REMARKS ON THE PROGRESS OF THE ANTITRUST MODERNIZATION COMMISSION

REMARKS AT THE MILTON HANDLER ANTITRUST REVIEW

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Deborah Garza*

It is an honor to be here today. I recognize a number of faces in the audience and invite you all to the next hearing of the Antitrust Modernization Commission.

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* Deborah Garza was appointed by President George W. Bush in March 2004 to chair the Antitrust Modernization Commission. She is also a partner with Fried, Frank, Harris, Shriver & Jacobson LLP. Previously, Ms. Garza served in the U.S. Justice Department Antitrust Division as Chief of Staff and Counselor to the Assistant Attorney General from 1988 to 1989 and as a Special Assistant to the Assistant Attorney General from 1984 to 1985. She received her J.D. from the University of Chicago Law School in 1981.

I hope that some of what I say today is informative. I hope that it motivates you to contribute your efforts and ideas to the work of the Commission, and better enables you to communicate with your clients about what the Commission is doing.

I suspect that you already know many of the basic facts about the Commission. So, I will try to be brief and to leave time for questions. The Commission is in the "intake" phase of its work now. Therefore, I want to make the best use of this time by hearing what is on your minds.

I. COMPOSITION OF THE ANTITRUST MODERNIZATION COMMISSION

As you may know, the Antitrust Modernization Commission—or AMC—is a bipartisan group of antitrust experts (if I can include myself in that group) jointly appointed by the Congress and the President. There are twelve Commissioners, including myself. The Senate, the House, and the President each appointed four Commissioners, no more than two of whom could be from the same political party. In total, there are six Democrats, five Republicans, and one Independent. My co-Chair, Jonathan R. Yarowsky, is a Senate Democratic appointment. He is a partner with Patton Boggs LLP in Washington, D.C. Jon has extensive prior experience on Capitol Hill and in the Clinton White House Counsel's Office.

You may know very well some of the other Commissioners. Several of them are your colleagues in the New York Bar. Each of them is quite accomplished.

Other Republican appointments are: Bobby R. Burchfield, W. Stephen Cannon, Makan Delrahim, Donald G. Kempf, Jr., and John L. Warden.

Bobby R. Burchfield was appointed by the White House to replace Deborah Platt Majoras when she left the AMC to chair the Federal Trade Commission ("FTC"). Bobby is a partner with McDermott, Will & Emery in Washington, D.C. where he heads that firm's Complex Litigation Practice. Previously, Bobby served as General Counsel to the campaign of President George H. W. Bush in 1992. He

argued before the United States Supreme Court on behalf of the Republican National Committee in support of its challenge to the McCain-Feingold Campaign Finance Laws.[1]

W. Stephen Cannon and Makan Delrahim both served as Deputy Assistant Attorneys General in the U.S. Justice Department ("DOJ") Antitrust Division and as Chief Antitrust Counsels to the Committee on the Judiciary of the U.S. Senate. Steve was also Senior Vice President, General Counsel, and Secretary for Circuit City Stores, Inc. He is now with Constantine and Cannon, PC, in Washington, D.C. Makan recently left DOJ to become a partner with Brownstein, Hyatt & Farber in Washington, D.C.

Until recently, Don Kempf was Executive Vice President, Chief Legal Officer, and Secretary at Morgan Stanley. Before that, he was a partner with Kirkland & Ellis LLP. He has been involved in a number of high-profile antitrust matters, including *FTC v. Staples, Inc.*[2] and *United States v. General Dynamics Corp.*[3]

John L. Warden, a well-known and accomplished antitrust practitioner and litigator, is a partner at Sullivan & Cromwell LLP. He was involved in such important cases as *Berkey Photo, Inc. v. Eastman Kodak Co.*[4] and *Virgin Atlantic Airways Ltd. v. British Airways PLC.*[5] Dennis W. Carlton is a White House Independent appointment. He is a professor of economics at the University of Chicago Graduate School of Business and Senior Managing Director at Lexecon, an economic consulting firm. Dennis is an extremely accomplished Ph.D. economist, and the only economist we have on the Commission. I am quite grateful for his presence.

