

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Monday, May 9, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice at 1:05 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General
Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

MICHAEL W. KLASS, Economist

ALAN J. MEESE, Senior Advisor

WILLIAM E. KOVACIC, Senior Advisor

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

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These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity.

P R O C E E D I N G S

CHAIRPERSON GARZA: I would like to call this meeting of the AMC to order. For the record, we have with us Commissioners Warden, Cannon, Shenefield, Yarowsky, Garza, Litvack, Jacobson, and Burchfield. We expect to be joined on the telephone by Commissioner Carlton. Commissioners Valentine and Kempf cannot join us. For now, we don't have Commissioner Delrahim, but we have sufficient Commissioners for a quorum, right, Andrew?

To start the meeting, I would just like to welcome a couple of additions to the Commission staff. Kristen Gorzelany has joined us as a paralegal. She was formerly at Hamilton College, and she also was living in Lake Tahoe. I don't know how we convinced her to come to Washington, D.C., but we'll try to keep her here as long as we can. Professor Bill Kovacic has joined us as a senior advisor. He, of course, is well known in the antitrust community. He is now the E.K. Gubin Professor of Government Contracts Law at George Washington University Law School. Until recently, he was General Counsel at the Federal Trade Commission. He held that position from 2001 through 2004, is that right? We welcome them. Thank you.

Let me cover the purpose of today's meeting briefly. At our January 13 meeting, the Commission adopted several issues for study. We then formed several study groups around those issues and asked those study groups to consider and propose a plan for proceeding to study the various issues.

These study groups went off and did that with the staff and have come back. They are still working on the study plans, but they have initially come back with questions for public comment that we would like to publish in the Federal Register and use to reach out to a number of stakeholder groups after this meeting. They have also looked at starting to schedule and set up hearing panels on these issues.

All of the Commissioners have received in advance the study plan questions. We thought it would be useful to have this meeting so that everybody would be aware of the direction we're going and we could basically get buy-in, sign-off, and have any discussion we might need to have if there are any questions that any Commissioners might have about the issues.

The questions give a lot more definition in some cases to the issues that we selected on January 13, and they

will, to a large extent, guide our work going forward. The study groups, as everyone knows, have coordinators to facilitate the work, and we are going to have one of the coordinators introduce the various study plans and start the discussion, if any, that there might be on any of them.

I will start with discussion of the enforcement institutions study plan. The memos that were circulated to the Commissioners state in the first part the issues that were adopted by the Commission for study and then propose questions for public comment divided by various categories. The one thing I would note, after talking to staff, is on page 2 of the memo, concerning the role of the states in enforcing federal antitrust law outside of the merger area. The one revision that may be made to this before it gets published in the Federal Register relates to what are now questions one and two.

Question two asks, "To what extent is state *parens patriae* standing useful or needed? Please support your response with specific examples, evidence and analysis." Because that really is the focus of our study, the *parens patriae* standing of the states, to avoid confusion, the proposal is to consolidate questions one and two and make clear that we are not intending to study the

ability of states to sue as direct purchasers, for example, or to sue for damages suffered by the state.

Do any Commissioners have any questions or comments about the study group's proposed questions for public comment on enforcement institutions?

[No response.]

CHAIRPERSON GARZA: All right; hearing nobody, then, staff, will you make the change that we talked about?

MR. HEIMERT: Do you want to delete question one in the role of states category and pose simply question two, with the other questions as stated.

COMMISSIONER WARDEN: Is that what you propose? To delete one? I shouldn't have thought so.

CHAIRPERSON GARZA: I think we were going to combine questions one and two, to make it clear that we are looking at the role of the states as *parens patriae*.

COMMISSIONER WARDEN: You can put the sentence that constitutes two first in one paragraph.

CHAIRPERSON GARZA: Anything else on that one?

[No response.]

CHAIRPERSON GARZA: Next is the Exclusionary Conduct Study Group. Commissioner Jacobson will introduce that.

COMMISSIONER JACOBSON: Thank you, Chairwoman Garza.

Of all of the plans, this is one that may require a bit greater explanation, perhaps, than some of the others. In our January meeting, there was quite a bit of discussion about the scope of the Commission's intended review of exclusionary conduct questions, and there were concerns expressed by a number of Commissioners that if we look too broadly into exclusionary conduct, I think Commissioner Warden's view was that we will be entering a black hole, and that view was shared to some extent by a number of the Commissioners.

What we did at the initial suggestion of the chair is go back and look at the memorandum provided by the working group in the late fall of 2004 as well as the transcript of the January hearing. And the conclusion was that to distill a consensus of what the Commission had, in fact, determined to review would be more closely to parallel what the chairs of the Senate Judiciary Committee had asked us to look into and what Congressman Sensenbrenner had asked us to look at, and that focused particularly on three aspects of exclusionary conduct: one, the refusal to deal doctrine, particularly as construed by the Supreme Court in

the *Trinko* decision; second, the essential facilities doctrine, also as referred to, although not construed by the Supreme Court, in the *Trinko* decision; and, third, the issue of single or multi-product bundling, as has arisen under the *Concord* case and the *LePage's* case.

The study group determined that the best way to get at these issues would be to ask three focused questions, focusing directly on those three issues, rather than asking a broader inquiry about what is the overall standard for reviewing exclusionary conduct under Section 2 of the Sherman Act or in determining whether conduct is anticompetitive under Section 1.

Certainly, thoughts on that broader issue will inform the Commission's determinations on the three substantive issues that the study group did suggest that we review. But the plan at this point is for the report to focus on those three questions, rather than endeavor to make an overall pronouncement that the intended effect would be to apply to all of Section 2 and Section 1 generally.

Along those lines, the study group also recommended a fourth question, which itself was a subject of some discussion at the January hearing. That was, how should the standards for determining whether conduct is

anticompetitive or exclusionary in these three respects in particular be determined? Should there be a legislative or code type solution? Should it be through the common law process? Should it be through agency guidance not inconsistent with the common law process, through amicus briefs or proposed guidelines? And that, too, will be the subject of our hearings and the Commission's intended report.

