ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

July 13, 2006

Main Conference Room
Morgan Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C.

Pursuant to notice, the meeting convened at 9:34 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

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ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General Counsel
SUSAN DeSANTI, Senior Counsel
WILLIAM F. ADKINSON, JR., Counsel
NADINE JONES, Counsel
MARNI KARLIN, Counsel
KRISTEN M. GORZELANY, Paralegal
JAMES ABELL, Summer Intern

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Exclusionary Conduct, Immunities and Exemptions, and Regulated Industries

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity. All Commissioner votes and views transcribed herein are subject to change or modification.

P R O C E E D I N G S

CHAIRPERSON GARZA: I would like to welcome the Commissioners, the staff, and members of the public. This morning the Commission will discuss the issues it agreed, through a majority vote, to study regarding exclusionary conduct.

We do have pending, from our last meeting, a motion by Commissioner Shenefield to reconsider whether the Commission should report on proposed reform of the patent process. That question will be taken up at our next meeting, July 25 and 26, and Commissioner Shenefield has agreed to that.

I would like to very briefly remind everyone of the procedure that we will follow. This is mostly for the benefit of the audience, and I will do it very quickly. The staff has prepared two documents for the Commissioners to assist us in our deliberations. The first is a rather lengthy memo that is designed to summarize the issues that we agreed to study, the testimony that we took, and the submissions that we got. It is a summary only. It is meant to help the Commissioners wade through the substantial materials that had to be considered.

The second is a discussion outline that the staff derived from the Commission record to date. The purpose of that outline is to help frame our discussions today. It is not intended to preclude discussion of any options or any ideas that are not included in the outline. It is just simply to help us begin to see where we are on various issues.

In the case of exclusionary conduct, the outline is a little different than prior ones; this is, in part, for the benefit of the Commissioners that I am saying this. It is a little different than some of the prior issues that we have discussed, where the options in the discussion outline may have been more action-oriented, recommending specific action. Because of the nature of the issues here, this tends to be a little bit more oriented to headlines and general principles.

Now, obviously we took a lot of testimony on a lot of very specific issues relating to various standards that might be employed by the courts relating to the essential facilities doctrine, *et cetera*. The outline does not list all of those various standards and permutations of standards, because it did not make sense to have people actually vote, or compel them to vote on a particular standard.

That is not meant to preclude any Commissioner from discussing any particular standard in the context of the principles that are outlined in the discussion outline.

So with that, unless anyone has any questions, what we will do is, as we have in the past - we have an order that the Commissioners are aware of, but I will also call on people. I would like you to indicate, with reference to the discussion outline, where, at this point, at least, you think you are leaning on specific issues in the outline. Also indicate whether there are any other issues that you intend to propose for discussion.

We will do that with every Commissioner briefly, and then we will come around, after we have touched base with every Commissioner, and have our discussion.

Exclusionary Conduct Issues

So, with that, Commissioner Carlton, are you ready to begin?

COMMISSIONER CARLTON: Yes. Let's see. My preliminary thoughts on exclusionary conduct are as follows: yes on 1, yes on 2, yes on 3, and under 3, yes on 3(a), yes on 3(b). Yes on 5, and yes on 6.

And, under II, yes on 7, and yes on 8.

CHAIRPERSON GARZA: Thank you.

Commissioner Warden.

COMMISSIONER WARDEN: I think I am exactly the same. Yes on 1, yes on 2, yes on 3, yes on 3(a), yes on 3(b). Yes on 5. I don't really have an opinion on 6. I would say that is not proven to my satisfaction.

Yes on 7, and yes on 8.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: These are very general propositions, most of which I subscribe to, just as Commissioner Carlton and Commissioner Warden have.

Let me just give votes, and then I would like to make a bit of a statement. I agree with 1, I agree with 2, I agree with number 3, and I agree with (a) and (b) of number 3.

I think 4 is unanswerable; I think 5 is unanswerable; and I think 6 is unanswerable.

I agree with 7, and I agree with 8.

Let me explain why I think 4, 5, and 6 are unanswerable. I don't think –

CHAIRPERSON GARZA: Commissioner Jacobson, can we do that on the second round?

COMMISSIONER JACOBSON: Yes. Certainly.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: I am largely in agreement with Commissioners Carlton and Warden.

I agree with 1, and I agree with 2 and 3.

Although, on an initial reading, I was unsure whether 2 and 3 were intended to be complementary or mutually exclusive, I think I can read them as being complementary. So, I would agree with 2 and 3.

I agree with 3(a) and 3(b).

I do not agree with 4, but I agree with 5 and 6, and, during the discussion, I would like to elaborate a bit on my views on 5.

And then I also agree with 7 and 8.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I think I am about the same as Commissioner Warden.

I would vote yes for 1, yes for 2, yes for 3, yes for 3(a), yes for 3(b). Yes on 5, yes on 7, and yes on 8.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Yes on 1, yes on 3, yes on 3(a), yes on 3(b), yes on 5, yes on 7, and yes on 8.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I would vote for number 1. I agree with the back-end of 2, but the front-end I just think is a bunch of gobbledygook.

3, I am inclined toward yes, but I want to hear more discussion.

4, I am no on.

5, yes. 6, yes, with some clarification. 7, yes. 8, yes, and no on 9.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Okay. 1, yes. 2, yes. 3, yes. 4, no. 5, no. 6, no. 7, yes. 8, yes.

MR. HEIMERT: Commissioner Cannon

COMMISSIONER CANNON: Okay.

I am voting yes on 1.

And I am with Commissioner Kempf on number 2. I am wondering about that.

Yes on 3(a) and 3(b). 4, I have no on that. Yes on 5, yes on 6, and yes on 7 and 8.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Yes on 1, yes on 2, yes on 3(a) and 3(b). Yes on 5, yes on 6, yes on 7, and yes on 8.

CHAIRPERSON GARZA: Just to let you know what we are doing we are going to discuss [inaudible.]

Commissioner Jacobson

COMMISSIONER JACOBSON: As most of you may recall, I thought that this was too broad to cover this whole set of issues –

[Inaudible.]

I think stating that there is something called existing standards and unilateral to the [inaudible] is a difficult statement, because I don't think anyone can articulate what those general standards are.

And if we are going to venture into this and make a positive contribution, then I think the thing that we have to emphasize is what we said in 3(a), which is that we need additional clarity. And I think it is difficult to vote for 3 and 3(a), and at the same time vote for 4, 5, and 6.

Unilateral refusals to deal is an area where I think it does not make sense to talk about unilateral refusals to deal as a unitary phenomena. I think there are extensions based on markets affected, and the persons with whom the defendant is refusing to deal who are appropriately pointed out - I don't know that we have the record,

necessarily, to do that in the same fashion that we did on bundling.

I thought we had a very clear record on bundling, and I would like to see us say something positive about the standards for the bundling.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I just wanted to echo what some people said in their earlier comments, which is, when some of the statements say that the standards currently employed are okay and generally good, and then we go on later and we criticize some particular cases, I think that does lead to ambiguity as to exactly what we are saying. And maybe we should just say, for example, as Commissioner Kempf suggested in 2, that you could start with, "While it is possible to disagree with individual cases…" just to say what we believe so that they know. That is the first point.

The second point is, some of these statements are very general, and some of them, I thought — the benefit of our report will be to articulate the reasoning underlying our statements. So, in particular, in item 3, when we refer to the fact that the profit-sacrifice test was mentioned, it might be appropriate for us to say what we think about the

profit-sacrifice test, if we can reach a consensus on that.

My own view is that it is not the right standard, and I think some of the criticisms that came up during the hearings would be appropriate if they reflect at least what some people on the Commission believe.

Regarding the two specific topics that the discussion outline talks about on *LePage's*, and the refusals to deal, I think it is important for us to emphasize why there was uniform criticism of the *LePage's* decision and the fact that there were many reasons why there were many criticisms raised, not just incremental revenue versus incremental cost. So I think we have to be careful in discussing that case if we do discuss it, and I think we should – there were several criticisms, and we should mention what they are. It was mainly the ignoring of a lot of relevant economic evidence, as well as the fact that, in light of that decision, you could make a lot of errors.

In terms of whether you want to adopt incremental revenue versus incremental cost, I would just caution people that those terms should be very carefully defined if we state that as the criteria. Let me just give you an example.

I think that this is what people mean: if there is

a discount, I am going to put all of the discount on one of the products, and I am going to see, in light of what has been sold after the discount, do the incremental revenues cover the incremental cost? I think that is what people mean.

If you apply that test to every possible single unit, you will be imposing a test that requires a firm to price at marginal cost. I don't think we want to do that.

For people who think that is what the agreed return test is, that is not what the agreed return test is. The agreed return test is where the price is below the average variable cost or marginal cost, some level above marginal cost.

It is not a violation to not be maximizing profits. So whatever we say about *LePage's*, I think that we have to be very careful to phrase it that we are not saying, if you are not at the level that some lawyer or economist believes maximizes your profit, which is really marginal revenue equaling marginal cost, then it is a violation.

I think that we have to be very careful about that. And if we want to say, given the quantity that is produced, the incremental revenue covers the incremental cost, that is

different from saying incremental revenue has to be above incremental cost for every possible output that you might choose.

So, I just want to caution exactly how we phrase whatever it is we recommend if we think we know the standard. My own preference right here would be to say that people have to look at things like incremental revenue and incremental cost, and that might be a safer way of covering our bases, rather than telling them precisely how to do the test.

Regarding refusals to deal, I think that we should say what we think about refusals to deal. We are voting on it, and if there is not a consensus, I think the report should reflect that.

My own view is that the current law, as I understand it, as far as refusals to deal, is a bit clouded. And maybe it is just me who is clouded in my understanding, but I think we should state what it is we believe about refusals to deal, rather than referring to existing standards. And that, then, would make clear if someone wanted to read our report, how they should be guided by our thinking in our refusals to deal case.

And what I should say for the record is that my

view on refusals to deal is that, at a unilateral level, it is very hard to think of convincing cases where I would force a firm to deal with a rival.

COMMISSIONER KEMPF: I have a question for Commissioner Carlton. What would you do about the so-called essential facilities doctrine, if anything?

COMMISSIONER CARLTON: I would abandon the essential facilities doctrine. I would treat cases that might previously have been brought under an essential facility doctrine as an ordinary Section 2 case.

An essential facility, as I understand the cases are brought, simply means someone has lots of market power over some product. And the antitrust laws allow the monopolist to charge any price he wants, as long as he obtains his market power legally. And I really see no distinction between someone who has market power and someone who owns what is called an essential facility.

COMMISSIONER KEMPF: Let me just pose a question to you, if I could, to follow up on that. What I think of as the classic cases - the railroad hub, where it is not a market power derived from success in marketplace, but by having a place where the railroads come together, and you

have got the switch-over place, and if you don't let somebody use it, their train stops there.

What do you do in that case?

COMMISSIONER CARLTON: I think the railroad case, where a joint venture owns the hub, raises a question about a joint venture and its duty to deal. And I would distinguish that from a unilateral refusal to deal.

If a bunch of railroads get together and then, because of their joint venture, collectively have what we would term an essential facility, I would give very careful scrutiny to requirements of making that joint venture, as conditional of me allowing a joint venture, or the government allowing a joint venture, have a duty to deal with people.

And I think it is very important to distinguish between joint ventures having a duty versus single firms.

COMMISSIONER KEMPF: Thank you.

Thank you, Madame Chair.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: I, just as a general proposition, come to these issues of unilateral conduct with the predisposition that I think there is more potential for harm here in having too-strict standards then there is in

having too-loose standards.

In other words, I believe, as a market-oriented person, that it is more likely that strict standards can produce false positives and deter beneficial competitive activity than it is likely that looser standards are going allow harmful, anticompetitive activity.

And I know that is a proposition on which reasonable people can disagree. But, from my observation, that is my view, just to be upfront.

I agree with much of what Commissioner Carlton said, and, in particular, with regard to bundling. My view on bundling, and I can be persuaded on this, but my view on bundling is that, if the two-product company is giving discounts on its two products that an equally efficient competitor could match at a break-even price, then I think that bundle should not be subject to challenge under the antitrust laws.

There may arguably be situations in which that standard is too forgiving, but, as I said earlier, my predisposition is, particularly in the situation of discounting, to give as broad a sway as possible to the discounter and not interfere with decisions on multi-product

discounting, except in extreme cases where there is some degree of demonstrable predation.

So, that obviously means that I have some serious misgivings about the *LePage's* case, for reasons that were well expressed before and probably additional reasons.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I agree with, I think almost everything, perhaps everything, that Commissioner Carlton said a few minutes ago.

I want to just raise a question that, when you are talking about bundling and these price tests, it is well to bear in mind that – I think it is probably not analytically sound that, as the *Microsoft* case illustrated, bundling can be a charge made in situations where you don't have, at least in the eye of the maker, two separate products that even have separate prices.

And if you get into, just reviewed as an improvement to an addition of a feature to a single product, if you get into the kind of thing that Commissioner Jacobson was talking about, I am not sure how you could possibly apply that in such a case.

If we are talking about prices only, that probably

doesn't exist, but I still think I probably agree with Dennis.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: On the discussion about item 2, I think I agree with several of the Commissioners who said it might be more helpful in terms of framing the report to focus on the second sentence, or the principles that are talked about there. In general, the courts would probably recognize, *et cetera, et cetera*.

In addition, I think, from my point of view, what would be potentially useful for the report would be to relate what we think the guiding principles should be.

What are our objectives? What are the things that have to be kept in mind that should be guiding the development of standards? What is right about the law? What aspects of certain significant decisions like *LePage's* are troubling?

Now most of us, I think, did vote for 3(a), which says that additional clarity and improvement is best achieved through continued evolution in the court. And *eBay*, which talks about the importance of public discourse and acknowledges that the Justice Department and the FTC, as well

as the International Competition Network, are both embarking on very extensive consideration of these issues where, presumably, I think their intent is to try to take real-life examples and subject them to various tests and really do a more thorough analysis than we were even able to do, although I think we did get a lot of very good testimony and commentary.

So, my own preference would be not so much to recommend a specific standard but to talk about the various standards and potentially apprise them against the principles that we might all agree to.

And, for example, on *LePage's*, to me the problem was the courts and what to me would be an improvement would be recognition of the principles in *Brooke Group*, and recognition that there should be some appropriate price standard; recognize that recoupement has a role.

And that alone would have made a difference. But then I personally don't feel comfortable saying what that cost standard should be. The courts haven't decided; the Supreme Court didn't do it, and I personally think that it needs more focus and that this Commission may not be in the position to definitively say it should be one standard or

another.

Similarly, with respect to refusals to deal, I think we can articulate what some of these standards are and how we view them, but I am not sure that I would be comfortable necessarily saying what I think the courts should do, although, you know, there might be some safe harbors and some principles that I think that it would be relevant to talk about.

Some Commissioners may favor a particular approach, and we can always note that, but I would be reluctant to assume that we could prescribe the standards that the courts should apply.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I would like to associate myself with the content and tenor of what was just said. I vote against 3, 3(a) and 3(b) to make a point. And the point that I would like to make, which I sense will be disagreed with by most of the members of the Commission, is, if this discussion represents a standard discussion in the antitrust community, Section 2 is in danger of being whittled away to virtually nothing, and that is a tendency that I very much disagree with.

I would vote for 3(a) and 3(b). How can you be against it? Although I don't particularly like the *Trinko* case, at least as it is read in its broadest terms. So, Andrew, if you can just note that I would, in fact, be for more public discussion, and additional clarity is a good thing, and the courts are a good place to have it.

In particular, I am unhappy with the way *Trinko* is read with respect to leveraging. I would not do away with that doctrine in its entirety. I certainly would not do away with the essential facilities doctrine, whether the result of a combination of entities or unilaterally. *Otter Tail Power Company*, I would not overrule, for instance.

So, I will be perhaps the only voice on this Commission in support of a pretty broad interpretation of Section 2. But the report is, as the Chairman sort of laid it out – that is something that, at least so far as she laid it out, I would be willing to support.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Commissioner Shenefield is not alone in his concerns about the direction of Section 2. I share many of those concerns.

But I don't think that there is a large area –

there is certainly some disagreement along the edges, but I don't think there is a large area of disagreement among the Commissioners. I want to address Commissioner Carlton's comments about bundling in particular. I absolutely agree that we need to be careful. I do think we should say something other than, *LePage's* is standard. I think that tautology is not much of a contribution.

I think we need to say more than that. I agree that applying the incremental costs, incremental revenues test in a way that would be translated into a profit-maximization test would be wrong. I think you achieve that, both by suggesting that that is a guideline and not a hard test, as Dennis was recommending, and by focusing on the fact that it is one component of proof of violation. You would also have to prove that there is a dangerous probability of monopolization of a relevant market. And, if it is a two-product case, of the incremental product being bundled in. And, as Commissioner Garza pointed out, that it doesn't make sense to have any rule that does not have some concept of recoupement associated with it also.

So, I think if you have an incremental-revenues-versus-incremental-cost test, that keeps in mind the other

elements (i.e., there must be some monopolization), and that, in turn, entails some recoupement. I think you address most of the concerns there.

I think it also addresses the concerns raised by Commissioner Burchfield about making sure that we are not protecting inefficient competitors. The reason I have never liked the equally efficient competitor case is, if you look at Section 2 law more broadly, you really don't want to look at the plaintiff's costs; you want to look at the defendant's costs, because the defendant's costs are going to tell you whether this a tool to further efficiency or a tool to further exclusion and harm to consumers.

If you look at the defendant's costs, then you are, in the main case, particularly if you are talking about the other elements that I mentioned, you are taking care of most – perhaps not all, but certainly most – of the cases where an inefficient competitor is the plaintiff.

And, although I completely agree with the concern, I think having a test based on the plaintiff's costs is problematic. The *Ortho* case I think came out correctly, but I think there are other instances where application of that case would be problematic.

To address Commissioner Warden's concern about the free bundled, I think that is a difficult case, but if it is a two-product, it is a very difficult predatory pricing case, because you certainly have below cost if it is free, because the cost is going to be greater than zero.

So, the question is whether there is going to be some recoupement. And again, I think you take care of most, perhaps not all, of the cases through utilization of incremental revenue standard subject to Commissioner Carlton's qualification that it may be over- and under-inclusive. So, let's have it as a guideline rather than a hard and fast rule.

And I think it would be very constructive for the Commission to say that, and I would certainly join in any Commission statement that said that, the profit-sacrifice test is not an appropriate test, although it is certainly something to look for in determining whether conduct is exclusionary.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I have some specific things to say about *Trinko*. I start with Justice Stevens's concurring opinion, where he says, what do we have this long discussion

for? This is an easy case, a no-brainer on standing, whereas the majority opinion said, in view of our subsequent discussion, we don't need to reach the issue of standing.

And what I read *Trinko* as basically saying is, we got *Aspen Skiing*, which, of course, Justice Stevens wrote, and that would explain why he would ask, why would we need to address that at all. And I think the majority wanted to send the Senate a signal that, as they put it, it is at the very margin of what improper conduct could be. I just think that was their way of saying, because a majority wanted to say it, that *Aspen Skiing* was wrong. And we will leave all the rest of it until later.

Let me get some specific suggestions growing out of the comments, generally, and particularly those by Commissioners Carlton, Shenefield, and Jacobson.

I would take number 2, and I like Commissioner Carlton's suggestion; I would like to formalize that. We kill the first two lines and start it with the word "while." Number 3, I would period out in the second line after the word "desirable." I think I am going to leave the rest of that sentence in there. And I could be persuaded to leave that in there, but I think the other statement that ends with

the period after desirable.

And then I would go with 3(a) as is, and 3(b), I would change as follows: In the third line, I would put a comma after "standards," and then I would, as well - "the filing amicus briefs by the Department of Justice and the Federal Trade Commission in appropriate cases" period. And again, I am open to persuasion on the subjects of duty to deal and bundling, but I think the broader statement is preferable.

I don't think that we need to commend them or encourage them. I just think that it is less embarrassing-sounding to have it go right from, "standards," comma, to "the filing of amicus briefs by the Department of Justice and the Federal Trade Commission in appropriate cases."

I think they get it wrong a fair amount of time. Therefore, I am content to let the court consider their views. And I don't think we need to do more than that. Leave them to say that we think there is value in them filing them.

