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UNITED STATES OF AMERICA

Federal Trade Commission

The FTC's Competition Mission

Boston University School of Management

Boston, Massachusetts

October 14, 2008

10:00 a.m.

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10	Office of Policy & Coordination, Bureau	
11	of Competition	
12		
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15	Carroll and Milton Petrie Professor of Law,	
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21		
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## Moderator:

Michael Salinger

Professor/Everett W. Lord Distinguished

Faculty Scholar, Finance and Economics

Department, Boston University

## Panelists:

Keith N. Hylton

Paul J. Liacos Scholar in Law and Professor of

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Nancy L. Rose

Professor of Economics, Massachusetts Institute

of Technology

Director of the National Bureau of Economic

Research program in Industrial Organization

Dennis Yao

Lawrence E. Fouraker, Professor of Business

Administration, Harvard Business School

## 1 OPENING REMARKS

2 (The proceedings began at 10:02 a.m.  
3 conducted by Mr. Heimert.)

4 MR. ABBOTT: This is sort of bizarre,  
5 but I've got lots of Federal Trade Commission alumni  
6 here, and I want to start out, of course, on this  
7 FTC 100 Boston Session by thanking Professor Michael  
8 Salinger, former BE Director Michael Salinger, for  
9 his arranging the gracious hospitality of Boston  
10 University in the Management School for us. This is  
11 a delight to be up here, and we're expecting the  
12 horde to rush in at any moment. But thank you,  
13 Michael, again for all of your efforts and your  
14 organization. And I really expect to learn a lot  
15 today.

16 I think for this audience seeking  
17 inside baseball to some extent, but I think you're  
18 all generally familiar with the FTC 100 exercise.  
19 In any event I will quickly run through it. When  
20 Bill Kovacic became chairman, I think he thought,  
21 and this is certainly going to be his legacy, the  
22 FTC has certainly attracted a certain amount of  
23 publicity and has been very active in recent years.  
24 However, there are certain unasked questions he  
25 thought merited being addressed; namely, why is the

1     FTC doing what it is doing? Should it reconsider,  
2     should it change its modes of operation? How  
3     should it develop plans? How should it think  
4     strategically about the future? And can one  
5     institutionalize a structure of self-assessment  
6     which would transcend partisan politics, transcend  
7     the particular administration?

8             Because I think Bill Kovacic, as you  
9     all know, was a student of the FTC and public  
10    administration in general and a public  
11    administration in foreign jurisdictions. As you  
12    know he spent a lot of time on the development of  
13    new competition agencies and developing countries.

14            Looking at all of these things he  
15    thought it was quite possible to think strategically  
16    about assessing the agency's mission and putting  
17    into place institutions that would survive  
18    leadership which comes and goes and would allow the  
19    agency, perhaps, to focus and basically engage from  
20    an economist's perspective in welfare maximizing,  
21    engaged with the outside world in a welfare  
22    maximizing way.

23            So that not only are its programs best  
24    aimed at maximizing consumer welfare, but are its  
25    program well understood, well assessed, is the

1 Commission able to change its programs when  
2 circumstances dictate.

3           So just in his words he said in a  
4 speech introducing this exercise, the FTC 100  
5 exercise seeks to encourage acceptance of a norm of  
6 periodic self-assessment in creating a template for  
7 the agency to engage regularly in analysis of its  
8 performance. The project announced here also  
9 attempts to decouple the process of self-assessment  
10 from any single electoral cycle and to put focus on  
11 adjustment that will improve the agency over the  
12 long term. By focusing on the commission  
13 centennial, which is in 2014, this exercise seeks to  
14 achieve a longer term perspective and engage the  
15 agency in the valuable process of considering the  
16 goals that animated the agency's creation in  
17 assessing how well FTC has attained those goals.  
18 The aim is to identify a process for improvement not  
19 only good today but also will be good in decades to  
20 come.

21           He posed six questions. He said how do  
22 we do this? There is a number of internal things.  
23 There is an employee satisfaction survey which has  
24 been undertaken. There are a number of internal  
25 studies. But he also was going to the outside world

1 and asking six questions, and these questions are:

2 First, when we ask how well the  
3 Commission is carrying out its responsibilities, by  
4 what criteria should we accept its work.

5 Second, by what techniques should we  
6 measure the agency's success in meeting the  
7 normative criteria by which we determine whether the  
8 agency is performing well?

9 Third, what resources, personnel,  
10 facilities, equipment will the FTC need to perform  
11 its duties in the future?

12 Fourth, what methods should the FTC use  
13 to select its strategy for exercising its powers?

14 Fifth, how can the FTC strengthen its  
15 processes for implementing its programs?

16 And sixth, how can the FTC better  
17 fulfill its duties by improving links with other  
18 government bodies and nongovernment organizations?

19 So to seek answers to these questions,  
20 he has sent staff in a number of different places to  
21 talk with leaders of the bar, leading economists,  
22 foreign officials, foreign academics, to get input  
23 on all of this. We have been so far, in connection  
24 sort of complementary to other activities like  
25 annual bilateral meetings. We had discussions in

1 London, Tokyo, one of our people was in Israel,  
2 Australia. We had someone in Panama, in connection  
3 with the annual OECD meeting and bilateral with the  
4 European commission will be in Brussels and Paris  
5 very soon.

6 We have been asking questions, specific  
7 questions arranged around the central theme and the  
8 6 overarching questions. We've already had a number  
9 of interesting comments. Japan, I was in Tokyo last  
10 week, and we had got a little bit of interesting  
11 feedback, and we will by the way publish a report  
12 hopefully before the end of the year or during the  
13 transition. And we'll try to put in perspective  
14 what we have learned.

15 And just for example, in Tokyo last  
16 week I saw a lot of interest in clarification of the  
17 collaboration guidelines. A number of speakers said  
18 given the emphasis on international cartel  
19 enforcement, businesses, and particularly  
20 multi-national businesses, need to know more than  
21 ever the line between noncartel and cartel conduct.

22 And there was an interest in extending  
23 beyond the current scope of the guidelines which can  
24 be read more broadly but are often viewed as joint  
25 venture guidelines. So more information on

1 collaborations.

2           There was also interest in single firm  
3 conduct and how the agencies are going to handle  
4 single firm conduct. Of course we have this justice  
5 report and questions about what the FTC may or may  
6 not say in the future, to clarify things. So that's  
7 just a couple of pieces of interesting input, and we  
8 heard that from not one but several speakers in  
9 Tokyo.

10           In London we had an interesting  
11 discussion about what should motivate, what welfare  
12 measures should motivate what we do. And the  
13 consensus seemed to be you should focus on sort of a  
14 consumer surplus, measure consumer welfare, that  
15 that in itself will be consistent with advancing  
16 overall welfare in long-term. Jon Baker in  
17 particular hammered home that point. I think he has  
18 a paper.

19           So just a few examples. We have been  
20 getting good insights from around the world, and I  
21 know we're going to get great insights here today  
22 because we have Andrew Heimert from the office of  
23 Policy and Coordination and Mark Winerman who is  
24 sort of an international and general advisor to  
25 Chairman Kovacic here to lead discussion in the

1 morning and afternoon. And I'm looking forward to  
2 learning a lot. And thanks very much. And thank  
3 you everyone for coming because Hillary, Einer,  
4 Keith, Michael, a great honor to have you here.

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1 THE FTC'S COMPETITION MISSION:

2 RESOURCE DEPLOYMENT AND EFFECTIVENESS

3 MR. HEIMERT: We'll get started, and  
4 thank you both for coming. Good morning. Welcome  
5 to the first panel. It's titled the Effectiveness  
6 of the FTC's Competition Mission. As Alden  
7 described, the "FTC: Into Our Second Century"  
8 project consists of a number of panels examining  
9 all aspects of the Commission's mission and  
10 structure.