Other Democratic appointments, in addition to Jonathan Yarowsky, are: Jonathan M. Jacobson, Sanford M. Litvak, John H. Shenefield, and Debra A. Valentine.

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[1] *See* 2 U.S.C. §44 (2000); McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

[2] 970 F. Supp. 1066 (D.D.C. 1997).

[3] 415 U.S. 486 (1974).

[4] 444 U.S. 1093 (1980).

[5] 69 F. Supp. 2d 571 (1999).

Jon Jacobson is a well-known practitioner in New York, and he is now at Wilson Sonsini Goodrich & Rosati. He has been a tireless member of the American Bar Association's ("ABA") Antitrust Section and currently serves as editorial chair for the Antitrust Section's upcoming sixth edition of *Antitrust Developments*, even while he serves as an AMC Commissioner.

Sandy Litvak was a highly respected leader of the Antitrust Division from 1979 to 1981. Upon leaving DOJ, he became Senior Executive Vice President and Chief of Corporate Operations for the Walt Disney Company, where he also served briefly as Vice Chairman of the Board of Directors. Sandy is now a partner with Hogan & Hartson LLP.

John Shenefield also previously served with great distinction as Assistant Attorney General in charge of antitrust enforcement during the Carter Administration, from 1977 to 1979. As Assistant Attorney General, John was responsible for an earlier report on antitrust enforcement, which focused on the trial of complex antitrust cases, immunities and exemptions, and monopolization standards.[6] From 1979 to 1981, John served as Associate Attorney General in DOJ. Today, he is a partner with Morgan Lewis & Bockius LLP in Washington, D.C.

Last, but certainly not least, Debra Valentine served at the FTC during the 1990s in several leadership roles, including as the FTC's General Counsel from 1995 to 2001. Debra was also an attorney in the Office of Legal Counsel at DOJ from 1981 to 1985. She recently left her private practice as a partner at O'Melveny and Myers LLP in Washington, D.C. to join United Technologies Corporation as Vice President and Associate General Counsel.

The last appointments to the Commission (before Bobby Burchfield) formally were made on March 17, 2004. The Commission held its first meeting about two weeks later on April 2, 2004. April 2nd is a significant date because the

[6] Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (1979).

Commission expires thirty days after it issues its report, and its report must be issued within three years of the date of the Commission's first meeting. Therefore, the Commission will issue a report no later than April 2, 2007.

II. THE COMMISSION'S CHARGE

The Antitrust Modernization Commission Act charges the Commission with four duties.[7] First, the Commission is directed to examine whether there is any need to modernize U.S. antitrust laws and to study related issues. Second, we are directed to solicit the views of all parties concerned with the operation of the antitrust laws. Third, we are required to evaluate the advisability of proposals and current arrangements with respect to the issues that we decide to study. Fourth, we are to prepare and to submit to Congress and the President a report containing a detailed statement of findings and conclusions, along with recommendations for legislative or administrative actions that we consider appropriate.[8]

The legislative history of the Antitrust Modernization Act is sparse. There were no hearings, and there was only one sponsor, Congressman James Sensenbrenner, Jr. Our principal guidance on what Congress intended (aside from the language of the statute) is contained in a press release issued by Congressman Sensenbrenner when he introduced the legislation. Congressman Sensenbrenner said:

> I believe our antitrust laws have worked well by fostering a competitive marketplace where American consumers have affordable choices. However, we shouldn't shy away from taking a look at some of these antitrust laws that have served us well over the past 100 years to see if any changes might help ensure a competitive and innovative marketplace for the next 100 years. Hopefully this proposed

[7] Antitrust Modernization Act of 2002, Pub. L. No. 107-203, §§ 11051-11060, 116 Stat. 1856 (2002), *available at* http://www.amc.gov/pdf/statute/amc_act.pdf.

[8] *Id.* at § 11053.