Based on that, we determined that it would be appropriate to have two substantive hearings: one that would focus on refusals to deal and essential facilities, and a second that would focus on bundling. The fourth issue – how do we determine how standards should be developed – would be encompassed in both hearings. Are there questions about the work of the exclusionary conduct group?

[No response.]

CHAIRPERSON GARZA: All right. Then the questions as proposed by the study group will be those that go into the Federal Register. Commissioner Yarowsky, you are going to talk about the immunities and exemptions plan?

VICE CHAIR YAROWSKY: Yes. This working group has broken down this area, this important area, into three main categories. One are the general immunities and

exemptions. Two, we are looking at the state action doctrine and the Noerr-Pennington doctrine. Let me take immunities and exemptions first, because I want to clarify a couple of points and make sure that everyone agrees with my clarification.

One of the things we want to do is at least understand the universe of immunities and exemptions that we are dealing with. It is an extraordinary list, and we have started a compilation just so we can find them in one place. The treatises really don't do that. I think Senator Hart a number of years ago, at least up to the time he was writing a report, actually had done that. But we have some more since that time. So, you will see that on the proposed study plan, how far we have gotten.

We have 31 listed as of this moment. But, at the same time, as we have gone about trying to compile them so we know what the universe is, we are not trying to give any special focus at this time to any one or two exemptions or immunities. We may use particular ones for illustrative purposes at the hearing. But I think I just wanted to clarify my understanding that we are really looking at a generic review here.

Back in January, for issues adopted, we did list

a couple of these exemptions. I don't want to give undue focus or spin to that. I am not backing away, saying we won't look at those, either. What I'm trying to do is "even the playing field," so that we can intellectually consider all of them. If people have a different understanding than that, let's chat about it, but I think that's what we're talking about.

In addition, in the course of our discussions in this working group, there have been some interesting ideas, and they're going to be listed here. The Commission hasn't taken any formal action. Obviously, once you compile all of these exemptions and immunities, we can't by our own power vested in this Commission do anything to change the operation of them one way or the other. But we can make recommendations.

Some of the generic recommendations we're thinking about for both existing or even future exemptions that come into being is the idea of a sunset. I think we talked about that briefly. We haven't decided that. But, as with antitrust consent decrees in the past few years, that is a notion that has taken root among some of the Commissioners. Likely, you will hear that explored at hearings.

In addition, maybe there are other models other than just a blanket exemption that seem to make up most of the exemptions and immunities that we find currently. The National Cooperative Research Act, it's hard to call it an exemption or an immunity. What it does as a different model, and Congress has actually looked at it three different times since 1984, is to have a voluntary pre-notification system to the Department of Justice for certain types of joint venture or collective activity. If they make that disclosure to the antitrust agencies, and their conduct stays within the scope of that disclosure, and they are later sued, then, any potential exposure is reduced to single damages. It's detrebled. There are some other incentives and disincentives, too.

That doesn't necessarily mean that is the preferable model. But, again, just to share our thinking as we have evolved, it is something that we're looking at. It may be the kind of thing that we may want to recommend if future exemptions are considered.

That is really the lay of the land for immunities and exemptions in a nutshell. Obviously, with state action, which is a major category of concern, the FTC opined about a year and a half ago on both of the prongs that we would look

at. Obviously, that report is of great interest to us. But we still anticipate that we will have hearings on the doctrine and look at it anew, and the Noerr-Pennington doctrine.

Those are the three major areas. Those are the three major areas for which we will set about constructing hearings.

COMMISSIONER SHENEFIELD: Madam Chairman?

CHAIRPERSON GARZA: Yes, Commissioner Shenefield?

COMMISSIONER SHENEFIELD: I have no objection to structuring hearings in that way. But it would be, I think, unfair not to disclose at least five or six that I will be especially focused on and that commend themselves to me as prime examples for more intensive study.

One category would be the Export Trading Company Act and the Webb-Pomerene set of exemptions. Another would be the Shipping Act amendments of, I think, 1984. Another would be McCarran-Ferguson. Another one would be the group of agricultural and food-related exemptions: Capper-Volstead, Fisherman's Cooperative Marketing Act, for example. We also had thought about the National Cooperative Research and Development Act. Those, at least for me, would be prime candidates for close attention.

CHAIRPERSON GARZA: Consistent with, John, what you summarized from the January 13th meeting, where a number of Commissioners expressed concern that the Commission not become involved or undertake a cost-benefit analysis of each and every immunity and that we focus on a few of them as examples to help us to establish a framework for analysis and recommendation to Congress primarily focused on how future immunities and exemptions should be viewed and weighed, I would actually prefer for us to determine and agree on today what those few would be, because I think that it will be difficult, as Commissioner Shenefield said, for us to focus when we get to the hearings on those specific ones unless we pick them in advance, and the public is apprised of it, and we get all of our comments directed toward that analysis.

My concern is about the way that the questions are put right now. The first asks, should Congress eliminate immunities and exemptions unless the benefits exceed the costs; then, E asks the public to comment on the impact, benefits, and costs of each of these specific immunities. The public may be under the misimpression that what we're intending to do is actually evaluate on a case-by-case basis each of these immunities and exemptions, when

I think that pretty clearly is not the case.

So, while I think that the subheadings A, B, C, D, under question one are appropriate, I would take out of question one the reference to eliminating existing immunities and exemptions. I will address the Webb-Pomerene and Export Trading Company Act issue in a moment. Then, I would limit E to be a catch-all that says essentially, let us know if there are any immunities that we've missed, and invite people to submit whatever they want to submit to us as a sort of a catch-all.

The other thing I would say is, it is true that in the international study group, there had been a recommendation to look specifically at repeal of the Webb-Pomerene Act and the Export Trading Company Act. To me, the purpose would be served if that were, as Commissioner Shenefield suggested, one of the handful of immunities that we were going to use as a sample set, if you will, to structure our analysis.