I find less value in the briefs they file than in the fact that those briefs tee up issues for consideration of the courts. I am thinking, for example, of other fields -

the Securities and Exchange Commission. They are on the wrong side, as held by the courts, more often than on the right side. But they do a service by teeing up certain issues for judicial consideration.

I would also probably want to tinker with 6, to put something in there that says "existing standards regarding refusals to deal may at times prohibit conduct," because the courts don't have that. There is not some uniform standard they are applying, and I think it is better to grow on that one a little bit as well. Again, I am not wedded to that particular language, but I think some qualifier may be needed in there.

I don't feel the necessity for a qualifier in 5, but others may, and I am certainly open to that.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Thank you.

A couple of things. I think Commissioner Jacobson had a salient comment right when we started, which was that this was a very difficult area to get into, but we decided to do it, so here we are.

And some of this discussion reminds me a little of our discussion on the Robinson-Patman Act, where I voted for

repeal. I think repeal is a good idea for Robinson-Patman. Not everybody agrees.

But, like Commissioner Burchfield said, you don't know what we've got here when you start talking about this - making sure that you are not discouraging very pro-competitive, very consumer beneficial behavior.

And I think that if we have to judge an error, Type 1 and Type 2 – and I always get them mixed up, which one is which – but, one way or the other, I just think we have a far greater degree of the possibility of anticompetitive or anti-consumer activity in this area and that we will not deter harmful conduct.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Thank you.

I would like to endorse and support the comments of the Chair, with respect to how we approach this section.

I will confess that I think it will make it hard for staff to write up, because I think there is general agreement that we think further development of this is best done through the courts.

The concept of trying to discuss principles or guidelines of where we think they might consider going, as

opposed to specific standards, may be something that is ultimately more useful. And, like the Chair, I would find it difficult to always come out with specific standards for every instance. I think that also comports somewhat with the comments of Chairman Majoras, which she made the first day of the Section 2 hearings, which I thought were very thoughtful, in terms of getting general guidelines and principles.

And she also raised that the balancing consumer welfare kind of test that the D.C. Circuit relied upon in *Microsoft* as a possibility rather than profit sacrifice in many of these instances.

I think I would agree with Commissioner Carlton and Commissioner Jacobson, that that is just not going to work in many instances, although I think I likewise would agree with Commissioner Carlton that actually forcing dealing with horizontal rivals is something that we rarely want to do. And maybe there, profit sacrifice might, oddly enough, make sense.

But literally prescribing for each type of dealing, I think, is something that we should not be getting into. There was some extraordinary consensus in the bundling area, and certainly a lot of discussion as to why *LePage's* was

wrong. And I think we could offer a fair amount of guidance there, without, perhaps, settling on an extremely specific standard or maybe generalizing a standard that Commissioner Jacobson has been talking about.

And then I think finally, I would not want to amend 3(1) and (2) the way that Commissioner Kempf has suggested. I think we specifically sought comments, testimony, and statements on those issues. We selected to do that for particular reasons. I don't think we have an adequate record to address a lot of other issues, and I would prefer to leave that to the FTC and DOJ hearings and the ICN work.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: Thank you.

I just have a couple questions, based on what some of the other Commissioners have said. And let me start with a question for Commissioner Carlton, who was talking earlier about an incremental cost and incremental revenue standard.

And I believe that you expressed some concern about that standard, that it would end up requiring or pushing companies to price at that level. I had understood you to be concerned that pricing at that level might be a standard that would require motivated companies to price too low. But,

based upon something Commissioner Jacobson said, I think he interpreted it as saying that that standard might be too high.

So, I thought I would just ask you, what is your concern about the incremental cost versus incremental revenue standard? Is it that it sets a threshold where the prices are too low or too high, recognizing that either could be true depending on where there are in the production curve?

COMMISSIONER CARLTON: My main concern is that it promulgates a standard that could be interpreted to mean that you have to be maximizing profit, because if you say incremental revenue has to equal incremental cost, that could be interpreted by someone to mean that marginal revenue equals marginal cost. That is what economists say is the requirement for profit maximization.

And therefore, if you are not at the point at which they are equal, then you are not maximizing profit. Well, if you are not maximizing profit, perhaps there is some ulterior motive that you have.

And what I am really worried about is – maybe with an exclusionary motive. Someone could infer that. And that chain of logic would make the departure from profit

maximization – let me start over. If you had a standard that marginal revenue had to equal marginal costs, and you set a deviation from that standard, you would trigger Section 2 liability. That seems like that would be a horrible situation to be in, because there are going to be a lot of errors that get introduced. You don't want the courts or juries to decide whether some businessman is appropriately maximizing his profits or just made a mistake.

Now, if you instead interpret it as the company did not have a discount, and now it institutes a discount as a result of where it wound up, does it make more money? Was it profitable for it to do? That is a slightly different standard. That is not asking for every possible sale of quantity of the new product that could be sold, would marginal revenue equal marginal cost.

So, there are just two different standards, one coming at the state of the world that emerges versus what might emerge for every possible output level. So, what typically happens with these cases – or in some cases that I have been familiar with – is, a company might say, I have product (a) and product (b). Here is the price schedule that would apply. And if it is an incremental-revenue-versus-

incremental-cost test, do you require marginal revenue to equal marginal cost at every possible output level, or just the one that emerges in the marketplace?

So, that is the subtlety. And I actually agree with Commissioner Jacobson's articulation, that you should give thought to incremental revenue versus incremental cost. My own notion would be that, at the level that emerges, the output level that emerges – But then there might be other conditions that you want to look at, recoupement and the like.

But my main concern is that it would somehow get interpreted as a requirement that you would be maximizing profits. And that scares me.

COMMISSIONER BURCHFILED: My other question is for Commissioner Jacobson. You mentioned your concerns about the equally efficient competitor formulation; how does that standard not focus the cost analysis back on the defendant?

COMMISSIONER JACOBSON: Because determining whether the plaintiff is equally efficient is an essential component of that. And so you have to look at the plaintiff's costs. And you are either allowing the plaintiff to continue with the case, or you are throwing the plaintiff out based on the

determination that that plaintiff's costs are at such a level that it is less efficient, and that is the reason that it is losing business. It really does, at the end of the day, focus on the plaintiff's house.

COMMISSIONER BURCHFILED: I may be misinterpreting it, but I had assumed that if you are looking at an equally efficient competitor, the proxy for that would be the defendant's costs.

And the defendant is pricing above whatever the appropriate measure of the cost is at whatever appropriate line on the production, that you are basically looking at predation based upon the defendant's cost.

And I agree with you that that is the way the courts are interpreting the equally efficient competitor standard, but that is not – I think that is an inappropriate way to interpret that.

COMMISSIONER JACOBSON: They are looking at both. And my point is that looking at the plaintiff's cost is not particularly relevant.

COMMISSIONER BURCHFILED: I agree with that. Unless it is a situation where, potentially, the plaintiff is more efficient than the defendant, and you are looking at a

situation where the defendant may be below some measure of cost in an effort to defeat the more efficient rival. I don't see how that would necessarily be anticompetitive.

COMMISSIONER JACOBSON: I think that is right. You capture that through an incremental-cost-type analysis.

I should point out that there is a non-frivolous view - in fact, a very respectable view, propounded by Professor Salop - which is that consumers benefit by keeping less efficient competitors in business if the less efficient competitor is a sufficient constraint on the defendant's market power that the presence of that competitor, albeit less efficient, drives consumer prices down.

I am not advocating that as a test, but it has not been articulated among this group, and it is a very important consideration to keep in mind when evaluating these issues.

COMMISSIONER BURCHFILED: Thank you.

COMMISSIONER WARDEN: I am not sure I understand how that is a test. I think that is almost a truism. Any competitor who checks the pricing power would be monopolist. It benefits consumers whether its costs are above or below the monopolist's costs.

That doesn't have anything to do with whether

particular conduct that drives them out of the market is wrongful.

COMMISSIONER JACOBSON: It's not being propounded as a test. It is being propounded as a basis for saying the test for the rule-of-reason consumer welfare may, in the process of being applied - that being the test - also protect less efficient competitors where the presence of the less efficient competitor drives prices down in the direction of competitive levels, notwithstanding the defendant's market power.

It is not a silly proposition at all.

MR. HEIMERT: Commissioner Delrahim. And if you would care to give your indication on each of these propositions, that would be helpful.

COMMISSIONER DELRAHIM: I would be supportive of all but 4, 5, and 9, and I will explain 5 in just a second.

And I think probably the most concrete of all the recommendations that we have is 3(a), from all the list of the statements that we have here. And not so much because I would disagree, but partly because they are statements that not too many people can disagree with. The Supreme Court's decision appropriately held market power – I don't know that,

as a Commission, we are adding much to the discourse at this stage of that, for example, in question number 7.

Now, that is not a criticism of these questions. When we got the draft of these questions, I looked at them and there was no other way we could improve them. And I think that just shows the difficulty of the subject matter we are dealing with.

I think that the first thing is, yes, there is no legislation in this area. The law should develop. And there are many, as Professor Shapiro mentioned, many forms of exclusion, and this law should develop in each.

And I think that we have a difficult time, as Commissioner Carlton suggested. We should try to come up with some standards, or at least discuss them. But it is tough, because each particular case, each fact pattern, needs to be animated by the economic analysis of those fact patterns. Had *Brooke Group* not come about, maybe the appropriate economic thinking may not have been applied to that type of practice, or its previous cases.

And so we may not have had a ruling of what predatory pricing should have been. So, I think we don't even know what kind of business practices might be out there.

Let me make one or two proposed suggestions. One is question 8, whether or not we should presume market power from copyright. I would agree with that.

But also, we should not presume market power for trademarks. I don't know if that changes the dynamic, but I thought, if we're going to discuss other forms of intellectual property not addressed by *Illinois Tool Works*, we should also add trademarks. And I know that there are different protections there, but I don't think Coca-Cola has market power in the cola market just because it has a trademark for Coca-Cola.

COMMISSIONER JACOBSON: There is no cola market.

COMMISSIONER DELRAHIM: There is no cola market?

[Laughter.]

COMMISSIONER DELRAHIM: The soft drink market.

My concern with *LePage's* – it is not so much that I disagree with that statement regarding bundling; I probably read that decision five times when we were trying to decide whether to recommend to the Supreme Court to grant *certiorari* in that case. I don't know if there was a standard. And that is the problem with that case, that businesses don't have a standard to follow.

So, I just take question with the wording of that. But also, in cases like that, I think there is abuse. And I think that everybody would probably agree that, in certain bundling practices, certain practices that are exclusionary. And there is current litigation going on, some in the medical device field that Vice Chair Yarowsky is aware of.

And there is a lot that is going on, and we are still learning there, but because of the widespread criticism, and the appropriate criticism of *LePage's*, I think it does a public disservice because it sends a signal that what may have gone wrong there should not be a violation of the antitrust laws.

And therefore, I think we can comment on the particular standard. In that area, I think perhaps a safe harbor makes a lot of sense without commenting on what is and is not the right standard.

I am humbled by the know-how of Commissioner Carlton, and would not presume to even know, or come close to knowing, but perhaps applying all discounts of the various incremental products to the one product where market power is proved to be had and seeing if that price is above the appropriate variable cost or marginal cost, incremental cost

– if you have that, I think there should be a *per se* lawful activity there.

And that sends a signal and allows for businesses to say, I want to engage in this, but if I do this, I know I am totally in the clear, because right now I don't know one way or the other. I have to find attorneys like Commissioner Jacobson and others around the table to tell me. And it is still questionable.

And then there are some folks who do take advantage of the marketplace and try to squeeze out new innovators and do engage in exclusionary conduct but then try to claim a broad test and say, well, if you applied the discounts to all of the costs of the whole bundle – And I don't agree with that. I think that is too narrow of a standard. Too broad or narrow – too narrow for purposes of liability, to be clear.

And so, I think that if we said that, and said the rest of it – we don't know; it is a fact-specific – and we will let the regular test go, we could do the public and the business community a lot of service. And I don't know if that test is appropriate. That might be something that we can discuss because there probably could be widespread

agreement, at least from the two-day hearings that the Justice Department and Federal Trade Commission held following the *LePage's* debate back in March of 2004.

And it could be helpful to courts, district courts and others, who can benefit from that as they face these very difficult tests, which are well litigated on both sides.

That is all I have to say. I do feel strongly about an area of unilateral refusals to deal, especially unconditional unilateral refusals to deal, where they relate to intellectual property. And I think it is just in the eye of the beholder, whether or not there are differing standards. I would read *Kodak* and the *CSU* and say that there isn't. Everything is fine, and there isn't much of a different standard. But I know that there are folks in the academic community and in the agencies who view those and say, well, no, there should be liability.

Chairman Pitofsky, who had testified before the Commission did raise concerns. Maybe that is too broad. I think that we should perhaps come up with a statement that unconditional unilateral refusals to deal to license your intellectual property should not be a violation of antitrust law, in that narrow field. Obviously, conditional when you

start getting into other issues.

Thank you.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I just wanted to go on the record to also endorse the Chairman's and Commissioner Valentine's suggestion about how to approach this methodologically.

At least with my capacity in this area, until I can be convinced otherwise, I think we should set out general principles, and we should set out a description of the test – competing analyses that exist out there.

My problem with voting on formulations like 5 and 6 is that I don't think that one can really refer to a bundle of existing standards – that is my problem – and then characterize, qualitatively, what you think about those existing standards. That is my problem.

But I do think that we can do a lot in this area. There are several others like that that we have considered. I think this is an area where Congress wrote two or three lines and then expected the courts to fill in the content. And they are doing that, and they are going to continue to do that.

And so the real question, I think, for us – and Dennis, I will certainly defer to your judgment – is, all we can do is take a snapshot of where we are now in this area. It is somewhat fluid. If we think we are on the dawn of some strong universal economic truths that really we can abide by for a long, long time, then I think we should drill down further and do more.

But if this is just the best learning that we have at this moment in time, then I think we need to be humble enough to say that. That is why I am deferring to you, because I think you could make a good judgment about it.

But I think there are a couple of areas where I begin to see that concreteness in this area is not in the economic theory, but in other developments, external developments. When Congress finally weighed in a different context on market power, I think that gave the Supreme Court an anchor then to try to deal with the market-power presumption in the antitrust context.

It did not make it right or wrong; that was just an anchor they could use. And then when we talk about the market-power presumption in the wake of that decision, we are really talking about a procedural policy. And I think we can

take our view and we can feel pretty confident in whatever that view is, because we are talking about procedural policy, one way or the other.

But once we go into the economic theories, I think we owe the public and other audiences kind of a snapshot of what we see in existence now. And then how far to make judgments? I have to hold back until we see how that develops, but I do approve of the methodology that you suggested at that start.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I generally agree with that. I think that, as I said earlier, and I think it is consistent with exactly what the Chairman said.

We should articulate what we think our general principles are, rather than going down and giving very specific examples.

But I think the way to illustrate that is the discussion that Commissioners Jacobson and Warden had about above-cost predation, when they referred to Professor Salop's work, I think there is no question that if you have an inefficient rival and, as Commissioner Warden said, that is useful from a competitive point of view in constraining what

a monopolist can do.

On the other hand, under the agreed return test, if you drove that rival out of business, what they were concerned about is that, if you had a general rule, there could be predation when you were above your cost that would show competition.

So, they were concerned about making errors in chilling competition. I think that is an important point. It is in our comments that we just voted on. And it sort of illustrates, maybe better than my answer to Commissioner Burchfield does, that what I was worried about, and what I am always worried about, is that you have profit maximization as a test, and the lack of profit maximization triggering liability worries me.

Now, Commissioner Delrahim, I think you had an absolutely correct point, which had to do with safe harbors. And that means you want to construct safe harbors in order to recognize – you don't want to make these errors that will choke competition. And I think what you said about incremental revenue versus incremental cost as a possible safe harbor is certainly something that we should reflect upon.

We want to make sure that businesses don't get caught up in reading legal decisions as inhibiting them from engaging in conduct that we would like to say has a safe harbor because we don't want to chill competition. I think that is exactly right.

There is one other thing that you said that I think deserves emphasis, and if people agree with - it is this, and it certainly reflects my view: the types of exclusionary conduct that have been attacked under Section 2 are very heterogeneous, a wide variety. And my own view is that you cannot have one rule for everything, even if you could possibly articulate a rule, other than the general rule of do the right thing.

But my concern is that the likelihood that you are going to make a Type 1 or Type 2 error is going to differ from behavior to behavior and type of experience we have with analyzing these behaviors. And therefore, I think I would rather have flexibility in trying to figure out what a safe harbor is for predatory pricing, which may not be a safe harbor for different types of conduct.

So, that is probably a point that, at least I feel, should be reflected, at least based on my understanding of

exclusionary conduct - that it is sufficiently heterogeneous that having one rule that is very specific is likely to lead to error.

I would like to raise a comment that is a little bit off the point, and it is maybe a comment that is more a legal comment, so it is particularly inappropriate coming from me, but when I finished reading this, I realized that, in many of the cases that I have been involved in, one of the issues that often comes up, that I am often asked about, is the distinction between market power and monopoly power. And I don't believe we have addressed that. Maybe in some of the discussions that we had at the economist roundtable, but –

I don't know whether we want to say anything on that, whether we want to punt on that question. But it is, at least from my experience, occasionally an important question the courts ask and sometimes ask economists' views on. And if we have something to say, maybe we should say it – or maybe we are precluded from saying it, because we haven't held hearings on it – But I believe there have been discussions that, from an economic point of view – although you can make distinctions, it is not obvious the courts have used those distinctions.

Moreover, what the courts mean by monopoly power, in my mind, as distinct from market power, is not quite always what economists mean, or what this economist might mean. Rather, the courts are asking for circumstances under which the particular exclusionary conduct would be more likely to have a harmful effect if certain things are triggered; maybe it is market share or something.

And I think it is an important enough topic that we should think about whether we want to say anything about it.

COMMISSIONER SHENEFIELD: May I ask a question, Commissioner Carlton?

COMMISSIONER CARLTON: Yes.

COMMISSIONER SHENEFIELD: On the issue of profit maximization, I understand that you regard it as not dispositive, that you don't want a rule that regards it as a dispositive in favor of liability.

Do you, at the other extreme, regard it as completely irrelevant, or would you be willing to say that it raises questions, invites further inquiry, so that it is a useful analytical point to pay attention to?

COMMISSIONER CARLTON: Yes. That is a good clarifying question. I think it is clearly the latter.

The way I interpret the Areeda-Turner test is, seeing price way below average variable cost or marginal cost or below, is such a deviation from profit maximization that I should inquire further.

Now, what I don't want it to turn into – it hasn't, but I would not want a standard that says marginal revenue doesn't equal marginal costs, and that triggers liability.

COMMISSIONER SHENEFIELD: Thank you.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: First of all, I think we can easily agree with Commissioner Delrahim's adding the word "trademarks" there. I don't think there is any live precedent that would presume market power from the possession of a trademark, but it certainly would not inappropriate to include it.

I absolutely want to associate myself with the concept that there should not be one rule for all conduct. There is a very good article, incidentally, in the latest issue of the *Antitrust Law Journal* by Mark Popofsky, to that effect that I commend to each of you.

But as Commissioner Carlton pointed out, you certainly have seen different rules in the past for pricing.

Pricing is particularly sensitive. We have special rules for predatory pricing that are not easily translated into non-price conduct.

On the area of refusals to deal, I don't want to trigger a long discussion, but if we are going to say anything other than, let the courts develop this area of the law - and I would be content with saying just that - I do think that we need to distinguish, consistent with what Commissioner Carlton said, between various types of refusals to deal. And three that come to mind quickly are a refusal to deal, not with the plaintiff, but with a customer or supplier, which is the *Dentsply* case. It is not much different than an exclusive dealing arrangement. You might have one set of rules apply to that type of refusal to deal that would not look a lot different than rules applicable to exclusive dealing.

You would have the more difficult *Olympia Equipment versus Western Union*, or *Aspen*-type refusal to deal, where the refusal is a refusal, effectively, to aid the rival from competing with you in the same market. That is one where no-economic-sense seems to be the emerging rule in the cases as applied to that strict form of refusals to deal. And it

probably makes sense in that area.

