

## Antitrust Modernization Commission Meeting

November 14, 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 Tuesday, November 14 from 9:45 to 2:45. All Commissioners were present, but Commissioner Delrahim arrived late and Commissioners Kempf, Shenefield and Warden left shortly before the end of the meeting. AMC Executive Director Andrew Heimert summarized the topics to be discussed.

I have summarized the discussion of each topic first, and, where applicable, included a tally of the votes for various proposals in the Discussion Outlines prepared by Commission staff. The Commission deliberations resulted in many changes to the original proposals from the staff. Only the final items voted on are included in this summary. The Discussion Outlines may be found at [www.amc.gov](http://www.amc.gov) and should be reviewed in conjunction with this summary. In the course of the meeting, it was announced that there would be another deliberative meeting on December 5, 2006, at which the Commissioner will discuss matters unresolved at this meeting.

### State Merger Enforcement Issues

Commissioner Kempf submitted a new proposal with respect to state merger enforcement, which he described as an attempt to reconcile the different positions and achieve a unanimous voice. He has concerns with the current state of affairs, but also has concerns with statutory changes. His proposed language was as follows:

No statutory change to the current roles of federal and state antitrust enforcement agencies with respect to assessing the competitive implications of mergers is recommended. However, these agencies are encouraged to coordinate their activities and to take comity considerations into account so that mergers are not subjected to multiple-and possibly inconsistent—proceedings.

Commissioner Garza proposed that this language be numbered 3. References to Item 3 in this summary refer to Commissioner Kempf's language.

Commissioner Warden began the discussion. He stated that footnote 1 in the Discussion outline was not accurate. He thinks states should be able to sue for damages as *parens* and seek equitable relief where sole or primary effect is in a particular state. With respect to merger enforcement, he cannot favor item 1. We have multiple national and supernational (in the case of Europe) antitrust enforcement agencies already and to add another 51 enforcers is not good. Merger policy should be formulated on a national basis. He favors item 2. He would modify it to

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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.

incorporate the “sole or predominant effect” test as described in his views on non-merger enforcement. He does not favor Commissioner Kempf’s proposed language, because it is just exhortations, like motherhood and apple pie.

Commissioner Jacobson stated that he could support Commissioner Kempf’s proposed item 3. He thinks it is an effective accommodation for all concerns. He continues to support item 1, and oppose item 2. He stated that the Commission cannot mean what it says in item 2. That item fails to recognize the ability of the states to sue in their proprietary capacity. Under item 2, a private school would be able to sue to block an anticompetitive school bus merger, but the state would not. At a minimum, if item 2 is adopted, there needs to be a carve-out to allow the state to sue where a private party could do so.

Commissioner Jacobson also stated that there has been no evidence, other than the anecdote related by Commissioner Shenefield, that the states have abused their merger authority. There is no systematic flaw that has deterred pro-competitive mergers. The burden of proof in this case, as it is with each issue considered by the Commission, should be on the proponent of change. Where there have been variations in state and federal enforcement, they have not been imprudent. He cited New York’s decision to challenge the Kraft merger, New York’s challenge in Bon Ton and California’s challenges in several supermarket mergers as sound policy decisions by the states. There is nothing that critics can point to that is harmful. Commissioner Jacobson also expressed concern about the implications on Capitol Hill of a recommendation to divest the states of authority.

Commissioner Cannon agreed that the effect of that recommendation on the Hill would not be productive. He stated that he still favored no changes to current enforcement.

Commissioner Yarowsky agreed with Commissioner Cannon that the recommendation would not get much attention in Congress, and he does not believe that is a result of the recent changes in Congressional control. He has objections to item 2 on both a theoretical and on a practical level. At the theoretical level, if you were to draw a chart of item 2, it would be quite messy, and there are many permutations. At the empirical level, he does not think that item 2 can work. First, there is no time period for the decision making. Second, what will happen if new facts emerge? State antitrust authorities will be perpetually on “one foot,” waiting for the federal agencies to decide. He believes that an important problem with this is that the state Attorneys General are involved in many transactions from many perspectives—counseling state health agencies in nursing home mergers, state PUCs in power company mergers, etc. This will just be taking them out in one area.