11 The focus of this morning's panel is  
12 the competition mission of the agency. There are  
13 three principal questions I hope we cover this  
14 morning on the panel. Later today we'll ask similar  
15 questions from the perspective of economists and  
16 economic welfare analysis.

17 The first question is how can we  
18 measure the benefits of the various competition  
19 activities the Commission undertakes. For example,  
20 what are the benefits of enforcement actions,  
21 deterrence, or the actual relief obtained, our  
22 workshops like this one and many others held this  
23 year ultimately benefit to consumers. Do the  
24 Commission's efforts internationally provide  
25 benefits to consumers indirectly or even directly?

1           The second question is whether the  
2 Commission is engaged in an appropriate mix of these  
3 activities. The challenge to measure the benefits  
4 of each is great, so figuring out where we get the  
5 most bang for the buck is probably even more difficult.  
6 But even if we can't really figure out  
7 precisely what the value of each is, is there a  
8 principled way to determine whether the FTC should  
9 engage in more or less of these various activities.

10           Finally, we'll turn to a few specific  
11 topics regarding how the Commission conducts its  
12 competition mission. Depending on the amount of  
13 time, we'll try to discuss such topics as the FTC's  
14 coordination with state AG, the civil remedies  
15 available to the Commission and the agency's  
16 transparency efforts.

17           Setting up the questions is the easy  
18 part. The hard part is answering them, but we've  
19 assembled a panel that I'm confident are up to the  
20 task. None of the roundtable participants need  
21 introduction, but nonetheless allow me a few minutes  
22 to lavish some praise for each of them and their  
23 numerous accomplishments.

24           Bob Langer is a partner of the Hartford  
25 office of Wiggin and Dana and head of the Department

1 of Antitrust and Trade Regulation Practice Group and  
2 is involved in all aspects of antitrust consumer  
3 protection and trade regulation counseling and  
4 litigation. He's represented clients before the  
5 Federal Trade Commission, the Antitrust Division of  
6 the United States Department of Justice as well as  
7 offices of state attorneys general throughout the  
8 United States.

9 Before joining Wiggin and Dana in 1994,  
10 Mr. Langer was assistant attorney general in charge  
11 of the Antitrust and Consumer Protection Department  
12 of the Office of the Connecticut Attorney General.  
13 There for more than 20 years he litigated numerous  
14 antitrust and consumer matters, consumer protection  
15 matters in both federal and state trial and  
16 appellate courts. Mr. Langer served as chair of the  
17 National Association of Attorneys General, multi-  
18 state antitrust task force from 1990 to 1992. And  
19 since 1979 has served as an adjunct professor at the  
20 University of Connecticut School of Business  
21 Administration MBA program where he teaches  
22 constitutional, antitrust, and trade regulation law.

23 Second is Hillary Greene. Hillary was  
24 previously at the FTC as project director for  
25 intellectual property. She is now associate

1 professor of law at the University of Connecticut  
2 School of Law, and director of the law school's  
3 intellectual property entrepreneurship law  
4 clinic. Prior to that she was associate professor  
5 at S.J. Quinney College of Law, University of Utah,  
6 where she taught intellectual property, antitrust, and  
7 patent law. She has recently published several  
8 articles including one entitled "Guideline  
9 Institutionalization: The Role of Merger Guidelines  
10 in Antitrust Discourse" which appears in the William  
11 and Mary Law Review, and she also published another  
12 one recently considering the state action doctrine  
13 which was in the Utah Law Review. Hillary currently  
14 serves on the board of the American Antitrust  
15 Institute and is contributing editor for the  
16 Antitrust Law Journal.

17 Third is Professor Einer Elhauge.  
18 Einer is a professor at Harvard Law School, faculty  
19 director of the Petrie-Flom Center for Health Law  
20 Policy Biotechnology and Bioethics. He teaches a  
21 gamut of courses ranging from antitrust contracts,  
22 corporations, health care law, and statutory  
23 interpretation.

24 Before coming to Harvard he was a  
25 professor of law at the University of California at

1 Berkeley. Author of numerous pieces on a range of  
2 topics even broader than he teaches including  
3 antitrust monopolization tying doctrine, antitrust  
4 petitioning and state action immunity, statutory  
5 interpretation, and a whole range of other topics  
6 that are in the bios that we've provided you, which  
7 I won't cover here, but so numerous and impressive.  
8 Among the most recent books are U.S. Antitrust Law  
9 in Economics and Global Competition Law and  
10 Economics.

11 Finally, I won't give a lengthy bio  
12 because he couldn't make it. Kevin Arquit, he was  
13 going to be on the panel but actually had paying  
14 clients who demanded he be in a courtroom to begin a  
15 trial on I believe it was the MasterCard  
16 Discover litigation so unfortunately Kevin can't  
17 be here today. We'll miss him, but we'll have  
18 Hillary and Einer, and Bob Langer momentarily.

19 So let me start the discussion, if I  
20 may, or at least introduce the specific discussion  
21 with those bios out of the way.

22 The FTC engages in several different  
23 types of competition-related activities. I've  
24 grouped them into four categories. Maybe they can  
25 be fewer. First is enforcement; second is the

1 issuance of guidelines, or perhaps more generally  
2 guidance; third is what we like to call competition  
3 advocacy, presentations to Congress, foreign  
4 officials, state governments, and other regulators  
5 as to how they might reduce the obstacles for the  
6 benefits of a free market, which we assume still is  
7 probably preferable to the alternative. Fourth is  
8 competition research and development which  
9 involves internal studies to understand competitive  
10 dynamics as well as workshops and conferences where  
11 the Commission learns from members of the public.

12 So we'll start with the panel we have  
13 assembled and ask the same sort of questions  
14 regarding each of these activities. First, can we  
15 measure the benefits of these activities in any  
16 meaningful way, and if we were to try, could we  
17 measure the magnitude of those benefits. And I'll  
18 go through each of the activities and ask for your  
19 thoughts. And then everybody else can have a  
20 response.

21 I'll start with, rather than starting  
22 with enforcement actions which maybe we can put off  
23 until Bob gets here because he was going to cover  
24 that. We'll start with the issuance of guidelines.  
25 And Hillary, you had some thoughts about what

1 benefits the issuance of guidelines provides. Is  
2 there a way to quantify them? Does the revision of  
3 those guidelines, is that similar to the issuance of  
4 them in the first place? Your thoughts.

5 MS. GREENE: Let me start off by  
6 explaining the discussion in terms of what are the  
7 guidelines, and basically what I think that we're  
8 focusing on, Andrew, is the issue of the agency  
9 actually codifying their enforcement policy. And in  
10 terms of what they do, there are many audiences and  
11 purposes served by the guidelines. Before we can  
12 talk about whether or not they're successful and how  
13 do we measure their benefits, we have to sort of  
14 understand what the intended purpose is. And I'll  
15 discuss that in terms of both their explicit and  
16 implicit roles.

17 Their express purpose is obviously to  
18 explain the reasoning and analysis underlying the  
19 agency's exercise of the prosecutorial discretion.  
20 Two target audiences are one internal to the agency  
21 which is to say the agency staff, they provide the  
22 guidelines, provide important mechanisms, clarify  
23 enforcement policies, priorities, and protocols.  
24 And they can serve to enhance continuity across  
25 administrations as they educate the attorneys.

1           And then the other obvious intended  
2 audience are businesses of private counsel, the  
3 external audience, and they benefit because the  
4 guidelines provide greater certainty, and as a  
5 result of greater certainty with regard to agency  
6 action, the businesses and their private counsel can  
7 make better informed decisions.

8           But the other sort of part of the issue  
9 is really their implicit purpose. And that's to  
10 provide a commentary on the law, to be a sort of an  
11 ongoing editorial. Guidelines are typically going  
12 to be a response by the agencies to gaps, ambiguities,  
13 or judicial rulings -- gaps and ambiguities in the  
14 law, where essentially judicial rulings that the  
15 agency perceives are somehow misguided. And so here  
16 the audience is the courts.

