

ANTITRUST MODERNIZATION COMMISSION

MINUTES OF MEETING ON MAY 8, 2006

The Antitrust Modernization Commission met on May 8, 2006, in the Federal Trade Commission Conference Center, 601 New Jersey Avenue, N.W., in Washington, D.C. This meeting was announced to the public in advance through publication of a notice in the *Federal Register*. See 71 Fed. Reg. 20,643 (Apr. 21, 2005). Andrew Heimert, the Executive Director & General Counsel, served as Designated Federal Officer for the meeting. The Chair called the meeting to order at 9:30 a.m. and noted a quorum. The meeting was transcribed. Approximately ten people were in the public audience.

Participating:

Deborah A. Garza, Chair
Jonathan R. Yarowsky, Vice-Chair
Bobby R. Burchfield, Commissioner
W. Stephen Cannon, Commissioner
Dennis W. Carlton, Commissioner
Makan Delrahim, Commissioner
Donald G. Kempf, Jr., Commissioner
Jonathan M. Jacobson, Commissioner
Sanford M. Litvack, Commissioner
John H. Shenefield, Commissioner
Debra A. Valentine, Commissioner
John L. Warden, Commissioner

Andrew J. Heimert, Executive Director & General Counsel

Also present:

William F. Adkinson, Jr., Counsel
Marni B. Karlin, Counsel
Alan Meese, Senior Advisor
Hiram Andrews, Law Clerk
Kristen Gorzelany, Paralegal

I. Remarks of Chair

The Chair offered opening remarks for the Commission meeting, in which she welcomed the public to the meeting, summarized the Commission's past year of issue selection and hearings, and set out the process for deliberations at the meeting. The Chair explained that prior to the meeting, to assist them in their deliberations, each Commissioner was provided with a memorandum prepared by staff summarizing the relevant testimony and comments for each topic set for deliberation, and a list of possible recommendations regarding each question upon which public comment was solicited. The proposed recommendations were designed to help focus

discussion. Commissioners were free to propose additional recommendations as well as modifications to those set forth in the discussion outlines. All documents were made available to the public at the meeting and in advance on the Commission's website.

II. Discussion of Issues

The Commission deliberated on two topics it adopted for study, criminal remedies and civil remedies. On each topic, each Commissioner provided his or her initial views on the subject, followed by general discussion among the Commissioners. When Commissioners had completed discussion on each topic, they each indicated their current views on the proposed recommendations. (It is understood that all views are subject to change.) References to questions below, as well as recommendation numbers, refer to the applicable discussion outline for the topic, a copy of which is attached to these minutes.

Criminal Remedies

1.A. (Whether the Sentencing Guidelines adequately account for degree of culpability and distinguish between violations of differing severity). Ten commissioners (Burchfield, Carlton, Delrahim, Garza, Jacobson, Kempf, Shenefield, Valentine, Warden, Yarowsky) favored recommendation 2 (make no change to the Sentencing Guidelines, but endorse continued limitation of criminal prosecutions to hard-core cartel conduct). Two Commissioners (Cannon and Litvack) favored recommendation 1 (make no change to the Sentencing Guidelines and no comment on current enforcement policy).

1.B. (Regarding the Sentencing Guidelines' base fine proxy based on 20% of affected commerce). Ten commissioners (Burchfield, Cannon, Delrahim, Jacobson, Kempf, Litvack, Shenefield, Valentine, Warden, Yarowsky) favored recommendation 3 (revise Sentencing Guidelines so that the 20% proxy is rebuttable by proof by a preponderance of evidence that would "materially change" the base fine). One Commissioner (Garza) favored recommendation 1 (no change to Sentencing Guidelines). One Commissioner (Carlton) favored recommendation 5 (increase the 20% proxy). Eight Commissioners (Cannon, Carlton, Delrahim, Garza, Jacobson, Kempf, Warden, Yarowsky) favored recommendation 6 (the Sentencing Commission should study the basis for the 20% proxy).

2. Consensus among Commissioners to request additional comment on whether (a) to repeal Section 3571(d) as it applies to antitrust offenses, and (b) whether to increase the maximum Sherman Act fine. Votes on questions 2.A and 2.B were subject to revision depending on what is later decided with respect to Section 3571(d), after public comment and further consideration.

2.A. (Whether gain or loss under section 3571(d) should be based on all conspirators' sales or only on the particular defendants' sales). Four Commissioners (Delrahim, Garza, Shenefield, Yarowsky) favored recommendation 2 (amend Section 3571(d) to specify that loss is that caused by entire conspiracy). Three Commissioners

(Burchfield, Litvack, Valentine) favored recommendation 1 (no statutory change). Three Commissioners (Jacobson, Kempf, Warden) favored recommendation 3 (amend Section 3571(d) to specify that loss is that caused by particular defendant). Two Commissioners (Cannon and Carlton) were undecided.