Commissioner Carlton stated that he was very impressed with the staff memo on state antitrust activity. He noted that a large fraction of state activity is focused on bid-rigging, which he believes is useful. and he is now convinced that in the non-merger enforcement area, state authority should not be eliminated. (This was his position in the original vote on this issue.) He stated that he continues to favor item 2, but if the majority does not approve statutory changes to limit state merger enforcement, he would support item 3.

Commissioner Burchfield stated that he does not believe that item 2 presents a significant improvement from where we are now. The political difficulty of achieving item 2 is a factor, but he thinks it is just not a good solution. He could support item 3, but agrees with Commissioner Warden that it is just “mom and apple pie.”

Commissioner Shenefield stated that, with respect to non-merger enforcement by states, he agrees with Commissioner Warden’s formulation of his position (i.e., states continue their *parens* authority and can seek equitable relief when primary impact is in the state). With respect to merger enforcement, he believes that item 3 is the same as item 1. We are currently in an untidy situation. Congress will provide the mechanics that are missing from item 2. He does not care about the political problems item 2 might raise.

Chairman Garza stated that her position on non-merger enforcement by states is the same as that of Commissioners Shenefield and Warden. She stated that she has struggled with state merger enforcement. She generally believes it is better to leave the merger regulatory scheme in the hand of one enforcer. The problem with item 2 is that it assumes that the FTC and DOJ thoroughly review each transaction that is subject to the HSR notification process. Although she is not a “fire-eater” with respect to mergers, she does not think that just because the agencies did not review it means it is problem-free. She wondered if this would put more of a burden on DOJ and the FTC because they would have to carefully screen more mergers, and noted that they had not expressed any views of this proposal. She stated that the record does not establish that states have intervened where the federal agencies have not. She does not like the idea of 51 sovereigns, but if the Commission is going to get rid of state antitrust enforcement, it should also get rid of private rights of action. She therefore supports item 3. Sometimes it is useful to go with a “mom and apple-pie” restatement.

Commissioner Litvack stated that he had flip-flopped so much on this issue he made Senator Kerry seem like he was cast in concrete. He agrees with Commissioner Burchfield that there is no point in doing something unless it makes things better. Item 2 has many problems. Item 3 does not do anything, so he supports item 1.

Commissioner Kempf stated that he would vote no on items 1 and 2. He suggested that the items agreed on by the Commissioners at their last meeting be included in item 3. He also suggested that item 2 be added to item 3, with the opening phrase, “States should generally give a right of first refusal. . .” The Commission would then be giving guidance without specifying statutory language.

Commissioner Valentine stated that she likes item 3 better than item 1. Last time she checked, the Supreme Court and Congress had made it clear that they support state enforcement of the antitrust laws. The record does not provide enough negative information to make a change. The staff memo is very interesting, and indicates that state enforcement seems to have ended up where it should. If we can live with federal agencies and private parties, we don’t have evidence of the states mucking up the system. She believes item 3 maintains the heart of our federalist system, but encourages efficient and effective use of resources.

Commissioner Warden stated that aside from “bad” enforcement actions by states (as to which he takes no position), the current system imposes costs on the parties. He believes that item 2 does have drafting problems, but the Commission could fix them. With respect to the argument that states should have the same rights to challenge a merger as private parties, he thinks private parties should not be able to do so either. Commissioner Jacobson disagreed that the presence of the states adds significant additional costs. He estimated it at less than 5 percent of all costs.

Chairman Garza asked why several Commissioners did not agree with the recommendation approved previously by the Commission that the states should revise their Horizontal Merger Guidelines to conform to DOJ’s Guidelines. Commissioner Burchfield stated that as long as the states are able to do merger enforcement, they should be able to voice their own concerns. Commissioner Yarowsky stated that DOJ could change their Guidelines whenever they want (since they do not have the force of law) and it would be silly to require the states to change their guidelines in lockstep. He anticipates convergence between the two. Commissioner Cannon agreed. Commissioner Kempf stated that he does not approve of the current DOJ Guidelines so doesn’t want to encourage either the states or the federal agencies to use them. Commissioner Jacobson stated that if DOJ changed their Guidelines to say, “We won’t challenge any mergers.” he would want the states to be able to take their own path.

