

Supplemental Federal Trade Antitrust Improvement Act (“FTAIA”) Discussion Outline

Note: Italicized text is based on the Commission’s questions for public comment. Indications of support for particular recommendations are based on AMC Staff’s recording of discussions during and review of the transcript for the deliberation meeting on June 7, 2006. No Commissioner is bound by the indications reflected in this document, and it is understood that Commissioners may change their positions from those tentatively indicated in initial deliberations.

I. <i>Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?</i>
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June 7, 2006, Recommendations and Indications of Support

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

[5 Commissioners favored: SC, DC, DG, JJ, SL. Not present: DK]

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

[6 Commissioner favored: BB, MD, JS, DV, JW, JY. Not present: DK]

[3] Recommend replacing the current FTAIA with simpler language, e.g., “The Sherman Act and the FTC Acts shall not apply to injury not occurring within the United States or U.S. territory.”

[9 Commissioners favored (as alternative to recommendation #1 or #2, where supporting those): BB, DC, MD, DG, JJ, SL, DV, JW, JY. Not present: DK]

Recommendations based on Supplemental Memorandum

[4] Recommend further explication of *Empagran* through the case law.

In particular:

[a] Recommend that courts follow the holdings in *Empagran*

[b] Recommend that courts follow two or three guiding principles (e.g. “Foreign conduct must cause harm to U.S. commerce. The harm to U.S. commerce must directly cause plaintiff’s injuries.”).

[5] Recommend alternate statutory language.

In particular:

[a] “The Sherman and FTC Acts shall not apply to harm not within the United States and not on U.S. territory.” (Prof. Fox)

[b] “Plaintiffs must show that their harm has been proximately caused by the illegal acts that harm the U.S. market and is

inextricably bound up with the affected U.S. commerce.” (Prof. Fox)

[c] “There is no private right of action under the U.S. antitrust laws for injury not occurring within the United States or U.S. territory.” (Commissioner Warden)

[d] “Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless ... (2) such effect gives rise to a the claim of the plaintiff under the provisions of sections 1 to 7 of this title, other than this section.” (Commissioner Delrahim)

[e] “Injured parties that are neither competitors nor consumers in the U.S. marketplace are precluded from suing under U.S. antitrust laws.” (Commissioner Delrahim)

[f] “The United States laws do not apply in the absence of an adverse effect in the United States' territory.” (Atwood)

[g] Other statutory language.