And then, a third, and probably more difficult case is a refusals to deal with a rival that effectively transfers – I know Chicagoans would hate that concept, but –market power or monopoly power from Market A into Market B, exemplified by the *AT&T* case, where the local lines were used to monopolize long distance, or the *Otter Tail* case, where the regional power was used to monopolize local power.

And I think that it does not make sense to treat them all with same broad brush.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: The Chairman said that she is going to sum up, and I would just ask, either as part of that or before that, that she sum up the approach that she and Commissioners Valentine, Yarowsky, and others have taken, that that sounds good to them.

I would like you to sort of restate that.

CHAIRPERSON GARZA: Well, I think it is part of what I was going to say, which is sort of a where-do-we-go-from-here approach.

It seems to me that there was substantial consensus on a number of things, items 1, 2, 3(a), and 3(b). And

obviously, there will be time for us to address exactly how that is written up and what is said about it. And all Commissioners will have an opportunity to input on that process.

There was also consensus in 7 and 8. 5 and 6 are really the issue. The area of bundling and refusals to deal, which were, I think, consistent with the notion that the one-size-fits-all rules don't really work very well. We had decided to focus on those two types of conduct, which also seem to us to be in the most confused state in the courts.

So, what I was thinking was that what would be most helpful for us to do would be to collect and state sort of what we have gathered in the hearings. Basically, what the various proposed standards were and how they measured up against some of the general overarching principles that we think are important in formulating standards; and maybe make some comments on them in that context without necessarily endorsing any particular standard, at least as a Commission. Different Commissioners might favor different standards than others.

And, indeed, there might be some safe harbors or something that we want to talk about coming out of this. I

was intrigued by Commissioner Delrahim's suggestion for the safe harbor and the bundling instance.

So, to move us forward, what I thought maybe should be done is that the staff should take 5 and 6, essentially the bundling and refusals to deal, and outline what the report might say: What are the various approaches? So, taking what is already in the memo and elaborating on it some so that the Commission would have a better idea of exactly what the report would say in this regard. And we could have additional, more focused discussions on those topics in that context and could have some agreement on what the report would say, and which variant views would be incorporated in the report.

So, was there anyone else?

COMMISSIONER SHENEFIELD: Sounds good.

CHAIRPERSON GARZA: Notice that I did not ask the staff for their views. But if we could, we will talk later, more specifically, about how we accomplish that. I expect that the study groups will be involved, and we will talk about timing. And I do note that the DOJ and FTC hearings – next week? – on bundling, obviously, might also be of interest to the staff in working something up.

So, that is where we will go, and this is not going to be for consideration on the 25th and 26th, I don't think. That is probably not a realistic goal, but for some later time -

COMMISSIONER JACOBSON: So, what kind of document do you envision coming out of the staff?

CHAIRPERSON GARZA: I think we will have to talk about that, and I would like to have the staff's input as to what they think would be useful. They are the ones who are going to be writing the report, initially, for us. So, I think it would be useful to get their thoughts and have them talk to the study group. But the idea would be to have further insight into what the report might say, particularly since different Commissioners have different views about the emphasis that might be put on particular standards, or certain principles on which it would be useful to get a little more elaboration.

What we did not think would be helpful to have at this time was a list of various standards for us to vote on, because it would be too complex. But now that we have had some discussion, I think there might be something they could do. And it may be expanding the memo on certain areas,

converting them into headlines; I don't know.

I think we should consider what the most efficient way to do it is, but we should start to look at what would be in the report.

Does anybody have any objections to that? And I assume that if you have any great ideas about how to do that, please communicate those ideas to Mr. Heimert.

COMMISSIONER KEMPF: I would like to raise a procedural matter.

CHAIRPERSON GARZA: Applying to the exclusionary conduct?

COMMISSIONER KEMPF: No. Relating to our next set of meetings.

I can raise it now, or sometime later, but we have dead time now.

CHAIRPERSON GARZA: What I was going to suggest that we take a short break, and then begin with the rest of our schedule. And the only cautionary note there is that what we have on the schedule right now is immunities and exemptions.

I think that is one where our audience might be supplemented. And those folks may not be coming until this

afternoon, and they may be a little unhappy if we began to discuss that now and think that I was doing something nefarious.

COMMISSIONER VALENTINE: We could flip to state action.

CHAIRPERSON GARZA: Well, that is what I would suggest. We could do state action and then lunch and then keep our schedule with immunities and exemptions.

Commissioner Kempf, did you –

COMMISSIONER KEMPF: Yes. The only thing that I would raise is the schedule for our next meetings, which are July 25th and 26th.

I had thought that we had agreed that we could use that time and schedule those meetings, but the announcement went out and said we might not meet on the 26th -

CHAIRPERSON GARZA: No. I don't think that is true.

COMMISSIONER KEMPF: Okay. The reason I am saying it in particular, again, is that for those who are from afar, we want to lock in our schedule.

CHAIRPERSON GARZA: I think that we kind of have a heavy schedule for that. And I think it is contemplated that

it will be two days.

COMMISSIONER KEMPF: Not only contemplated, but we are agreed that it is two days?

CHAIRPERSON GARZA: Unless Washington is destroyed in the interim, that is the plan.

COMMISSIONER KEMPF: Okay that is fine with me.

COMMISSIONER DELRAHIM: Well, I am glad Madam Chairman is not serving on the 9/11 Commission.

MR. HEIMERT: Okay. The Commission will take a 15-minute break.

[Brief recess.]

State Action Doctrine

CHAIRPERSON GARZA: All right. Can I have everyone's attention, please, so we can start?

Just to refresh everyone's recollections of where we were, I know it is a little bit confused. But when we first discussed the state action doctrine, we began to discuss, I think at the suggestion of Commissioner Jacobson, a standard that was analogous to the foreign sovereign compulsion standard. And we determined that we really didn't have enough appreciation of the impact of applying that kind of standard would be in the kinds of cases that had come up

where there had been an issue of state action immunity.

So, we asked the staff to go back and do some additional work. They did that, and they circulated a memo on their research. So you have that, and - Andrew will correct me if I am wrong - you also have two other documents. One, which is the landscape-type document, entitled state action doctrine, is the staff's record of the straw poll from that last meeting. So you can just refresh your recollection as to where, at that time, everybody was on the issues.

The state action doctrine discussion outline, as I understand it, which you also have, is the same as what we worked on at the last meeting. So, these two things were provided just to help us to refresh where we were. The memo represents the research that the staff did.

Now, just to really bring us back up to speed, I have asked Commissioner Jacobson if he could lead the discussion by reminding folks what his proposal was, to provide some of us who didn't receive the staff's memo, you can address a little bit about what the memo indicates in your view. And then have others who might have a different view – Commissioner Shenefield had a slightly different perspective on the standard last time and maybe –

COMMISSIONER SHENEFIELD: Radically.

COMMISSIONER JACOBSON: He thinks that I am nuts.

COMMISSIONER SHENEFIELD: Just on this.

CHAIRPERSON GARZA: Okay.

In that case, Commissioner Jacobson, Commissioner Shenefield, and then any other Commissioner who wants to discuss it.

COMMISSIONER JACOBSON: All right, the short summary is the one that you just gave, which is my proposal that we consider proposing to Congress reform of the state action doctrine through means that would be similar or identical to the foreign sovereign compulsion doctrine.

Just to refresh everyone as to what that means, it is that the action that is compelled by an act of government would be immunized from the antitrust laws, because you can't have one sovereign telling you you have to do something, and another sovereign saying it violates a set of laws. That is the underpinning of the foreign sovereign compulsion doctrine.

It would equally apply, I would say, to a federal or state sovereign doctrine, but in any event, the idea would be to have that as the basis for whatever state action

immunity there is. A corollary of that is that an action that is merely authorized, but not compelled, by state law would not be immunized from the federal antitrust laws; only activity that is compelled by state law would be.

The cons on this will be articulated, I am sure, by Commissioner Shenefield.

The pros, at least that I had in mind, are the following: first, it is a doctrine capable of more ready understanding and ease of administration. Second, and probably the most important of all, is that it would narrow the scope of an immunity that, as interpreted over the last 20 years in particular, seems to expand with each case and seems to immunize a great deal of activity from antitrust scrutiny without much underlying policy support for doing so.

Those would be the principal reason for it. As the staff's memorandum correctly points out, the adoption of such a doctrine would be a wholesale overruling of the state action doctrine as we know it today.

To just start with one of the oldest cases cited here, the *Southern Motor Carriers* from 1985, if you look at the first paragraph of Justice Powell's opinion, he says the question for us today is whether conduct that is authorized,

but not compelled, by the state should be immunized from the antitrust laws.

And the Court answered that question in the affirmative. This proposal would flatly overrule *Southern Motors Carriers* and go back to a much more truncated state action doctrine.

COMMISSIONER KEMPF: Can I ask a clarifying question?

COMMISSIONER JACOBSON: Sure.

COMMISSIONER KEMPF: Would you delay the applicability of it for x number of years so that state legislatures would have an opportunity to change statutes that currently said, you can do this, to, you must do this?

COMMISSIONER JACOBSON: I would certainly support something like a three-year grace period, yes.

CHAIRPERSON GARZA: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Well, as some of you know, I may even have said last time, I spent nine happy years as Chairman of the Virginia Racing Commission.

As a promotion, Virginia happens to breed the best thoroughbreds in the country –

[Laughter.]

COMMISSIONER SHENEFIELD: – and anything that gets in the way of that is not going to find much favor with me. The fact is that we operate in a federal system. And you simply cannot have a competing policy that cuts so sharply to the bone of so much of state regulation, as the sovereign compulsion version would.

I would venture to guess, and I don't know how you would do this, but I would venture to guess that 80 percent of state regulation is not compelled; it is authorized, it is appropriated, and it is approved. Its approval is signified by appropriation, by confirmation, and by appointment, by all sorts of ways.

And in order to – if you put the sovereign compulsion version into place, you simply bring to a screeching halt most of state regulation, which tells me that this has not got a snowball's chance in Washington in August of ever lasting.

So, I would suggest that it risks making us look as though we have no idea as to what we are talking about. I keep making this point, and if 8, 9, or 10 Senators can sign a letter to us about the export trading company act, you haven't seen anything yet when you start looking –

CHAIRPERSON GARZA: I think 9 may be too low a count, by the way.

COMMISSIONER SHENEFIELD: Well, the version I got, anyway.

CHAIRPERSON GARZA: They keep coming in.

COMMISSIONER SHENEFIELD: So, I would be all in favor of making the clear articulation, and the other prong of sort of active supervision crisper, clearer, doing what is appropriate in that area. But I sure would not be in favor of reversing either *Parker v. Brown* or *Southern Motor Carriers* and sweeping away 80 percent of state regulation.

COMMISSIONER WARDEN: Question. How would changing to the sovereign compulsion doctrine have affected the operation of the Virginia Racing Commission?

COMMISSIONER SHENEFIELD: Well, in all sorts of ways. The Virginia Racing Commission authorizes a lot of things, but it doesn't require them.

COMMISSIONER WARDEN: Such as?

COMMISSIONER SHENEFIELD: It authorizes people to participate in race meetings. It authorizes jockeys if they satisfy certain requirements.

COMMISSIONER WARDEN: That is licensing, right?

COMMISSIONER SHENEFIELD: Well, that is one way state regulation works. But nobody is compelled to do anything.

COMMISSIONER WARDEN: Well, you are compelled not to operate in some particular profession if you don't have a license.

COMMISSIONER SHENEFIELD: That isn't what the foreign sovereign compulsion did.

COMMISSIONER WARDEN: Lots of states say you can have three weeks of racing at this track, and six there.

COMMISSIONER SHENEFIELD: Right. Yes.

COMMISSIONER WARDEN: And you are outside. It is unlawful -

COMMISSIONER SHENEFIELD: Correct.

COMMISSIONER WARDEN: That is sovereign compulsion.

COMMISSIONER SHENEFIELD: No. I don't read it that way. Sovereign compulsion means, you shall do something.

COMMISSIONER WARDEN: Or you shall not.

COMMISSIONER SHENEFIELD: Well, that is a hazier line. I guess there are other ways in which regulation works that don't fall within that. Any kind of budgetary allocation, for instance, that is not required. If you are

the Racing Commission, and you have a certain amount of money to dispose in order to promote the racing industry of the state, you can give it to people, according to certain standards, but there is nothing compelled about any of that.

COMMISSIONER WARDEN: What is the antitrust issue about spending its own money?

COMMISSIONER SHENEFIELD: Well, I don't know. That is a different issue. The question is, what would be an appropriate defense if the question were raised in an antitrust case?

COMMISSIONER JACOBSON: We are going to have the same issue, though, when we talk about the whole panoply of regulated industries, and particularly immunities and exemptions. I think Commissioner Warden is hitting the exact right question, which is, how would this change things?

If someone who wants to be a jockey without a license sues the Virginia Racing Commission under a sovereign compulsion rule for violating the antitrust laws, there is a sovereign compulsion defense, which is, you have no right of action because the law says you cannot be a jockey without a license.

COMMISSIONER SHENEFIELD: And *Southern Motor*

Carriers, you agree would be reversed?

COMMISSIONER JACOBSON: Absolutely.

COMMISSIONER SHENEFIELD: And if *Southern Motor Carriers* is reversed, that makes a big difference in how state regulation will be allowed to work, right?

COMMISSIONER JACOBSON: That is the point.

COMMISSIONER SHENEFIELD: That is all I am saying.

COMMISSIONER JACOBSON: I agree with you.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Well, I think we all share Commissioner Jacobson's view that we would like to see the exemption that is involved narrowed. So, I think this is his laudable attempt to try to do that. It is very elegant.

But I have problems also, Commissioner Jacobson; I think you know I have serious problems. I do agree with Commissioner Shenefield on a couple of levels.

I think Commissioner Shenefield has talked about the practical problems. I want to talk about that a bit more too, but I have some conceptual problems with this approach, as elegant as it is. It is a neat, slicing approach, and it just does it.

I think the origins of these doctrines are

different - what lead to them were different. That doesn't mean that you can't import it into the antitrust laws. But I think *Parker v. Brown* was really the Supreme Court's attempt to navigate between very real concerns about federalism that were still alive and well in 1944 with the federal antitrust laws and our competition policy.

And they wanted to respect States, and that is why certain elements of state action are black-boxed, where it is hard to reach in and tell states what to do because of various reasons, the Tenth Amendment among them.

I think the foreign compulsion doctrine was very much needed for another reason, and that was to have to regulate in terms of national entities the relations between citizens in sovereign situations. It was more of a regulatory idea as opposed to a constitutional idea, at least for America.

All right. So, I start saying these are different concepts, with different origins. If we talk about a time lag or transition period, I really believe that the time it would take – even if you gave it a three- or four-year transition period to reeducate the states, serve notice and reeducate. In practice, it would be 20 or 30 years before

you really would reeducate the states.

The only analogies that I could think of like this is when you have a UCC commercial code or some other of UCC-type of revision, and you watch how long it takes 50 states, if you ever get 50 States to come around to recognize these practices - It takes decades. I would hate to see litigation spawn for decades or states to be in complete turmoil for decades.

So, I mean, I think we could give a three-year, five-year, and even ten-year transitions. I still think we would have some problems. That is a practical discussion. I also think that if you were able to make the transition to this new regime, we might be talking in 15 or 20 years about new abuses by the states. Because if it was just a simple, magic declaration to create compulsion, we might see compulsion multiply, in terms of those magic words, over and over again, and it would be a rock solid defense.

Right now, it seems clean and elegant, but I don't know. I can't predict the future. But I think once states are dragged, kicking and screaming, into this regime, they would say, okay, let's go with the program, and here is what we are going to do. And they would insulate a lot of conduct

that, maybe, many of us would not like to see down the road.

So, putting aside the empirical realities of putting this through the Congress of the United States, I do have these serious concerns, both conceptual and practical.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Only two questions at this point, since I have to say, intuitively, that I am very attracted to the proposal.

The memo says that sovereign compulsion requires not only state and/or sovereign compulsion, but also that significant penalties, or the denial of significant benefits, would result from failure to comply with the state's mandate.

Other than the fact that one could be sued for going against it, is that a necessary component? It seems to me that that is not necessarily a necessary component of what we are trying to get at here.

Second, I guess I would assume that, absent Congress actually doing this, we might have constitutional issues. And that is where Commissioner Shenefield's concerns come in, since Congress would have to do this, and it is unlikely that they would.

But if anyone has any thoughts on constitutionality

of this, I would be interested in hearing those thoughts.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: You know, it is a very interesting and complex area, precisely because it implicates the federal/state relationship, and there may – I share Commissioner Valentine's concerns that there may be constitutional considerations here.

And I think both Vice Chair Yarowsky and Commissioner Kempf have made points that suggest to me that while it may seem like a very elegant solution, I am not sure that it would make things better. There is a point that Commissioner Kempf raised, which is, basically, you have got states that would all of a sudden have a number of programs and regimes in peril, because - is there compulsion? They have to go back and redo everything. Everybody would be subject to the antitrust suit.

Then there is the issue of, while I think the proponents of the standard believe that, if it came to compulsion, maybe the state legislatures would be less likely to enact legislation and rules that burdened competition, but I am not so clear that that would be the case. And it could be a worse situation where you end up with a bunch of states

compelling activity that has significant spillover effects, which is why I kind of prefer the – my own preference is to focus on the spillover issues and not have the state action doctrine apply in those contexts.

So, given these concerns, I don't think that I would feel comfortable endorsing, at this point, a compulsion-type standard.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Between 1950 and 1963, I worked off and on at two racetracks in Chicago.

COMMISSIONER CANNON: As a jockey?

[Laughter.]

COMMISSIONER KEMPF: And I developed a lifelong interest in horse racing.

I have also long been an admirer of the work of the Virginia Racing Commission.

[Laughter.]

COMMISSIONER KEMPF: And I would hate to see us do anything that would undermine their fine efforts. Although I am not sure that Virginia does breed the best race horses.

In any event, for many of the policy reasons articulated by Vice Chair Yarowsky, as well as the practical

issues that I raised earlier, I would not favor adopting the sovereign compulsion test. I then turn to the other two recommendations of 1 and 2, and they sound a little bit inconsistent.

One says no change and clear articulation upon -

And the second one recommends that courts reaffirm the standard as proposed in the FTC reports.

It sounds to me that I could vote yes, if it is really reaffirmation. But strikes me that what must be proposed is a change, not a reaffirmation. So, I think there is some disconnect between 1 and 2. If there is no change – if 2 is a reaffirmation - then we could also vote for 1, which is no change.

But I do not support the sovereign compulsion test.

COMMISSIONER VALENTINE: The clear articulation standard that is proposed in the FTC report is in fact different from the clear articulation prong currently observed by most courts. So, those are two different standards, although the same words are being used.

COMMISSIONER KEMPF: Well, that is why I think you need to change – the word "reaffirm" doesn't change.

CHAIRPERSON GARZA: That is a well-taken point; the

words need to be changed. I think at the time that we were first deliberating, the Commissioners understood what the actual proposal was, but you are right, the word "reaffirm" is confusing. That will be fixed.

MR. HEIMERT: Commissioner Cannon

COMMISSIONER CANNON: By my count, the almost-famous John caucus of the AMC is split two to two, at this point, which is kind of unusual. Usually, it is not quite like that. But I have to go with the pony sub-caucus of the John caucus, if we can get that straight.

I think that on the foreign compulsion act, the whole point of that is to keep American executives out of jail, right? That is what I think. And in terms of the state action doctrine and the question of federalism, nobody is pure on federalism these days.

If you think that the state is doing something that you like, then obviously things should be left to the states. If you think they are doing something you don't like and it should be a different rule, then you are in favor of preemption. And it just depends on what issue on any given day as to where you may fall on federalism concerns, and I think that is true.

But I think Commissioner Shenefield is right. I think it is probably true that more than 80 percent of all of these things authorize but do not compel. The fact that we are talking about a three-, four-, or five-year phase-in period – or probably, what may be more likely is some sort of grandfather provision that says, okay, we are going to leave this as it is now, but for everything else going forward, this is going to be the new rule - I just don't think it is remotely possible to do that.