17           So when you ask the question how are we  
18 supposed to evaluate the guidelines, I think success  
19 is going to be determined differently depending upon  
20 which purpose your focus is on. Is it the sort of  
21 guidance mission or is it more of this editorial  
22 mission. In terms of the guidance what we're going  
23 to be asking is really how effectively can agency  
24 staff use the guidelines as a point of reference  
25 when assessing mergers and how accurately can

1 businesses and their counsel anticipate outcomes.

2 Now in that regard I think that the  
3 criticism tends to be fortunately from one direction  
4 which is to say that the guidelines might suggest  
5 that something could be potentially problematic and  
6 yet the agencies are not going to bring an action,  
7 as opposed to a criticism from the other direction  
8 which is to say the guidelines suggest there is no  
9 problem at all, and yet the counsel or businesses  
10 find that they're encountering problems with the  
11 agency.

12 So that sort of brings up the  
13 interesting question that you alluded to at the end  
14 of your comments with regard to sort of the revision  
15 of the guidelines. And I think one of the most  
16 important things about the guidelines, no matter how  
17 sort of valuable they may be when first introduced,  
18 is to recognize that if they don't have an  
19 expiration date they certainly can at a minimum lag  
20 behind in thinking of the agency at any point in  
21 time. I think that it's a very difficult balance to  
22 strike in terms of at what point is the lag of  
23 sufficient magnitude that they need to be updated,  
24 et cetera. And we've seen instances in the past in  
25 which the gap between reality and the guidelines is

1 sufficient that the guidelines just should actually  
2 be abandoned.

3           Just a couple of words on the editorial  
4 function of the guidelines. How are we supposed to  
5 evaluate their success in that regard? Obviously  
6 the most concrete way to do so is to look and see to  
7 what extent have the guidelines changed the terms of  
8 the debate. And I think the clearest example in  
9 which that happens would be the incorporation of  
10 HHI as a concentration measure into antitrust  
11 discourse. You can literally within that context  
12 see instances where Stigler, Posner, et cetera, were  
13 advocating HHI. It had been brought before the  
14 courts. They weren't receptive to it, and in fact  
15 they were often very, not only inhospitable, they  
16 actually rejected it with some force. The  
17 guidelines then adopted the HHI, and everything  
18 started to change rather dramatically. So that's  
19 clearly an instance in which they have had a success  
20 in terms of impacting the terms of the debate.

21           So it leads me to the sort of issue of  
22 just sort of measurement more generally. I think  
23 that looking at the guidelines sort of as a whole  
24 and sort of seeing what impact they've had in  
25 impacting the policy debate is often difficult.

1 It's easier to track specific issues. What do they  
2 have to say about X or Y? You're not talking about  
3 what the impact of the guidelines are. You're  
4 talking about what is the impact of the provisions  
5 of the guidelines.

6 With that said, however, I do think  
7 that there is sort of something to be gleaned from  
8 sort of taking a broader more abstract temperature  
9 of what impact the guidelines have had. And so I'll  
10 just talk a little bit about quantitative measures  
11 because this is something that comes up repeatedly  
12 in terms of to what extent are quantitative measures  
13 attractive when it comes to measuring success.  
14 Obviously it's a very sort of noisy measure  
15 depending on how the inquiry is conducted. And what  
16 I can say is that within the context of merger  
17 guidelines, which I've studied pretty closely, I  
18 looked at over a period from the '60s to 2000  
19 something, whether a court not only referenced  
20 merger guidelines but also what I call the reliance  
21 factor which is to say in order for these citations  
22 counts to have any meaning at all you really have to  
23 get a firm understanding of how the court used the  
24 reference to the guidelines. Were they doing so in  
25 the context where they were just acknowledging

1 existence, were they relying upon it, were they  
2 relying upon it in a profound way or in a more sort  
3 of alternative way, et cetera.

4           So I'll spare everyone all the  
5 specifics of that, but I guess I'll sum up with a  
6 couple of brief points, one of which is that I think  
7 that some quantitative measures that are meaningful  
8 can be achieved. The analysis of the impact that I  
9 conducted demonstrates that it can be sort of, you  
10 can undertake such a thing and get a meaningful  
11 outcome.

12           The other thing that is important to  
13 recognize is that what makes the guidelines  
14 successful or influential is going to be a lot of  
15 things other than the content of the guidelines.  
16 And by that I mean it's not going to necessarily be  
17 a function of the sort of somehow objective merit  
18 the content of the guideline. It will be a function  
19 of what is the state of the law at the time. To  
20 what extent do the courts feel, to what extent do  
21 they need guidance, et cetera.

22           And then the third thing that I'll just  
23 flag is, particularly in light of your perpetual  
24 revision requirement or issue, is that guidelines  
25 have a sort of a life cycle. You can see that most

1 strongly with something like the merger guidelines  
2 which have gone through many iterations. So if you  
3 were to ask the question in the early '70s to what  
4 extent were the '68 guidelines successful, you might  
5 have gotten mixed reviews. But I think one of the  
6 most important things about the '68 guidelines was  
7 actually they established a basis upon which the '82  
8 guidelines can build, and that's the type of thing  
9 that is hard to measure, quantify, because it takes  
10 a much more longer term perspective.

11 MR. HEIMERT: Einer, I'll ask for your  
12 reaction to that or if you want to go beyond that,  
13 and I may have a couple of follow ups.

14 MR. ELHAUGE: Sure. First let me say I  
15 think this is a fantastic project for the FTC to  
16 undertake. I mean I think to have a bipartisan  
17 inquiry into what works and doesn't work, actually  
18 try and figure out what goals you are trying to  
19 maximize is precisely what a major organization like  
20 this should be doing. So I commend the agency for  
21 that.

22 So I guess I would first start by  
23 asking the question what should be the goal that  
24 we're trying to maximize. I myself think that the  
25 goal should be maximizing consumer welfare. And for

1 reasons I lay out in my book, and I do think it's  
2 part just legally what the goal is, but also I'm  
3 convinced first that in the end anything that  
4 benefits total welfare could be converted into  
5 something that benefits consumer welfare as long as  
6 the firms are willing to put their money that they  
7 get from the efficiency into benefiting consumers.

8           So one could think of the consumer  
9 welfare test as simply a way of forcing firms to put  
10 their money where the mouth is on the size of  
11 efficiency. And second in my book I lay out the  
12 fact that I think the consumer welfare goal makes it  
13 much easier for nations to coordinate in global  
14 markets. The trouble with total welfare goal  
15 pursued by each individual nation they had  
16 incentives depending on whether they are net  
17 importers or net exporters to over underweigh the  
18 benefits of cost to producers versus consumers.  
19 Whereas it's relatively easy to coordinate if all of  
20 them are promoting consumer welfare goals because in  
21 essence the net importing agencies will become the  
22 decisive enforcers. Their incentives are to  
23 maximize consumer welfare. So that's not a problem  
24 given the standard. And the exporting agency will  
25 under of course but that doesn't matter as long as

1 we at the minimum have information exchange and  
2 enforceability of judgments in other nation. So  
3 which seems to me the main area we're actually  
4 seeing international coordination.

5           So for all those reasons, I feel the  
6 first big question, which is what goals should you  
7 be trying to maximize, as Alden raises in the  
8 introduction, is consumer welfare. So then how to  
9 deploy resources given that goal. It seems to me  
10 the FTC should want to deploy its resources so that  
11 maximizes the gain to consumer welfare. So as a  
12 framework you want to ask, among various activities,  
13 which activity would produce the biggest gain to  
14 marginal consumer welfare from those activities.