2.B. (Use of 20% proxy). Seven Commissioners favored recommendation 1 (no statutory change) (Burchfield, Garza, Jacobson, Litvack, Valentine, Warden, Yarowsky). Three Commissioners favored recommendation 2 (use actual gain or loss) (Delrahim, Kempf, Shenefield). Two Commissioners were undecided (Cannon, Carlton).

Government Civil Remedies

1. (Civil fines). Ten Commissioners favored recommendation 1 (no civil fine authority) (Burchfield, Cannon, Carlton, Delrahim, Garza, Jacobson, Kempf, Litvack, Warden, Yarowsky). Two Commissioners favored authorizing civil fine authority for both DOJ and FTC (Shenefield, Valentine).

2. (FTC disgorgement policy). All twelve Commissioners favored recommendation 4 (no change to existing authority, with recommendations on limitations to be developed). Six commissioners (Burchfield, Carlton, Delrahim, Kempf, Shenefield, Warden) favored recommendation 2 (modify 13(b) to bar monetary remedies in competition cases), if DOJ does not also have authority to obtain disgorgement.

Staff will follow-up: (a) to determine DOJ's view on whether it has authority to seek equitable relief such as disgorgement; (b) to provide a supplemental memorandum more fully describing (i) the FTC's policy on seeking monetary equitable relief; (ii) the instances in which it has actually sought such relief; and (iii) criticisms of the application of policy in those cases.

Indirect Purchaser Litigation

Consensus of Commission to put aside the four recommendations as stated and focus on a combination of elements from options 3 and 4, with the following components:

(1) Overruling of *Illinois Brick* and *Hanover Shoe*. Ten Commissioners tentatively favored a proposal incorporating this element (Burchfield, Delrahim, Garza, Jacobson, Kempf, Litvack, Shenefield, Valentine, Warden, Yarowsky); two opposed (Cannon, Carlton).

(2) Preemption of state law or removal of state indirect purchaser actions to federal court. Five Commissioners (Delrahim, Garza, Litvack, Shenefield, Warden) favored a proposal including preemption of all but intrastate matters. Five Commissioners (Burchfield, Jacobson, Kempf, Valentine, Yarowsky) favored a proposal including removal as an element. Five Commissioners (Delrahim, Garza, Litvack, Shenefield, Warden) favored removal as an alternative

to preemption. One Commissioner (Cannon) would provide for neither preemption nor removal. One Commissioner (Carlton) was undecided.

(3) Consolidation of all related matters in a single federal court for pre-trial and trial proceedings. Nine Commissioners (Burchfield, Carlton, Delrahim, Garza, Jacobson, Litvack, Shenefield, Valentine, Warden) favored a proposal incorporating this element. Three Commissioners (Cannon, Kempf, Yarowsky) opposed including it.

Eight Commissioners (Burchfield, Cannon, Carlton, Delrahim, Garza, Kempf, Litvack, Yarowsky) would make no recommendation on structured proceedings (or “trifurcation”). One Commissioner (Shenefield) supported mandatory “trifurcation.” Four Commissioners (Jacobson, Shenefield, Valentine, Warden) supported encouraging courts to use structured proceedings or trifurcation.

No Commissioner favored recommending changes to class action certification standards.

No Commissioner favored including prejudgment interest specifically for indirect purchaser actions (with the larger question to be addressed with other damages issues).

Staff will follow-up: (1) interview district court judges regarding proposed reforms relating to indirect purchaser litigation; (2) draft for Commission consideration a request for public comment on specific reform proposal(s).

Damages and Liability

7. (Joint and Several Liability, Contribution, and Claim Reduction). Eleven Commissioners (Burchfield, Cannon, Delrahim, Garza, Jacobson, Kempf, Litvack, Shenefield, Valentine, Warden, Yarowsky) favored recommendation 4 (allowing claim reduction against non-settling co-conspirators). Nine Commissioners (Burchfield, Cannon, Delrahim, Jacobson, Kempf, Litvack, Valentine, Warden, Yarowsky) favored recommendation 3 (allowing contribution from non-settling co-conspirators). One Commissioner (Carlton) favored recommendation 1 (no change in respect to either contribution or claim reduction). All twelve Commissioners favored using market share as a basis for allocation if contribution were available, or gain if it is not feasible to apply market share.

The Commission began discussion of attorneys’ fees and prejudgment interest. Several Commissioners noted that their views depended on the outcome of deliberations on treble damages. Further consideration of those questions, as well as on treble damages, was deferred to the Commission’s meeting on May 23, 2006.

The meeting was adjourned at 4:39 p.m.

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.

Deborah A. Garza
Chair, Antitrust Modernization Commission