendar days), and to adopt processes to meet that requirement. **(Valentine, Shenefield, Kempf, Jacobson, Garza, Warden, Cannon, Carlton)**

Commissioner Jacobson proposed that the Commission encourage the agencies to agree to clearance within five days. If not cleared within 18 days, there would be a “jump ball” or the transaction would automatically clear. Commissioner Burchfield did not want to force a mandated period of days on the FTC and DOJ unless the agencies thought that the Commission’s views on this would be helpful. Commissioner Cannon stated that this is just the type of legislation that Congress can do—it is simple. Commissioner Jacobson stated that no matter how good the exhortation is to the agencies, they will tend to let things slide. He described a

transaction which languished for 28 days. On the 29<sup>th</sup> day, the agencies got a call from a customer, and on the 30<sup>th</sup> day it was cleared to one agency and a second request was issued. He suggested that if the agencies are unable to agree to clearance, all even docket numbers should go to one, and all odd docket numbers to the other.

Commissioner Kempf stated that he favored elimination of dual jurisdiction. The FTC is a “favored stepchild” of Congress, but he is not talking about scrapping the agency, just eliminating one part. Commissioner Yarowsky stated that he doesn’t care about the allocation of transactions among the agencies, but just about the procedure. If Congress gets involved, they will likely allocate industries to different agencies. He does not favor the odd/even suggestion. Commissioner Jacobson stated that this was just a fall back when the agencies were not able to agree on clearance. Commissioner Yarowsky asked whether Commissioner Jacobson would agree to a neutral arbitrator instead. Commissioner Jacobson stated that would just add more time and complication to the process.

Chairman Garza stated that she was seeking the best way to help DOJ and the FTC on this process. Commissioner Kempf suggested that Chair Garza and Vice-Chair Yarowsky speak to the staff of the Senate Commerce Committee about this issue. Commissioner Burchfield stated that he believed legislation was not necessary and it would be helpful for the AMC to support the agencies working it out among themselves so they can make adjustments to the process as needed. Chairman Garza pointed out that there are already statutory deadlines in the HSR Act, so there should be no greater problem with shorter deadlines for clearance. Commissioner Litvack stated that FTC Chair Deborah Majoras had to swear to Congress and to the White House that she would not propose this type of legislation. Commissioner Yarowsky stated that the worst case scenario would be if they tried for legislation and it failed—the agencies would not move forward. He suggested a strong exhortation, and if no resolution ensues, legislation may be necessary.

Commissioner Shenefield asked about tie-breakers that couldn’t be gamed by one agency. He pointed out that if the agency with even numbers wanted to investigate a transaction with an even number, they could just wait to the end of the process and automatically received it. Commissioner Jacobson stated that this would be inequitable on individual mergers, but not over time. He quoted Justice Brandeis to the effect that having this settled is better than having it settled right. Commissioner Kempf pointed out that the odd/even system would benefit the parties in that they would know which agency would be reviewing the transaction. Commissioner Garza agreed and noted that it would still be resolved more quickly. Commissioner Valentine suggested that the parties get to pick if the agencies can’t decide. She also suggested that legislation could simply require that the decision occur by a set deadline. Commissioner Burchfield suggested a “resolution” by Congress which would recognize the agencies’ ability to work it out but would serve as a marker.

Commissioner Yarowsky suggested that the agencies be required to publish clearance statistics. Commissioner Kempf stated that this would be misleading, because the vast majority

of transactions don't have a problem, and the numbers would be small in both relative and absolute terms.

4. *To the extent there is a difference in legal standards that the agencies face in obtaining a preliminary injunction, should the different standards be harmonized? If so, how?*

- [7] No statutory change is appropriate. There is insufficient evidence that preliminary injunction standards applicable to the two agencies have resulted in materially different outcomes. **(Burchfield, Litvack, Yarowsky, Jacobson, Cannon)**
- [8] Recommend statutory change to ensure that the legal standard for obtaining a preliminary injunction in merger cases is the same for both the FTC and DOJ. **(Warden, Garza, Kempf, Shenefield, Valentine, Carlton)**

If so:

- [a] The Clayton Act should be modified to adopt the standard specified in Section 13(b) of the FTC Act for preliminary injunctions in HSR merger cases. **(Carlton, Kempf)**
- [b] Section 13(b) of the FTC Act should be modified to specify the traditional equitable standard is applied when the FTC seeks a preliminary injunction in HSR merger cases. **(Warden, Garza, Shenefield, Valentine, Yarowsky (possibly))**