The votes on the state role in non-merger enforcement were as follows:

*I. Role of state attorneys general play in non-merger civil enforcement*

- No change is appropriate to the current role of the states in non-merger civil antitrust enforcement.

<b>BB</b>	<b>SC</b>	<b>DC</b>	<b>MD</b>	<b>DG</b>	<b>JJ</b>	<b>DK</b>	<b>SL</b>	<b>JS</b>	<b>DV</b>	<b>JW</b>	<b>JY</b>
<b>X</b>	<b>X</b>		<b>X</b>		<b>X</b>	<b>X</b>	<b>X</b>		<b>X</b>		<b>X</b>

Commissioners Carlton, Garza, Shenefield and Warden would eliminate the right of states to undertake non-merger antitrust enforcement except with respect to claims brought in their capacity as *parens patriae* and claims for damages brought in their proprietary capacity.

*II. Role of state attorneys general play in merger enforcement*

[1] No change is appropriate to the current roles of states and federal enforcement agencies in merger enforcement.

<b>BB</b>	<b>SC</b>	<b>DC</b>	<b>MD</b>	<b>DG</b>	<b>JJ</b>	<b>DK</b>	<b>SL</b>	<b>JS</b>	<b>DV</b>	<b>JW</b>	<b>JY</b>
<b>X</b>	<b>X</b>				<b>X</b>		<b>X</b>		<b>X</b>		<b>X</b>

[2] Recommend that Congress should amend the relevant statutes to provide the following:

- For proposed mergers or acquisitions that require a filing under the Hart-Scott-Rodino Act, the federal antitrust enforcement agencies should have the “right of first refusal” to decide with respect to a proposed transaction whether to: (a) clear it; (b) investigate it, either independently or jointly with a state(s); or (c) refer it to a state(s) if the federal agency believes that the state(s) could evaluate the proposed transaction most effectively or efficiently, for example, due to familiarity and expertise with local markets.
- A state should not investigate or challenge under the federal antitrust laws a proposed transaction that requires pre-merger notification under federal law, unless a federal antitrust agency has asked the state for assistance in the federal investigation or has referred the matter to the state for its own investigation.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
		X						X		X	

[3] [Kempf proposal]No statutory change to the current roles of federal and state antitrust enforcement agencies with respect to assessing the competitive implications of mergers is recommended. However, these agencies are encouraged to coordinate their activities and to take comity considerations into account so that mergers are not subjected to multiple-and possibly inconsistent–proceedings.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	X			X	X	X			X		X

Immediately after lunch, the staff came back with a rewrite of the Kempf proposal as follows:

*No statutory change to the current roles of federal and state antitrust enforcement agencies with respect to assessing the competitive implications of mergers is recommended. However, these agencies are encouraged to coordinate their activities and to take comity considerations into account so that mergers are not subjected to multiple–and possibly inconsistent–proceedings. Actions that federal and state antitrust enforcers should consider in order to achieve further coordination and cooperation (which would improve the consistency and predictability of outcomes in such investigations) include the following:*

- B. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law. In particular, they should seek convergence on Horizontal Merger Guidelines.
- B. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.
- C. Through NAAG, the state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements
- D. For proposed mergers or acquisitions that require a filing under the Hart-Scott-Rodino Act, states generally should give federal antitrust enforcement agencies the “right of first refusal” to decide with respect to a proposed transaction whether to: (a) clear it; (b) investigate it, either independently or jointly with a state(s); or (c) refer it to a state(s) if the federal agency believes that the state(s) could evaluate the proposed transaction most effectively or efficiently, for example, due to familiarity and expertise with local markets.
- E. A state generally should not investigate or challenge under the federal antitrust laws a proposed transaction that requires pre-merger notification under federal law, unless a federal antitrust agency has asked the state for assistance in the federal investigation or has referred the matter to the state for its own investigation, absent a determination by the state that important state interests are at stake.

The Commissioners voted on this proposal as follows:

<b>BB</b>	<b>SC</b>	<b>DC</b>	<b>MD</b>	<b>DG</b>	<b>JJ</b>	<b>DK</b>	<b>SL</b>	<b>JS</b>	<b>DV</b>	<b>JW</b>	<b>JY</b>
<b>X*</b>	<b>X*</b>	<b>**</b>	<b>**</b>	<b>X*</b>	<b>X*</b>	<b>X</b>	<b>X*</b>	<b>**</b>	<b>X*</b>	<b>**</b>	<b>X*</b>

\* Commissioners Burchfield, Cannon, Garza, Jacobson, Litvack, Valentine and Yarowsky support item 3 with respect to subsections A, B and C only.

