

# The Antitrust Modernization Commission: An Introduction

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*THE ANTITRUST MODERNIZATION COMMISSION, authorized by Congress to examine whether the need exists to modernize the federal antitrust laws, has begun its work. A task force of the Antitrust Section of the ABA has already submitted a report to the Commission, suggesting topics for study, and will continue to be involved in the process. This article outlines the background and membership of the Commission and its work to date, and summarizes the report of the Antitrust Section task force. Further details on the Antitrust Modernization Commission, as well as the text of all public comments, including the report of the Antitrust Section, can be found on the Commission's Web site at [www.amc.gov](http://www.amc.gov).*

■ The Antitrust Modernization Commission plans to hold its next public meeting on January 13, 2005. At that meeting, the Commissioners will consider the recommendations of its working groups, with a view to setting an agenda of topics for study. The Commission has indicated, however, that there may be a further Commission meeting in February if necessary in order to finalize the agenda.

We are planning to publish in the March issue of *The Antitrust Source* some articles on the topics the Commission will be studying. We welcome the submission of articles on relevant topics from our readers. Send inquiries and submissions to: [antitrust@att.net](mailto:antitrust@att.net).

## Introduction

The Antitrust Modernization Commission (Commission) was established by the Antitrust Modernization Commission Act of 2002 (Act).<sup>1</sup> The Act was introduced in June 2001 by House Judiciary Committee Chairman, F. James Sensenbrenner, Jr. When the legislation was introduced, Chairman Sensenbrenner stated that he expected the Commission to address at least three areas: (1) the role of intellectual property law in antitrust law; (2) how antitrust enforcement should change in the global economy; and (3) the role of state attorneys general in enforcing antitrust laws.

However, the legislation as enacted is drafted more broadly and gives the Commission the freedom to set its own agenda. The Act defines the duties of the Commission as follows: "(1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) to solicit views of all parties concerned with the operation of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) to prepare and to submit to Congress and the President a report . . ."

The Commission's report, which is to be submitted not later than three years after the Commission's first meeting, must contain "a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate."

The Commission has the power to hold hearings, take testimony, administer oaths, obtain data directly from any executive agency or court, and request facilities and support services from an

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<sup>1</sup> Pub. L. No. 102-273 §§ 11051-60, 116 Stat.1856.

executive agency. It may also appoint an executive director and other staff as necessary. It has a budget of \$ 4 million to carry out its charge.

Although there have been several reviews of U.S. antitrust law over the past few decades, the last time such a commission was established by Congress was in 1938.

### **The Commissioners**

The Commission consists of twelve members, four of whom were appointed by the President (with a maximum of two members from each political party), another four of whom were appointed by the leadership of the Senate (two from each of the majority and minority leaders), and the final four members being appointed by the leadership of the House of Representatives (again, two from each of the majority and minority leaders).

The Presidential appointees are Deborah Garza (Chair), a partner at Fried, Frank, Harris, Shriver & Jacobson in Washington, D.C.; Dennis Carlton, Professor of Economics at the University of Chicago Graduate School of Business; Sanford Litvack, a partner at Hogan & Hartson in Los Angeles, and previously General Counsel and Vice Chairman of the Board of Directors for the Walt Disney Company. The fourth Presidential appointee, Deborah Platt Majoras, is now Chairman of the Federal Trade Commission and thus can no longer serve as a Commissioner. The Act provides that, "if a member of the Commission who is appointed to the Commission as . . . an individual who is not an officer or employee of a government becomes an officer or employee of a government . . . then such member shall cease to be a member of the Commission . . ." Her replacement, who will also be selected by the President, has yet to be appointed.

The Republican appointees are Stephen Cannon, Senior Vice President and General Counsel of Circuit City Stores, Inc.; Makan Delrahim, Deputy Assistant Attorney General for International, Policy, and Appellate Matters in the Antitrust Division of the Department of Justice; Donald Kempf, Executive Vice President, Chief Legal Officer, and Secretary for Morgan Stanley in New York; and John Warden, a partner at Sullivan & Cromwell in New York.