5. *Should there continue to be a difference in the procedural aspects of federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how should that be done?*

- [9] No change to the FTC's statutory authority for Part III administrative litigation is appropriate. **(Kempf)**
- [10] Recommend that the FTC and DOJ consolidate proceedings for preliminary and permanent relief in HSR merger cases whenever possible. **(Burchfield, Warden, Garza, Kempf, Shenefield, Carlton)**
- [11] Recommend that the FTC adopt a policy that will limit its use of Part III procedures with respect to mergers subject to HSR Act notification to exceptional circumstances, but do not recommend any statutory change. **(Litvack, Warden, Yarowsky, Kempf, Valentine (possibly))**
- [12] Recommend statutory modification to Section 13(b) of the FTC Act that would restrict the circumstances in which the FTC can use its Part III procedures with respect to mergers subject to HSR Act notification to exceptional circumstances. **(Jacobson, Carlton (possibly))**
- [13] Recommend statutory modification to Section 13(b) of the FTC Act that would prohibit the FTC from pursuing administrative litigation if it fails to obtain a preliminary injunction in an HSR merger case. However, the FTC would not be barred from pursuing administrative litigation, post-closing, based on evidence that a consummated merger has actually had anticompetitive effects. **(Cannon, Litvack, Yarowsky, Garza, Valentine, Shenefield, Carlton).**

Commissioners Yarowsky and Warden stated that they did not want to increase the FTC's

current burden in these cases. Commissioner Litvack expressed concern about option 10, in which the agencies consolidate preliminary and permanent injunction proceedings, because the FTC can't do this. Commissioner Kempf stated that the FTC can agree to do both preliminary and permanent injunction at once, but can't be forced to.

Commissioner Burchfield stated his support for no statutory change in injunction standards because the Supreme Court has been pushing the lower courts toward a unified injunction standard for decades. Commissioner Jacobson said that there was value in having a separate preliminary injunction hearing. Deals that need a quick answer do not necessarily have to go through the permanent injunction hearing first. Commissioner Kempf stated his support for option 8(a) because there are differences in the injunction jurisprudence in the federal courts. If uniformity is the goal, the application of 13(b) standards will achieve it. He cited the differences between "serious questions of law" and "likelihood of success on the merits." In response to a question from Commissioner Warden, Commissioner Kempf stated that mergers have been enjoined based on the "serious questions" standard. Commissioner Valentine pointed out that section 13(b) applies to consumer protection cases at the FTC as well as antitrust cases. Commissioner Carlton expressed concern about the asymmetry between the procedures before the FTC and in the courts. Commissioner Kempf stated that there are differences in different courts as well.

### **Enforcement Institutions-States**

1. *What role should state attorneys general play in merger enforcement?*
2. *Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal antitrust enforcement agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?*

- [1] No change is appropriate to the current roles of states and federal enforcement agencies in merger enforcement. **(Burchfield, Yarowsky, Cannon, Jacobson, Valentine)**
- [2] Recommend statutory change that allocates merger enforcement activity between the federal and state enforcement agencies.
  - [a] Recommend that merger enforcement be exclusively conducted by federal enforcers. **(Warden, Litvack, Garza)**
  - [b] Recommend division of merger review depending on the locus of harm. When the effects of a merger are national (or not limited to a single state or small group of states), states would not have the authority to investigate the merger. **(Kempf, Shenfield, Carlton)**
  - [c] Recommend a federal right of first refusal on merger enforcement. No state would be permitted to investigate a merger if a federal enforcer is already doing so. **(Warden, Litvack, Carlton)**
- [3] Recommend improved coordination among enforcers, which would help achieve

consistency and predictability of outcomes, irrespective of any limits on state merger enforcement. **(Kempf, Litvack, Garza, Jacobson, Burchfield (guidance only), Valentine (guidance only))**

- [a] Recommend harmonization of the substantive antitrust law between states and the federal government. **(Carlton, Warden)**
  - [I] Recommend the NAAG merger guidelines be revised to reflect the current state of antitrust law and theory.
  - [ii] Recommend the states adopt the federal merger guidelines. **(Carlton)**
- [b] Recommend that data requests are consistent across enforcers. **(Carlton, Warden)**
- [c] Recommend adoption of a model confidentiality statute to eliminate inconsistencies between state and federal confidentiality agreements. **(Carlton, Warden)**
- [d] Recommend NAAG establish a permanent staff of lawyers and economists with the responsibility of assisting and overseeing the states' merger review process. **(Kempf, Garza)**