15           So I think that raises two questions,  
16 or two general sorts of approaches. One is to focus  
17 perhaps more on what the FTC can do distinctively  
18 because that may be where the biggest marginal gains  
19 are. What can the FTC do that private actions  
20 cannot do and the Department of Justice cannot do.  
21 It seems to me those are likely to be the areas  
22 where there is the biggest marginal gain from FTC  
23 activity just because it's likely to make more of a  
24 difference.

25           So that to me suggests a few things,

1 particularly about the topic of guidelines. One  
2 thing it suggests is that first focusing on  
3 guidelines is good because that's one thing private  
4 parties cannot do. It make sense for Department of  
5 Justice and FTC to focus on guidelines. But also it  
6 might make sense for the FTC to focus more on guidelines  
7 on topics that are unique to the FTC. In particular  
8 you might want to focus on unilateral conduct that  
9 isn't necessarily a Section 2 violation.

10 So one thing we've seen in the U.S.  
11 courts is narrowing enforcement of the Sherman Act,  
12 particularly the Sherman Act Section 2, and I think  
13 a big part of the reason and the course has been  
14 tremendous concern about private treble damage  
15 actions brought by attorneys who are trying to  
16 maximize profits for their client. Appropriately  
17 so. But I think that makes the court more nervous  
18 and you see in a series of opinions where they feel  
19 much more comfortable with some regulator than they  
20 do with the private antitrust actions because the  
21 regulator is disinterested. You don't have the over  
22 deterrent problem created by treble damages,  
23 possible criminal penalties. So that might suggest  
24 that the U.S. courts would be a lot more open to  
25 enforcement activity by the FTC against unilateral

1       conduct that was not linked to a Sherman Act Section  
2       2 violation.  Because the FTC is more financially  
3       disinterested so less likely to bring cases with big  
4       over-enforcement concerns.  There is not the same  
5       treble damages and criminal penalties.  So it's  
6       likely to be less deterring as well.  So that, I  
7       think, might be an area of relatively large marginal  
8       gain to focus either guidelines or enforcement  
9       activities of the FTC.  And I guess also include  
10      challenges to facilitating practices and practices  
11      undifferentiated market, of course have a hard time  
12      because they think of markets in a more lay sense,  
13      but you can have price effects in differentiated  
14      markets even though the court might not think some  
15      area of a market really should be called a separate  
16      market.

17                    Another thing that I might suggest that  
18      the FTC should focus on is rule making under  
19      antitrust, not just the Consumer Protection Act,  
20      because the Department of Justice can't do rule  
21      making.  Rule making authority can issue guidelines  
22      and that's an important activity, but it might be  
23      useful to provide the clarity that would come with  
24      an actual regulatory rule.  So I think that's  
25      something else worth considering for the agency to

1 do.

2 A third area I think might be to  
3 address the problem of a lack of court expertise in  
4 antitrust. Every so often at Harvard we have a  
5 symposium for judges. And invariably several of whom  
6 meet me find out I do antitrust, and then the fact  
7 they had some antitrust case and had no idea what  
8 was going on. And these are incredibly smart  
9 sophisticated judges, but they're finding, and  
10 antitrust is so complicated, that they can't quite  
11 follow nuance.

12 Well, that might suggest a greater role  
13 or agency expertise being an area of bigger marginal  
14 gain. Again the guidelines I think are quite useful  
15 to perform not only guidance but also the advocacy  
16 role that Hillary was mentioning. But in addition  
17 to my suggestion, the FTC might want to focus on  
18 cases through ALJ and enhancing the economy  
19 expertise of the ALJs to resolve these incredibly  
20 complicated cases.

21 Then I think we get to an issue, that's  
22 the first issue, sort of general theme of  
23 distinctive. The second theme I would say is  
24 getting data. That seems to me the FTC is just  
25 right to ask what should the criteria be and not

1     only think theoretically about where are the best  
2     places resources are, but how do we measure whether  
3     or not it was effective or not. And I think not  
4     only FTC but for all antitrust enforcement there is  
5     a big problem of a lack of data. What we really  
6     could use is price and cost data from all industries  
7     so that studies can be performed. And companies  
8     don't want to give it to us because it's proprietary  
9     information. They don't want to have their  
10    competitors have this kind of data. But the  
11    agencies, I would think it would require a new  
12    statutory authority, I believe, but the agencies  
13    could collect it and use it in an aggregate way, not  
14    lead to any individual firms, to study things like,  
15    well, which merger enforcement actions or nonactions  
16    worked and which didn't work. What actually  
17    happened after the merger. Did prices go up more  
18    than cost went up in a way that suggests increased  
19    market power or not? If we had this kind of data  
20    across multiple enforcement decisions, then you  
21    could start to get some serious statistical measures  
22    of what is working and not working, on an area  
23    that's obviously theoretical. I think it may be  
24    harder to get really good statistical data to figure  
25    out which guidelines work and which don't work.

1 Obviously there is a small end problem and change  
2 guidelines from before to after and if things got  
3 better it could have been for other reasons and if  
4 things got worse for other reasons too. So that  
5 will be harder to disentangle although you could try  
6 to do cross national studies, but it's harder to  
7 control all the differences across nations.

8 MR. HEIMERT: Thank you. That gives us  
9 a lot to chew on through the rest of the morning.  
10 Let me ask a follow up and direct it to Hillary, but  
11 anybody is welcome to answer. One of the challenges  
12 with guidelines is, and this is suggested by Einer.  
13 Your suggestion of Section 5 guidelines or  
14 guidance, should guidelines be issued in a sort of a  
15 forward looking manner, or is it better to wait  
16 until there is some degree of consensus on what  
17 should be a violation of whether Section 5 or  
18 Section 7 of the Clayton Act or Section 2 of the  
19 Sherman Act. Section 5 is an area where there isn't  
20 a lot of guidance, haven't been a tremendous number  
21 of cases. So the law is perhaps unclear. On one hand  
22 that suggests guidelines would be great. On the  
23 other, it suggests we don't really know what we're  
24 doing in that area would guidelines be useful. And  
25 the same argument could be made frankly for Section

1       2, I think, but there is such a wide range of cases.  
2       Is it sensible to hold off on issuing guidelines and  
3       if so is there another mechanism to provide  
4       guidance, or is it a good idea to issue guidelines  
5       even if it's on sort of incomplete information, if  
6       you will, or absence of consensus on what  
7       constitutes a violation?

8                   And Hillary I'll give you a chance  
9       while we digest Einer's thoughts.

10                   MS. GREENE: I think you really touched  
11       upon what is a central tension in sort of guideline  
12       formulation. And I think the conventional wisdom to  
13       date has been one of we need to hold off until the  
14       area is sort of the legal questions are somewhat  
15       settled, and that there is a consensus of merging.  
16       But as you say that, that does fly in the face of  
17       sort of the purpose of the guidelines, and that the  
18       purpose of the guidelines is actually enhanced in  
19       the face of uncertainty because you're providing all  
20       be it transitory certainty, and I think that the  
21       reason for, one of the reasons that is contributed  
22       to that tension is what the guidelines have become.

23                   Guidelines are oftentimes erroneously  
24       thought of as sort of almost a restatement of the  
25       law because in so many instances there is an actual

1 or at least argued consistency or conflation between  
2 the state of the law and the guidelines. And so  
3 that kind of thinking is what sort of prompts people  
4 to say, Well, we can't issue them until things are  
5 fully thought out. There is also a real fear that  
6 the guidelines will be used against the agencies in  
7 the courts. If you are sort of still feeling your  
8 way on the legal issue, then you don't want to have  
9 your own guideline used against you.