Commissioner Delrahim?

COMMISSIONER DELRAHIM: Madam Chair, two points I'd like to make. One is something that seems to be missing from this and an area that I think deserves even more of our attention. I think this subgroup is probably

one of the more important ones for our Commission study. But one area that bothers me the most is the implied immunities, the judicially created doctrines.

At the least, the ones that we have on the books, whether we agree with them as a matter of policy or not, which I generally don't, at least Congress has considered them. There was some debate somewhere, whether in a conference report late at night or however it was done. At least, there was an act of Congress that said this area deserves an exemption.

Some of the implied immunity doctrines that have been created, particularly in the securities industry, but in other areas as well, deserve our attention. That's an area where we should consider. Does Congress need to go back and say, unless explicitly provided, there shall be no exemption? Maybe there just should be one amendment in a simple line, which would be very difficult to pass, as Mr. Yarowsky and Mr. Cannon and others would know, but that's an area, I think, that deserves our study.

Second is, we should consider as we are recommending to Congress and others in the report and for folks who will be presenting at the hearings, a lot of these exemptions come about not so much because folks in

particular sectors want to be immune from the antitrust laws, but rather, because they want to be immune from the uncertainty of treble action damages. I think treble action damages play an important role in the whole overall enforcement scheme, but we should consider in certain areas, because of the incentives, and our system is very unique, and the treble action damages have been on the books for a number of years.

One possible way would be that the folks who currently have exemptions maybe will no longer be exempt. And I don't know if we want to consider that in this Commission, because I'm sure people on Capitol Hill will consider it if we get to that point of implementation. But, does it make sense in particular industries to allow just the Justice Department and the Federal Trade Commission or maybe state AGs as well, or whomever – governmental enforcement – but maybe not private enforcement, or governmental enforcement and maybe single damages, or single and a half damages, or whatever.

I think that's an area that we should look at, because the motivation for many of these exemptions is to have a certain level of certainty for sometimes frivolous, sometimes not frivolous, private damages.

CHAIRPERSON GARZA: Commissioner Warden.

COMMISSIONER WARDEN: I agree with virtually everything that Makan just said. But they're the subject of other of the study group reports, both the regulated industries study plan, which brings up implied immunity, savings clauses, et cetera, and the remedies study plan, which addresses the whole subject of private enforcement versus government enforcement and remedies and private enforcement and so on.

This seems to be what you might call a much better defined but more limited study that's proposed here of express statutory exemptions. So, I don't think this should be modified in any respect as a result of the desirability of studying the things that I agree it's desirable we study.

CHAIRPERSON GARZA: Jon?

VICE CHAIR YAROWSKY: My view is that as long as we can cover the areas that Makan suggested, and we do have them in some other study groups, we should. I think some of this will relate to the writing of the report so that we do tie these concepts together in a coherent way. Obviously, a discussion of immunities and exemptions should include some cross-referencing or some direct discussion at the time.

Whether we do it through the hearing structure of this study group recommendations or not, I second what Makan has said that we need to include that in the universe of issues.

Madam Chairwoman, I just wanted to respond to your comments and am open. What I wanted to do at the very beginning was to remind everyone, which probably didn't need a reminder, that we have not made any a priori decisions about any particular exemption or immunity. Maybe this just comes from my past training to do that up front. What Commissioner Shenefield has said, and you have said, about choosing illustrative exemptions and immunities, as long as people understand that this is what the purpose of that is, to help generate some discussion that can then be broadened to a more generic framework, which I think is what seemed to be our consensus, I'm fine with that.

The sub-universe that John mentioned is the one where we have talked the most, because we have had a lot of comment about it. Also, these subjects come up a lot in Congressional oversight. On the other hand, the compilation issue is more of a research compilation. Yes, we are not opening up hearings on 31 exemptions. But we would love to know if we have missed one.

So, let me turn it back to you. Do you think

that we need to amend what we have adopted for clarity's sake?

CHAIRPERSON GARZA: I think it would be good to get a sense of where the other Commissioners are on that. I would like to do something to clarify if only because I think people are going to react to what is published for public comment and are not going to go back and read the transcript. I think it should be clear that what we are looking at is not a cost-benefit analysis of specific immunities, but rather at some that for a variety of reasons might further our analysis.

It to some extent picks up on what Makan was saying. Not all immunities and exemptions are structured in the same fashion. Some of them, like the NCRA, have a requirement that you disclose, and then you get protection from treble damage litigation. And even then, there are some carve-outs. That's a very different situation than another kind of immunity, which might be a sort of a blanket immunity for what historically has been regarded as inherently anticompetitive behavior.

So, to me, it seemed that one of the things that is useful about picking the ones that Commissioner Shenefield noted is you get ones that are obviously big in

the sense that we know that they involve important industries and a lot of commerce, or they have ancillary issues relating to them, I guess the Webb-Pomerene Act and Export Trading Company Act, for example, have been raised because of concerns about what they communicate about our commitment to enforcement with respect to cartel activities. Others, like the NCRA, are useful to pick because of the structure of the exemption.

So, I would actually prefer to make it plain that we are looking at these, as you said, as an example and not to solicit public comment on benefits and costs, et cetera, of all the individual immunities.

Commissioner Jacobson?

COMMISSIONER JACOBSON: Just for what it's worth, I agree entirely with your comments and particularly with Commissioner Shenefield's list of prime candidates. I think the Cooperative Research Act is an interesting one. I think everyone supports the promotion of research and development, joint ventures, joint production ventures. The question is, is this the right way to go about it? I think this is an important area to look at. Certainly, the other four categories of exemption mentioned have huge impacts on the U.S. economy and warrant particular scrutiny.

So, I endorse the suggestion completely. I also agree with Commissioner Delrahim and Commissioner Warden: the implied immunities issue is a huge one, but I do think we cover it in the regulated industries proposal.