3. *What role should state attorneys general play in non-merger civil enforcement? To what extent is state parens patriae standing useful or needed?*

4. *Should state and federal enforcers divide responsibility for non-merger civil antitrust enforcement based on whether the primary locus of alleged harm (or primary markets affected) is intrastate, interstate, or global?*

5. *Has the ability of states and private plaintiffs to seek injunctive relief under 15 U.S.C. § 26 benefitted consumers or caused harm to businesses or others? Should standing to pursue injunctive relief under federal antitrust law be different for states than it is for private parties?*

- [4] No change is appropriate to the current role of the states in non-merger civil antitrust enforcement. **(Litvack, Garza, Burchfield, Yarowsky, Cannon, Jacobson, Kempf, Valentine)**
- [5] Recommend that state civil non-merger enforcement be restricted to those matters involving localized conduct or effects.
  - [a] The restriction should apply equally to matters seeking damages and injunctive relief. **(Shenefield, Carlton, Warden) (Kempf–guidance only)**
  - [b] The restriction should apply differently depending on whether damages or injunctive relief is being sought.
- [6] Recommend that state civil non-merger enforcement be restricted to certain types of antitrust matters. **(Shenefield, Carlton, Warden)(Kempf–guidance only)**
  - [a] Recommend restriction to local horizontal price-fixing cases. **(Shenefield, Carlton, Warden)**
  - [b] Recommend restriction to matters with direct consumer impact.
  - [c] Recommend restriction to matters involving injunctive relief.
  - [d] Recommend restriction to matters seeking damages.
- [7] Recommend statutory revision of Section 4c of the Clayton Act to create a formal

review process by which a state attorney general who wished to bring a *parens patriae* case would submit the matter for review by the federal enforcement agencies. If the federal agencies cleared the matter, the state could proceed.

- [a] The revision should apply equally to matters seeking damages and injunctive relief.
- [b] The revision should apply differently depending on whether damages or injunctive relief is being sought. **(Warden)**

Chairman Garza stated that she finds it difficult to say that state Attorneys General should have less power than private parties in merger enforcement. Commissioner Kempf stated that if the Commission adopts the restrictions contained in 2, 3, 4, 5, 6 and 7, it would ensure a massive attack on the work of the Commission by Congress. He believes the Commission can achieve the same thing by making a recommendation in its report, urging use of sound enforcement discretion, etc. Commissioner Warden stated that he took Commissioner Kempf's point as to the political realities, but that doesn't persuade him. He doesn't know how much problem exists in this area, but as a matter of principle will vote to restrict states. Chairman Garza expressed approval of the recommendation to states to concentrate on local matters. She believes states are doing this in any case.

Commissioner Jacobson stated his strong belief that plurality of enforcement plays an important role. He noted that notwithstanding ample opportunity given to the public by the Commission, there has been no demonstration of systematic or significant episodic improper enforcement. No case has been made for systematic revision of the current methodology of state enforcement. He views the states as a check against under enforcement at the federal level—the Microsoft case illustrates this. He believes that the states and federal agencies strive to coordinate their actions to the greatest extent possible. He has not heard of any instances of poor coordination. With regard to the merger guidelines, he noted that the courts apply the same law no matter what.

Commissioner Warden stated that the states have created a second repository of power under article 2 of the Constitution. We should have a single competition policy in this country. It is a vital part of that policy for DOJ and the FTC to determine what the relief should be in any given case. He stated that the idea of under-enforcement is not persuasive because it is not a two-way street—no one is saying that the states should be able to prevent over-enforcement by the federal agencies.

Chairman Garza stated that she believes the nation's economy is interlinked, and the Administration that is elected by the people should be able to take steps it believes necessary. However, she remains concerned about preventing state Attorneys General from bringing cases when private plaintiffs can. Commissioner Yarowsky stated that limiting the state Attorneys General to transactions with local effect is tricky—what is considered purely localized effect is shrinking. Commissioner Shenefield stated that even though he had represented some of the settling states in the Microsoft case, he still thinks state Attorneys General should not be able to

interfere with national enforcement policy.

Commissioner Jacobson noted that the states have no “pull” through the HSR process. The only way a state can block a merger is to get a court to agree with that result. States really have to prove their cases—there is no presumption that they are right, as there is for the federal agencies. Because of a number of Supreme Court cases, there is effectively no private right of action in merger cases. He is unwilling to say that we should allow enforcement to turn completely on the ballot box.