10 I'll just sum up on this sort of  
11 focusing a little bit on some of the issues that  
12 Einer raised. The idea that the judges are really  
13 sort of starving for additional guidance on  
14 antitrust law. It's a complicated field to  
15 navigate, and it becomes particularly more  
16 complicated at certain points of time when you see  
17 sort of a more wholesale integration of economic  
18 analysis, that is a point at which courts were  
19 particularly in need of guidance. And the thing  
20 that is both sort of the value of the guidelines in  
21 terms of their ability to sort of help judges out at  
22 those times I think is partially lost by a potential  
23 over-reliance on the courts, over-reliance by judges  
24 on the guidelines. And what I mean by that is that  
25 in a perfect world the guidelines would be the

1 statement of enforcement policy. It would carry  
2 some weight with the court in terms of they would  
3 see these are thoughtful agencies. This is where  
4 they are taking this now on a certain issue. But  
5 the courts wouldn't have a sort of undue deference  
6 to it. And I think that would make the guidelines  
7 more of a point of discussion, and it would frame  
8 the issues for discussion between the courts and the  
9 agencies and others as opposed to resulting in the  
10 court buying into them too quickly.

11           And the reason why it relates to your  
12 question is that you're asking at what point are  
13 guidelines premature. And I think the timing issue  
14 regarding the guidelines is a function of how we  
15 think the courts are going to use them, and if we  
16 have a system in which guidelines receive undue  
17 deference by the courts, then that is going to force  
18 the agencies regardless of their preferences  
19 otherwise to hold off issuing guidelines until they  
20 are closer to being sure about how an issue should  
21 be handled.

22           MR. HEIMERT: Bob, do you have thoughts  
23 about the guidelines, use of guidelines, benefits of  
24 the guidelines, and I'll pose this question and then  
25 if Einer and Hillary also want to answer it. If

1     it's not guidelines are there alternative  
2     mechanisms? We had the guideline commentary that  
3     was issued regarding the horizontal merger  
4     guidelines, not guidelines but it sort of gave some  
5     insights as to what we meant in the guidelines. We  
6     issue an advisory opinion occasionally that  
7     generally comes from staff, but that can sometimes  
8     clarify areas of the law. They tend not to be as  
9     broad as guidelines but maybe are focused on a more  
10    narrow area. Are those useful substitutes,  
11    should they be considered substitutes in any  
12    way or standing alone, or are they valuable?  
13    But feel free also to answer the more general  
14    question about guidelines.

15                 MR. LANGER: Someone who is a former  
16    prosecutor and now in private practice, let me focus  
17    particularly on the health care guidelines because I  
18    think those have been extraordinarily available. I  
19    left government in '94 just when the health care  
20    guidelines really were drafted and then revised.  
21    And they provided enormous value to those of us who  
22    were advising our clients regarding the enforcement  
23    intentions of the agencies and had a spill-over  
24    effect upon the states in terms of what they were  
25    likely to do. So from that perspective of warding

1 off truly problematic areas of focusing on areas of  
2 uncertainty, obviously in the area of clinical  
3 integration is one that still needs to be wrestled  
4 with. So from that perspective guidelines from a  
5 practitioner and from a counselor's perspective are  
6 enormously valuable.

7           Advisory opinions perform a slightly  
8 different function but are equally valuable. In my  
9 practice we've utilized either business review with  
10 DOJ or advisory opinions with the commission on  
11 discreet areas or issues where there is significant  
12 reluctance for the client to move in a particular  
13 direction unless they have virtual certainty that  
14 they're not going to suffer in terms of potential  
15 risk of litigation. And those advisory opinions  
16 have been enormously available. They have to be  
17 crafted very carefully. The agency is very careful  
18 about how extensive or narrow the opinion happens to  
19 be.

20           One of the frustrations I had as a  
21 former assistant attorney general for Connecticut  
22 all those years, is we really didn't have the  
23 authority to do that. And there was tremendous  
24 uncertainty and litigation pronouncements really  
25 were not sufficient, speeches didn't really do it.

1 And the guideline concept we eventually adopted as  
2 you know through NAAG, and the horizontal merger  
3 guidelines.

4 And so I think that from that  
5 perspective they performed slightly different  
6 functions. Guidelines are, apart from academic  
7 side, from the practitioner side provide enormous  
8 value. Whether or not you can provide sufficient  
9 guidance under Section 5 which I think sort of go  
10 into how Section 5 is enforced, I think maybe we'll  
11 defer that for the enforcement issues. But I'm not  
12 sure how you go about doing that. It would be a  
13 very difficult area to adopt guidelines. And I  
14 realize you're having separate discussions regarding  
15 Section 5. I think that has some enormous  
16 implications for the consumer protection side of the  
17 Federal Trade Commission authority which I can wait  
18 on when we get to that point. Obviously I have some  
19 strong feelings about that from half of my life  
20 being in consumer protection and antitrust, and let  
21 me stop there.

22 MR. HEIMERT: Einer, circle back to you  
23 on the guidelines question, and we can move on  
24 unless Hillary wants to follow.

25 MR. ELHAUGE: In terms of thinking

1 about choices among different kinds of guidelines,  
2 commentaries, advisory opinion reports, just think  
3 of them all as substitutes, and it seems to me the  
4 two, I think Hillary identified the two salient  
5 factors, and there's some tension with each other so  
6 perhaps there is a sliding scale.

7           So the one factor is it makes sense to  
8 do guidelines to improve clarity. So I quite agree  
9 with Hillary that it doesn't make much sense to wait  
10 for consensus because if you have a consensus what  
11 do you need guidelines for, if we already agree, and  
12 it doesn't really fulfill what I think of the  
13 importance of having a distinctive role for the FTC,  
14 if we already have a consensus. Some area of  
15 clarity that they improve upon.

16           So one factor is to understand, to  
17 increase clarity, but the second factor is are  
18 courts going to hold you to it, particularly that  
19 which is not prohibited is allowed kind of way.  
20 It's not covered and said to be bad, whatever  
21 guidelines you issue are the courts going to say  
22 well now you're stopped, FTC from bringing other  
23 kinds of actions.

24           That I think creates the trade-off that  
25 is the clearer you make what you're doing, say

1 guidelines rather than saying just commentary, you  
2 get more clarity but also more likely judges are  
3 going to hold you to it. So I think the agency may  
4 have to weigh those risks and benefits against each  
5 other when it makes these distinctive kind of  
6 choices.

7           The other benefit I gather to  
8 guidelines, I heard, and this is hearsay evidence,  
9 but I'll count it anyway, that Bill Baxter back when  
10 he was talking about, back in the '80s, that he said  
11 one of the big goals not just to provide guidance  
12 outside the agency but actually to control people  
13 within the agency to tell them what the top policy  
14 officials actually wanted to happen and make sure  
15 the same thing was going on throughout these huge  
16 agencies. So I don't think we should lose sight of  
17 that potential advantage of guidelines in the  
18 discussion.

19           MS. GREENE: One of the questions, I  
20 think raised, what is the alternative mechanism. I  
21 completely agree with Bob in terms of there are a  
22 lot of other devices, speeches, the commentary, all  
23 of these things increase transparency, but  
24 particularly about Einer's comment about rule  
25 making. I think the trade-off between having a more

1 administratively complex process surrounding rule  
2 making versus sort of formal rule making versus  
3 having guidelines is one where an interesting  
4 trade-off and I'm also curious about the extent to  
5 which doesn't the agency FTC have the sort of  
6 threshold issue of whether it has rule-making  
7 authority within the competition arena. So it's  
8 something where it crops up a lot because I think  
9 the obvious counterpoint, two guidelines would be  
10 well why not sort of rule making, and the question  
11 is whether the agency has that authority. They've  
12 certainly not exercised it in the competition arena,  
13 but I think it's certainly something for further  
14 thought.