> Commission could exhaustively tackle this issue and make some constructive recommendations.[9]

Congressman Sensenbrenner identified three areas in particular that he hoped the Commission would address: (1) the relationship between intellectual property and antitrust law, (2) antitrust enforcement in a global economy, and (3) the role of the State Attorneys General in enforcing federal antitrust law. However, the Commission was neither required, nor limited to addressing solely these issues.

III. THE COMMISSION'S INITIAL WORK: SETTING AN AGENDA

The Commission thus had broad discretion in deciding its agenda, which it was directed to exercise after considering the views of interested persons. The Commission began its work by deciding what it would study. At the same time, we hired a staff, set up an office, launched a website, and did all of the things necessary to create a new federal agency.

The Commission engaged in several months of public outreach. We solicited public comment. Groups of Commissioners and Commission staff met with members of the antitrust community, including present and former antitrust enforcers, judges, scholars, and representatives of the ABA and American Antitrust Institute ("AAI"). We extended invitations to many interested persons, including consumer groups and various business and legal groups.

During this period, the Commission formed several small working groups of Commissioners organized around broad areas of antitrust policy. Each working group worked with Commission staff to collect information and to make recommendations to the full Commission on what issues should be studied. They each produced a memorandum discussing specific questions and areas suggested by the public for study, advising which issues the working group

[9] Press Release, Sensenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001) [hereinafter, *Press Release*], *available at* http://judiciary.house.gov/legacy/news_062701.htm.

recommended for further study or not and explaining why or why not.

The full Commission met in January 2005 to discuss the working group recommendations and to select issues for further study. All of our substantive deliberations were conducted in public.

The Commission did not accept all of the recommendations of the working groups. Some were revised, and others were deferred for further development, but most were accepted. The working group memoranda and all comments received by the Commission are available on the Commission's website, at www.amc.gov.

Perhaps as a result of the process that we used, the Commission adopted a long list of issues to study—about twenty-nine issues covering ten subject areas. We have been criticized for that, and the criticisms were well taken. I suspect that if any one of the Commissioners alone had developed the agenda, it would have been more limited. Nevertheless, none of the issues that the Commission is considering are unimportant. In addition, covering such a broad range of issues can be beneficial because it gives the Commission an opportunity to set forth a more coherent and cohesive assessment of antitrust enforcement, which is based on a few fundamental principles. It will also help the Commission to appreciate more fully how changing enforcement policy in one area may affect enforcement in another area. In addition, if we do not confront these issues now, then when will they be addressed? For at least some of the issues that we are studying, another opportunity for improvement might not come along for a long time, if ever. I think that each of these considerations motivated the Commission to adopt such an ambitious agenda.

IV. CRITERIA FOR SELECTING ISSUES FOR STUDY

Before discussing the issues specifically, I want to answer some questions that you might have about the criteria that we applied in deciding which issues to address.

At the Commission's October 2004 meeting, we agreed to focus on issues that appeared to have significant impact, where there was broad public consensus on a need for change, and where the Commission could usefully and uniquely contribute to reform. Although the AMC Act directs the Commission to consider legislative recommendations, we did not limit ourselves to issues that seemed particularly amenable to legislative change. A majority of the Commissioners agreed that for some important issues not suited to legislative reform, the Commission nevertheless should use its platform to promote the use of clear and sound enforcement principles.

Some Commissioners suggested that we should not study issues that likely would be addressed through the development of the common law, and that our focus should be on procedural issues, rather than on substantive ones. They argued that antitrust case law has continuously evolved over the last 100 plus years. Over time, the courts and enforcement agencies have moved toward broad application of a sensible "rule of reason" approach to most business arrangements.[10] The exception is a narrow range of "hard core" violations where there appears to be a relatively broad consensus for applying a standard of *per se* illegality.[11] In addition, application of the "rule of reason" has been refined over time, so that the risk of wrongly decided cases inhibiting efficient, procompetitive conduct has been greatly reduced.

These Commissioners expressed a concern that if we were to codify standards currently employed under the rule of

[10] Under the rule of reason, a court will consider all relevant facts to determine whether the challenged conduct is actually anticompetitive.