Commissioner Carlton stated that merger policy at the federal level has been relatively consistent over various administrations. There are more political pressures at the state level. He wants to stress the states’ comparative advantages in local knowledge, that’s why he favors a limited state role. States also have less resources. Commissioner Jacobson acknowledged that state Attorneys General may face political pressures. However, they still have to prove their case in court. Commissioner Shenefield stated that a national merger enforcement policy should not be in the hands of a federal judge only.

In response to a question by Commissioner Burchfield, Commissioner Warden stated that he wanted to reverse the state Attorney General’s authority to sue under federal law and preempt state law. Commissioner Litvack stated that he was willing to leave non-merger enforcement as it stands right now, but he believes the country needs a merger policy in one federal agency. Commissioner Carlton stated that he favored preemption except with regard to local mergers, but defining what is local is very difficult. Some state merger laws take into account the effects on employment in the state, and should definitely be preempted.

Commissioner Warden stated that he would favor one statute that would clarify all state authority (including parens authority). He believes the statute should say that state Attorneys General cannot do under state law what they cannot do under federal law. For local matters, he is indifferent as to whether the state Attorney General brings a case under state or federal law.

Commissioner Kempf stated that because five Commissioners have now expressed that they believe merger matters should be handled by the federal agencies, he will change his vote. He believes that the Commissioners could be persuaded to rally around either 2[a], [b] or [c] or some combination. He wants to do something that is not irritating to the states. Commissioner Yarowsky stated that the only possible option is to do a structural change—only a complete ban on state merger enforcement is possible. Otherwise, there will be too much litigation about what is local. Commissioner Valentine stated that she would be content to urge the states to focus on local matters. Chairman Garza said that even if states had no authority, they would still have the ability to go to the federal agencies and ask the to do it. Presumably, if it has some merit, the federal agencies would pursue it. Commissioner Valentine stated that she just thought the federal agencies would pay more attention if the states had their own ability to enforce the law.

Commissioner Jacobson stated that he was concerned that by including this provision, the

Commission would put its entire report in a different light, and it would have much less traction on Capitol Hill. These issues will have spill-over effect on the rest of the report. He expressed concern that the Commission was “careening toward” a different direction. Commissioner Cannon stated that the Commission didn’t seem to be careening, but upon re-counting, he acknowledged that Commissioners Carlton, Warden, Kempf, Garza and Litvack were all in favor of complete preemption of state merger enforcement. Chairman Garza jokingly thanked Commissioner Cannon for his help in solidifying support for her view of the issue.

Commissioner Warden stated that he preferred alternative [2b] or [2c] to [2a], but [2a] is preferable to the status quo. Commissioner Burchfield stated that he saw a significant problem with 2a, which is that it removes state Attorney General authority only until the merger is consummated. If the state believes that the merger is likely to be anticompetitive, it will be challenged later on those grounds. Chair Garza stated that it was more difficult to challenge a merger after the fact. Commissioner Burchfield stated that if a state Attorney General is willing to go to court today in circumstances where the federal agencies have not, the Attorney General will find a way to challenge mergers. If the Commission’s purpose in voting for [2a] is to move mergers through more quickly, then it may accomplish that purpose. If the purpose is to rationalize merger policy, this is not going to do it.

Commissioner Jacobson noted that the Supreme Court decided in *Philipsburg* that there is an ability to challenge a merger under the Sherman Act. Commissioner Carlton stated that it is up to a federal judge to determine whether a merger challenge is successful. He believes that in its exercise of prosecutorial discretion, DOJ weighs the overall benefit of the merger against the costs to smaller parts of the whole. States don’t do that weighing. States are only appropriate “laboratories” when there are no national effects. He might favor permitting states to prove the merger had anticompetitive local effects. Even if Commissioner Burchfield is correct, the state’s challenge would only involve local effects, and thus wouldn’t be as damaging. Commissioner Warden stated that he agreed with Commissioner Carlton and believed that Commissioner Burchfield’s concerns might be somewhat overstated. He also dismissed Commissioner Jacobson’s reference to *Philipsburg*, because the intent of option 2a is to preempt the Attorneys General from enforcing the entire range of antitrust laws, not just the Clayton Act. It would provide exclusive federal jurisdiction on everything.

## **Robinson-Patman Act Discussion Outline**

### *1. What purposes should the Robinson-Patman Act serve?*

- [1] Find that the Robinson-Patman Act should promote consumer welfare, total welfare, and competition. **(Jacobson, Garza, Burchfield, Litvack, Carlton)**
- [2] Find that the Robinson-Patman Act should protect small retailers from the exercise of buyer power.
- [3] Find that the Robinson-Patman Act should protect small retailers from the exercise of buyer power, but only where such protection is consistent with promoting consumer

welfare, total welfare, and competition.