15 MR. ELHAUGE: It's surprisingly  
16 uncertain, the rule making authority in the  
17 competition area. I think there is some support  
18 but it's from the early '70s and never really quite  
19 exercised. But that would be one important area of  
20 uncertainty to resolve. Why do you want to go ahead  
21 and try to find out where that authority exists or  
22 not. I think there is a trade-off as you say, more  
23 complexity. The guidelines already are so complex  
24 the process of adopting and changing them. I'm not  
25 sure just how much more complex, but on the other

1 hand you get certain areas, say patent settlements  
2 with generics where the FTC pursued a policy trying  
3 enforcement for years and years and years, and it  
4 might have been simpler to go through the  
5 rule-making process and have some specific FTC rule  
6 about it, that is also less vulnerable to the  
7 vicissitudes of judicial decision making.

8 MR. HEIMERT: Let me shift back. We  
9 talked a little bit about enforcement and the  
10 benefits of that. Professor Elhauge suggested  
11 perhaps a selection mechanism or criteria for FTC  
12 enforcement, but stepping back to an even more  
13 general level, are there benefits to enforcement?  
14 Surely there are benefits. Is the principal benefit  
15 the relief obtained in a given case? Is it the  
16 deterrent effect? Is it teaching judges, the  
17 counsel, antitrust counsel, clients, what is and  
18 isn't allowed? Where do you see the principal  
19 benefits of enforcement? And then if you want to  
20 take it a step further, what types of cases would be  
21 most beneficial to bring? I'll start with Bob and  
22 have some follow-up questions as we go through.

23 MR. LANGER: Putting on my former  
24 government enforcer hat, Einer, I think the answer  
25 is it depends on the nature on the matter that

1 you're looking at, that sometimes, speaking for  
2 myself and looking at the FTC and DOJ function, it  
3 was seeking to extend the long and particular  
4 direction and provide guidance to the courts and  
5 give guidance to practitioners. Sometimes it was  
6 clearly some extraordinarily bad behavior that  
7 needed to be punished and there was not an otherwise  
8 appropriate vehicle to do so. And meaning private  
9 enforcement, would not be an adequate substitute.

10 So I think it's a very difficult  
11 question to answer because it really does depend  
12 upon the specific matter that you are looking at.  
13 There is no question that when I was head of  
14 antitrust, and particularly when I chaired the NAAG  
15 task force in the early '90s, one of the ideas was  
16 clearly a law reform issue and certainly the  
17 commission has worked in that area to try to develop  
18 the law in particular areas, sometimes successfully,  
19 sometimes not successfully, but those are the risks  
20 of taking on new and creative ways of developing the  
21 law in an adjudicatory context.

22 The benefits seem to me to be obvious.  
23 That there is a need for deterrence. There is a  
24 need sometimes for punishment. In my former life  
25 obviously we would get back large amounts of money

1 for classes of individuals or consumers,  
2 municipalities or state and sometimes provide for  
3 penalties as well, which I think looking farther  
4 down the list of questions to be asked, I do think  
5 that the absence of civil fine authority by the FTC  
6 to me is problematic from an enforcer's perspective.  
7 I know when we look at who is looking at a  
8 particular matter, is it a state? Is it the  
9 Department of Justice? Is it the FTC? When we know  
10 there is no civil fine authority, it's almost like  
11 take a breath, and it seems, you know, I'm not sure  
12 my clients would like to hear this, although there  
13 will be a transcript of this. But it seems to me  
14 the states overuse civil fines. The DOJ obviously  
15 has criminal authority. That changes the calculus  
16 enormously. I can't begin to tell you how the  
17 analysis, I go by counselling a client, varies  
18 depending on the nature of the remedy available to  
19 the agency. And not having civil fining authority  
20 to me is highly problematic with what would be  
21 considered rectified in terms of creating some  
22 balance. At least that would be my suggestion.

23 MR. HEIMERT: I promise we'll circle  
24 back to civil fine authority maybe a little later in  
25 the session. I'll get some other views. Sticking

1 to enforcement, Einer or Hillary, your thoughts  
2 about direct enforcement action?

3 MR. ELHAUGE: Yes. I guess all of the  
4 above was my reaction to your question. It provides  
5 the relief, deterrent, and the teaching function. I  
6 do think there is a question about whether the  
7 effect is positive or negative. We have to assume  
8 that the enforcement action was correctly brought.  
9 And there is so much concern in the judiciary about  
10 over enforcement. So we might have deterrence but  
11 it could be good behavior if you're mistaken about  
12 the action.

13 So I think that the notion of getting  
14 much bigger price-cost data and really addressing  
15 that concern that the courts have by showing a very  
16 vigorous way there is not that much over-enforcement  
17 going on would make it easier to get that  
18 enforcement, make it much more effective. In some  
19 ways what you really care about is not just how much  
20 you punish bad behavior. What you care about is how  
21 big the difference is between the expected penalty  
22 for good behavior and bad behavior. So separation  
23 is a crucial part.

24 I do agree that the deterrent function  
25 might be undermined by a lack of civil fine

1 authority, but as I've written in a recent article,  
2 I think the FTC could use disgorgement authority to  
3 address that concern by bringing more actions  
4 seeking the disgorgement of profits in antitrust  
5 cases.

6 MR. HEIMERT: Unfortunately Kevin  
7 Arquit was going to opine on both sides of that  
8 argument. He has made both sides of that argument.  
9 We won't get that benefit.

10 Hillary, anything?

11 MS. GREENE: With regard to the  
12 enforcement actions, it seems as though, something  
13 as simple as issuance of guidelines or other more  
14 policy-oriented activities that the agency can  
15 undertake. They sort of prime the pump. I think  
16 that's part of, sort of to the extent that the  
17 courts are overly concerned with over-deterrence.  
18 There are a lot of activities that can be taken, that  
19 can take place outside of the courtroom, divorced  
20 from the specific sort of case that you're  
21 prosecuting that can hopefully set the stage, if you  
22 will, and make the courts more receptive to it.  
23 Because within that context if the FTC is not  
24 appearing as a litigant but sort of opining as a  
25 more neutral competition expert, and it's great when

1 all of these factors can dovetail.

2 MR. HEIMERT: Shall we move on to  
3 the next one?

4 MR. LANGER: Do you want to wait? I  
5 can talk about the Section 5 when you get to it, but  
6 in terms of the relationship between Section 5 on  
7 the consumer antitrust side, why don't we wait. I  
8 can touch on it before we leave.

9 MR. HEIMERT: Competition R and D.  
10 Einer, you've already spoken a bit about gathering  
11 more data to be able to have some better sense of  
12 whether we're doing a good job, whether the cases  
13 for bringing are actually having a positive effect,  
14 if there is over-deterrence under-deterrence it may  
15 be different for the type of case. I think Section  
16 2 context and perhaps in the Section 5 context is  
17 the area where there may be the greatest concern  
18 about over-deterrence. I think there is less  
19 concern in the merger area, but maybe there is there  
20 as well.

21 But let me ask more broadly. Is there  
22 a lot of bang for the buck to be had from doing  
23 studies, retrospectives of some sort or another? Are  
24 other types of studies that maybe are not data based,  
25 for example, we had the FTC issue its patent report

1 several years ago now, and that seems to have had,  
2 at least it was listened to. Obviously one can  
3 argue the merits of what was in there, but it seems  
4 to have had some impact. Are those type of reports  
5 of consequence and benefit? Should the FTC be putting  
6 its resources into that type of research and  
7 advocacy as the case was there but doesn't  
8 necessarily have to advocate a position?

9 MR. ELHAUGE: I certainly think  
10 research is a very important role the FTC can serve.  
11 And consistent with my opening remarks the way I  
12 would frame it is where can you get the biggest bang  
13 for the buck, what can FTC do distinctively. And  
14 here is distinctively compared to academic research  
15 because there is a bunch of academics are already  
16 studying about these questions. I think what the  
17 FTC can do distinctively is get data unavailable to  
18 private officials particularly if we can get broader  
19 statutory authority and be held to a series of laws  
20 that bind the agency as to using that data only in  
21 an aggregate way that maintains confidentiality and  
22 doesn't have leaks. In a way it would be difficult  
23 for individual researchers to really get, although  
24 perhaps the data could be made anonymous in some way  
25 and made available to academic researchers as well.