[11] Hard core violations subject to *per se* condemnation are agreements between or among competitors to fix price or output, to rig bids, or to allocate business that are unrelated to any economic integration of the competitors' operations that plausibly could generate efficiencies. *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); FTC & DOJ, Antitrust Guidelines for Collaborations Among Competitors, *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

reason—for example, in the areas of intellectual property licensing, collaboration on standards, and Section 2 of the Sherman Act—we might inappropriately interfere with the free evolution of antitrust policy.

I believe that all of the Commissioners appreciated the merits of these arguments. However, a majority believed that the Commission could play an important role by endorsing certain principles of law or by urging the formulation or clarification of enforcement guidelines in certain areas.

For example, a majority of the Commissioners voted to study exclusionary standards under Section 2 of the Sherman Act, even though they appeared to agree that the Commission is unlikely to recommend codifying any particular standards.[12] A similar approach was taken with respect to reviewing other substantive areas, such as merger analysis.

During hearings, the Commission asked witnesses whether the Commission should study monopolization and other substantive standards. In regard to Section 2, we specifically requested public comment on whether any change should be effected through the development of case law, legislative reform, or other means. With relative uniformity and enthusiasm, witnesses recommended that we look at Section 2 jurisprudence and standards. Although they urged the Commission not to recommend legislative change, they endorsed the importance of promoting dialogue about Section 2 enforcement.[13]

Obviously, there has already been a good deal of discussion in other fora concerning Section 2 standards. The ABA and other groups have done a very good job in this area, and DOJ and the FTC will hold hearings soon on this issue. Nonetheless, the majority of Commissioners believe that, given the Commission's status as a bipartisan group appointed by Congress and the President to report on the

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[12] 15 U.S.C. § 2 (2000).

[13] *See Hearing Before the Antitrust Modernization Commission* (2005), *available at* http://www.amc.gov/commission_hearings/pdf/050905_Exclus_Conduct.pdf.

state of antitrust enforcement, the Commission is uniquely positioned to facilitate reform.

Did the Commission decline to consider issues that might be considered controversial or politically infeasible? No. For example, the Commission agreed to consider controversial issues, such as whether to recommend repeal of the Robinson-Patman Act,[14] the appropriate role of the state attorneys general in federal antitrust enforcement, the standing of indirect purchasers to sue under federal antitrust law, the recovery of treble damages in private antitrust suits, the DOJ-FTC clearance agreement, and Section 2 standards. The Commissioners did not shy away from taking on these issues, notwithstanding the controversy.

You might ask about the Commission's decision not to study reform of American international trade law. Isn't that an example of "chickening out?" I don't think so. Nothing precludes the Commission from recommending that Congress and the President extend the principles of free and open competition to international trade policy, if the majority of Commissioners agree to do so. However, trade policy is distinct from domestic antitrust policy. International trade issues are part of foreign policy. The Commissioners are not experts in trade law, and we have our hands full with core antitrust issues.

Did the Commission try to identify issues where we already thought that we had consensus on a particular conclusion? No, we explicitly agreed that this would not be a criterion. Recommendations supported by the full Commission likely will have more weight with policymakers. However, we do not want to prejudge the existence of a consensus on any particular issue or recommendation.

V. THE COMMISSION'S INITIAL HEARINGS

To give you a sense of how the Commission is proceeding, I would like to discuss briefly the issues that the Commission

[14] 15 U.S.C. § 13 (2000).

addressed in its initial hearings, which concerned the Robinson-Patman Act, private remedies, and civil remedies.