And I do fear what John's fear is, also. If we were to come out with this, I think it would be viewed as kind of unusual. And not that it isn't an elegant proposal - I agree – who knows what would happen or what it would look like ten years from now? But I would not be supportive of that, respectfully for John. But I think the head pony guy here is correct.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I think I will be going against the pony sub-caucus here and will strongly endorse the foreign compulsion test for this. I missed the original debate. I had to travel, unfortunately, but I did read the memo and some of the background here.

I just think that it is silly to not – not silly – I hope that you don't take this as a criticism to my fellow Commissioners – but to allow immunity from liability for much lower state tests. And I was thinking through the possible constitutional – in the 12-minute analysis that I have done here without any case law in front of me, I just don't see the constitutional problem here, when we can preempt states, and maybe we do in merger cases or recommend that.

But if the test - if you have been compelled to act rather than just authorized to do so - unless we are saying somehow that the federal antitrust laws do not carry the importance of the national economic policy that the Supreme Court said it should. And so I think there should be a much more stringent test.

Now, part of that, as I mentioned during the hearings we had on this exact topic, deals with my familiarity and also some skepticism of the political process. And knowing, having been involved with making the policy arguments for passing the legislation that would allow for certain activities that you want to be shielded from antitrust law, I think, from the Commission -

Now, I do agree wholeheartedly with Commissioner

Shenefield that we will get a lot of mail. We will get a lot of letters, more so than the FTC, perhaps. That doesn't mean that what we would be doing is not a good recommendation for them. And let Congress decide, politically, whether or not it is the right policy for them to adopt. But at least they have trusted us, and empowered us, to give them recommendations.

And that is what we are doing. Some of the recommendations they will like, and some they will not like. But hopefully they didn't create this Commission to only hear recommendations that they like. Otherwise, they could have done that. And they could still tell us to go to hell after we make that recommendation.

CHAIRPERSON GARZA: Washington in August, you mean?

[Laughter.]

COMMISSIONER DELRAHIM: And I think it would be helpful, because hopefully, someday the persuasion of the work done by the FTC and Commissioner Muris and his predecessors and, hopefully, successors, this type of thing will find its way in case law, but it might take 50 or 60 years before we do that, and a lot of harm to consumers might occur.

So, I do hope that we could recommend this new test.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. Maybe I could start with a response about the constitutional issues, and certainly not end it at all.

But I think that, until a few years ago, the *Ussery* case that was finally modified that was in the mid – 1976, 1977?

COMMISSIONER VALENTINE: 1976

VICE CHAIR YAROWSKY: Ironically, the time of *MidCal*. With its core concept of an integral state function – I think if that was still operative – I'm not saying that this would be unconstitutional, but I am saying that that is how you would start the analysis. And so, there would be some real thick issues.

Now, that has been changed a bit, and so we would need to see how that would work in the post-*Ussery* period. But remember, even with the state action doctrine, there are different concentric circles of sovereignty, even how this doctrine applies now.

So, for active supervision, for that prong, when

you are talking about an action of a state court or a legislature, there is no active supervision required. They just have to authorize it under analysis now. Once you go further out from there to state agencies and other agents and actors – certainly by the time you get to private actors, it is an intense requirement. That same type of analysis of sovereignty might apply if you look at Congress coming in and preempting and laying down that standard.

So, it might have an impact on constitutionally at different levels of state government than other ones. In any event, it is an interesting question. I don't think it is an irrelevant concern. I can't say that we could say that this unconstitutional because of the Tenth Amendment, John.

I think we would really need to study this a bit if we were going to recommend it.

COMMISSIONER DELRAHIM: The only immediate thing that I would see would be a possible Eleventh Amendment concern where you had a state arm that assumed Congress would make them liable for a lawsuit. But if that is the case, the Eleventh Amendment is not shielded when the federal government sues them, when you authorize that. And that is the perfect situation where you have the FTC and the Justice

Department, like in the real estate cases, suing a Commission that is brought up that makes absolutely no sense. Now, they are doing lawsuits, but they are also doing competition advocacy.

And in those cases, I really don't want the states to be sued by private plaintiffs for treble damages. That is really not the intent of the goal. I think the Justice Department and the Federal Trade Commission are probably better suited to just bring injunction actions and challenge those.

And that is the only Eleventh Amendment – I don't see a Tenth Amendment issue, if the Tenth Amendment even exists nowadays. I hope it gets revived. I would love to see a Tenth Amendment issue in these types of cases, but I just don't see it here.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Just to clarify one thing. I don't think any of us who are uncomfortable with the sovereign compulsion test are saying, let's give the states carte blanche to do it when they feel like it. That is not what is driving it. It is trying to figure out a sensible test.

The courts have done a pretty good job of not letting it get out of hand. I think of the *City of Boulder* case, for example, where they said it is a civil action test, not a city council action test. And similarly, there are a number of cases that make it clear that if the state of Michigan were to pass a law permitting, or even compelling automakers to fix prices, they would run afoul of the federal antitrust laws. It would not survive under some sort of state action doctrine or state compulsion doctrine.

So, I just want to make it clear that, in my own case, the act supports the sovereign compulsion test but does not signal anything like, let the states and their legal subdivisions do whatever the heck they want to do here.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I think I agree with what Commissioner Kempf just said, although I do support the sovereign compulsion test. I think it is the right test, and I think that the fact that it may not get enacted in the legislation is not a reason to forego recommending it. I don't see any constitutional issue.

If the subject of legislation is within the confidence of both Congress and the states, the supremacy

clause settles whatever issues might otherwise be present. It doesn't have anything to do with who can sue states. That is a different question.

But if this is raised as a defense by a private party and the antitrust laws are clearly with the legislative confidence of Congress, that's that, I think.

COMMISSIONER VALENTINE: I agree. Overrule *Parker v. Brown*, and declare x. I think that is right.

COMMISSIONER WARDEN: There is nothing magic about articulating this as - using the term "sovereign compulsion," which does carry with it the baggage of penalties and possible prison sentences and so on and so forth, when you go into the federal or state, as opposed to the international, arena. And there may be better words - there are some words on question 16 that are on the discussion outline that are taken out of a statute in Connecticut.

Now, these questions address state action, if you will, in terms of other federal directives, I believe. 15 and 16; am I correct, Andrew?

15 and 16 deal with the quote, "federal state action doctrine," which I think means federal antitrust laws versus some other federal law.

If not, then it seems 16 in the box is sovereign compulsion and some other softer language. But I thought they had to do with –

MR. HEIMERT: Well, there is something called the federal compulsion –

COMMISSIONER WARDEN: Yes. I think that is what this is. And I think 16(a) is, in my opinion, the same thing as number 3, if it was not meant specifically directed or required.

COMMISSIONER VALENTINE: Actually, I think that 16 is based on the testimony of Robert Langer, who was, at one point, the Assistant Attorney General for Connecticut, or something like that. And I think what Connecticut has is something like a statute that says, as a general proposition, competition is favored, but – and you should not legislate so as to prevent competition. And then nothing in this chapter shall apply to activities where it is specifically directed.

I think we could flesh that out. But I think that if we go back, that is what that is trying to capture.

COMMISSIONER WARDEN: Right. Well, my only point in referring to this - and I do think that it is the same as 3 - is, if it is meant to affect *Parker versus Brown*-type state

action is that the language specifically directed or required by statute is a lot softer, if you will, than compelled by a state.

The attractive thing about the doctrine to me is its ease of application, and its conservatism in exempting conduct from the antitrust laws, obviously. There may be all these practical problems. I don't set myself up to oppose the Chair or the Vice Chair or the Chairman of the Racing Commission on the practical problems. And I agree with the Chair that the spillover is, in my opinion, the more important issue here.

But, even if spillover were taken care of, there is something to be said for doctrines that are easily administered. And if states are given time to conform, and this is properly thought through so that there is no doubt that, for example, trying to be a jockey without a license is unlawful and not protected by the federal antitrust laws, I would still support going to a sovereign compulsion or a sovereign requirement and direction standard.

I am not sure how many of us are in the corner –

CHAIRPERSON GARZA: Well, what I was hoping to do was wrap this up, because we are running a little bit over.

I think we have heard from most people. Can I just have a show of hands, which will be monitored by the staff, of which Commissioners would favor some sort of compulsion, whether it is articulated as 3 or 16, but some sort of compulsion standard? If you favor that, will you raise your hand, please?

And Andrew, can the record state –

MR. HEIMERT: Commissioners Jacobson, Warden, Valentine, and Delrahim.

CHAIRPERSON GARZA: Four Commissioners. Just in case there are abstentions, Commissioners who do not favor adopting that standard, can I ask you to raise your hands?

MR. HEIMERT: Commissioners Shenefield, Carlton, Kempf, Cannon, and Burchfield, and Chairperson Garza and Vice Chair Yarowsky.

COMMISSIONER JACOBSON: Madame Chair, can I just make one brie comment?

CHAIRPERSON GARZA: Very brief.

COMMISSIONER JACOBSON: I think those of us who were in the minority there will certainly support AMC's action in putting real teeth into the other prongs of the state action doctrine.

So, I think we will able to speak with one voice in that respect. I respect quite a bit, the political negatives of doing this, and practical negatives of doing it. Just the one comment I want to make is that it seems to me a little bizarre to say that the state of Rhode Island can immunize conduct by authorizing it, but the government of England cannot. And that is really what we are saying, here. And that bothers me.

COMMISSIONER VALENTINE: Yes. Absolutely. And I would want to second that. There are many fine other positions set forth in the discussion outline and votes that have already been taken that I would reaffirm. And this is just, in an ideal world, the concept I would have espoused, even though I doubt it is politically doable.

CHAIRPERSON GARZA: I understand.

So, in other words, people who yielded because there was a consensus on the clear articulation, *et cetera*, would buy into that. But then, the report might reflect that four Commissioners favored this other approach.

COMMISSIONER VALENTINE: In an ideal world. Yes.

CHAIRPERSON GARZA: Okay. Great. Thank you.

With that, we will wrap up the meetings for this

morning, and we will resume at 12:45 a.m.

[11:58 a.m.]

Immunities and Exemptions Issues

CHAIRPERSON GARZA: I would like to thank, this afternoon, the members of the public who have come to observe our deliberations.

We will begin, this afternoon, first, with immunities and exemptions in general, consistent with the issues that we adopted for study and on which we requested public comment. We will address them generally, and what, if anything, the Congress or the President might do to limit the terms that the testimony and comments received suggest that immunities, in certain circumstances, could create.

As you can see from the documents prepared by the staff that were available on the website and made public here today, the questions that we will be addressing all relate, generally, to immunities and exemptions and do not call for an evaluation of individual immunities.

The materials that were prepared for the Commissioners to help us with our deliberations - they include a memoranda prepared by the staff covering the issues that were agreed to be studied. They studied the testimony

that we received and the comments that we received. There is an appendix to the memo that summarized what we received that happened to relate to specific immunities and exemptions.

We are also continuing to study and collect data and information with respect to the several immunities that we identified as exemplars, and we may have a hearing at some time in the future, a single day hearing, to help us to supplement the record on some exemptions to be determined at a later day.

And also, we will be following the procedure – for those in the audience – for deliberations that we have generally followed in our deliberations. That is that the Commissioners will have something called an immunities and exemptions discussion outline, which should be available to all of you. And it is a discussion outline to help us begin our deliberations. It is not intended, of course, to bind any Commissioners.

We will initially go around - Commissioners have the order of discussion - we will go around initially to each of the Commissioners and ask them to indicate, using the numbers on the discussion outline, where, at this point, they tentatively stand.

I will ask that the Commissioners be brief in stating what their positions are, and then we will open it up to further discussion.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Okay.

Beginning on number 1, yes, although I would make some word edits. We can talk about that later.

2, yes, but, again, I'd like to make some word edits. I like the first phrase, "Recommend that courts construe all immunities and exemptions narrowly," but would make a few word changes after that.

On 3 and 4, I combine those, because what I would recommend is culling certain features from both of those, not either/or. There is no reason we should feel so constrained, and try to get the best set and make it as succinct as possible.

One example is, I do like the Bush-Leonard-Ross model, generally, but I don't think we need to be so didactic telling Congress how to do it. I think we need hearings and a comprehensive public record, but I would not go through and list all the things they need to do, because they will know what to do. So, I would combine 3 and 4.

5, we would all like to see that. That is a major assignment for the FTC. Provisionally, yes, because I think we would all like to see it, just how long it would take, I don't know.

6, no. 7, no. 8, no.

I will explain my reasoning briefly on 7. One argument could be that that is a good idea because, instead of a blanket immunity, you might have a more limited immunity. But what I would worry about is that, by giving the opportunity for a half-loaf, that might seem more attractive, and people could cloak themselves in the robe of not going whole-hog. And that might make more half-loaf immunities start occurring. So, originally I though that might be a good idea. I don't now.

No on 8. No on 9.

And yes on 10. But again, I am not fixed on five or ten years. Let's just talk about it and we will come up with a year that works.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I would vote for 1, 2, 3, 4, 7, 8, 10, and 10(b).

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: 1, and 2.

And, similar to Vice Chair Yarowsky, some sort of combination of 3 and 4.

5, although with a twist. I don't think – well, we can talk about it later. I might suggest amending the language, but a variation of 5.

A variation of 7.

8.

And that is it.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes on 1. Yes on 2.

A combo on 3 and 4, although I think we are going to have some discussion on theory versus reality, which I think is important to have.

On number 5, I actually am not in favor of doing that. We can talk about that later.

No on 6. Yes on 7. No on 8.

Yes on 10, and I am thinking about ten years seems to be right.

COMMISSIONER KEMPF: What was your vote on 9?

COMMISSIONER CANNON: No.

MR. HEIMERT: You said you are thinking about 10

years, but tentative, Commissioner Cannon.

COMMISSIONER CANNON: Ten. Yes.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: Yes on 1.

Yes on 2.

I am interested in where we come out in terms of a combination of 3 and 4. I am open to discussion on that.

Yes on 5. No on 6. Yes on 7. No on 8. Yes on 9. No on 10.

My concern about 9, about sunset provisions, is I think it just makes it too easy to have trial runs of antitrust exemptions. And in this town, once something gains life, it tends to live for a long time.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Yes on 1. Yes on 2.

I would also support an amalgamation of 3 and 4.

Yes on 5.

No, with some reservations, on 6.

On 7, if we ended the statement after the words, "limited forms of immunity" on line 2, I would support it. As written, I would vote no. I think the single damages and disclosure requirement motif is misguided. So, as written, I

would vote no.

COMMISSIONER VALENTINE: What would that mean then?

COMMISSIONER JACOBSON: Limited forms of immunity - I could go into it at length, but not these.

8, I would vote yes on. And it also seems to me to be mom and apple pie. And not only that, I would say apple pie with no carbs and no calories. So, I am very interested in why there isn't overwhelming support on 8. And I know a number of people have voted no on it, and I would like to get some indication of it, because maybe I am misreading it.

And I am undecided on the sunsets. I would like to hear more discussion about it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Yes on 1.

I would favor 2, if it were a rule for declaratory judgment and government injunctive cases. Otherwise, I vote no, because I think this creates traps for the unwary and damages litigation.

I think some form of 3 and 4 would be fine.

I vote yes on 5.

No on 6.

No on 7; I agree with Vice Chair Yarowsky.

And as to 8, I agree that is apple pie, and I am not sure that is not the same thing as 2, and I have the same concern about it as I do on 2.

No on 9.

Yes on 10.

I don't know between five years and ten years. I like ten years, but I would prefer something like seven.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would vote yes on 1, and yes on 2.

I happen to like 3, in terms of being slightly more principled, simple, clear, and clean.

I find 4 a little bit unduly prescriptive, but I probably could at some point be convinced on some combination of the best of both. And I certainly do like the renewal part of number 4, but that comes later in 10. So, I don't know; I do need to take that now.

5, I guess would be helpful. I do remember Chairman Majoras being pretty reluctant, although we are giving them funds to do it. The one concern that I have is that many immunities and exemptions tend to show up in what were previously regulate industries would tend to go to DOJ

as a substantive matter. And so, I am not sure that we are going to have all the industry expertise that we want or need at the FTC. But if the majority were to go with recommending that, I would do that.

And then I'm not sure that 7 and 8 add that much.

And particularly with respect to 8. Yes, it is mom and apple pie. I guess I thought it was captured in 2, which is what I said when I didn't vote for it. But I am happy to say it if that is what we want to say.

COMMISSIONER CANNON: Are you yes on 7?

COMMISSIONER VALENTINE: Ultimately no I am not.

And I would go with 10. And I guess I would think about a default sunset period more in terms of maybe seven to ten years with a general presumption, but I don't care which one we pick. But if it were in an industry that was high tech, rapidly moving, five years might be more appropriate. And again, that might be hard to write, but that is where I would end up.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I would vote yes on 1. Yes on 2. Yes on 3.

Although, to 3, for the first bullet point, I would

add something where it says, "Apply three principles" grant only (1) narrow immunities (2) after considering the likely impact on consumers…" - After the word "consumers," I would add "and producers."

4, I would vote positively on, although I do share some concerns about being too detailed in our recommendation to Congress. But generally, I am in favor of the views in 4.

Yes on 5.

I am a little unsure on 6. In general it seems to me that if the purpose of the immunity or exemption is that Congress believes that competition doesn't work in that industry, then I would let the FTC make that decision rather than Congress. If there is some other stated purpose, then I don't know if it is right for the FTC to be evaluating that other stated purpose. So, I don't know quite where that leaves me on 6. I would rather rely on the expertise of the FTC if it is purely a competition motivation that is supposedly justifying the exemption.

Yes on 7. Yes on 8.

Yes on 10. And if it is between five and ten years, I don't really have strong views.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Yes on 1.

Yes on 2, with some wording modifications, which I will get into later.

And, in principle, I agree with the spirit of 3 and 4, but a strong no on the 2, just out of some respect for the Congressional process. And I think 7 will address some of this.

On 5, yes. Normally, I would say that the FTC and the Department of Justice should study, for exactly the reasons that Commissioner Valentine said - However, I would say, the FTC, after consultation with the Department of Justice. The reason I say that is if the two of them are directed to give the report, the Justice Department, as part of the Executive Branch, will have to go through an OMB clearance, whereas the FTC has a much broader right to make recommendations based on competition policy rather than other policies. And so I would allow the FTC to do that study, but only after consultation with the Department of Justice.

A strong no to number 6. We can discuss that later.

Yes on 7. No on 8. No on 9. Yes on 10, with a five-year sunset.

And if I could add 11, it would be that Congress would adopt the general provision, statutorily, and say, "Unless explicitly exempted from there" on or however they decide. And we can discuss that. Antitrust laws and –

VICE CHAIR YAROWSKY: Savings loans.

COMMISSIONER DELRAHIM: Yes. Except where it says, "unless explicitly" in the statute, then the antitrust laws shall apply.

VICE CHAIR YAROWSKY: Right.

COMMISSIONER DELRAHIM: And that will address a lot of the judicially created implied immunities, which I have more of a concern with than I have congressionally created immunities from the antitrust laws. And that would be one thing for us to consider.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: On number 1, I would be yes, but I would strike the words, "if ever." Since about half of the economy operates under immunities exemptions, it strikes me that to say, "Rarely, if ever," is a blind eye to reality.

On 2, I am generally yes, but we could talk about that more when we get into stuff.

3, 4 – I like the emerging consensus that we ought

to take the best of both and not micromanage it.

5, I would change. And my change has actually been addressed by the other Commissioners. I would change the first line to read, "Recommend that Congress direct the Department of Justice and FTC to sponsor studies." That would give them option of outsourcing it to academics or other people as appropriate. And it brings them both into the act, without mandating that either of them do it or add resources to do it. But I leave the funding provisions still in there.

6, no. 7, no. I could be persuaded to go along with a revised 7, along the lines articulated by Commissioner Jacobson.

8, no.

On the sunset provisions, Commissioner Burchfield's remarks remind me of a wonderful piece in the 60s by Nobel Laureate George Stigler, where he adopted several truisms with respect to government regulation on business. And one of them was, the government never knows when to quit.

So, I would still favor sunsetting as an alternative to letting them otherwise operate in perpetuity.

I would be against 9.

I would be in favor of 10. And I don't care as between five and ten years. I think probably ten is more appropriate, but I don't really have a strong view on that.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Let me just try to go through those areas where I thought we could work with some modifications. Because we have 2, I am going to explain my reasoning on 8. What happens is that courts adopt rules of statutory construction.