\*\* Commissioners Carlton, Delrahim, Shenefield and Warden support item 2, but if that is not possible, support item 3 in its entirety (including subsections D and E). Commissioner Delrahim favors item 2 with a limitation on state merger enforcement to matters with an impact on four or fewer states.

### **Regulated Industries**

The Commission focused its discussion on the unresolved items in this discussion outline, which were contained in the section on Mergers in Regulated Industries.

Commissioner Yarowsky stated that Congress has created many different regulatory schemes for different industries. Congress obviously thinks these industries should be subject to regulatory review. Some agencies defer completely to the antitrust agencies on competition analysis, some do *de novo* review. Commissioner Yarowsky thinks the antitrust agencies' review of competition should be the gold standard. There is no reason for the regulatory agency to do its own competitive review. However, there are other concerns, for example, the public interest standard applied by the FCC. He believes that DOJ should be able to challenge the agency's determination in a review under the Administrative Procedures Act (APA) rather than seeking a preliminary injunction under the Clayton Act.

Commissioner Valentine asked why the options listed are the only ones. What about a system where the antitrust agencies take into account the public interest concerns of the other agencies? In other words, the antitrust agencies are the decision makers. Commissioner Carlton asked whether we want our antitrust agencies to be able to restrain the regulatory agencies. In the absence of an explicit statement by Congress that they are replacing the antitrust standard, Commissioner Carlton would prefer to let the antitrust agencies sue under the Clayton Act. Commissioner Shenefield stated that unless Congress says so, the antitrust agencies shouldn't be able to challenge a merger approved under the public interest standard.

Chairman Garza asked whether, in a situation where the regulatory agency has made its determination, there is anything to review under the APA. Commissioner Burchfield stated that the court should apply *Chevron* deference to the antitrust agency on antitrust issues, but would apply the same deference to the regulatory agency on its own standards and on the balancing it does. So, if the agency did not give appropriate weight to the antitrust determination, the judge could correct it. Commissioner Litvack noted that this would be the same situation even if the antitrust agencies' findings were binding. Commissioner Yarowsky agreed that it could be "binding" with respect to the antitrust analysis, but the regulatory agency would still be able to balance it against other interests.

Summarizing the options, Chairman Garza stated that item 5 allows a challenge by the antitrust agencies under the Clayton Act, item 6a says no challenge (although it is possible the agencies could join in a challenge filed by someone else) and 6b says the antitrust agencies could initiate a review petition under the APA. Commissioner Delrahim asked about the situation where the regulator says the transaction can go forward and the antitrust agencies think it should be blocked. He thinks the antitrust agencies should prevail. He suggested an alternative to items 1 and 2 that encourages congress to reexamine whether it is appropriate to exempt certain agencies from the Clayton Act and the Hart-Scott-Rodino Act. There should be a presumption of no exemption. He noted that it would be awkward for DOJ to sue another federal agency.

Commissioner Litvack agreed with Commissioner Delrahim's proposed alternative. He noted that the Commissioners are naturally skeptical of regulatory agencies, because that is their bias. The purpose of regulatory agencies is to take into account all factors. So, the Commission should recommend that the antitrust analysis by the FTC or DOJ is binding, but the regulatory agency can do the balancing. Once they do, the antitrust agencies should be able to challenge their determination under the APA.

Commissioner Warden said that he did not think the Commission should show undue hostility to regulatory agencies. The Federal Reserve, for example, does a good job and collects a lot of information. He thinks Commissioner Valentine's proposal to let the antitrust agencies be the decision makers is too radical. He supports Commissioner Delrahim's proposed alternative.

Commissioner Valentine noted that the rest of the world is eliminating regulation and moving toward competition. She can live with Commissioner Delrahim's proposal. She cited FERC, the FCC and DOT as examples of regulatory agencies who are doing a bad job with competition analysis.

Commissioner Shenefield proposed additional language (denominated item 0) as follows:

The Commission urges Congress to add to each regulatory statute, "In its consideration of the public interest, the agency should give substantial/primary/significant consideration to competition."