A. The Robinson-Patman Act

For many years, observers have criticized the Robinson-Patman Act for discouraging procompetitive price competition and reducing efficiency in distribution that generally benefits consumers. In addition, it has been argued that the Robinson-Patman Act is unnecessary, given the availability of Section 2 of the Sherman Act to attack anticompetitive predation.[15] Some critics have recommended outright repeal of the Act, while others have argued that, at the very least, the Robinson-Patman Act should be applied in a manner that is more consistent with modern antitrust policy—for example, by requiring plaintiffs to prove anticompetitive market effect.[16] As some opponents to change testified before the Commission, however, there is also a view that the Robinson-Patman Act should be used to protect small businesses in order to promote diversity in distribution.[17]

We held hearings in July asking for public comment and testimony on a number of issues related to the Robinson-Patman Act. For example, we sought testimony and comment on the effects of current Robinson-Patman Act enforcement. What are the costs of litigation? Is there still a

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[15] *See, e.g.*, Herbert Hovenkamp, Symposium: Antitrust at the Millennium (Part I): The Robinson-Patman Act and Competition: Unfinished Business, 68 ANTITRUST L.J. 125, 130 n.15 (2000) ("Very few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act."). *See also* DOJ, REPORT ON THE ROBINSON-PATMAN ACT 35-74, 75-100 (1977) (criticizing the Act for discouraging procompetitive selective price cuts and reducing efficiency in distribution); ABA Antitrust Section Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. 1 (1980) at 27-33 (criticizing the Act); REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, 2 ANTITRUST L. & ECON. REV. 40-41 (1968-69).

[16] *See, e.g.*, *Hearing Before the Antitrust Modernization Commission* (2005) (statement of Herbert Hovenkamp), *available at* http://www.amc.gov/commission_hearings/pdf/Hovenkamp.pdf.

[17] *See, e.g., id.*

significant amount of litigation under the Robinson-Patman Act? Are businesses avoiding efficient distribution practices because of fear of liability and litigation? Are consumers being deprived of lower prices? What purposes should the Robinson-Patman Act serve? Should the Act protect small business or further consumer welfare? To what extent do those two interests converge? To the extent that they do converge, are we better off relying on Section 2 of the Sherman Act?

We asked whether the Robinson-Patman Act should be repealed or modified by requiring a showing of antitrust injury or competitive harm. We also asked whether repealing or modifying the Robinson-Patman Act would result in moving enforcement from federal court to state court, thereby potentially creating a larger morass. Through its inquiry, the Commission hopes to bring additional coherence to antitrust law and to clarify the proper goals of antitrust in the Twenty-first century.

B. Antitrust Remedies

The Commission has also held hearings on antitrust remedies or, more generally, whether we are achieving optimal deterrence. This is an area that theoretically could be subject to legislative reform. Among other things, the Commission is considering the issue of treble damages or damage multipliers. Are treble damage awards appropriate in all civil cases? Are some procedural changes appropriate, such as giving courts the discretion to impose a damage multiplier? Should the availability of multiple damages be limited to certain types of offenses—for example, to *per se* unlawful, hardcore (or "naked") price-fixing? Should courts apply a heightened burden of proof for the imposition of multiple damages?

The Commission is also considering questions relating to the award of prejudgment interest, fee shifting, joint and several liability, contribution and claim reduction, and whether private parties should be able to obtain injunctive relief affecting an entire industry. With respect to indirect purchaser litigation, the Commission has been examining

whether Congress should establish the rule of *Illinois Brick Co. v. Illinois*[18] as a uniform national standard, which would preempt state repealer statutes, or whether it should overrule *Illinois Brick*. If Congress was to overrule *Illinois Brick*, should it also overrule *Hanover Shoe, Inc. v. United Machinery Corp.?*[19] Assuming that both indirect and direct purchasers would have standing to sue, should procedural mechanisms be adopted to facilitate the consolidation of direct and indirect purchaser claims? What is the impact of the recently passed Class Action Fairness Act?[20]

All witnesses testifying before the Commission agreed that the area of indirect purchaser litigation is imperfect, if not broken. The Commission heard from a balanced panel of witnesses. Despite its flaws, some witnesses urged the Commission to recommend maintaining the current state of play. Other witnesses, however—including representatives of both the plaintiff and defense bars—testified that reform is needed. I believe that the Commission could be instrumental in helping Congress to address this area.