- [4] Find that the Robinson-Patman Act does not serve any purposes not already served by Sections 1 and 2 of the Sherman Act. **(Kempf, Warden, Garza, Burchfield, Litvack, Carlton, Cannon, Warden, Jacobson)**

2. *What are the benefits and costs of the Robinson-Patman Act as currently enforced?*

- [5] Find that the Robinson-Patman Act imposes significant costs on U.S. businesses and consumers that outweigh its benefits to consumers and competition. **(Kempf, Warden, Garza, Burchfield, Litvack, Carlton, Cannon, Warden, Jacobson)**

- [6] Find that the Robinson-Patman Act provides benefits to U.S. consumers through preservation of fair competition that exceed the costs it imposes on businesses and consumers.

- [7] Make no specific finding with respect to the costs and benefits of the Robinson-Patman Act. **(Yarowsky, Shenefield)**

3. *Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts altered?*

- [8] No statutory change to the Robinson-Patman Act is appropriate.

- [9] Recommend that Congress repeal the Robinson-Patman Act in its entirety. **(Kempf, Warden, Garza, Burchfield, Litvack, Carlton, Cannon, Warden, Jacobson)**

- [10] Recommend that Congress repeal the criminal provisions of the Robinson-Patman Act, but leave the civil provisions as is [or with specified changes, as proposed below]. **(Yarowsky, Shenefield)**

- [11] Recommend that the FTC increase its enforcement of the Robinson-Patman Act.

- [12] Recommend that Congress amend the Robinson-Patman Act so that it covers sales of services (in addition to commodities). **(Yarowsky)**

- [13] Recommend that plaintiffs in Robinson-Patman cases be required to make a showing of injury to competition similar to that required under the other antitrust laws.

If so:

- [a] Encourage the courts to interpret the existing law to impose such a requirement.

- [b] Recommend that Congress amend the Robinson-Patman Act to impose such a requirement.

- [14] Recommend that Congress amend the Robinson-Patman Act to require that plaintiffs in Robinson-Patman cases establish “buyer power” on the part of the favored buyer. **(Yarowsky, Shenefield)**

- [15] Recommend that Congress amend Sections 2(d) and 2(e) of the Robinson-Patman Act (regarding promotional services and materials) to require that a plaintiff asserting a claim meet the same competitive injury requirement applicable to discriminatory pricing claims. **(Yarowsky, Shenefield)**

- [16] Recommend that Congress repeal Section 2(c) of the Robinson-Patman Act (regarding the payment of commissions or brokerage). **(Yarowsky, Shenefield)**

- [17] Recommend that Congress amend the Robinson-Patman Act to permit defendants to establish the cost justification defense by showing that the preferential price was

“reasonably related” to cost savings. **(Yarowsky, Shenefield)**

Commissioner Litvack favors repeal of the Act in its entirety, or at a minimum, repeal of section 3. The Act serves no purpose different than Sherman Act sections 1 and 2. Anecdotaly (although no empirical evidence has been shown) the costs are enormous. Commissioner Litvack doesn't want to amend it in any other way because that would imply it should be retained. Commissioner Burchfield also voted for repeal. He stated that he is less pessimistic about the chance of repeal now that a consensus has formed about the purposes of the antitrust laws. Commissioner Kempf suggested that option 1 should be amended to read “Find that the antitrust laws should promote consumer welfare, total welfare, and competition.” Commissioner Cannon also voted for repeal, noting that although he is no expert in it, there appears to be no significant case for retaining it.

Commissioner Yarowsky stated that although he also believed it should be repealed, that is not a recommendation that will be received with any credibility on Capitol Hill. This repeal is not going to happen because economic discrimination is coming up in other contexts, in particular, the media and telecommunications industries. Because the Robinson-Patman Act doesn't work, other agencies have created their own rules and regulations to deal with discrimination. He cited as an example the program access rules created by the FCC. At this moment, Commissioner Yarowsky pointed out, Congress is debating “net neutrality” legislation, which includes antidiscrimination provisions. Commissioner Yarowsky stated his belief that if Robinson Patman applied to services, it would resolve some of these issues.