Now, individual statutes can have their own sections of statutory construction for the statute at hand. I am trying to think of a place where you would put in the U.S. Code, other than a freestanding provision that –

COMMISSIONER JACOBSON: So you interpret 8 as a direction to Congress, not the courts? I think that may be the issue.

CHAIRPERSON GARZA: It says "Congress adopt."

VICE CHAIR YAROWSKY: Yes, "that Congress adopt."

COMMISSIONER JACOBSON: Yes, but I read it as "adopt for the courts."

CHAIRPERSON GARZA: No. I don't think that is what it was intended to be.

COMMISSIONER KEMPF: Madame Chair, a point of procedure.

I actually had one other thing that I should have commented on during my –

VICE CHAIR YAROWSKY: Yes. Go ahead.

COMMISSIONER KEMPF: – and it picks up on Commissioner Delrahim's point number 11. I agree with him, and I think Vice Chair Yarowsky chimed in. Well, I took a stab at writing something down. Maybe I could just read that. And there is no pride of authorship, obviously: "Recommend that Congress pass a statute stating that in statutes dealing with regulatory regimes, absent a provision expressly providing otherwise, the antitrust laws continue to apply."

Now, that is the gist of what I think Commissioners Yarowsky and Delrahim were referring to. I concur in that. I commend this language for consideration, but anything that accomplishes it - I am an easy sell to change my draft to something else.

COMMISSIONER WARDEN: Is that regulated industries?

CHAIRPERSON GARZA: Yes. There is an overlap. Discuss it here or discuss it there; I don't think it makes

much difference, frankly. There is a very big overlap.

But I think 8 that is here now was intended to be something along those lines, and Commissioner Delrahim's 11. And I think it does come up in regulated industries.

So, why don't we go back to Vice Chair Yarowsky and go through it. And if it seems like it is ripe to talk about at some point, this issue, I think we might as well talk about it now.

COMMISSIONER KEMPF: Madame Chair, to facilitate the discussion, I am having someone type this up.

CHAIRPERSON GARZA: Good. Thanks.

VICE CHAIR YAROWSKY: Okay. On number 2, I would be content to just end it after the word, "narrowly." I think in other places it comes out, we are putting the burden on the moving party, so I just think that we don't need to repeat these concepts over and over again.

Numbers 3 and 4, we could start with the ABA's three general principles. The procedural safeguards are fine. I think we do – and I am trying to be sensitive again, Commissioner Delrahim, to not be didactic or instruct Congress on how to do its own work. I think what we would seek to do is just have a full and fair public hearing around

these issues. I would rather just have some general phrase like that than to tell them to have hearings and things like that.

I think it does not hurt to talk about balancing the cost of benefits of the immunity. One assumes that would happen, but I don't think that would be a problem. I do like putting it here, Debra, because you raised it as you flipped the page. I think that if we do a combination of 3 and 4, we should talk about the renewal requirements.

Again, this is more just word editing, but I like Commissioner Kempf's idea about sponsoring studies on number 5.

Again, I feel very strongly about 6, that Congress is not going to be happy to defer to the Federal Trade Commission those decisions. And just, personally, whether or not they are, I am not content with that.

On number 7, I said no at the beginning, and I think I feel that even more strongly. I would not point to a path of half measures. So, I feel more strongly that should be no.

And then, quickly wrapping up, because this is really just a series of procedural process changes, I think

seven years is a magical number, and I will go for that.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: I want to come back to the sunset provision, given that I appear the only dissenter on that, and make two points –

CHAIRPERSON GARZA: I think I was also –

COMMISSIONER BURCHFILED: on the sunset provision, which is number 9 and 10.

My concern about this is, that, along the lines of what Jonathan has just said, which I find persuasive, on number seven, if you allow, or if this Commission holds out the prospect that you can have limited – limited either in scope or duration – exemptions or immunities, that may have the unintended effect of a proliferation of those immunities, which concerns me.

And the second thing that concerns me is that once they are in place, you will hear the same sorts of arguments for retaining them that we talked about this morning on the state action doctrine issue. Once they are in place and businesses rely upon them and begin structuring their business operations around them, it is going to be even more difficult to get rid of them. So, I am concerned that there

is going to be an incentive to proliferate immunities and exemptions, and they are going to be no easier to get rid of than we are finding that they are currently.

So, I am persuadable on this, but at the present time I am still very skeptical of sunset provisions.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Let me say on 8, if 8 is perceived as a directive to Congress, then I would vote no on that. I didn't read it that way, but since everyone else does, I will change my vote on that.

With regard to the very intriguing suggestion by Commissioner Delrahim of a general savings clause, I would like to think more on that. I love it as a general proposition. I am concerned, though, because there are some implied immunities, typically in regulatory industries, that meet the traditional, and, I believe, correct, standard, which is the statutes are plainly repugnant, and unless you imply this immunity to the minimum extent possible, the regulatory scheme will not work.

There are not a lot of those, but *Silver v. New York Stock Exchange* is a pretty good example of one. It cannot be that, if you violate exchange procedures that are

blessed by the Securities Exchange Commission and get booted out of an exchange for having violating those rules, you have an antitrust case. So, there is something there that needs to be done to make sure that an overall savings clause doesn't sweep in the appropriate implied immunities.

But if we could draft it in a way that says, "never, except" – and then rearticulate the correct implied immunity standard, then I would support that.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Actually, I had my hand up, because I did want ask those folks who like the sunset provision – particularly those who support it who are much more familiar with the way Congress works than am I. I was persuaded by what was in the arguments in the staff's memo, and then Commissioner Burchfield reiterated why it seems like a bad idea.

But having seen that Vice Chair Yarowsky, Delrahim, and Cannon all support it, I wonder if you could just address some of the concerns were in the memo and that Commissioner Burchfield raised and say whether you think – why hasn't it been done more? Basically, what would the reception be to this kind of recommendation?

And the only other thing I will mention is - I just almost have to giggle. Five years, ten years, or seven years - how in the world will we ever know which one to pick or whether one size fits all? That is another area where I just would feel uncomfortable even suggesting a particular period.

COMMISSIONER BURCHFILED: If I could make one quick point. The shorter the duration – I think this implicit in some of the comments earlier, the shorter the duration, the less benefit the immunity is, because no one can plan business operations on something that may not be there in five years.

CHAIRPERSON GARZA: But a lot of people were saying seven or ten, and so, I suppose a very few – well, I may have lost count on who was at five or who was at ten, but I would like to understand exactly where people were coming from on that.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: First, the Chair's question, and, just in my experience, I think that Commissioner Burchfield is right. Often, when you have a sunset – and we saw that in the Patriot Act, when those who opposed the passage of the Patriot Act in the first instance

coalesced around a sunset of four years, even that opposition dropped. I think, ultimately, it would have had to. But it made it a little bit more palatable, because people said, all right. We'll test this and then come back to it.

So, I think Commissioner Burchfield's concern is generally right. Once you have these, then some of the folks who would more strongly oppose will less strongly oppose. I still think that a single exemption for other things that passed have ever happened just because of the exemption. I don't think it will make it more likely. I don't think the existence of the exemption will trump policy considerations.

So, if it is going to pass, like the medical residents matching exemption just two years ago, it is going to get done.

CHAIRPERSON GARZA: Did that have a sunset?

COMMISSIONER DELRAHIM: No. No. And it was supported by Senator Kennedy and others.

VICE CHAIR YAROWSKY: How would anybody know that, since nobody voted on that?

COMMISSIONER DELRAHIM: And there were no hearings. But that is part of the Congressional process. That is why I think the thing to say is that you should have hearings, and

you should have certain tests is just silly unless there are constitutional amendments.

But it is good for the Commission to say something, depending on the Chairman at the time of the Judiciary Committee; he could say, look, anybody who wants to come in here and wants to get an exemption, this is my test.

And somebody might be receptive to this body's recommendation along those lines and say they should consider this. And that is why I thought something like 7, 1, and 2 makes some sense. And that may be a general statement along these lines for anybody to really consider that.

So, for whatever that is worth, that is my view on the sunset issues.

CHAIRPERSON GARZA: Just to clarify, how would that happen? So, there is a sunset provision and an exemption in, say, seven years; what, actually, would likely happen as we came up to the seventh year?

COMMISSIONER DELRAHIM: A lot of lobbying on the two sides of this. So, the two years right before it happens, you will see lots of employment and registration and lobbying, lots of campaign contributions.

CHAIRPERSON GARZA: Well, I am beginning to see –

COMMISSIONER DELRAHIM: And then you would begin doing that.

The ACLU, for example, really built up its campaign leading up to the reauthorization of Patriot Act 2, or the authorization of the Patriot Act. They gave them four years to be able to make a case and hired former Republican majority leader, Dick Armey, along with Bob Barr, to make their case that this is not just a liberal issue.

So, part of this is just tactical for folks who really –

CHAIRPERSON GARZA: Can someone else introduce a bill? How much harder is it –

COMMISSIONER DELRAHIM: Yes. Absolutely. You can do the whole thing all over again –

VICE CHAIR YAROWSKY: Pardon me.

Or you would have to attach – it has to be positive law. So, what you normally think of positive law is a freestanding bill, but it could be put in the Omnibus Appropriations Bill on October 10th before they run out to the election.

And if it is in a bill that passes in both Houses, and the President signs, it would be operative. And –

CHAIRPERSON GARZA: And are we aware of any instance of a statute that had a sunset where it wasn't re-upped.

COMMISSIONER DELRAHIM: Sure. You have the Assault Weapons Ban sunset. It didn't get renewed.

CHAIRPERSON GARZA: Oh.

[Laughter.]

CHAIRPERSON GARZA: Well, I am only going to say, is there is gun control in D.C.? So there you go.

COMMISSIONER DELRAHIM: But getting back to the issues, I think that on number 2, I would just add - and I guess I do agree with Vice Chair Yarowsky's change, of saying, instead of, "and against the beneficiaries," say, "and place the burden on the beneficiary claim and protection." But that is repetitive and that is current law, anyway.

Number 7 is the one I thought worthy of a little bit of explanation on why I support that and why some of my colleagues, who generally - we agree on much of these things, but Vice Chair Yarowsky tends to disagree on this one - a lot of these exemptions go into place – watching some of them go into place, because the policy argument is made to Congress

that, look, what we are doing really isn't and shouldn't be a violation of the antitrust laws, but we are getting killed because of the treble action and the plaintiffs and the class actions. And therefore, we need this exemption.

So, many of these exemptions actually go into place for the original argument that this is really – we just want to make certain something that already isn't a violation of the antitrust law, it just gives us the certainty to continue doing what we do.

COMMISSIONER VALENTINE: It is usually not getting killed [inaudible].

COMMISSIONER DELRAHIM: Well, there might have been lawsuits that have been filed and they have to defend and therefore some of these folks, if they are agricultural cooperatives or dairy or whatever – they say we don't have the funds to do this. So –

COMMISSIONER JACOBSON: Is there a lawsuit pending [Inaudible.]

CHAIRPERSON GARZA: Folks, can we use our flags and microphones so –

MR. HEIMERT: Commissioner Delrahim, please go ahead.

COMMISSIONER DELRAHIM: So I believe, actually -and Commissioners Cannon and Yarowsky might be able to better discuss that one, but I believe there was. And there was one on this recent one.

COMMISSIONER VALENTINE: No. No. No. No chance.

COMMISSIONER DELRAHIM: And so when you take away – not that Congress cannot think about this, but if we have this, something that they can refer to regularly, and have some standards to go by - I'm taking away, at least, just having the choice to say, all right. We are not going to immunize you from everything, including the Justice Department and the FTC bringing action.

But if you are saying this, we will just remove the private rights of action here, or limit it to single damages, like in the Cooperative Research and Production Act. And I think that is a good thing for them, because it is the treble damages provisions of the Sherman Act that is the strongest policy argument for those seeking exemptions and immunities to go to Congress in the first place.

So, I think it actually helps, because it would not then enact a whole broad immunity, but at least just those for the private actions.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I agree with what Commissioner Jacobson said when he last spoke.

I think that the question is posed - the question that Commissioner Kempf has given us, actually talks about regulatory regimes. I think that belongs in the next discussion, not in this one. This is a statutory immunity and exemption topic.

But taking it the way Commissioner Delrahim put it, I think they are completely different issues, if you are talking immunities and exemptions versus regulated industries. And, aside from what I fear is the unfairness of imposing treble-damage liability on people when they had a litigable case but they fell within a statutory immunity.

I do believe that immunities and exemptions should be very strictly construed. On the other hand, in regulated industries, the question was well posed by Commissioner Jacobson. Take the Interstate Commerce Commission in the old days when you were required to fix rates, basically, and divide them up between different railroads and so on.

The antitrust laws cannot apply to that. You don't have to have a provision in that Act that says, "Conduct

pursuant to what we require here doesn't violate the antitrust laws." That doesn't make any sense as a legal requirement.

So, I think that the standards that the courts have developed, in the implied immunity or implied repeal area with regulated industries, which I think, again, is the next topic, not this topic, are entirely sufficient and appropriate.

Like with any other area, you can quarrel with the particular decisions and particular cases, but I think the approach they have taken is pretty good.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I would say this. I would bet that if you could really do a thorough investigation of the legislative history, *et cetera*, of the history of all the antitrust immunities and exemptions that we talked about, maybe one or two would have started as nice, clean, crisp pieces of legislation introduced by a few folks and then went through the whole process.

Most of them really fall into the category of sausage being made, where you are not exactly sure how they got on the books, but they got on the books. And some are in

direct response to perceived threats of antitrust liability.

But the point of that is, on the sunset provision, I read 10, and then also 7, which I will address in a second with John, as assuming that it was going to be done. I doubt that you will ever see a bill that started out introduced with a sunset clause at the bottom of it.

It is just very unlikely because the way a sunset clause would get adopted would be, when you are in the middle of the night - You are in an appropriations conference; it is 3:00 in the morning, and you are about a vote or two short of being able to get your exemption done. At that point in time you say, okay. All right. How about ten years? We'll limit it to ten years.

And if that is what you think it takes to get it, that's what would happen.

COMMISSIONER VALENTINE: Sounds like tax bills.

COMMISSIONER CANNON: Well, it does. But that is what it is all about.

I can tell you, Commissioner Kempf, that on the NCRA, that actually did start kind of cleanly. In fact, I remember it well, Admiral Bobby Inman in Austin Texas, had a brand new –

VICE CHAIR YAROWSKY: Symantec?

COMMISSIONER CANNON: Symantec. Had a brand new joint venture. He came to the Congress and said, you know, Senator, we have got this great thing going on and we really are worried. Our lawyers are telling us that we are going to get sued, and it is going to be the end of everything here – and treble damages – and look at all the great benefit we would have had, but for this.

And that sort of argument is met with skepticism when you say, well, look. You should have pretty good lawyers who can advise you what you may expect as being a liable conduct or not.

So, in that regard – that is exactly where you got to on 7, Vice Chair Yarowsky, a limited remedy, or a limited immunity, which was, okay. We are not going to say this conduct is no longer subject to the antitrust laws. What we will say is that you registered this with the Justice Department, and we will give you single damage.

VICE CHAIR YAROWSKY: Right. And Steve – will the gentleman yield?

COMMISSIONER CANNON: Sure.

VICE CHAIR YAROWSKY: It started after Commissioner

Burchfield and them came up, as you remember, Steve, and others - the proposal that was introduced was to give the Secretary of Commerce the ability to grant - an Executive Branch official - an exemption from the antitrust laws.

Now, this has surfaced, Commissioner Delrahim, in the several other bills that you saw, but not the Secretary of Commerce. On the House Judiciary Committee and the Senate Judiciary Committee, that seemed rather extreme and others said -

COMMISSIONER JACOBSON: [Inaudible.]

VICE CHAIR YAROWSKY: Yes. That is correct, Commissioner Jacobson. Well, that was the idea, anyway.

COMMISSIONER CANNON: I think that was before Scott Johnson.

VICE CHAIR YAROWSKY: Well, and so then it eventually evolved into a statutory exemption.

And then Tom Campbell, who many of you know, said, look. There must be a way to do this in a more measured way.

And Tom and others – Neil Roberts; let's get his name on the record, helped crated the basic model of voluntary disclosure. Let the Justice Department see it first in return for that – mainly though, because, a you

remember, Tad Lipsky and others testified at our hearing with a lot of concerns about joint ventures, how they are treated. Generally benign, but still scared of what might happen, that this was joint-venture material that we are talking about.

And so part of the NCRA was a statement that it would be treated under the rule of reason. But it did really evolve from all of those types broad exemptions into this more narrowly crafted.

So, Jonathan, I just wanted to give you a little context about how that happened.

COMMISSIONER CANNON: And in the end, the Local Government Antitrust Act is the exact opposite circumstance, where you had the city of Boulder come down, Don. The League of Cities and the National Association of Counties all rushed up to the Hill, breathlessly saying, look at this. We can now be subject to treble damage liability.

And everybody scoffed at that and said, oh, that is ridiculous. That will never happen.

And about six or eight months later, lo and behold, a case involving the city of Gray's Lake, Illinois, that had a $5 million annual operating budget, was sued, and a $30 million judgment was handed down against the city of Gray's

Lake.

So then the National League of Cities came back up to John and me and some others and said, we told you so. Senator Thurmond, Senator Metzenbaum, Mr. Rodino, and Ham Fish - they all got together in one room and said, okay. We don't think taxpayers should be paying damages. What do we do about this?

And we kind of said, well, how about you don't want to let them engage in this kind of conduct, which involved – you may remember, it was a situation of real-estate developers who wanted to put a hotel somewhere, and somebody else wanted a hotel somewhere else. And the ones who got their permit turned down sued the city, saying, you did this in conspiracy with the other hotel builder.

So we said, look, we don't necessarily want that activity to go on, but let's say no damages. However, you are still subject to Section 16 injunction relief.

And you know what? That bill went from an idea in a meeting to signed by the President of the United States in about two months, or something like that. So, they all have a life of their own, and it is hardly ever that people go up and say, here is an idea. This is why we should have

antitrust exemption. So therefore, let us enact a bill.

It just doesn't quite work that way.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Two things.

When I initially commented, I said I liked 2, but I had some difficulty with it. I am now a yes with Vice Chair Yarowsky's amendment, putting a period after the word, "narrowly." I am very comfortable with that.

Second, the staff typed up my hand scribbling. I think I agree with Commissioner Warden that it really belongs in our next discussion. So, I am happy to wait until that discussion.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. I want to go to what Commissioner Burchfield said, because it is really the psychology – it is behavior modification. What I really think we are all talking about is behavior modification.

And right now I think there is a pretty strong consensus around this table, anyway, that, when immunities get created, they last forever.

So, how can you change that behavior? I think realistically you can't expect this Commission or any of us

to just write a letter to Congress and say, please repeal all the existing 33 or 34 immunities that our staff has – the first time in my life - identified most of them.

What do we do? I think that it will be welcomed – I am just guessing on this – I think that it will be welcomed up on the Hill if we can come up with some kind of procedural framework. Because I think they will then be able to point to it.

So, I don't know the right psychology, Commissioner Burchfield. I think you raised a good scenario. The reason I wasn't with you on that though – I was with you on most of these others – was that, I am just thinking - when I was up there and what I observed and it is this.

I think the more the members and the staff in the private sector realize, these are harder to come by and harder to retain, there is more of an inhibitory effect, and then there is more scrutiny. And so, once you get an immunity or exemption on the books, I think you are right that - let's say that it is every seven years - then you get this feeding frenzy every seven years to extend, a terrible lobbying situation.

But you know, I think the members and staff may

resent that. And, after the first time, the word is going to come out that every time you go out and create this immunity, you are going to have to live with this, because they are going to come back with these – if you have a sunset clause – they are going to have to come back. And the members and staff are not going to like the thought of them coming back periodically.

And then hopefully, farther down the road, there is some inhibitory effect or a higher standard that is applied, because what we are talking about is, there could be some other reasons why an immunity or exemption would be created.

We all like to embrace what number 8 says about the central economic assumption of this nation and the antitrust laws. But there are other assumptions that flow up there, too.

So, again, I don't know what the right scenario is, but that could also be offered.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Yes. This is more in the guise of a question to those who - which is probably on this panel - have more experience with Congress than I do.