CHAIRPERSON GARZA: Commissioner Litvack?

COMMISSIONER LITVACK: Obviously, I would also agree with how best to rephrase or refocus this; I do. I have a question, though, which is, with respect to Noerr-Pennington, what is the plan in terms of deferring that, and for how long, and when are we going to ask for comment on that?

VICE CHAIR YAROWSKY: I think this was more sequencing, lining up what we thought would be the substantive issues for hearings over time. We absolutely want to cover Noerr-Pennington. I think the consensus of the working group was simply that we probably could structure hearings sooner on state action for a lot of reasons, because it has been reviewed recently. But, absolutely, we want to cover Noerr-Pennington.

COMMISSIONER LITVACK: I guess my question is, should we be asking for comment on that now? It doesn't seem as though we are, and it would seem to me we might without regard to when we held hearings on it.

CHAIRPERSON GARZA: I wasn't a member of the working group, but I think I had understood that deferral was tied to an expectation that there will be an FTC report coming out on Noerr-Pennington.

MR. HEIMERT: We were informally told that the Noerr report may come out sometime this summer from the FTC, the middle of July. But, that is obviously tentative until it comes out.

CHAIRPERSON GARZA: I think the thinking was that we didn't want to have a request for public comment that would ask for comments to come in all before the FTC staff report had come out. It's not an indefinite deferral. I think they were hoping to get a better sense of the FTC staff's timing and then be able to put it out maybe a little bit later. The other possibility, of course, is to put it out now — we have the questions, I think — and then just to extend the deadline for comment. We don't have the questions?

COMMISSIONER LITVACK: We don't have any questions, which is what really triggered my comment.

VICE CHAIR YAROWSKY: Well, Sandy, we can develop some questions and then at our next meeting — but I guess I would like to direct this to Andrew or the staff: are we

pretty firm that the FTC will come out this summer?

MR. HEIMERT: We have informally been told that the report will soon be submitted to the Commissioners of the FTC for their consideration. As to time frame, that is really their own decision as to how soon they will authorize staff to issue the report. The estimate we were given was early July. But again, that's not something we have any control over. It may be then; it might be later; it might be sooner.

VICE CHAIR YAROWSKY: Well, I would certainly, if I could engage in a colloquy with you, Sandy, I would certainly then say that our next public meeting, which has yet to be set, that we should watch this. And then, maybe at that point, if it is still somewhat vague, we may want to vote to put out a request for comments.

COMMISSIONER LITVACK: I would agree with that, yes.

CHAIRPERSON GARZA: Okay, well, the next - I will announce it later, but I think we have tentatively scheduled a hearing, our first hearing, for June 27 or 28.

MR. HEIMERT: June 27.

CHAIRPERSON GARZA: June 27. So, maybe we could

have a short meeting right before that hearing and discuss that then. In advance of that, can the staff and the study group have some proposed questions in the event that it's determined that we can't really wait to see what the FTC is going to do?

Commissioner Burchfield, did you have any comment on the issue of the study plan or, in particular, the exemptions and immunities part of it?

COMMISSIONER BURCHFIELD: I don't disagree with anything that has been said so far, but my question is whether the proposal that you have made, Madam Chairwoman, is to edit the questions as phrased to focus comments in on any particular list of exemptions. I think that is the way the conversation seemed to be going. But the way the questions are phrased now, I suspect we are not going to get the sort of focused commentary that several of the other Commissioners have suggested they are interested in.

COMMISSIONER SHENEFIELD: Madam Chairman?

CHAIRPERSON GARZA: Yes.

COMMISSIONER SHENEFIELD: Under general immunities number one, you could simply add a sentence which says, consider specifically one, two, three, four, and five.

CHAIRPERSON GARZA: Yes. I think that's right.

The other question I have, though – and others would not agree with me – is whether question one should refer to eliminating existing immunities and exemptions.

COMMISSIONER SHENEFIELD: Certain?

CHAIRPERSON GARZA: Certain?

COMMISSIONER SHENEFIELD: Certain immunities and exemptions, and then signal which ones we're most interested in.

CHAIRPERSON GARZA: Okay, all right – "Should Congress eliminate certain existing immunities and exemptions?" and maybe –

VICE CHAIR YAROWSKY: Then, you could say, including but not limited to, and have the specific examples.

CHAIRPERSON GARZA: I do want to get into this issue of enacting future ones, because a lot of what we wanted to do was give a framework for the instance in which Congress gets petitioned for some sort of protection by an industry. So we could say eliminate certain existing immunities and exemptions, and not enact future ones, unless the benefits exceed the costs, and then, in responding, please focus your response on these exemptions in particular and then list the five that we had talked about.

VICE CHAIR YAROWSKY: That sounds fine.

CHAIRPERSON GARZA: And just for the record, Commissioner Shenefield, could you run down, so the staff could note it, which those five are?

COMMISSIONER SHENEFIELD: The ones that I have had in my mind were the one -- there are actually several groupings. One is the export-related ones: Export Trading Company Act and Webb-Pomerene. The next one would be McCarran-Ferguson. The next one would be Capper-Volstead, the Fisherman's Collective Marketing Act -- that's a grouping, Shipping of 1984, and the National Cooperative Research and Development Act as amended.

CHAIRPERSON GARZA: The only other thing I would suggest, while we haven't had a lot of introductory language in these questions, is to make the point very clear that we are specifically requesting this information, not to do a cost-benefit analysis of any one exemption, but to guide our assessment of the appropriate principles or something; some sort of sentence that makes it clear that we are not undertaking a cost-benefit analysis of any particular immunity.

Commissioner Warden.