The Commission asked panelists to comment on model legislation proposed by the ABA. Parts of the ABA proposal gained consensus among the panelists that testified before the Commission.[21]

The Commission is also considering enforcement institution issues. This is an area in which many people agree that there is a need for change. Antitrust enforcement today involves two federal antitrust agencies, multiple regulatory agencies, fifty states, countless private plaintiffs, and the common law, which has developed through multiple levels of courts. If you were sitting down to construct an antitrust enforcement system today, it is likely that you would not create a system that looked like this.

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[18] 431 U.S. 720 (1977).

[19] 392 U.S. 481 (1968).

[20] Class Action Fairness Act of 2005, Pub. L. No. 109-2, §9, 119 Stat. 4 (2005).

[21] *See Hearing Before the Antitrust Modernization Commission* (2005), *available at* www.amc.gov/commission_hearings/pdf/revisedhearing transcript050627.pdf.

Conversely, other commentators have advised that the existence of multiple enforcers is not undesirable because substantive standards are converging and/or that competition among regulators is good.[22] Harry First, for example, testified before the Commission that competition between regulators is desirable.[23]

Congressman Sensenbrenner identified the issue of multiple enforcers as one that he hoped the Commission would consider.[24] Even if the Commission does not recommend legislative preemption of enforcement authority, it could still make some solid recommendations to minimize the conflict that can arise from a system of multiple enforcers.

C. DOJ-FTC Clearance Agreement

On the federal level, the Commission has considered the clearance process between DOJ and the FTC, particularly in the area of merger enforcement. Everyone here probably is aware of what happened when DOJ and the FTC attempted to resolve clearance problems themselves. One member of Congress in particular became concerned about the agencies' agreement to allocate the review of media mergers to DOJ.[25] Clearly, the agencies have been "gun shy" after that. During her confirmation hearings, I believe that FTC Chair Debbie Majoras was asked to commit that she would not seek a clearance agreement with DOJ. Accordingly, clearance seems to be an area where the Commission might actually be useful. Indeed, if the only thing that comes out of the Commission's work is a sensible clearance procedure,

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[22] *See, e.g., Hearing Before the Antitrust Modernization Commission* (2005) (statement of Prof. Harry First), *available at* www.amc.gov/commission_hearings/pdf/051026_transcript_state_enforce_.pdf.

[23] *Id.*

[24] *See Press Release*, *supra* note 9, n. 10.

[25] *See* Caroline E. Mayer, *Merger-Review Plan Scuttled; Hollings Threats Kill Proposal*, WASH. POST, May 21, 2002, at E1.

taxpayers will have gotten a good return on their $4 million investment in the Commission.[26]

D. State Enforcement of Federal Antitrust Law

The Commission is also considering the role of the states and private parties in federal antitrust enforcement. This tends to be a very emotional issue. We heard testimony from the State Attorney General from Maine on behalf of the group of state attorneys general.[27] The other Commissioners and I know that the state attorneys general feel very passionately about their enforcement mission. However, a majority of Commissioners have agreed that it is worth considering whether we can achieve better coordination of state and federal enforcement efforts, particularly where the effect of conduct and relief is national or regional, rather than statewide.

E. Other Issues

The Commission is also studying a number of other issues, including the standards for assessing exclusionary conduct, unilateral refusals to deal, and bundling. With respect to the so-called new economy issues, we are considering the appropriate balance between policies that protect intellectual property rights versus those that promote competition. In this area, the Commission is largely looking at the FTC's existing recommendations,[28] some of

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[26] However, I do not think that this will be all that the Commission will be able to accomplish.

[27] *See Hearing Before the Antitrust Modernization Commission* (Oct. 15, 2005) (statement of Hon. G. Steven Rowe), *available at* http://www.amc.gov/commission_hearings/pdf/Statement-Rowe.pdf; *Allocation of Antitrust Enforcement Between the States and the Federal Government: Hearing Before the Antitrust Modernization Commission* (Dec. 8, 2005) (statement of State Attorney General G. Steven Rowe), *available at* http://www.amc.gov/commission_hearings/pdf/Supplemental_Statement_Rowe.pdf.