Commissioner Kempf stated that he could accept only the first sentence of item 4. He does not want the regulatory agencies to be forced to accept a shoddy piece of work from DOJ or the FTC. He does not favor allowing the antitrust agencies to sue independently under the Clayton Act.

Commissioner Burchfield stated that he was trying to apply three principles: 1) recognize the expertise of the antitrust agencies; 2) respect the legislative judgments as to the need to supersede competition with regulation; and 3) achieve normal judicial review that does not disrupt the regulatory process. He favors item 4, giving presumptive weight to the antitrust agencies. A court reviewing an agency decision under the APA is not inclined or equipped to do a full fact-finding.

Chairman Garza suggested that the Commission say to Congress that it does not think the competition laws inhibit regulators from considering the public interest. Perhaps Congress should revisit the balance between competition and regulation. She supports item 4, with presumptive, rather than binding effect. Commissioner Carlton suggested that Congress must first decide whether regulatory agencies should even consider antitrust issues. Commissioner Jacobson agrees that item 4 should include a presumptive, not binding, finding by the antitrust agencies. Commissioner Yarowsky stated that making the finding presumptive allows regulatory agencies to do an analysis de novo. Commissioner Warden stated that he preferred item 3 to item 4, because he does not see why the regulatory agency should defer to a bad analysis, if there is one. He views the agency as comparable to a district court.

Chairman Garza noted that the Commissioners seem to be coalescing around items 4 and 6b. She suggested that the staff focus on those items, as well as the language proposed by Commissioner Shenefield. She said that the items would be revisited at the Commission's next meeting on December 5.

The Commission votes on the Regulated Industries issues were as follows:

*IV. Mergers in Regulated Industries*

**A. Exceptions from Clayton Act and Hart-Scott-Rodino Act**

[1] Recommend no change to the current exceptions to the Clayton Act and Hart-Scott-Rodino pre-merger filing requirements for certain regulated industries (*e.g.*, banking, certain forms of surface transportation).

<b>BB</b>	<b>SC</b>	<b>DC</b>	<b>MD</b>	<b>DG</b>	<b>JJ</b>	<b>DK</b>	<b>SL</b>	<b>JS</b>	<b>DV</b>	<b>JW</b>	<b>JY</b>
<b>X</b>				<b>X</b>		<b>X</b>				<b>X</b>	

[2] No mergers should be exempt from the Clayton Act and/or the Hart-Scott-Rodino pre-merger filing requirements based on the industry or whether the company is subject to a regulatory regime.

<b>BB</b>	<b>SC</b>	<b>DC</b>	<b>MD</b>	<b>DG</b>	<b>JJ</b>	<b>DK</b>	<b>SL</b>	<b>JS</b>	<b>DV</b>	<b>JW</b>	<b>JY</b>
	<b>X</b>	<b>X</b>			<b>X</b>			<b>X</b>	<b>X</b>		<b>X</b>

**B. Performance of Competition Assessment Under Clayton Act and/or Relevant Public Interest Standard**

[3] Regulatory agencies should conduct an independent public interest analysis for any merger that they have the authority to review. They should accord whatever weight they wish [substantial weight–Commissioner Warden] to any analysis of competitive effects of a merger conducted by one of the antitrust agencies.

<b>BB</b>	<b>SC</b>	<b>DC</b>	<b>MD</b>	<b>DG</b>	<b>JJ</b>	<b>DK</b>	<b>SL</b>	<b>JS</b>	<b>DV</b>	<b>JW</b>	<b>JY</b>
						<b>X</b>				<b>X</b>	

[4] The antitrust agencies should be exclusively responsible for undertaking a competitive analysis and reaching a conclusion regarding a proposed merger’s likely effect on competition. That analysis and conclusion should be given presumptive weight by [Commissioners Burchfield, Garza, Jacobson] (or be binding upon) [Commissioner Yarowsky] any regulatory agency that has authority to review the merger under a public interest standard that also considers factors other than competitive effects. Regulatory agencies should not “redo” the competition analysis in conducting their public interest assessment.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
X	X	X*	X	X	X	X**	X	X	X		X

\*Commissioner Carlton would not require that the antitrust agencies’ determination be given any weight by the regulator.