COMMISSIONER WARDEN: I agree with your approach generally, and with what Commissioner Jacobson said, but I don't think we should preclude ourselves from recommending repeal of particular exemptions at the conclusion of our work. So I would not want to word this in a way that would suggest that we were precluding ourselves.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER BURCHFIELD: Are you saying those other than on the list or --

COMMISSIONER WARDEN: Well, I think we ought to concentrate on the list, and John Shenefield's list is fine with me. And I think if we were to want to consider concrete specific recommendations to anything else, we ought to add that publicly at some point to the list before the process has gone on too long, but for now, I'm satisfied with this list.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER CANNON: Yes, Madam Chairman, I think the way it's written at this point, when you read it all in context, when I read it, to me, it reflected the discussions we've had a couple of times, certainly in January, which is, this list exists. Everybody knows it exists. We are not sure it's the complete list. We want to

make sure that it is.

We may get comments about five or 10 of these, and you may get comments about some you think you'll never get a comment about. I am in general agreement with John, and I think maybe Bobby, if I am hearing him correctly. I am a little bit hesitant to -- this list is not going to disappear from the request for public comment. Is that what we are saying at this point?

CHAIRPERSON GARZA: I think that's right, although the proposal would be, the purpose of the list would simply be to determine whether there is anything in addition. To be clear, the problem I had with this one was the request to please provide any pertinent information about impact, benefits, and costs, including references to empirical studies. The problem I had was that, when you read it, it says that the Commission is considering whether to eliminate these immunities and exemptions. My concern is that you will have important big industries looking at the list: airlines, baseball, newspapers, railroads, soft drinks. It just struck me, the problem with it is that people may misinterpret what we are doing and think that this is the chance which they have to come in and substantiate and justify the exemption that applies to them.

And that would turn us into the Exemptions and Immunities Commission, and set us up for doing something that we are ill equipped to do. So, what I wanted to do was write it in a way that made very clear what we are doing. If our purpose is to have a complete compilation, then, I would word it to make that plain. And I would focus on the five that we are using and make clear that they are being used to help us frame our analysis.

COMMISSIONER CANNON: My only question would be, it's one thing for the Commission to outline its work, but it's another thing to ask people for relevant information. So, to me, when we ask somebody for that, it doesn't necessarily equate automatically that we will be doing exactly that, which I agree. The last thing that we want to try to accomplish is an exhaustive analysis of all of this.

So, I'm just concerned at the front end of this process in attempting to avoid either being interpreted as trying to prejudge these issues or cutting off any sort of analysis; that's all. It's a pretty simple point.

COMMISSIONER LITVACK: I have not understood that we were cutting off anything. I had understood that we were going to focus, by way of illustration, on five particular ones. We would receive information on anything anyone wants

to give us, and if it should appear ultimately that something, not one of the five, deserves special attention, we would do that; I think, at least that's my understanding.

COMMISSIONER CANNON: I agree at this point.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: Given what we have now proposed to do with the Arabic number one question, I wonder if we should – which is now focusing on five areas of immunity. I am also interested in a more general discussion of what should the public policy be on immunity. So, I would be inclined to have question one and then, before starting with subpart A, have a more general question, a number two, if you will, that requests comment on the methodology for evaluating immunities.

So, you end up with question one, which now focuses, perhaps not exclusively, but it will probably be read by many people to be focusing largely on, the five that John has mentioned. Then, you would have a second category of comments that are focusing on the economic and public policy justifications for antitrust immunity or the lack thereof.

COMMISSIONER JACOBSON: In other words, we are going to look at five categories of exemption both within

themselves exemplars of the methodology, and we are going to look at the standards. Second question, we are going to look at the standards for exemptions generally and see if we can determine whether to make, and if so, what to make, in terms of a recommendation as to how to deal with exemptions both retrospectively and prospectively.

Two related but important inquiries at least as I understand the discussion, and I get the sense that everyone agrees with that.

VICE CHAIR YAROWSKY: To me, it's just organizational. Staff can redraft question one, A through E, so that we have two separate, distinct questions. But, you know, all of those concepts will need to be blended into those. I have no problem with reorganizing it that way if it's clearer.

I also think if we are going to do a completely 360 degree wraparound consistency operation, we should probably look at the issues adopted up front by the Commission for study, because there, you have B, with a pointed question about Webb-Pomerene and the Export Trading Act. Again, just to reiterate, for illustrative purposes in working out a general analytical framework, we are going to choose to use five exemptions or immunities for purposes of

developing this larger framework.

So, I think we could redraft B – because it's already omitting three of the five that you have mentioned – and pick up later with the questions. So we may just want to look at that to make this harmonized as a work product.

COMMISSIONER SHENEFIELD: Given that we seem as though we are in agreement, why don't we ask the staff to effectuate that agreement by doing the drafting themselves?

MR. HEIMERT: We would be pleased to if we could get slightly greater clarity to spell it out if possible.

CHAIRPERSON GARZA: Would the coordinators of the study group commit to working with the staff to make sure that we have reflected what the Commissioners have decided?

COMMISSIONER SHENEFIELD: Who are the coordinators?

MR. HEIMERT: John Yarowsky and Steve Cannon.

COMMISSIONER JACOBSON: You might want to just include John Shenefield.

MR. SHENEFIELD: No, no.

CHAIRPERSON GARZA: John is on the working group, so I think –

COMMISSIONER SHENEFIELD: I'm on the working group.

CHAIRPERSON GARZA: Or the study group.

VICE CHAIR YAROWSKY: Maybe we could present that on June 27th, if we are able to work it out.

COMMISSIONER SHENEFIELD: Or do it by unanimous consent.

CHAIRPERSON GARZA: I think for this purpose, we have the sense of the Commission, so we will rely on the staff and the working group to make the editorial revisions and coordinate it. And that will be what will be published, if that's okay, rather than having another meeting.

VICE CHAIR YAROWSKY: That would be swifter.

CHAIRPERSON GARZA: All right. Before we move on, is there any other comment about the immunities and exemptions work plan?

[No response.]

CHAIRPERSON GARZA: Okay. The next is the international study plan. Commissioner Delrahim, can you introduce that?

COMMISSIONER DELRAHIM: Sure. This one could be one of the shorter study plans and work groups.