[28] FTC, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

which, I believe, may be part of various pieces of proposed legislation pending before Congress. The Commission heard testimony specifically on those recommendations with the idea that we might advise Congress on their merits. The Commission has also held hearings on antitrust analysis as applied to industries characterized by significant technological innovation. The Commission understands that the FTC and DOJ may soon issue a report on these issues as well. We look forward to the publication of that report, as it may influence what we say in ours.

In relation to merger enforcement, the Commission has considered both the Hart-Scott-Rodino Act "second request" review process and substantive merger analysis, particularly transparency issues and the treatment of efficiencies.[29]

In the future, the Commission will hold hearings on antitrust immunities and exemptions and the application of antitrust rules to regulated industries. These are also controversial areas, or at least areas that have drawn substantial public attention. Immunities and exemptions hearings will be held on December 1. Regulated industries hearings will be held on December 5.

In January, the Commission will hold hearings on international issues, including *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*[30] and the imposition of conflicting remedies by various jurisdictions for the same conduct. While Congress has recently focused on conflicts between the United States and the European Union, in the future, the problem could become much broader. Many jurisdictions have adopted antitrust laws. Although there may be no basis for believing that Europe has applied its competition laws in a discriminatory fashion, there is at least a theoretical concern that some developing countries might be tempted to do so. In the future, conflict may occur not so much with Europe, as between the United States and other jurisdictions. Indeed, such conflict is possible even where

[29] Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. §18(a) (2000).

[30] 542 U.S. 155 (2000).

jurisdictions do not apply their laws in a discriminatory way. The Commission will consider whether it makes sense to develop a framework to resolve this potential conflict now, rather than waiting until the conflict boils over into possible trade war.

The Commission currently plans to conclude issues hearings in January 2006. On January 19, the Commission will hold an economist roundtable involving leading industrial organization economists to discuss the state of economic learning and the economic underpinnings for current policy. The Commission is also hoping to hold a separate hearing in February or March to provide the Assistant Attorney General for Antitrust and the Chair of the FTC an opportunity to share their thoughts on reform. Through May 2006, Commission staff—consulting with Commissioner study groups—will compile summaries of the information collected from comments and testimony and develop the framework for Commission deliberations on findings and recommendations.

A question has been raised by the AAI whether meetings and calls of the study groups with Commission staff should be open to the public. However, the Commission has not delegated its responsibilities to the study groups. The study groups are intended to help guide and to be a resource to the Staff in framing the Commission's deliberations and communicating the results. The Commission's substantive deliberations will be conducted in the open, as required by the Federal Advisory Committee Act.[31]

VI. CONCLUSION

Some people have expressed skepticism about what the Commission can accomplish. First, it has been said that there may be no political will to act on the Commission's recommendations. Congressman Sensenbrenner was the only active proponent of the Commission, and he will no longer be head of the House Judiciary Committee as of April of 2007. Second, it has been said that because the

[31] 5 U.S.C. § 10 (2000).

Commission is a consensus-based entity, it is likely to make only marginally important and incremental recommendations.

Although there was hardly a groundswell of support for any particular antitrust reform at the time the Commission was created, the Commission could be the impetus for change. Further, although I do not necessarily expect the Commission to recommend radical change, as Congress does not tend to move radically in changing policy. Such restraint is generally a good thing, insofar as it helps to avoid mistakes and to ease the impact of change on affected interests. Even if the Commission recommends less than radical changes, however, I believe that its efforts can still offer significant value.

The International Competition Policy Advisory Committee ("ICPAC") is perhaps a good model for the AMC. ICPAC appears to have had a beneficial impact. Again, if the AMC could prompt movement on a DOJ-FTC clearance agreement, toward eliminating the litigation nightmare associated with indirect purchaser litigation, or on any other issue that we are considering, it may well have been worth the investment. As I have mentioned, the Commission hopes to promote dialogue on key issues and to guide other jurisdictions in developing their competition law. Even if there is no immediate legislative or other action as a result of the Commission's report, it may serve yet as an important reference in the future.