Commissioner Jacobson stated that he agreed with Commissioner Burchfield in thinking that repeal is not a political dead letter. Commissioner Garza stated that she thought it might be better for Congress to direct its attention specifically to the networking industries described by Commissioner Yarowsky, rather than using the Robinson-Patman Act. She wondered whether this would follow the Illinois Brick model, where 30 states enact their own legislation. Commissioner Yarowsky stated that he did not believe states would enact such statutes.

Commissioner Valentine pointed to a decline in the number of Robinson-Patman cases brought. She believes it is the wrong remedy for cases of buyer power. The “Wal-Mart” issue should be addressed through application of monopsony jurisprudence. Commissioner Warden stated that the specific networking industries raised by Commissioner Yarowsky should be dealt with on their own terms.

Commissioner Burchfield stated that perhaps the Commission should make a strong statement that the Robinson-Patman Act is disliked by business, economist and academics and that it doesn't serve the purposes of the antitrust laws. Commissioner Jacobson stated that a number of states have little R-P Acts. He would argue vigorously against preemption of these statutes, but would recommend that state courts should interpret those provisions to require plaintiffs to make a showing of injury to competition similar to that required under the other antitrust laws. Although Commissioner Jacobson believes that true monopsony power is rare, he

suggested that the FTC study buyer power and economies of scope and the positive or negative effects on consumer welfare.

Commissioner Kempf stated that some of the most powerful support for repeal came from those testifying in opposition to that repeal. He believes that the Supreme Court, which has taken six or seven R-P cases during the past years and no merger cases, is wasting the limited time it gives to antitrust cases. The fear by small grocery stores of A&P was the impetus for this Act, and now both the small stores and A&P are gone. He noted that the 9<sup>th</sup> Circuit recently issued an opinion in the Weyerhaeuser case, which involved monopsony.

Commissioner Cannon stated that there are still small grocers, and in fact they have a trade association. He stated that inclusion of services in the R-P Act would not solve any problems. There is lots of harm in this statute, even if it is not being enforced. Commissioner Carlton stated that the R-P Act helps one group at the expense of others. This is exactly the type of legislation politicians like—it helps a grateful small group a lot, while hurting a great many people just a little. Perhaps the way to do it is to let Congress debate this in the sunshine of full press coverage.

Commissioner Shenefield stated that the subject is more complicated. The Commission needs to ask what needs is this responding to? What needs are being met? The antitrust laws are actuated by purposes greater than economics. Commissioners should ask whether the benefit to the smaller group is greater than the harm to the larger disfavored group. He has seen no evidence of the costs and benefits of R-P. He would be happy to hear of a better way to take care of small businesses.

Commissioner Jacobson stated that the R-P Act is not a useful tool to achieve the goal of protecting small businesses. Protection is better achieved through tie breakers and robust vertical enforcement, as described in a Robert Pitofsky article. The evidence of harm is the cost of compliance with the statute. Commissioner Jacobson has spent hours on the phone counseling clients on these matters. Commissioner Cannon stated that small business is the economic engine of this country, but the R-P Act is not the reason for that. He does not believe small business is clinging to this anymore. Commissioner Litvack stated that the costs of the R-P Act are wasted time, price rigidity and costs of compliance. The Commission has not seen evidence of any benefits. Commissioner Kempf asked the staff to look at the hearing record to see if there is any evidence of harm. He expressed concern that the easiest way to avoid the R-P Act is to decline to lower prices to consumers.

Commissioner Burchfield stated that he views the “meet but don’t beat” requirement as incredibly irrational. Businesses are encouraged not to lower prices as low as they can go. Chair Garza stated that she had asked a local small grocer in Rappahanock County about his views of the R-P Act, and he told her he thought it was absurd. Commissioner Jacobson stated that the Act’s effects on price rigidity are not imaginary. It doesn’t encourage discounting. Much time is spent advising around the act, but some clients just are not willing to take risks. He cited

booksellers and gasoline retailers. Commissioner Warden stated that he agreed with Commissioner Jacobson. It is a burden to have to consult a lawyer before you can set a price. Commissioner Shenefield stated that compliance burdens are not alone a reason for repeal. Commissioner Valentine stated that the paper submitted by the ABA with rationales for preserving R-P was not persuasive. Commissioner Yarowsky suggested that if the Commission recommended repealing R-P, it be done as a technical matter of cleaning up the antitrust laws. Commissioner Carlton stated that perhaps Congress would want to help small business in other ways, rather than taxing consumers in certain industries.

Chair Garza brought the meeting to a close at about 4:20. She stated that the next hearing would be on June 7 and would cover State Action and International Antitrust, and possibly other matters. The meeting will be held at the FTC Conference Center.