Two issues have been identified by the working group and are being proposed to the Commission. The first is whether or not the FTAIA should be amended to clarify the

circumstances in which the Sherman Act applies to extraterritorial and anticompetitive conduct. We have had some discussion about that. There was some recent D.C. Circuit oral argument in the *Empagran* matter, and I think the law will continue to develop. We have discussed about not officially deferring, but in our scheduling of the hearings waiting for that opinion to come out. That was a recommendation by the working group.

The second is, are there technical or procedural changes that the Government could implement to facilitate further coordination. We have had some discussion about trying to keep that as narrow as possible, and as focused, so we don't go too far.

One of the identified areas of technical or procedural change is the International Antitrust Enforcement Assistance Act and whether there are changes that may be needed that the Commission should consider to facilitate international cooperation and information exchanges, particularly as cartel enforcement has taken on more of an international nature.

The second is the budgetary authority granted U.S. agencies. That could facilitate the international technical assistance and cooperation. One example of that

is a lot of the funding that goes into technical assistance that the Justice Department and FTC do comes from the USAID, and there are certain countries that are now establishing their antitrust agencies and implementing their laws, Singapore being one, who, because of the development of the country, cannot qualify for USAID funding.

However, there are certain countries where antitrust is the furthest thing from their mind right now and should be. However, they qualify for USAID funding, and there are programs to try to encourage antitrust cooperation. So, it's an effort for the Commission to look at specifically and see if there are changes that the Commission could recommend to facilitate this increasingly international enterprise of antitrust that we are engaging in.

The questions for the public comment are exactly as I have read. I think it's going to be intended to be a one-day hearing with two panels, and the parties who have been involved with *Empagran* as well as the other scholars and the government participants. On the technical procedural side, the two agencies as well as other players, including the USAID, would be making presentations to the Commission.

CHAIRPERSON GARZA: Are there any questions or comment on the international study plan?

COMMISSIONER SHENEFIELD: Is there a sense that if *Empagran* doesn't come out by some specific time that we would go ahead, or is there any notion that we wait?

COMMISSIONER DELRAHIM: I think that by the fall if it doesn't, or, if we don't have any other hearings that are in the queue, we should go ahead with it and perhaps start getting the public comment. My guess is that the D.C. Circuit's opinion is not going to put the issue to bed. You already have different circuits who have ruled on this matter who have gone different ways. Although, given the fact that it's on remand from the Supreme Court, it could try to clarify certain areas and coming from one of the more important appellate courts – but, I think the point is an important point to move forward and not allow the Commission's work to linger in case the court sits on it.

COMMISSIONER SHENEFIELD: I agree with that. There was a case out of the District of Minnesota last week, Bill Kovacic undoubtedly knows what it is, in which the guidance of the Supreme Court was taken as a road map to plead around all of the requirements in the Foreign Trade Antitrust Improvements Act, demonstrating to me that we're

going to have to grapple with this issue no matter what the D.C. Circuit says.

CHAIRPERSON GARZA: Okay. Then, the staff will publish the questions as proposed by the international study group.

The next one on our agenda is the mergers study plan, which I will present because Commissioner Valentine could not be here today. There were four issues adopted by the Commission for study. The first was a pretty broad one about whether current U.S. merger enforcement policy has been effective. The second related specifically to whether the Horizontal Merger Guidelines accurately reflect the federal agencies' analysis and policy on mergers. Third was whether or not the federal enforcement agencies and courts were appropriately considering efficiencies and analyzing mergers. And the fourth was whether the HSR merger review process should be revised to address various issues relating to the number and type of transactions requiring notification and relating to the burdens involved in an extended investigation of a transaction that has been notified to the government.

The questions for public comment focus on each of those areas. There is maybe a typographical error in

efficiencies and merger analysis. Question two, we have, "Should courts and agencies evaluate claims of efficiencies?" I'm thinking that that probably should have been, "How should the courts and agencies evaluate claims of efficiencies?"

MR. HEIMERT: Appears to be.

CHAIRPERSON GARZA: If there is a "how" in there, I don't personally have a question about it.

Are there any comments or questions about the merger study proposal plan for the questions for public comment?

[No response.]

CHAIRPERSON GARZA: Hearing none, staff can then publish for public comment these questions as proposed by the mergers study group.

Next, we have the new economy study plan, which Commissioner Warden is going to handle.

COMMISSIONER WARDEN: The Commission adopted three issues for study, which are stated at the outset of the report. They are tracked, I think, quite carefully by the questions for public comment. The one thing that I think deserves express note at this meeting is that we did not propose to wade into a de novo evaluation of the patent

system, but rather make use of work that has been done by the National Academies and the Federal Trade Commission and pose some very specific questions related to their reports.

We also have not expressly addressed the issue of patent pools, although I suppose someone might believe it to be encompassed within the first of our specific issues at the interface of intellectual property, innovation and antitrust, where we talk about the presumption of market power in tying cases.

Our questions, I think, are broad enough for us to deal with anything that Commissioners or commentators may believe to be of particular importance in this area, and when we become specific, I think we have cabined our efforts sufficiently not to be dragged into the abyss.

CHAIRPERSON GARZA: Any questions or comments on the new economy study group's proposal for questions for public comment?

COMMISSIONER JACOBSON: In deference to the presentation, I will give a "hear, hear."

CHAIRPERSON GARZA: Okay. Then, the staff can publish that as proposed by the study group.

The next study plan presentation is on regulated industries, and Commissioner Cannon, you are going to

present that?

COMMISSIONER CANNON: Yes. This tracks the three questions that the Commission decided to address in January. One, I think I'll read specifically, so that we are clear on this. There was some question about whether we had gotten it right or not, and I think we did.

First was, "How should responsibility for enforcement of antitrust laws in regulated industries be divided between antitrust agencies and the regulatory agencies." Secondly, determining the appropriate standard for determining the extent to which the antitrust laws apply to regulated industry, whether there is no specific antitrust exemption, or there is an antitrust savings clause. And, finally, whether or not Congress and regulatory agencies should set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations.