1           That seems to me is the area where the  
2     FTC could achieve the biggest gain, just not  
3     available to academic researchers as building and  
4     using these kinds of anonymous databases.

5           MS. GREENE: I couldn't agree more in  
6     terms of the sort of value and of the FTC really  
7     sort of acquiring more data and making it available  
8     broadly consistent with all of the protections that  
9     Einer focused on in terms of aggregate. Over the  
10    course of the hearings for the patent report that  
11    you mentioned, the number of academics primarily  
12    economists saying we would like to know X, Y, Z was  
13    astounding, and putting that information out there,  
14    will I think yield an incredible amount of benefit  
15    in terms of additional points of view on the debates  
16    of interest.

17           I do think that notwithstanding the  
18    fact that the agency can acquire that data and that  
19    it should if possible, I think that there is  
20    another, I don't know if it's a truly distinctive  
21    attribute of the FTC, but I think there is a  
22    filtering mechanism that the FTC, or the agency, but  
23    I'll obviously talk about the FTC, the FTC can  
24    engage in terms of wading through debate. When you  
25    look at something like the patent report, and I'm

1 obviously a very unbiased or completely biased I  
2 should say fan of the report, but notwithstanding  
3 that bias, what I'll say is that if you look at the  
4 recommendations in the report, a lot of them are not  
5 novel. And in fact one of the things that we were  
6 able to do while generating the report was to rely  
7 upon prior reports generated by the government. I  
8 mean we relied on the 1966 report on the Commission  
9 on the patent system. There was a report that came  
10 out in '79, '92, et cetera. Why am I doing this?  
11 It's not that I want to tear down the hearing and  
12 say they were not novel. I think however what they  
13 did, part of their contribution was to really focus  
14 debate and to sort of draw together a lot of  
15 resources in a way that other people can't  
16 necessarily do. We had hundreds of people come in,  
17 et cetera. And so I think that what the agency did  
18 in that context was there was already a ground swell  
19 of dissatisfaction about various aspects of the  
20 patent system generally and about certain aspects of  
21 sort of antitrust treatment of it. And we were able  
22 to tap into that, sort of wade through a lot of  
23 information and then make recommendations.

24 So I think there is a focusing by the  
25 agency. In this regard it did really well. We see

1 it cited by the courts. You talk about measures.  
2 You see it cited by the court. In the KSR case I  
3 don't think the Supreme Court cited it, but it  
4 seemed like every other brief before the court cited  
5 it. I think those are all really valuable things.

6 And one of the things that I would  
7 recommend that we do when it comes to making sure  
8 that we, making sure the agency gets as much value  
9 from this report as possible is go back and look at  
10 the recommendations. I mean when I sit and look at  
11 the 10 recommendations that were in the patent  
12 report, there has been movement on some of them.  
13 And I'm very curious to find out what movement if  
14 any has occurred on other aspects. There was a lot  
15 of hope in terms of increasing relationships and  
16 ties with the PTO. Has there been progress made on  
17 that.

18 So I think that when it comes to the  
19 exercise of how do we measure our success or measure  
20 our work product, I think part of the answer is you  
21 have a report. Once the report is done, that's on  
22 some level the beginning of the agency's work. Go  
23 back 5 years from now and say what have we actually  
24 accomplished.

25 And before I am quiet on this issue, I

1 have to tell one thing that I think really makes the  
2 FTC special is its study function, and the  
3 commitment of the commissioners and the chairman to  
4 engaging in study in an unbiased way, because the  
5 agency will lose all credibility and the reports  
6 will not have the effect that they can if they are  
7 perceived to be the result of a sort of narrowly  
8 tailored end game. We want to achieve X so we are  
9 going to write a report.

10 The story I'll tell is just that the  
11 patent report was actually started under Chairman  
12 Pitofsky. And then of course there was a transition  
13 in the middle, and then Chairman Muris came in, and  
14 I can honestly say the commitment to the report and  
15 sort of this broad sort of intellectual undertaking  
16 was not in any way changed despite the change of  
17 administration. There was just a commitment to this  
18 is something sort of like pure research. We need to  
19 figure it out. And the commitment was there and I  
20 think that that is invaluable.

21 MR. LANGER: Just a thought. As you  
22 probably know I'm a former finance officer of the  
23 Antitrust Section ABA and member of the Advisory  
24 Board and Section Reserves, and we have all this  
25 money, although not as much as we had 2 weeks ago,

1 to consider doing something with. And we have  
2 talked for some length of time about commissioning  
3 empirical research for academics. It could be in  
4 marketing. It could be in competition policy, to  
5 get answers to certain questions. I'm wondering  
6 whether linking together the interest of the FTC in  
7 particular in its reporting function with the  
8 interest on the part, and I can't speak now on  
9 behalf of the entire leadership, but we clearly are  
10 moving in direction of coming up with a methodology  
11 to provide some of our funds available for this type  
12 of empirical research that you folks have already  
13 talked about.

14 I just raise that issue now, and I  
15 would like to follow up with the Commission and with  
16 the other members of the advisory board and with the  
17 chair of the section to see whether there is a  
18 linking together in a way that would provide some  
19 value generally for competition policy.

20 MR. HEIMERT: One of the challenges I  
21 think we face, Einer may be familiar with this and  
22 alluded to it, there are limitations on how easy it  
23 is for us to gather data outside of our enforcement  
24 function. We have the authority but we have to go  
25 through the office of management and budget if we

1 want to request information. I forget if it's more  
2 than 10 entities and some other requirement which  
3 limits it, and that's putting aside the issue of the  
4 company willing to do this just for our kicks to do  
5 research, whatever it is. Not to say it's not worth  
6 doing but it does raise a significant obstacle.

7 MR. LANGER: One of the things I do  
8 miss not being in government any longer is I miss  
9 subpoena power. I was able to get whatever I needed  
10 whenever I needed, and certainly the commission has  
11 that authority depending on the circumstances. Not  
12 suggesting that you just issue random subpoenas.

13 MR. HEIMERT: And one of the  
14 suggestions that has come up in previous panels was  
15 in the context of mergers there may be another  
16 vehicle which is at the end of the merger one of the  
17 conditions or part of the consent decree may be a  
18 data provision obligation of some sort down the  
19 road that obviously has, putting aside why one might  
20 not want to do that, there is also some limit to  
21 parties involved, the merging entity. You may be  
22 able to find out and Einer was saying put your money  
23 where your mouth is. On the efficiencies you might  
24 be able to ask did you achieve the efficiencies you  
25 said you would. And that alone might be an

1 interesting question.

2 Bob, let me move back to you on  
3 competition advocacy, and Hillary and Einer I will  
4 get your thoughts as well. This is related to sort  
5 of the research and development but we also have  
6 some advocacy role. Speeches, sort of goes on from  
7 guidelines but speeches is one way. We have  
8 substantial international participation both ICN,  
9 OECD, will write letters to regulators, state  
10 legislatures about typically the adverse competitive  
11 effects we predict from taking a particular action.  
12 It that a valuable use of our time at the FTC? Is  
13 that something we should be doing more of or at  
14 least as much as we're doing, or is it not money  
15 well spent?