But it seems to me that a central issue here is

that, as the staff memo points out, a lot of immunities and exemptions can arise because of political influence and getting someone to do what a relatively concentrated group of participants in an industry want done, with the harm imposed, by and large, on a diffuse group of consumers.

And in order to limit that, some of the suggestions, such as those in 3 and 4, if done as outlined, would at least constrain people, publicly, to acknowledge what is going on. And that seems right to me, and helpful.

And number 5, therefore, seems sensible. Someone should keep track of what he is doing. And here is my question. I am a little surprised by how few people were interested in number 6. That is the way that you minimize political influence interfering with the competitive process; you don't allow it if the alleged reason for interfering is that the competitive process doesn't work.

If someone says, I am going to pass bill (a) and give some industry (a) an exemption from the antitrust laws because competition doesn't work in that industry, I am more likely to have confidence that that's true if the agency, whether it is Department of Justice or the FTC, which is expert in competition, tells me that than if a congressman

who happens to be in a state with industry (a) in it tells me that.

And I am just curious why I am off on my own on this.

COMMISSIONER DELRAHIM: I think 6, aside from its other concerns – I am just trying to think about its constitutionality - to give to a body, especially a body that is not in the Executive Branch, not in the Judiciary Branch, not in the Legislative Branch, the Federal Trade Commission, its power to repeal a statute.

It is a difficult one to do. Now, I don't know; you might be able to draft a sunset, but to delegate that discretion to a body like that, even if it is the Executive Branch, I think, would be constitutionally prohibited.

COMMISSIONER WARDEN: Whether or not constitutionally, it just seems to be way out in terms of the delegation or the legislation afforded.

VICE CHAIR YAROWSKY: Well, whether or not it is constitutional, I think, Commissioner Delrahim, you are right. I think if you go back to Article 1, Congress, in terms of a legislative action -

So, in repealing a statute created by Congress, not

a regulation that was delegated originally but a statute, if it is a statutory exemption, Congress couldn't delegate to a creature of Congress that final authority.

COMMISSIONER VALENTINE: Since everyone is interrupting – it is not a VINS issue, John; it is a separation of powers issue. And a law can only be created or altered by action by both Houses and the President.

MR. HEIMERT: Why don't we try to get back to – Commissioner Carlton, were you finished with your remarks for that?

COMMISSIONER CARLTON: That helps answer that there is a constitutional impediment. But for that –

[Laughter.]

COMMISSIONER CARLTON: I will defer to the constitutional experts.

MR. HEIMERT: Chair Garza, do you want to respond?

CHAIRPERSON GARZA: That is why I didn't go with 6. But after Vice Chair Yarowsky was talking, it occurred to me that, with the sunset, and the combination with the sunset, I wonder whether it would possible to make that more meaningful by accompanying it with – if you do have an immunity or an exemption, and it has a sunset, whether, at that point, the

FTC couldn't be asked to, basically, prepare some sort of report.

And then, at the time that it was coming up, give a report to Congress so that they would have a basis for deciding whether to –

COMMISSIONER CARLTON: That is a good idea.

COMMISSIONER WARDEN: Here, here.

COMMISSIONER VALENTINE: Yes.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER KEMPF: Well, before we leave that, there is - like in the British Parliament, there were a lot of, here, here's!.

I think we would be well served by the staff doing an articulation of what the Chairman just said, because I think that a number of us thought that was a pretty good idea. So, can we have the staff -

MR. HEIMERT: Yes. We could certainly do that and articulate something.

Commissioner Delrahim, was that your point?

COMMISSIONER DELRAHIM: No. I have two points. One was just in response to that.

I think there are two ways that you can do this. I

think you would probably have to do some research. One is to give authority to a regulatory body, whether it is the FTC or someone else, to create the liability, and also give them the power to remove. That would, I think, pass constitutional muster. And say, "If you find such a harm, you now have power to promulgate regulation to do such." And they have to go through the administrative procedures.

And then say, "Once that harm goes away, you then have the power to repeal that." Something like that would probably pass.

The second one would be – and we studied this exact proposal during the Patriot Act – whether or not something should sunset unless something triggers it. And I think that is the proposal. So you have a statutory immunity that says it sunsets in year five, unless a finding is made by the agency, or by the Federal Trade Commission or by the Attorney General, certifying that this is needed.

And in the other context we were examining whether or not certain provisions of the Patriot Act should sunset unless the Attorney General would report that without it, it would not be able to pursue certain investigations.

And that would probably pass. We could not get a

definitive answer to anything. There are always lawyers who would disagree until the Supreme Court speaks. But I think those are two avenues where you could do this. I would probably disagree with both for the same reasons, but it would address the problem with number 6.

The second point - I had forgotten to respond to the repugnancy issue and the *Silver v. the Stock Exchange* and its later progeny, which, in the Second Circuit, became options. *Options* went wrong, in my view, because it said that if a particular conduct could be authorized and regulated by the Securities Exchange Commission, you would be immune from the antitrust laws. And that is my problem with traditionally created implied immunities.

Now, I don't disagree, and I think there are many exemptions. I don't wholeheartedly wholly oppose all of the immunities. I think some of them are well justified. What I think should happen is that, if you have a clause that says, Congress pass a statute that, absent a explicit exemption, the antitrust laws shall apply to this conduct.

What will happen is that the folks who are regulated, the New York Stock Exchange or whoever, will then go to Congress and now have a real reason. Look, Congress,

you passed the securities laws, and you passed the antitrust laws; we've got a problem here.

And therefore, if Congress does pass that immunity, that is the type of situation Congress should be dealing with. It is their problem, not the courts', to solve, I think. And that is where these things get so broad, because, like we saw in the *Options* case – Now, with the *C.S. v. Boston* case, they have tried to address that, but the *Options* case is still pending until reversed by the Supreme Court. And that is a rule of the law for a very significant part of the country and financial services.

Where antitrust laws don't apply to conduct could be price fixing. But so long as the SEC might have the regulatory authority, that is perfectly fine. And that is the type of thing that goes wrong with judicially created immunities.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: Let me just make a few quick points.

The problem there is a very serious problem, but the problem is that the plain repugnancy standard was buried by the *Trinko* decision. And now people are off on a

completely divergent course from what implied immunity law had been and should be. And that is a terrible outcome in the Second Circuit in those cases.

But it is a result of applying what had been settled doctrine wrongly, and led, in part, by the Supreme Court's missteps in *Trinko* in forgetting about that doctrine. I think that is the problem. I think we should address that. I think that will be in the next session.

Quickly, I was persuaded by the comments of Commissioner Delrahim, Cannon, and Yarowsky, that a sunset provision would be good. So, I am voting in favor of that. I think the concerns raised by Commissioner Burchfield are real but, I think, are adequately and very well addressed by our legislative folks.

And that is it.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I was wondering if I could try to, not sum up, but state what I think might be my understanding of where we all are in an effort to reach some consensus here, because I think we are getting close.

I think one is an agree-to-verity. It seems to me that 7, limited to the first sentence, naturally flows from

1. And then once you got immunities disfavored, if they are ever created, view them as narrowly as possible, and then you get 2, recommend that the courts construe all immunities and exemptions narrowly. And I am happy to with the proposal that we drop the last half of that.

I hope we can move, as Vice Chair Yarowsky suggested, more towards the general principles in 3, incorporating, perhaps, the concept of a full hearing and renewal from the fourth section. And, in light of some of Vice Chair Yarowsky's graphic descriptions of prior legislative processes, I think a hearing would always be highly recommended.

I would also be willing to go along with the proposal of Commissioner Kempf on number 5, that Congress direct the FTC or DOJ to sponsor or undertake studies of competitive effects.

And I guess I am now not understanding exactly what 8 adds to any of this, and I don't really care where we come out on it. I do think that a sunset provision continues to be a good idea. I like the concept that the FTC or DOJ, whoever is appropriate, review the immunity just before it sunsets to make a recommendation. I think, maybe, not so

much as to whether they are serving their goals but whether competition is being unduly, inappropriately, or unnecessarily curtailed, because presumably, they are going to be serving their goals.

And that is it.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes. I just want to get back to your question, Commissioner Carlton, about how this stuff gets done and who has the ability to get a bill passed.

Except for appropriate bills, you have got a better chance of picking out a salmon swimming upstream as the one that is going to make it. It is just the odds her. If in fact it were really pretty easy to get an exemption or immunity, the Sherman Act might apply to three percent of the economy. That is just the way it is, because you always hear someone who comes and says, the antitrust laws are great; we are big believers in competition, but here is why it shouldn't apply to us.

That is the way the conversation always starts. So, I think, in the end – when I started looking on the recommendations, both of the ABA proposal and Steve Ross, and Darren Bush, and Greg Leonard – there is really only one

procedural safeguard here, and that is the votes. If you have the votes to get it done, if something is considered so innocuous and unimportant that you can get unanimous consent to get something done, then that's it.

But if I am ever going to be able, on the side of either defending an antitrust immunity or trying to get one done or trying to defeat it, it is a lot easier to defeat something in Congress than it ever will be to pass something. So, I want to give you a little comfort there, in terms of – you know that great AARP commercial? Where the woman calls up and ask to speak to the President of the United States and says, "Gee, can you cover health care for seniors?" And he says, "Sure."

And the commercial says, "Well, if it were that easy, you wouldn't need the AARP."

None of this is very easy.

[Laughter.]

COMMISSIONER CANNON: It is a great commercial, actually. And it makes a point. And that is exactly what we are talking about.

On 7, in particular, I just read that as saying, it is going to happen. And there will be no luxury of time in

terms of being able to say, well, okay. It looks like we are going to get an exemption, so let's start knocking this back.

All you are talking about here is a negotiation that may take place over a period of years, or it may take place over a period of minutes. And that is just what you are going to have to be aware of.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Just one comment on Chair Garza's yet-to-be-written-down proposal. And that is, during the discussion surrounding that, there were various iterations. One being that the authority is delegated to them.

I think I would probably be more comfortable with one that asked them to weigh in and then left it to Congress to consider their views, rather than delegated the authority directly to them.

CHAIRPERSON GARZA: Right. That is what I had in mind.

COMMISSIONER KEMPF: But during the discussion, there were some variations.

CHAIRPERSON GARZA: I understand.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: I still retain some skepticism about the sunset provisions and what is going to happen down the road.

But I would be more attracted to it if it were, rather than – and I don't know how it is going to be drafted. Maybe this is a drafting issue. But if it is drafted in such a way to convey that the Commission believes that exemptions and immunities should be rare, that competition should be the strong policy, and that, in the event that Congress, after going through whatever process comes out of points 3 and 4, determines that exemption or immunity is appropriate, the Commission encourages Congress to draft those immunities narrowly, as indicated in number 7. And with a sunset provision subject to a thorough review by one of the antitrust agencies prior to renewal – thorough review and back to Congress prior to renewal.

I still am concerned that the lower the bar, or the more limited the immunity, the easier it will be to get. Some of the stories, which I always find fascinating, by Commissioner Cannon and Yarowsky about the legislative process suggest to me that throwing in a sunset provision can often be a deal closer to get an immunity that might not

otherwise have gone on the books.

But, putting that aside, I do remain concerned about that, but if you hold out the prospect of limited immunities subject to careful study before their review, that will go a long way towards satisfying my concerns, or addressing my concerns about this.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. I just wanted to compliment both Commissioner Valentine and Commissioner Garza in encapsulating the emerging consensus. The only thing I would throw in, a final detail, is, we should probably - if we are going to go with the Chairperson's suggestion about reporting to Congress – a number of days for which the exemption expires, so they don't get this before three days before.

So, I just throw out - often you get 90; I would say 120 days. You could make it 180 days, but usually that is so far ahead that people then forget about it. So, generally, on report backs – Commissioner Delrahim, you did them more recently than I, but 90, 120 days, usually gets their attention. They know they have to do something.

So, at least we need to fill in that blank. That

is my suggestion.

COMMISSIONER BURCHFILED: And can I make one other quick point? And that is I think probably five years is too short a time, because as businesses consider whether the immunity that is being created is going to be useful to them. A five-year horizon, before they would abandon that immunity, is unrealistically short, and will probably cause the proposal to be ignored.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I think the accompanying report should be very straightforward on this and say, one concern the Commission has in making this recommendation is that it may be misused to secure more immunities rather than less. And we want to make it crystal clear that our objective is not that. It is not a way to get an immunity. We view it as something that we ought to provide in doing them, and not as something - if we grant a sunset, let's go ahead and give the immunity a shot.

So, I think our report ought to take the concerns, so well articulated by Commissioner Burchfield and echoed by others, and have them be part and parcel in our report.

MR. HEIMERT: Commissioner Cannon, do you have a

response?

COMMISSIONER CANNON: Yes. Just one more thing, here. We really are talking in terms of basis points, not in terms of one percent or five percent or ten percent; it is 25 basis points.

I am enjoying this debate, and this is great. But I am trying to comport this as experience and reality, and we aren't quite there yet. It is not a bad idea to do it that way, but I am still thinking reality is not what we are saying it is.

COMMISSIONER JACOBSON: But that will be your job.

COMMISSIONER CANNON: Yes. Glad to do it.

CHAIRPERSON GARZA: I just want to wrap it up. What I mean is, can we move on?

MR. HEIMERT: We'll take a fifteen-minute break?

CHAIRPERSON GARZA: A ten-minute break.

MR. HEIMERT: Okay. We will resume at 2:15 p.m.

Regulated Industries Issues

CHAIRPERSON GARZA: The final topic for today is regulated industries. You should have, in addition to the score sheet, the outline, and the memo, two supplemental recommendations that were circulated to you before lunch.

They are on the table for the public to look at, and they will be put on the website.

The supplemental recommendations are numbered 1(a) and 17(a). So, when we go through and do the initial indications of our thinking, if each Commissioner could also include your thoughts, to the extent that you've formulated an opinion, on 1(a) and 17(a).

And then we will call Commissioner Kempf's proposal – what are we calling that, Andrew?

MR. HEIMERT: To be clear, the two that were circulated at lunch, which are on the table for the public, are 1(a) and 17(a).

And Commissioner Kempf, who had one drafted up during the last session, relating to the statute, which is sort of a general savings clause statute, we will number, for convenience, 15(a).

The Commissioner-Kempf proposal denotes, "Recommend that Congress pass a statute stating that, in statutes dealing with regulatory regimes, absent a provision expressly providing otherwise, the antitrust laws continue to apply." We will call that 15(a) for purposes of voting and keeping track.

And we will begin with, if Commissioner Cannon is ready -

COMMISSIONER CANNON: Great. Thank you.

I was no on 1, but I do like 1(a). So, I would cast, I guess, the first vote for 1(a).

Yes on 2, 3, and 4. Yes on 9, no on 10, and yes on 11, although a little more explanation would be helpful on that. I am not exactly sure what "soft conversions" would be.

And then, under heading 3, on 12, I know that this is just the outline, so we cannot say exactly – have what the current legal standards are all written out, but, subject to a little debate on that, I would vote for that.

And 13.

15 and 16 – first, I had thought that if – we could say, confirm that *Trinko* is best understood that it serve only as a limit on refusals to deal, yada, yada, yada, and go to that it does not displace the role of antitrust laws to regulate industries. I think it is somewhat similar, unless I am misreading this quickly, to what 17(a) tries to get at.

But it seems to me that we will need some debate on *Trinko* overall.

And then yes on 18. And no on 19.

And then on Commissioner Kempf's, I am not inclined to do that either.

Is Commissioner Kempf's 18?

CHAIRPERSON GARZA: 15(a).

COMMISSIONER VALENTINE: How did you vote on 16?

COMMISSIONER CANNON: 16, I voted yes.

MR. HEIMERT: And 17?

COMMISSIONER CANNON: 17, I am just going to hold on. I could either modify 17 as it is or think about modifying 17(a), but I am hopeful that we will get some consensus on that.

MR. HEIMERT: 17 and 17(a) are sort of something modified.

COMMISSIONER CANNON: Yes. Exactly.

VICE CHAIR YAROWSKY: No on 1. Yes on 2. Yes on 3. 1(a), yes. No on 5 and 6.

7, I need to explain a little bit, succinctly here, and then, hopefully, a little more later. I would like to vote yes, that when the antitrust agency does a competitive review of a merger in the context of a situation where other agencies are involved and other factors are involved, like in

the public-interest test, that their antitrust analysis is deferred to in terms of the competitive analysis. If there are other overlays, other factors that should be considered because the statute says they should be considered, that is fine, even if that agency then makes the final call on the merger, not the DOJ. That is what I am trying to get at.

But if we think 7, by having the word "exclusive" authority, says what I just said, then I am for it. If it does not say that, then I would like to redraft it.

COMMISSIONER WARDEN: 8 says that.

VICE CHAIR YAROWSKY: Okay. Then 8.

COMMISSIONER CANNON: So 7 is -

VICE CHAIR YAROWSKY: 7 is no, because 7 would say that regulating agencies have no role. So 8 says, when it is an antitrust determination, it is the antitrust agency.

9, yes. 10, no. 11, we should talk more about soft convergence. Possible yes, then.

12, I agree with you, Commissioner Cannon; I am happy to make a statement there once I know what the current legal standards are, but that begs that question.

13, yes. 14, leaning yes. 15, yes.

16, yes, but changing the wording to "strong

deference to the antitrust laws."

Let's see - I have jumped over Commissioner Kempf, so yes on 15(a).

And then I want to do something between 17 and 17(a). I'm just not content yet with the language of either, but I want to make a statement in the affirmative with those with some type of wording.

18, yes. 19, no.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: 1, yes. 2, yes. 3, yes.

I have a problem with 4 and similarly worded numbers to come later, which is that of foreseeability. I am not sure that this is feasible, because I don't know that you can think about all of the issues that will arise.

5, yes. 6, no. 7, no.

I could accept 8, but I prefer 9.

10, no.

11, I think is a great aspiration, so I vote yes.

I am happy to vote yes on 12, and I am not sure I am as despairing of the current law as Commissioner Delrahim is. I will address that later.

No on 13, because the regulatory regime may involve

anticompetitive conduct, with or without supervision.

I have no present view on 14.

15, I have the same problem that I had earlier with 4.

I think I cannot support 16. You just have to look at the interaction between the two regimes, and you can't necessarily prefer one to the other.

I think 17 I strongly favor.

I vote yes on 18. No on 19; it is moot.

I vote no on 15(a).

I don't find it appropriate to vote on 17(a). I don't think the case was wrongly decided. I don't think it holds what 17(a) assumes it holds.

And I think I vote yes on 1(a).

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I actually found this one of the harder outlines. I don't think it ever captured quite what I might have wanted. But let me try to at least do votes and then maybe explain later where I might want to try to come out.

I would vote yes on 1(a). No on 1. Yes on 2. Yes on 3.

4, I am not sure that is the right way to get at that problem, and I am not sure if we can rely on Congress being able do that at the time it is drafting the statue. So, I am a little closer to Commissioner Warden, there.

I think, as of now, I am no on 4. I don't understand what it means, exactly. I may be convinced that it means something, and I am happy to vote for it.

No on 5. No on 6. No on 7, to the extent that it says regulatory agencies can have no voice in merger review. But what I would really like to try to get at in 7, 8, 9, and 10, I guess, is that I think this was the ICPAC recommendation. I think when it comes to the competitive effects of any merger or acquisition of any firm, whether it is regulated or not, that should be done by the Justice Department and the FTC.

I do think that if there are non-competition issues or public interest issues, that the FCC, or the ICC, or - the most important are banking agencies or safety and soundness, FAA, maybe, for safety and soundness in the airline industry, and the FTC for diversity, or whatever the issues are in the First Amendment sense.

I think there should be some role there. I don't –

it sounds like 8 is trying to say that competition determines everything. It is binding on the public-interest determination. And I think there may well be aspects or conditions that a regulatory agency would put on a merger that don't address competition issues.

COMMISSIONER KEMPF: It says, "as a part of".

COMMISSIONER WARDEN: Really, 8 is what you want.

COMMISSIONER VALENTINE: So what that means, "as a part of," is not that competition is the only determinate, but as to the competition aspect of the public interest determination – yes. That is what I want. I want it binding as the competition aspect part of the public-interest determination.

Okay. Well, that is not what it says, but that is what I want.

On 9 and 10, no.