\*\*Commissioner Kempf would support the first sentence only.

C. Authority to Challenge/Block Mergers

[5] The antitrust agencies should have authority to challenge any merger under Section 7 of the Clayton Act regardless of whether a regulatory agency also has authority to impose conditions on or prohibit a merger under a separate public interest standard.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
					X				X		

[6] In regulated industries, the regulatory agency should have exclusive authority to prohibit or impose conditions on a merger or acquisition under the applicable public interest standard. If so:

[a] The antitrust agencies should have no independent authority to challenge the merger or acquisition.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
					X	X					

[b] The antitrust agencies should be able to petition for review, or participate in any review sought by another, of the regulatory agency’s conclusions under the applicable public interest standard regarding the proposed merger.

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BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
X	X	X	X	X		X	X	X		X	X

### FTAIA

The Commission had a long and complicated discussion about amendment of the FTAIA. Much of the time was spent on specific wording questions. The final language proposed is indicated in the vote tallies below.

Commissioner Burchfield was the primary author of the legislative fix contained in the Discussion Outline. He believes the statute as it stands is an embarrassment because of its poor drafting. He noted that “private plaintiff” includes a foreign government, which is not treated as a sovereign for purposes of this language. In item 3, he was attempting to be consistent with *Empagran*. The test is disjunctive, either the conduct is in the United States or it had a reasonably foreseeable direct effect. Commissioner Jacobson expressed concern that under this standard, you wouldn’t be able to bring a case against a foreign cartel. He also initiated a long discussion about the phrase “injury to competition.” He was concerned that it could be argued that simply selling items that were priced higher because of a cartel would not be considered an “injury to competition.” He suggested “antitrust injury.” There was a great deal of discussion about this phrasing.

Commissioner Shenefield said that he does not support item 3, and recommends no change be made. Commissioner Delrahim stated that he had been skeptical that the Commission would be able to provide a legislative fix, but this draft is very good. He believes that case law will supply the answer to Commissioner Jacobson’s concerns about “injury to competition.” Chairman Garza suggested that the Commissioners agree on what they are seeking to accomplish in this revision of the statute.

Nadine Jones, an AMC staff member, stated that under current statute and common law, the statutory language that the Commission is considering will apply only in situations where foreign parties are interacting with U.S. commerce. Thus, in situations where conduct abroad hurts someone abroad, the question is whether there is interaction with U.S. Commerce. Commissioner Jacobson stated that foreign purchasers should not be able to sue foreign sellers in U.S. courts. On the other hand, what about the case of a foreign purchaser from a U.S. company where the purchase is made outside the U.S.? Commissioner Carlton noted that we want to deter cartel behavior. Commissioner Jacobson cautioned that the Commission should not make changes that broaden the statute, but rather, the changes should limit the statute. Commissioner Valentine suggested that the staff work with Commissioner Burchfield to first address the jurisdictional aspect of the FTAIA, then use Commissioner Burchfield’s proposal as a beginning for new language.

The Commission votes on the new language they developed were as follows:

I. *Foreign Trade Antitrust Improvements Act (“FTAIA”)*

[1] Recommend no statutory change to the FTAIA; allow courts to continue to develop application of the Act.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
	X							X			

[2] Recommend no statutory change to the FTAIA, but encourage courts to apply the D.C. Circuit’s *Empagran* standard.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
								X		X	

Commissioners Warden and Shenefield stated that this vote was their second choice.

[3] Recommend replacing the current FTAIA with alternative language.

A plaintiff may not bring a cause of action for violation of Sections 1 through 7 of this title unless:

- (a) the conduct being challenged occurred in the United States or its territories, or at the time undertaken had a reasonably foreseeable direct and substantial effect on the United States or its territories;
- (b) the conduct being challenged proximately caused antitrust injury in the United States or its territories; and,
- (c) the injury claimed by the plaintiff occurred within the United States or its territories or was proximately caused by conduct that occurred in the United States or its territories.

BB	SC	DC	MD	DG	JJ	DK	SL	JS	DV	JW	JY
			X	X			X		X	X	X

Chairman Garza directed the staff to work with Commissioner Burchfield on revised language, to be discussed at the December 5 meeting.

The meeting was adjourned at approximately 2:50.

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