The questions for public comment, I think you will see, pretty much track those three issues. I guess one question, perhaps, we should talk about is under question six for public comment, we have listed a dozen or so specific industries vis-à-vis merger decisions, whether it's financial institutions, media companies, rail, motor

carriers, et cetera.

To me, that was an appropriate list to have to help guide the discussion, and we would welcome any input on that as well.

CHAIRPERSON GARZA: Are there any comments or questions?

Commissioner Jacobson?

COMMISSIONER JACOBSON: I think there are really a couple of different sets of issues associated here. One is where the Congressional legislative schemes endeavor to allocate responsibility for antitrust review of a particular transaction or particular types of conduct. I understand our sixth question to be directed at that. I think it's a fair and important area of inquiry that we look at the existing allocation and determine whether, in light of deregulation as it has taken place over the last 35 years, the structure is in need of modernization, if you will. I think that is important.

I think at least as important as the issue that Makan referred to earlier, is the basic standard for implying immunities from the antitrust laws. There has been a concern in some quarters that the courts have veered off course over the last five years, in particular. The

securities cases in the Second Circuit come to mind. The *Trinko* decision, some people would say, including our legislative benefactors, may have gone awry in that respect.

So I think these are very different inquiries, but ones of great importance to the national economy, and I think the questions as drafted hit them right on the head very well.

CHAIRPERSON GARZA: I would like to note that question three in particular is the one that specifically addresses the question of implied immunity.

Commissioner Delrahim, you might want to look at that and determine whether it meets what you had raised, the concern you had raised earlier.

COMMISSIONER DELRAHIM: It does.

CHAIRPERSON GARZA: Any more – Commissioner Warden?

COMMISSIONER WARDEN: I just have one question/observation. The arrangements between domestic and foreign airlines, I guess, are not properly characterized as mergers or acquisitions, although they often involve significant equity investments. But there is a statutory division of authority with respect to the competitive analysis of those matters, and perhaps they should be

listed, or that statute should be listed?

VICE CHAIR YAROWSKY: Just one comment. You know, I think this may interlock pretty nicely. I think Makan helped develop this idea. But in the immunities and exemption area, like for state action, obviously, clear articulation is a very important component of this judicially created doctrine. There is no such doctrine directed to Congress about how to create a regulatory scheme. I think what we're watching are two different currents coming together with implied immunity, Jonathan.

I'm just trying to think through if we are going to cover everything. I think, in the end, it is interlocking conceptually, anyway. And, it is our job to make sense of it when we write a report. So, I'm pleased with how this came out.

COMMISSIONER JACOBSON: In response to John's comment, I think, clearly, air carriers should be added to the list.

COMMISSIONER CANNON: Is there agreement among all the Commissioners on that?

[General agreement.]

COMMISSIONER CANNON: We will add that provision.

CHAIRPERSON GARZA: Are there any other comments

from the Commissioners?

[No response.]

COMMISSIONER GARZA: With that addition, then, the staff can publish the questions as proposed by the study group.

Next is the remedies working group proposal for public comment, and that is Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Thank you. The Commission adopted three questions for consideration. Speaking generally, they involve remedies in private antitrust litigation, remedies in government litigation, and indirect purchaser litigation.

Under the first topic, private antitrust remedies, the study group recommends study of questions in the following topic areas as stated there: treble damages, prejudgment interest, attorneys' fees, joint and several liability, and private injunctive relief.

Under the second topic, government remedies, the study group recommends study of questions concerning the advisability of authority for government to impose civil fines.

Under the third topic, indirect purchaser litigation, the study group recommends study of questions

relating to costs and benefits of indirect purchaser litigation, procedural issues created by current state court and direct purchaser litigation, as well as a review of the *Illinois Brick* rule under federal law.

The study group recommends five panels which, as all of you know, I have been conservative in the recommendations of panels, but I believe five are appropriate.

CHAIRPERSON GARZA: Are there any questions or comments about the remedies study group proposal?

[No response.]

CHAIRPERSON GARZA: All right. Hearing none, then, the staff will go ahead and use the questions as proposed.

Finally, we have the Robinson-Patman Act study group's proposals for questions on the Robinson-Patman Act. Commissioner Litvack, will you do that discussion?

COMMISSIONER LITVACK: Yes. Basically, the Commission adopted the issues to be studied as to whether the act should be repealed in whole or in part and then specifically whether Section 3, providing for criminal remedies, should be repealed.

The questions for public comment really focus

broadly on the Act. I ought to say, it is not our intent to restudy the whole Robinson-Patman Act. A lot has been written on it, and really, we ought to be taking what is there and trying to build on it as we ask a couple of fairly well-focused questions, like what are the benefits that should be derived? What changes, if any, should be made in the Act? Should the Act serve, does it really serve, any particular purpose? How does it interface, if at all, with state acts that may do much of the same?

So, we are trying to focus on what has already been done, building on that to get to a very narrow question. We ended up by recommending only one panel, because we think we can adequately cover it within that type of hearing.

CHAIRPERSON GARZA: Are there any questions or comments on the Robinson-Patman Act proposal?

COMMISSIONER SHENEFIELD: Just as a clarification, the fact that we agree to one panel here or two or three doesn't limit us, I take it.

CHAIRPERSON GARZA: No. I meant to address the hearings after we were done with this. I would like to defer that discussion for now. The only thing that will come out of this meeting, assuming that we all agree, is the

questions for public comment that have been proposed and adopted, or adopted with revisions. They will be published in the Federal Register as soon as they can be, whether it is tomorrow or Wednesday, and that will be used in further outreach with specific stakeholder groups to try to organize the information. But we want to talk about hearings in a second.

Before that, just to be clear, are there any questions or comments on the questions for public comment proposed by the Robinson-Patman Act study group?