11, yes.

12, I think the courts are probably getting that about right. I will be interested in the discussion, but as of now I think I am voting for 12.

And for 14.

I would vote for 16 and for 17.

And for 18, again, to the extent that the agency-specific standards are going to the antitrust aspect of that, so that the concept of special antitrust rules for oil and gas would be bad, but the concept of special rules for telecoms that don't exactly have to do with antitrust would be permissible -

MR. HEIMERT: Did you have views on 15(a) or 17(a)?

COMMISSIONER VALENTINE: 15(a), I am not behind, at least as currently drafted.

17(a), I do not agree with, because I do not think that is what *Trinko* held.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I would vote yes for the first sentence on number 1. I am a little unsure about the exact meaning of the second sentence.

I vote yes for 2. Yes for number 3.

I am a little uncertain. I tend to be positively inclined towards number 4, but I think Commissioner Warden has raised some issues on foreseeability that deserve some discussion.

Yes on number 5.

On number 2, some of the concerns that Commissioner

Valentine raised are some of the ones I had. When there is an antitrust issue to be decided, I think it should be decided by the antitrust enforcement agency. Since the regulatory agencies have a public-interest standard, or a standard other than antitrust, I can't see delegating to the federal antitrust authorities the decision about a merger when those other public interest aspects are involved.

But I can see delegating to the federal antitrust authorities the determination as to the antitrust issue. So, I am not quite sure where I am.

I believe that means that I should vote no on 7, yes on 8, and yes on 9, but I am not entirely sure.

Okay, and no on 10.

Number 11, again, if by "convergence," we mean "cooperation," since I am in favor of delegating the antitrust issues to the DOJ and FTC, and I am happy to have cooperation.

In that sense I would vote yes on 11.

Regarding 12, I would tend to vote yes, but I would like to get a sense of what we think the current legal standards are, so I know what I am agreeing to.

I'm going to vote no on 13, because I thought that

the last part of that clause, where it says, "makes it unlikely that anticompetitive conduct or effects will occur," must mean that someone should do a study of that. And that seems quite complicated to me. So, I am inclined to vote no on 13.

Yes on 14.

Yes on 16, although I have a question if anyone thinks that is different than how the courts currently interpret matters.

On 17, let me just say that I mentioned that I do work in the telecommunications industry, and I am working for Verizon. So, I don't know if that precludes me from saying anything about *Trinko*. I may well have worked on *Trinko*. But maybe I will just answer this simply by saying that I agree that no decision, that I am aware of, should be interpreted as displacing the role of antitrust laws in regulated industries.

I think that would convey my views.

COMMISSIONER BURCHFILED: Very lawyer-like.

[Laughter.]

COMMISSIONER CARLTON: That's what you get from hanging around with 11 lawyers.

[Laughter.]

COMMISSIONER CARLTON: As far as 18, again, I have the same concern that Commissioner Valentine raised, and that is, if it is only an antitrust issue that a regulatory agency is responding to, then I don't think there should be industry-specific standards. On the other hand, if there are broader concepts, public interest standards, they may well impose requirements that wouldn't be required under the antitrust laws.

Let's see, in terms of 1(a), again, I am a little unsure on how to interpret it. I certainly would agree with it if there was a period after "United States." That is, "Competition is the fundamental economic policy of the United States." The rest of the sentence, it seems to me, you have to try to figure out what it means. I assume a regulatory regime is created in order to do something other than rely just on the antitrust laws.

So, therefore, I am a little unsure what it means to construe it consistently with competition being the fundamental economic policy to the maximum extent possible. I am a little worried about what "to the maximum extent possible" means. But in general, I like competition, and if

a regulatory regime wants to rely on competition, I think that is important. So, I am in accordance with those sentiments.

I just won't say anything about 17(a).

Regarding 15(a), I would agree with that.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I would favor an abbreviated version of 1 - the one sentence.

I do favor 1(a), 3, 4, 5, 8, 11, and 12.

And I am assuming that the standard is the repugnancy standard that we talked about earlier.

14 and 15, but not 15(a).

17.

17(a), because it includes the language, insofar as it can be read - I don't necessarily agree with the characterization, but if that is what people read it as, then I agree with 17(a).

And 19.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I have no on 1.

I don't understand 2.

Yes on 3.

Commissioner Warden talked about 4, and I think it is 15, and I am comfortable with 4, and I am comfortable with 15, although both of them strike me as subsumed and better in what I will call 15(a).

6, no. 7, no. 8, no. 10, no. 11, no.

12, I had the same concern others do about having some meat on the bones of what the current legal standards are. So, I am uncomfortable voting either way on that.

13, I would bust in half. I would be against the first half of it, and I would probably favor the last part of the third line.

"Courts should construe any implied immunity narrowly." To me, that is at the front part of it. It strikes me with a little bit of an implication there that courts should ignore the intent of Congress when interpreting the statute. And I am uncomfortable saying that. In other words, the courts should not imply any, unless active regulatory supervision makes unlikely anticompetitive effects will occur.

Well, if the Congress directs them to, I don't think that the courts have the option to say, this is a statute; we find that it doesn't do this, and therefore, we are going to ignore what the statute says.

I don't understand the front half. So, I would vote no on the front half of that, and yes on the back half.

14, I would vote yes on. I would soften it a little bit in the second clause by - where it says, "and legislatively overrule," making it say, "and consider legislatively overruling it." So, it is more of a guideline than a mandate.

15, I already commented on.

16, yes. 17, no. 18, yes. And 19, no.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: 1(a), yes. 2, yes. 3, yes.

4, I take the point that Commissioner Warden made about the foreseeability issue and the difficulty of Congress ever being able to predict, effectively, what the antitrust issues are going to be. But with that caveat, I am inclined toward it if it can be drafted in a way that could take that into account.

5, I find somewhat ambiguous. I would think that courts addressing an antitrust claim in a heavily regulated industry would, by nature, have to take into account the regulatory context in evaluating the effect of any action on

competition. If that is what it means, I am in favor of it. If it means that courts should expand the scope of antitrust immunity without explicit authorization, I am against it. But I find it somewhat ambiguous in that respect.

6, no. Under part 2, I am in general agreement with Commissioner Valentine's concerns about this. In my view, the best of the lot under 2 is proposition 9, with the understanding that if the antitrust enforcement weighs in with their competitive analysis, then that competitive analysis is not going to be determinative in every instance of the public-interest standard. And that is what the regulatory agencies are paid to do.

So, with that understanding, I would support 9.

Number 11, I am inclined to favor.

Under III, if the standard in number 12 is defined as has been discussed, I would favor 12, and I would incorporate the actual standard into that when the final recommendation is made.

13 and 14, no.

Under IV, I think 15 is a good aspiration or goal, but I go back to Commissioner Warden's concerns about the earlier recommendation.

16, I am inclined toward, but I am open to discussion on that.

17, yes. 17(a), no. And 18, yes.

And then, as for 15(a), I am open to discussion on it, but I think my preferred approach to that is the current status of the law that we are discussing in 12.

COMMISSIONER KEMPF: Madame Chair, I did not register my votes on the three supplemental ones, if I could do so.

MR. HEIMERT: We'll go through, and then we will come right back to you.

COMMISSIONER KEMPF: Okay. Well, I didn't vote one way or the other on them.

CHAIRPERSON GARZA: 1, and I may be the only one. To explain, I took this to mean essentially what was explained in the staff's memo, and I think would have been the testimony of Professor Carstensen, and I think the AAI, in their comparative advantage discussion. So, to the extent that is what it meant to refer to, I would say 1, yes.

1(a), yes. Yes to 2 and 3.

On 4, I was going to say yes, but I would like to have more discussion of the concerns raised by Commissioner

Warden.

5, yes.

On 7, I think here again, I am the lone wolf. I would go with 7, that the federal antitrust agencies should have the exclusive authority to review and challenge mergers and acquisitions of regulated firms under the antitrust laws. I would insert something about seeking the views of the regulators.

My notion here was that, to the extent the question was whether or not there was an anticompetitive effect, the agencies would be solely in the position to challenge the merger, after taking into account the regulatory context. The regulators could still conceivably condition or even block a transaction for other types of non-antitrust concerns, but could not be in a position of saying an otherwise anticompetitive transaction could go forward.

So, that was my thinking on 7.

12, I had the same concern other people had, which is, I am not sure it is clear what the current legal standards are. Perhaps, 12, as saying - adding something that was basically explained in the memo. But if there was a particular standard that we were going to articulate, then

possibly yes on 12.

Yes on 14.

17 is the way that I would read *Trinko*. So yes on 17.

Yes on 18.

I am going to abstain on 17(a).

And I am going to wait to hear the discussion on 15(a).

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Yes on the first sentence of 1 only.

Yes on 1(a). Yes on 3. Yes on 4.

I go back and forth on 5. If it means that the special circumstances of regulation should blunt application of the antitrust laws, I would say no. And, absent further explanation, I would vote no on 5.

No on 6.

I like the combination of 8 and 9 within II.

In III, I would say yes to 12, provided that we could coalesce around the standard articulated by the Supreme Court unanimously in the medical case, which also incorporates the standards of many cases starting before the

Borden case in the 40s, and going up to at least 2003, if not beyond. And each of you should have a copy of that paragraph from the Supreme Court's decision. It is virtually hornbook law, and if we can agree that that's the standard, and I hope we will, I can certainly endorse 12, subject to that.

Yes on 13. Yes on 14. No on 15. Yes on 15(a), provided that it be redrafted, largely to conform with the medical papers.

Yes on 16. Yes on 17. Yes on 17(a), for the reasons articulated by Commissioner Shenefield.

And yes on 18.

19, no.

MR. HEIMERT: And Commissioner Kempf, you wanted to mention the (a) proposals?

COMMISSIONER KEMPF: Yes. 1(a), particularly as I listen to others - I would vote yes on, with some tinkering on the language. First of all, I would kill the "in general." I think it is better to say, "Competition is a fundamental economic policy of the United States." I would put a period there.

Then the second sentence – and I think that this addresses some of Commissioner Carlton's concerns – the

statutes that create regulatory regimes – kill the clause "should be construed consistently with the policy to the extent possible."

CHAIRPERSON GARZA: Could you say that one more time?

COMMISSIONER KEMPF: Yes.

In the first sentence I would kill "in general." And there would be a period after United States. Strike the word "and."

Kill the parentheses clause, and kill the word "maximum."

So, it would read, "Competition is the fundamental economic policy of the United States. Statutes that create regulatory regimes should be construed consistently with that policy to the extent possible."

COMMISSIONER CARLTON: Could I just –

MR. HEIMERT: 15(a) and 17(a)?

COMMISSIONER KEMPF: Yes.

15(a), I was the author of it, but it was an attempt to capture something that is in 4 and 15 and various discussion we have had.

And I favor it, but there is no pride of

authorship, and I would be happy to tinker with it in any way, including - I would be inclined to take the *Gerimedical* quotation that we have there and have our report say, we find that this is an excellent articulation of our view as a Commission. And then go on to make the recommendations in 15(a). I am very comfortable with that version.

On 17 (a), I don't read *Trinko* that way. And I don't like saying, insofar as it can be read as to suggest that maybe that is a good reading of it. And I don't like that.

Let me just give you my reading of *Trinko*. As I said earlier in the day, I think it was basically a soft reversal of *Aspen Skiing*.

Interestingly enough, as I was saying to someone during the break, *Aspen Skiing* was an attempted monopolization case. But if you will look in the website tonight, of the Aspen Historical Society, you will see that, in 1993, it went from an attempted monopolization case that the owner of Highlands was complaining about, to an actual monopolization, courtesy of the owner of Highlands.

What he did at the end of the day was sell his resort to Aspen Skiing Company. And now you have – if you

think there was a monopoly there now, he who was protesting the attempt to monopolize, accomplished an actual monopoly by selling his property indirectly to Aspen Skiing Company.

In any event, what I read Justice Scalia as saying in *Trinko* is a clause here, and it says, "no impact on antitrust." And therefore, I don't think that the plaintiff is able to piggyback his way into an antitrust violation. Basically, I think *Aspen Skiing* got it wrong.

It's more like how the Commissioners suggested during the break, but this is how I read it. Therefore, I am reluctant to stand on something that reads it a different way and suggests – I don't want to suggest that that's the way it should be read. In other words, to the extent it read this way, I don't want to suggest that we read it that way, and therefore compound a perceived problem on *Trinko* by saying that we really read as being something that is very, very harmful to these types of cases.

Thank you.

COMMISSIONER CARLTON: I just wanted to add my vote.

I didn't vote yes on 7, but – because I maybe misinterpreted it – but in light of Chairperson Garza's

articulate explanation of what it means, I would vote yes.

MR. HEIMERT: Does that change your vote on 8 and 9?

COMMISSIONER VALENTINE: But I thought that was what 8 meant.

CHAIRPERSON GARZA: I don't think that is what 8 means, but we are going to discuss it.

COMMISSIONER WARDEN: Well, she would make the antitrust decision determinative under 7.

Under 8, you authorize the legality of the merger.

CHAIRPERSON GARZA: Under the antitrust laws.

[Simultaneous conversation.]

COMMISSIONER VALENTINE: She's saying that they could block a merger on their grounds.

COMMISSIONER WARDEN: But even if approved on an overall public-interest standard, you would allow it to be blocked under 7.

CHAIRPERSON GARZA: Assuming that the Justice Department or Federal Trade Commission could get an injunction from the court.

COMMISSIONER VALENTINE: Yes. Yes. Yes.

COMMISSIONER WARDEN: Or on 8, it makes them

preclusive on that issue, but doesn't make that issue preclusive as a blocking issue.

CHAIRPERSON GARZA: Right.

COMMISSIONER VALENTINE: Then I am 7, I think.

MR. HEIMERT: Well, we'll have that discussion. Maybe we can try to come up with something that describes what everybody would like.

Commissioner Shenefield, I am going to start with you.

COMMISSIONER SHENEFIELD: I think where everyone mostly is, is 8. 7, you have a regulated industry; you have a public-interest standard that is given to the regulatory agency, as a part of which, you have a competition issues. In 7, the antitrust agencies are given the authority to go to court and get an injunction on the competition issue alone, thus trumping the rest of the public-interest standard. That is not what I want.

8, you have the antitrust agencies taking a view on the competition issue, and that will be preclusive as to that issue only in the public-interest judgment of the regulatory agencies.

In number 9, same situation. The antitrust

agencies take a view. It is not preclusive; it is given presumptive weight, but it can be overruled on that issue, as it has been in the past by the Department of Transportation.

COMMISSIONER VALENTINE: And that is why I don't understand why people voted for 8 and 9.

COMMISSIONER SHENEFIELD: I think you have to do one or the other.

COMMISSIONER VALENTINE: Exactly.

COMMISSIONER SHENEFIELD: And I think 8 is the right one.

COMMISSIONER VALENTINE: I agree.

COMMISSIONER JACOBSON: Since I voted for the two, let me explain what my understanding is.

I understood that the antitrust agencies' determination would be conclusive on the competition issue, and that the regulatory agency would have to take that consideration into account - in fact, it would be binding on the competition issue - but that the competition issue would be given presumptive but not conclusive weight in the public interest determination.

CHAIRPERSON GARZA: That is not in 8.

COMMISSIONER JACOBSON: No. That is in 9.

[Simultaneous conversation.]

COMMISSIONER VALENTINE: No. No. What 9 is the current FCC, which is, the views of DOJ are given presumptive effect by the FCC, but the FCC could say, no; we think this is anticompetitive."

COMMISSIONER JACOBSON: Well, that I don't agree with. Let me give you the hypothetical that I was thinking of when I voted this way. And your reading of 9 is closer than mine.

Let's say the product is tobacco, and the antitrust agencies determine that the merger is unlawful, because it will reduce the output of tobacco. And the National Tobacco Commission determines that, nevertheless, it's in the public interest: we want the output of tobacco to be reversed. That is our public interest determination, that competition is a bad thing in this industry. We want less of it.

I don't think antitrust should trump that kind of regulatory determination. That is all I am saying.

COMMISSIONER WARDEN: You are for 8.

COMMISSIONER VALENTINE: You are for 8.

COMMISSIONER JACOBSON: Let me just say, in two seconds, that as a point of order, I think it would be useful

if we could coalesce around the Supreme Court's standard that was articulated in those many cases that I circulated. I think we can provide a useful function by endorsing that standard.

And I didn't hear any disagreement.

CHAIRPERSON GARZA: Are you making a motion with respect to 12?

COMMISSIONER JACOBSON: Yes.

CHAIRPERSON GARZA: Can you articulate that, and then we can vote on it?

COMMISSIONER JACOBSON: That the Commission determine that the quotation circulated from the *Gerimedical* case represents the current state of the law on when immunities will be implied from a regulatory regime, first. And the Commission endorse that as an appropriate standard of what the law should be, going forward.

COMMISSIONER KEMPF: May I make a comment on that, because I earlier said that I am in support of that? My only concern is that it is 25 years old, and I would like the staff to give us some comfort level that is still a good articulation.

But, subject to that, I enthusiastically endorse

what Commissioner Jacobson said.

COMMISSIONER SHENEFIELD: I endorse it.

COMMISSIONER WARDEN: I agree.

COMMISSIONER VALENTINE: I agree.

CHAIRPERSON GARZA: Okay. Let's do this in a slightly more formalized fashion for the record.

MR. HEIMERT: Okay. Let's phrase it this way, if people are okay with it: option number 12 shall be deemed to incorporate the standard as articulated in *National Gerimedical Hospital* as the state of the law 25 years ago and currently. And the question now is, yes or no, to make that one of the Commission's recommendations.

And can I have a show of hands of who agrees with that?

[Hands raised.]

COMMISSIONER KEMPF: I am going to raise my hand, yes. I enthusiastically agree with it. But I do want to note that I would be comforted, other than taking it on faith.

MR. HEIMERT: We will.

I see Commissioner Jacobson, Shenefield, Warden, Carlton, Kempf, Garza, Yarowsky, Valentine, Cannon, and

Burchfield.

COMMISSIONER JACOBSON: I think that it is unanimous.

CHAIRPERSON GARZA: Can I just make a point? In the afternoon, we tend to get a little bit looser, but it does make it very difficult to keep a clean record, unless we continue to observe the protocol of putting up your flag and waiting to be recognized by either myself or Andrew.

Thank you.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: Yes. I just wanted to assure Commissioner Kempf that the next edition of the ALD treatise on antitrust law will reflect this standard as continuing to be the appropriate standard for determining plain repugnancy.

I can assure you of that.

MR. HEIMERT: Commissioner Jacobson, if you can share some of that research with us, we would be grateful.

[Laughter.]

MR. HEIMERT: All right. Commissioner Kempf?

COMMISSIONER KEMPF: I am going to address the discussion that we have been having on 7, 8, 9, 10, and 11.

I voted no on all of them, and I will explain why.

And I did handle bus mergers in the ICC, airline mergers, and I actually handled the case that Commissioner Jacobson raised in the tobacco industry. And I have tried numerous private actions in the courts.

Let me take an easier case to illustrate the point: *Staples*. There is no regulatory regime; it is just a plain old case. And what happens is, you go to the court and the suing agency - in that case, the FTC – says, this is illegal, and the parties say, no, it isn't. And the judge decides.

They don't get a determination; they just get a plain old allegation. And I don't know why, when it shifts into a regulatory regime, they should suddenly get more deference than they get outside a regulatory regime.

To me, all they are is the same thing in an unregulated industry. And it is a skewed view to be sure. The agency would get whatever rate it considered appropriate, but to me, they are entitled to no greater deference than the parties are. They are recognizing that they may have a schooled view, but they also have a partisan view because they want to do mergers.

And they could be either binding, presumptive, or

anything else; that is why I am against all of those. And the airlines feel - I would like, as an attorney representing a proposed merging party, to have the same option that I would have in a courtroom.

I don't want to have less of an opportunity to get the merger approved because I am in a regulatory agency. I don't want an advantage, but I don't want a disadvantage either. And if I could just digress for a moment, the tobacco case - I don't want to mention the clients, but it's not in a regulatory regime, but, as part of the assessment of what our chances were of getting the merger through, a clear factor was - we had a name, and we had to go to great lengths to hear, at an extremely accelerated place in their minds, well, do we want cigarette prices to be lower?