The Democrat appointees are Jonathan Jacobson, a partner at Akin, Gump, Strauss, Hauer & Feld in New York; John Shenefield, a partner at Morgan Lewis in Washington, D.C.; Debra Valentine, Vice President, Secretary, and Associate General Counsel for United Technologies Corporation; and Jonathan Yarowsky (Vice-Chair), a partner at Patton Boggs in Washington, D.C.

The Commissioners have appointed various members of staff, including Andrew Heimert as the Commission's Executive Director and General Counsel. Mr. Heimert was previously an attorney in the Federal Trade Commission's Office of Policy and Evaluation.

### **Work of the Commission to Date**

The Commission has held two public meetings, the first on July 15, 2004, and the second on October 20, 2004. At the first meeting, after some opening remarks and suggestions of topics by Chairman Sensenbrenner, the Commission adopted a procedure for identifying issues to study, which included inviting the public to recommend topics for its agenda by September 30. At the second meeting, the Commissioners explained that they have formed eight working groups to address different areas (including mergers, immunities and exemptions, intellectual property, and single firm dominance) and discussed the criteria which these working groups might use for selecting issues to study.

The working groups are to make recommendations as to which issues are most worthy of Commission study by December 17, 2004, in order to give the Commissioners time to review them before their next public meeting on January 13, 2005.

### The Contribution of the ABA Section of Antitrust Law

A specially formed task force of the ABA Antitrust Law Section submitted a report to the Commission on September 30, identifying certain topics for consideration by the Commission. These were organized into four broad areas: Antitrust Enforcers and the Remedies They Seek; Ways to Improve Antitrust Enforcement; Antitrust Exemptions; and Issues of Substantive Antitrust Law.

Under the first of these areas, the task force suggested that the Commission consider the rule applicable to indirect purchasers under *Illinois Brick*, and especially the interaction between federal and state antitrust law; the role of state enforcement and specialist industry regulators; the Foreign Trade Antitrust Improvements Act, and in particular what should constitute a direct, substantial and reasonably foreseeable effect on the United States; the nature, scope and efficacy of antitrust remedies in both public and private enforcement actions; the impact of the Federal Sentencing Guidelines on antitrust criminal penalties and fines; and criminal anomalies, such as Section 3 of the Robinson-Patman Act and Section 2 of the Sherman Act.

Under the second heading—"Ways to Improve Antitrust Enforcement"—the task force suggested the following topics to the Commission: the criteria for appointment of FTC Administrative Law Judges, and in particular whether judges should have some expertise or training in antitrust law; the application of the Sunshine Act to the FTC; overlapping antitrust enforcement by the DOJ and FTC for mergers, and division of responsibility between the two by industry (for both mergers and enforcement actions); and the burdens of the Hart-Scott-Rodino Antitrust Improvements Act, especially the second request process, and multi-jurisdictional merger filings.

As regards "Exemptions and Special Considerations," the task force suggested that the Commission consider the application of the antitrust rules to the public sector, including: (a) whether a clarification of the state action doctrine might be helpful, (b) the *Noerr-Pennington* doctrine, and (c) governmental restrictions of competition, such as Medicaid's "most favored nation" requirement. The task force also suggested that the Commission might undertake a systematic review of statutory exemptions from the antitrust laws and consider the future of the Webb-Pomerene and Export Trading Company Acts.

The task force also identified certain issues of substantive antitrust law as potential areas for the Commission to study. These were the repeal or amendment of the Robinson-Patman Act; the interface of intellectual property and antitrust, and in particular the recommendations of the FTC's October 2003 report entitled "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy"; and how antitrust laws are functioning in the "new economy" and the challenges to antitrust posed by network industries.

The task force will continue to be involved in the Commission process. At the second public meeting, the Commission Chair, Deborah Garza, referred to the report of the task force and also to the Antitrust Section's offer to undertake some background work for the Commission if necessary. She indicated that it was likely that the Commission would be approaching the Section in due course to take it up on this offer.

### Web Links

The Commission's Web site can be found at [www.amc.gov](http://www.amc.gov). The site contains general information about the Commission and the Act, as well as biographies of the Commission members, information on Commission meetings (including documents handed out and transcripts), and the full text of all public comments. The report of the ABA task force can be found at [www.amc.gov/comments/abaantitrustsec.pdf](http://www.amc.gov/comments/abaantitrustsec.pdf). ●