[No response.]

CHAIRPERSON GARZA: All right. Hearing none, then, the staff will go ahead and publish what has been proposed by the group.

On the issues of hearings, the study groups have begun to consider the structure of hearings, including the number of panels, what the panels should cover, what types of individuals should be invited to speak, so that we ensure that we have heard from all of the important stakeholder groups and have gotten to hear from and put questions to those kinds of people that we think would be important to hear from for our analysis.

In order to be able to structure our calendars

between, say, now and at least through the fall, there is a proposal to establish a calendar and presumption about the number of days that would be devoted to specific hearings on specific issues, so that the staff has something to work with in working with the working groups and scheduling the actual hearings.

They will continue to focus on the number of panels and who will be on the panels, informed in part by further outreach efforts, in part by what we receive in response to our request for public comment within the constraints of the time that we have.

I think everyone got a copy of the memo, but the proposal for now is to allocate a day for exclusionary conduct; three days for merger enforcement and enforcement institutions, one and half days each; a day for immunities and exemptions; a day for international; a day for new economy; a day for regulated industries; one and a half days for the remedies; a half a day for Robinson-Patman; and a half day for criminal issues, should we need to discuss those.

This is a proposal so that the staff can move forward in scheduling with the Commissioners and scheduling the calendars for the hearings. It is conceivable that we

might decide that we need to expand the time or that we will need to do some sort of other follow-up following initial hearings. There may also be certain circumstances in which we might decide to have a panel in, say, January. Right now, we are focused on a schedule from June through the end of November, is it?

MR. HEIMERT: Thanksgiving or so.

CHAIRPERSON GARZA: Thanksgiving.

MR. HEIMERT: Before Thanksgiving.

CHAIRPERSON GARZA: With the possibility that it is conceivable that one or two may go into January for reasons really not related so much to our time but to things that are happening, other reports and work that the agencies are doing, that it might be useful for us to wait on. Specifically, one of those being considered is merger transparency due to an expectation that the Federal Trade Commission may or may not be doing something in that area between now and the end of the year.

Right now, we have tentatively scheduled, or I don't know how tentative it is, but we are planning on having this June 27 hearing on indirect purchaser, or *Illinois Brick*, issues. We are taking steps to line up panelists and having the Commissioners hold open on their

calendars the afternoon of June 27.

MR. HEIMERT: That is the idea, the plan.

CHAIRPERSON GARZA: Okay. Then, the hope is to try to have a couple of hearings in July and then September, October, and November would carry the rest of the hearings or the bulk of them.

Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Do we anticipate having the public comment on these topics by the time we begin our hearings?

CHAIRPERSON GARZA: Hopefully, yes; that's the plan. The plan is to ensure, and for that reason, if you look at the Federal Register notice that the staff has drafted, I think indirect purchaser and others are earlier.

MR. HEIMERT: The remedies topic, we asked for comments at least on the draft – by June 17th. Two other topics that we thought might be the subject of earlier hearings: immunities and exemptions and Robinson-Patman by July 1; and the rest would be by July 15. Those would be the panels we would more likely be scheduling in the fall. So, we should have comments in advance of the hearings on the topics.

COMMISSIONER JACOBSON: Is that a draft, or is

that in the Federal Register?

MR. HEIMERT: That is a draft.

CHAIRPERSON GARZA: A draft. There is nothing –

MR. HEIMERT: There's nothing that's been put in the Federal Register.

CHAIRPERSON GARZA: Yes.

COMMISSIONER JACOBSON: It makes good sense. I think the sooner the better on that.

CHAIRPERSON GARZA: All right. Are there any other questions about hearings, panels, calendaring?

COMMISSIONER WARDEN: I think that I'm happy with this as an opening proposal, but I do – personally, I would be more inclined to increase, rather than reduce, from the opening proposal. I don't think that would –

CHAIRPERSON GARZA: You mean the number of –

COMMISSIONER WARDEN: Yes, the amount of time devoted to hearings.

COMMISSIONER LITVACK: Isn't that just something we are going to have to ascertain as we go along and see what happens?

CHAIRPERSON GARZA: I think that's right. I think the presumption is going to be that we will have those

days set aside for panels. They may be long days. But to enable as many Commissioners as possible to participate in as many hearings as possible, we wanted to project forward at least some days, because it's awfully hard to get calendars all coordinated; also, to help us to begin to line up speakers. We anticipate that a lot of people will want to be heard from. We will also all have crowded calendars.

So, it may be, as I said, that we would add if we need to. We will do what we need to do in order to make sure that the Commissioners have the information they need in order to guide our way to the final report. But we really do want to have this as a base. Then, of course, as we move forward, we will have to balance the question of having hearings and the call on the Commissioners' time.

All right. Well, if there is nothing else –
COMMISSIONER SHENEFIELD: Are you about to adjourn?

CHAIRPERSON GARZA: Yes.

COMMISSIONER SHENEFIELD: I just want to call attention to the fact that over the weekend or in the last week, we have lost two major figures in the antitrust world. We have, of course, read about Peter Rodino, who was, in my experience, my guess is in yours, Sandy's, as well, and

perhaps others, always a huge friend of antitrust enforcement and the Antitrust Division.

He gained his fame in other areas, but for me, as Chairman of the 1978 Commission, I found him a huge supporter and strong person to lean on. Holding hearings in his hearing room, sitting in his chair with him sitting to my left saying what about this, what did you think about that, was terrific. He was a wonderful human being, and we will all miss him.

Not as well known, and Professor Kovacic mentioned to me, we lost Ernie Gellhorn over the weekend as well. Ernie was a very good friend of mine and of many of the people in this room, a gentle and genial man, friend and mentor to very many people both in the academic community and outside. I thought it would be appropriate simply to mention that on the record in this particular Committee.

CHAIRPERSON GARZA: Thank you.

With that, the meeting is adjourned. Thank you.

[Whereupon, at 2:18 p.m., the meeting adjourned.]