There are a lot of segments of our government that think that less tobacco consumption is a good thing. And they don't want to take action that is designed increase tobacco consumption, if you believe in the law of supply and demand.

And the transaction was not challenged, and I always thought that a significant part of that was a broader governmental determination that high tobacco prices are a

good thing.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I didn't put my flag up for this, but let me say, first, that I don't read 7, 8, 9, and 10 the way that Commissioner Kempf reads them.

You are not precluded from judicial review of a denial of your merger. This not making antitrust authorities either presumptive or conclusive. It is no different at that level than making the agency that otherwise is going to decide this presumptive or conclusive.

What I did put my flag up for was to explain why I voted for 9 rather than 8.

In the abstract, I would be in favor of 8, but experience in the airline industry has led me to favor 9. I think that the antitrust enforcement agencies have not shown, over the years, a depth in dealing with industries that have been constrained by law.

Instead of, for example, Air France and United being able to merge, they can't do that because we have all these crazy protectionist laws that prevent that. They have to do other things to try to get the benefits, and I think that fact has not been given sufficient appreciation by the

antitrust authorities, and the DOT has been more attuned to it.

On the other hand, in general, I could favor 8.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFILED: I cannot articulate it any better than Commissioner Warden. I agree 100 percent with the comments he made about the difference between 8 and 9. Let me add one less articulate point there.

And that is, I also agree with Commissioner Shenefield, that I have more confidence in the antitrust Division and the FTC to do competitive analyses than I do in all, or virtually all of the other federal agencies in town.

But I am not sure that everybody in town understands the word "competition" or "competitive analysis" in the same way that people sitting around this table do. A public-interest analysis, with a competitive aspect of it, does have industry-specific issues, as Commissioner Warden has indicated, that I think the agencies have been vested by Congress and have developed expertise in analyzing over the years.

And I think those are important to an analysis of the entire basket of issues. I'm not sure where you would

draw the line in saying the Justice Department's or the FTC's competitive analyses are presumptive and binding on the agency. That is my concern about it, and that could lead to a lot of disputes over time. So, I am still inclined toward 9. I could probably live with 8, but I think there is a latent ambiguity there, both in terms of what the competitive issues are, and in terms of what "binding" means in light of the other range of public interest issues.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would like to ask if we could address another set of issues and try to maybe get some common consensus, maybe like we did around 12. Because if we are not dealing with implied immunity, then I think my sense is that 4, 15, and 16 are trying to get at savings clause issues.

And I guess I don't – it seems to me that 15(a) conflicts somewhat with the concept of implied immunity. It says it could never exist, I guess.

But I don't know that I like any of 4, 15, or 16, and I am wondering if anybody has a better idea as a way of addressing savings clauses that we could all coalesce around.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: Yes. I concur. And I would add 15(a) into the mix, because they are all trying to get at the same thing. And maybe we don't have, yet, comfort among us that 4, 15, and 16, or 15(a) accomplish what we sort of, I think, have a consensus that we would like to do, but it is not really articulated any place at the present time.

So, I think I would join Commissioner Valentine in urging the staff to sort of weigh the comments. Take a look at all of those and see if we can't come up with something that captures the spirit of what we are saying here.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I would like to return to 7, 8, and 9 and change my vote again, because it appears from the discussion, especially from Commissioner Shenefield, if his interpretation is correct - then I think I am for 8, and not 7 and 9.

But I want to raise a question. My understanding is that, for example, the FCC, in approving a merger, may require it to be pro-competitive, while the antitrust authorities simply require that it not harm competition. And I am trying to see if that tension is addressed by 8.

As I understand 8, or what I think I am voting for

is, as a competition issue, defer to the agencies. They will tell you whether or not it harms competition, on the economic competition.

Now, my question is - let's suppose the regulatory authority believes it should only approve a merger if it is pro-competitive. How then have we –

COMMISSIONER VALENTINE: That gets trumped.

COMMISSIONER CARLTON: That gets trumped? In other words –

COMMISSIONER VALENTINE: In other words, that is a competition issue.

COMMISSIONER CARLTON: – my interpretation of 8 is that, as long as the Antitrust Division basically signs on it, that is not going to be a negative in the FCC weighing. I am just trying to get an understanding what 8 says.

VICE CHAIR YAROWSKY: Can I take a whack at it?

MR. HEIMERT: Commissioner Cannon is up next, but if you want to defer.

COMMISSIONER CANNON: I am thinking back to the testimony on that snowy day on the Hill. I remember John Thorne from Verizon. If you remember his testimony - I thought it was terrific, because what he essentially said

was, okay, the agencies can look at the competition aspects of it, but the FCC, for instance, who they deal with every day, views the public-interest standard as really obviously encompassing not only that, but some other broader analysis that, in fact, is a good bit more ephemeral than the competition analysis.

And so what you have, as my recollection of the testimony was, and I think, to my own experience, it is true, is the agencies may sign off with either little or no structural relief or remedy on what they think is anticompetitive. You get to the agency, and then the FCC will propose not structural changes but conduct changes.

So, therefore, you end up with various participants in an industry such as communications, essentially having to run their business in a different fashion from everybody else. Now, I think that is what that means. But my point is, whether it is 8 or 9, the agency, under the public-interest standard, can trump it all.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I just want to try to answer your question. Here is, I think, the problem: let's take two examples.

One is the FCC for telecom mergers, and one is the Bank Holding Act for banks. Basically, what we learn there, and we see, in both agencies, are certain cases where the DOJ, let's say, does a Section 7 analysis. That is the universe; that is their only brief to do. So whether the Telecom statute of 1996 has some loosely phrased standard about competition, that statute also contemplates that Justice will do its Section 7 analysis.

It sends it over to the building, to the FCC. Now, the FCC's concept of competition goes beyond Section 7. And it may want to look at the little players.

Here is your Section 7. But, guess what - the communication policy of the United States says media ownership, things like that, I have to look at a few other things that have nothing to do with Section 7 analysis.

COMMISSIONER CANNON: Diversity of opinion.

VICE CHAIR YAROWSKY: That is right. Competition broadly construed under their mandate.

That is fine, because it is an overlay to the Section 7 analysis. And what do you do in the Bank Holding Act, because they are going to look at solvency, redlining, you know, their basket of issues. That's fine; put them all

together on top of Section 7. But then you give them an arbiter; they will make the decision. Not always, but in those two agencies, they make the decision, not the DOJ.

Take defense mergers. It is the opposite. Defense tells DOJ what to do, and the DOJ does it.

Here is the problem. There have been mergers in which the FCC has basically turned to some of their attorneys and said, "Redo the Section 7 analysis." I mean, that's fine for them to tell their attorney advisors to add the media, diversity, and all that stuff, but to redo the Section 7 analysis? And this has also happened at the Fed.

So, the reason I really voted for 8 was that, even if we have to reformulate it, I want to get the concept that the Section 7 analysis that the DOJ does in those types of hybrid mergers should be deferred to. They'll do what else the statute tells you to do, and you make the final call. I just don't want to see it re-litigated by a different set of antitrust attorneys.

COMMISSIONER VALENTINE: I don't disagree, but I think the one other added benefit of this 8 option is that, because the competition agencies' competition analyses govern, if the regulatory agency is going to do anything

extra, put on bells and whistles, they have to explain, as a transparency issue, why, on non-competition grounds. It is actually the way that a lot of the world is going in other countries, and I think it would be a very healthy thing for this place.

Plus, it eliminates the costs and burdens associated with a supposed competition merger, which is being done by two agencies.

COMMISSIONER CARLTON: My question really was also whether there was a tension. In other words, I understand there are non-competition issues they look at, but is it possible that a regulatory agency is charged with determining whether something enhances competition, while the DOJ or FTC really determine that something won't be harmed?

Let's suppose the DOJ says, no harm to competition; we don't see a problem. And then someone at some regulatory agency says, oh, that's fine. DOJ said there was no harm. But there is no gain, so I am not going to say anything.

Now, maybe the regulatory antitrust authorities would have said, oh, if you wanted us to opine on whether there was a gain, we could have said that.

But technically, their expertise is in saying no

harm. So, I am asking whether there is a tension, even the way 8 is written, with everybody's clarifying interpretations, between a regulatory agency and an antitrust agency?

VICE CHAIR YAROWSKY: And there could be, Commissioner Carlton.

The only thing that I can respond to is that maybe their concept of competition, broadly construed, allows them to comment that there is a gain. But it would not necessarily be construed as a gain under Section 7 analysis. It is a gain under the competition factors that they are looking at.

MR. HEIMERT: Commissioner Garza?

CHAIRPERSON GARZA: To that point, I would think the concept would be that you apply Section 7. You might say there is no anticompetitive harm, but if the statute that the regulatory agency is administering imposes, for this industry, an additional burden, which for some reason happened to say that "no harm" wasn't enough, only the regulatory agency would apply that, but that is not an antitrust law concern. That is a regulatory agency concern.

COMMISSIONER VALENTINE: I don't know if that makes

sense.

CHAIRPERSON GARZA: I don't know if it does either, but it could, theoretically.

And then my question to other folks, and I guess it was touched on with tobacco, but what my concern is, is that, if the FTC or the DOJ conclude and convince the court that a merger in the regulated industry was anticompetitive, should the regulatory agency be in a position to say, yes, but there is this other public interest reason why we think it trumps the antitrust laws in this event. So, we are going to, basically, overrule it.

And I am not sure what it means when you say it is binding, it is part of the public interest determination, or it has presumptive weight. Presumably, then, the regulatory agency – who knows how they balance it out? They can balance it out however they want. But I was trying to get at the situation where the regulatory agency wouldn't be able to essentially nullify, in any event, the antitrust conclusions of the agencies.

Tobacco is a good example. Would you really want, in a situation in which the agency said one thing on tobacco - the price – the agency said, well, we don't like people

smoking, so we are going to effectively take a different position on the value of competition in this industry. That was sort of my reason for going with 7.

I had another question for, not on this subject, but on the savings clause, which is, Commissioner Kempf, to your point. I would like to be sure that I understand – and so the staff does – what is it that we want to say about savings clauses?

COMMISSIONER KEMPF: Let me see if I can't capture that. It really is the articulation that is in the piece that Commissioner Jacobson distributed.

The concern with a lot of people however, is that that is not what is happening. And therefore I think we would probably want to take a belt and suspenders approach, and say, that's what the rule should be, and we endorse it.

And secondly, it would be good if Congress passed a general statute that says, "Unless we provide otherwise, the antitrust laws always apply."

Now, you need some fine tuning to that to handle certain situations, but that is sort of the thrust of it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I think it is a good idea to

try to put something together that will go with 12. But I think you can't go much further than urging Congress to consider this question in setting up a regulatory regime. And provide guidance in clear – clearly, the antitrust laws will still apply to this, or clearly they won't to that.

I don't think you can get away from the clear repugnance standard, just because there is a savings clause that says the antitrust laws always apply. You can't get away from it. It doesn't work.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes. I had to step outside for a bit, so maybe you covered this.

But one of the concepts that interface with what you just talked about, Commissioner Warden, and others, is the fact that – and this is where I thought clear repugnancy emerged from – towards the end of the 1800s, the first agency was the ICC. And it came about almost the same time the antitrust laws came out.

That was the model. It was a comprehensive system of regulation, from A to Z. And so it completely displaced the antitrust laws and it had its own world. And there were a lot of other agencies, probably throughout the '30s, I

don't know -

That was the model. The ICC was the model of agencies. What started happening in the '60s, but really starting at a great pace in the '80s with the move to privatization and deregulation, was that you had some agencies completely deregulated, but you also had the remainder, which, for the most part, were hybrid regulated agencies.

They weren't comprehensive, but they weren't private sector; they were hybrids. And that, I think, is what caused a lot of the confusion that has now showed up, at least, in the savings clause issue. Because there are parts of practice in a certain industry that are regulated. There are other parts that are not. And yet, it is the same regulators and the same industry players that are kind of in and out of regulation.

And so that has kind of forced the issue, at least, in Congress a number of times about, well, we need something. Regulation is fine, if it is there, but if it is not there, we cannot say that it displaces the antitrust laws, or you have nothing. You have absolutely nothing in terms of competition safeguards.

So, I just wanted to throw that into the context. Now, how we say it is really the issue for numbers 4, 5, 15, and 16.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Two things. First, on the savings-clause area. Commissioner Warden's observation that, we should tell Congress to make it clear - The problem is that they don't always make it clear. And it's like, should the legislation be prospective or retrospective? Sometimes one of the reasons they don't make it clear is that they don't have consensus. And they can't get the votes either way, so they punt on it. And same thing is on the savings clauses.

Sometimes, some want to make it one way, and some want to make it the other way, and they can't reach agreement, so they punt. So what my statute is designed to do is to fill that void and say, absent the savings clause, one way or the other, antitrust is still not out. And so it harmonizes the system.

We can get them to say, it is a good idea to give guidance. But they are not always going to do that, and therefore, you may need this.

Second thing, I have been thinking about Commissioner Warden's comment on the regulatory area where it says, you could always go to court.

And then it terribly oversimplifies things. In the telecom field, I represented John Thorne in court cases. It had to with mergers. In this particular case, it was representing Nynex and Bell Atlantic in attacking the proposed acquisition of McCaw Cellular by AT&T on the grounds that the government find antitrust violations, and there was no consent decree. They didn't go far enough, and it really wasn't adequate, and, therefore, we wanted stronger relief.

COMMISSIONER JACOBSON: Is the case that you told us about that you –

COMMISSIONER KEMPF: I am not going to comment on that.

But the concern that I have is the decider in the first instance. But when you are managing a territory environment and the agency says, we don't want you to go forward, you can say, to heck with you; I am going to go forward anyway.

And then they have to sue you and convince a first-decider that you can't forward.

In a regulatory context, the agency is the first decider instead of a court. And so I still, upon reflection, do not want to give the agencies an advantage they don't have. And that is to require the first decider to give deference to them. The first decider in a court case doesn't have to give them deference. And the first decider, when it is the ICC or the Telecom people, or whoever it is, should, in my view, give them whatever weight their views carry, but they should not have to presume that they are correct or give binding effect to them, *et cetera, et cetera.*

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: This is for Commissioner Kempf. I hate to be dense about this, but how would your 15(a), if it were enacted, affect, if at all, the laws expressed in *Gerimedical*?

COMMISSIONER KEMPF: It would basically codify it, I think.

COMMISSIONER VALENTINE: That is not what it says, though.

COMMISSIONER WARDEN: Antitrust laws always apply, even if they are clearly repugnant. It would say that, absent some clause in the statute.

CHAIRPERSON GARZA: Is that what you intended, what Commissioner Warden said? It would seem to suggest that, if this statute were enacted, the absence of a provision to the contrary would mean that the antitrust laws would always apply, even if they were clearly repugnant to the regulatory scheme.

COMMISSIONER KEMPF: I think I have to think about that. What you are saying is, you have someone directing a statute that – in that instance, it would seem you would just automatically put in a thing saying antitrust laws don't apply.

COMMISSIONER JACOBSON: But they don't –

COMMISSIONER WARDEN: That could also broaden the immunity far beyond what the courts –

COMMISSIONER KEMPF: No. This is designed not to broaden the immunity, but to say, unless you specifically grant immunity, there isn't any.

COMMISSIONER WARDEN: Well, okay. All I was saying is that Congress reacted the way that you said they would, which is, when they set up one of these regimes, they will put in a provision that says the antitrust laws don't apply. That could provide broader immunity than the judicial

doctrine now provides. If they react the way you said they would to your statute.

COMMISSIONER KEMPF: No. No. What I am saying is, if they wanted it, they would put it in there, but I don't think they would get the votes to do that.

I think what this really addresses is the places where they don't have the votes either way – it's a default position. It establishes a default position, and it codifies what the judicial default position is in the case that Commissioner Jacobson passed out - unless that is the objective of it.

COMMISSIONER BURCHFILED: Did you say that we are adding a sunset provision?

[Laughter.]

COMMISSIONER JACOBSON: That sounds like a motion to adjourn.

CHAIRPERSON GARZA: So where do we stand then? Just to be clear, the staff is going to go try to think about this and present something to us for our next meeting, to consider on this question of savings clauses, and good luck.

[Laughter.]

CHAIRPERSON GARZA: And then I think it might also

be good if you could try to make some sense of the discussion of 7 through 11 as well, so we can come back and consider those, too. Those are probably the two areas, savings clauses and mergers. Because I think there was a – this a difficult area to articulate. I think the staff did a good job with the discussion outline, but it is difficult to parse it through, and I think it would be useful to get, again, one more shot and one more formulation based on the sense that the staff has of where the Commissioners were so we can look at that next time.

COMMISSIONER VALENTINE: And I am also, if I could add - I am wondering whether instead of trying to make normative judgments that, if it is regulatory, it is more appropriate for regulatory agencies – and this does not have to do with 7, 8, and 9, but just on the general way the memo was written - I think the truth is that we are generally moving towards competitive environments.

If you think of the world as having been subject to monopolies or regulation, and now it is increasingly privatized and deregulated around the world, what we should be saying is that there should be less and less regulation. Because we are finding that, more and more, there are really

no such things as natural monopolies. And when we regulate, we should regulate very, very lightly.

I think something like that, rather than trying to say that, until there is a workable regulatory context, regulation may be superior. It may be that, precisely because you want to move towards a workably competitive context, you actually do want lots of antitrust insight and regulation.

So, I think my problem with some of these things in 1, 2, 3, and 4 is that they are somehow missing the boat of trying to say, let's move as much as possible towards deregulation, privatization, and away from having regulation, if that makes sense.

MR. HEIMERT: Commissioner Garza?

CHAIRPERSON GARZA: I think that is right, and I agree with that. I think the only thing they were trying to capture based on the comments was a sense of some commentators that some context – the traditional antitrust laws - because you don't have a workably competitive environment, standard antitrust laws may not be sufficient. And there may be a transitional period in which you would have a stricter regime to counteract the incentives of the

monopolists, *et cetera, et cetera*.

I am not saying that I agree with that; I am just saying that is a view that is expressed. It is not necessarily incompatible. But maybe if we can get a little bit clearer articulation from the staff we can parse that out.

COMMISSIONER VALENTINE: Right. Because maybe what we might want to be saying is that you need more robust, competitive analyses. I understand what you are saying, that as you move from the regulated to the deregulated, there is almost more opportunity for monopolistic behavior.

MR. HEIMERT: Commissioner Kempf, quick last words?

COMMISSIONER KEMPF: Yes. I just want to follow up on what Commissioner Valentine said.

I voted against number 1 - I was one of the few who did, but the reason that I did was precisely what you sort of captured in your comment. When you say, well, antitrust – it depends on the industry. It really is at odds with what we are saying elsewhere, where we are saying competition is the way we run our economy, *et cetera*, *et cetera.* And this one really looks like it waffles at this point and says, well, it depends. And that is your closing observation, which is why

I voted against number 1.

MR. HEIMERT: Is there anybody who wants to speak against the general tenor of what Commissioner Valentine said?

Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: No, but just a clarification. Maybe what we might want to do is reduce the number of alternatives under 1.

Really, what I think you are talking about with regard to that is the transition period. And, generally, the thrust of everything we are saying is very pro-application of the antitrust laws and competition. We are in this kind of transition area, form heavily regulated moving to a deregulated state. And that is what we need described, and then what our position is.

But I think we have three or four alternatives that reach for that, and maybe we can reduce it just down to transition industries, because that is what the testimony was about, of the three witnesses that day, transition industries.

So, maybe we could capture that.

COMMISSIONER VALENTINE: Flavor it a little bit

more.

CHAIRPERSON GARZA: So, just to clarify it a little bit, I think it would be number 1, Commissioner Valentine's point about favoring market context over regulation to transitioning industries. There may be some reason to have some regulatory enhancement, then, in dealing with that.

COMMISSIONER VALENTINE: Regulate lightly to encourage competition to the extent possible.

CHAIRPERSON GARZA: Exactly. And then they will have something on the savings clause.

And to the extent that the staff has any difficulty after this, figuring out what was going on, the study group will be available to help you understand.

Just call Commissioner Cannon.

And I think that, unless anyone has any other comments on this topic, I think we will adjourn for the day.

Thank you.

[Whereupon, at 3:46 p.m., the meeting was adjourned.]