16 MR. LANGER: The short answer is yes.  
17 There is no question that as coming out of  
18 government service where I was both head  
19 of antitrust and consumer protection but also advise  
20 occupational licensing boards for over 20 years  
21 which in retrospect seem like a conflict of interest  
22 but come across that way in my former life is I  
23 think there is a real concern a continuing concern  
24 about the entrenched anticompetitive behavior of  
25 state agencies. I used to refer to them as

1 affectionately as de jure trade associations in  
2 some cases. So I think in looking, I looked  
3 yesterday at the FTC website in terms of the numbers  
4 of competition advocacy filings, the types of  
5 letters or whether they were requested or not, and  
6 it looked like from 20 to 30 a year over the past  
7 five or six years. And it just seems to me that  
8 there is an awful lot more going on than 20 or 30  
9 files. And it may be a function of what resources  
10 the commission has to devote to this. And obviously  
11 that's part of the question we have here. But the  
12 types of questions that were asked, the types of  
13 issues that the Commission is focused on are almost  
14 uniformly right on the right track in terms of  
15 trying to ward off the most egregious  
16 anticompetitive behavior at state and local levels  
17 either in terms of legislation or some type of  
18 regulatory action. And then you also have the  
19 amicus briefs and attempts to try to influence  
20 legislation, particularly when there is a group of  
21 states that want to move in a particular direction.  
22 And I also think to the lesser extent the speeches  
23 are enormously important. They perform a slightly  
24 different function. Go back to the issues about  
25 sort of closer to guidelines in some cases. I was

1 just surprised at looking at this that there was not  
2 more, maybe there is more. I don't know enough  
3 about the FTC's internal workings to know whether  
4 how often the Commission will venture its opinion  
5 through a competition advocacy vehicle when not  
6 asked as opposed to when invited in.

7 MR. HEIMERT: I believe we have a  
8 policy that it is only when invited do we comment.  
9 So we're not sort of a roving band of  
10 pro-competition advocates in the sense we go out and  
11 find things. Typically it's limited to circumstances  
12 where a legislator or government official will say  
13 would you care to weigh in on this, and then we're  
14 often quite happy to. But that is a limit, and  
15 maybe we need to get more people to ask.

16 MR. LANGER: I understand the political  
17 dynamic having been involved in some issues back in  
18 the '70s and '80s. I'm not sure we were so happy  
19 when the Commission weighed in on certain things in  
20 my former life. I do think that if there is a way  
21 of increasing the numbers because there is just, we  
22 could talk forever about just the potential  
23 anticompetitive and actual anticompetitive effects  
24 of certain entrenched entities political  
25 constituencies particularly at the state and local

1 level, and combined that with State Action immunity  
2 doctrine as interpreted you go from our foreign  
3 discussions during the time of the Antitrust  
4 Modernization Commission. I just think there is  
5 enormous value in expanding the competition advocacy  
6 program.

7 MR. ELHAUGE: So I think I would ask  
8 the same bang for the buck question I asked for  
9 everything else. I would be inclined to think  
10 competition advocacy is probably some good bang for  
11 the buck in part because the cost seems relatively  
12 low of engaging in competition advocacy. It would  
13 be interesting to measure how often change results  
14 in various proceedings whenever a regulatory agency  
15 follow the FTC approach, and I think it might be  
16 interesting to reconsider this invitation-only  
17 approach. You know on the one hand I worry if you  
18 only show up when you are invited, the only ones  
19 showing up are the people who agree with you, the  
20 FTC may not be making a really big difference. On  
21 the other hand, uninvited guests to the party might  
22 also, depending who you listen to, not listen  
23 particularly well. So there may be some middle  
24 ground there where the FTC can pick spots where it  
25 can make a difference particularly because it's

1 offering a point of view, whatever this group is not  
2 used to hearing about, the importance of  
3 competition.

4 MS. GREENE: I'm curious about the  
5 extent to which the middle ground might exist  
6 through things like sort of speeches and annual  
7 reports in which the agency is able to sort of, I  
8 don't want to say rattle the cage, but sort of opine  
9 on state issues, but they're not formally inserting  
10 themselves into the process as something is being  
11 considered in a state agency.

12 But one of the points that I am going  
13 to drag in because it doesn't have a natural spot.  
14 You were talking about the fact that the businesses  
15 don't like to hand over this information, and there  
16 is a burden associated, this goes back to our prior  
17 conversation, sort of what immediately brings to  
18 mind is the line of business data acquisition that  
19 the agency engaged in previously. One of the things  
20 that I found really invaluable at the Federal Trade  
21 Commission was having people around that had not  
22 only an institutional memory because it seems to me  
23 that most of the things that we come up as sort of  
24 maybe we can try this, variations have already been  
25 tried in the past. We have people that are

1 informally historians like Mark Winerman and other  
2 folks who have this institutional memory. And I  
3 think that when you're putting forward a proposal,  
4 it's always useful for the agency to acknowledge  
5 when it's done something like it in the past and if  
6 there were problems attendant to it. That's the  
7 most likely predictor of what may be the problems  
8 going forward.

9           So if we try to acquire data what we've  
10 run into is the sort of limits in terms of you have  
11 a lot of paperwork if it's more than 10, or  
12 companies complain that it's burdensome. We can  
13 show that we've learned from our own history.

14           MR. LANGER: Well, this may be  
15 something already done on an ongoing basis, and I  
16 wouldn't be privy to it any longer. The extent to  
17 which it's usually the state attorney general is the  
18 principal competition advocate within the state, and  
19 although that same state attorney general is likely  
20 to be the advisor to these various agencies or  
21 boards, there is always going to be in most states  
22 there is a separate antitrust unit or battalion or  
23 whatever they're called in that state, and I know  
24 when I was there we would often talk to the FTC  
25 folks or DOJ about sort of the competition side of

1 things to try to ward off -- we didn't do it on a  
2 formal base like Maryland did. They had a much more  
3 formal basis back in the '70s and '80s than we did  
4 but they were reasonably effective. And this is  
5 sort of a question for the FTC folks is whether or  
6 not the current relationship with NAAG continues  
7 that type of coordination where if the FTC looks at  
8 a problem, thinks there is a competition issue  
9 within a state, either the legislation or some type  
10 of regulation or some type of action, does it  
11 coordinate with the state in a way to get its  
12 message out. Is that the way to sort of please ask  
13 me to be invited in? Because that would be the most  
14 effective way short of changing the policy.

15 MR. HEIMERT: Bob, you may be the  
16 better person to opine on this from the state side.  
17 My sense is quite often there is a battle within the  
18 state that there may be, that the interests are that  
19 the state attorney general's office may be  
20 interested in competition and may have a regulated  
21 entity or regulated set of entities who perhaps  
22 captured whoever the regulating entity is and  
23 advocated for continued limitations on competition,  
24 and we may be able to break that or may not be able  
25 to. I do think we do participate in those

1 instances. Perhaps we could participate more.

2 MR. LANGER: You're right. That's  
3 exactly the tension and the real tension comes when  
4 the same agency, the AG's office has this dual  
5 function of being the antitrust competition advocate  
6 and representing the agency with this multi-headed  
7 organization. It's very complicated that way, and  
8 sometimes competition doesn't win out. And I think  
9 the FTC has been very effective, and the matters  
10 that I have seen and reviewed over the past short  
11 while and the matters I have known previously, the  
12 FTC has done a very, very good job.

13 MR. HEIMERT: Let me shift gears and  
14 try to talk about some specific topics. We talked a  
15 little bit about civil remedies or remedies for the  
16 FTC and whether those perhaps might be expanded.  
17 Rather than focusing on whether or not the FTC in  
18 fact has disgorgement authority, as Einer pointed  
19 out, there is certainly a decent if not strong legal  
20 argument we have used that authority and it has  
21 being acknowledged by a court or several courts at  
22 least enough in the context of settlements. Whether  
23 or not it in fact exists, should it exist, should it  
24 be made more clear we have that authority, and the  
25 most important question I think is should the FTC be

1 seeking disgorgement or civil fines or anything of  
2 the sort in cases. And would it be a good thing  
3 in light of treble damages private actions or  
4 necessary. Einer, do you want to go first on that?

5 MR. ELHAUGE: Sure. I think it would  
6 be a good thing. I think first treble damages seems  
7 to me is not a big obstacle, a reason not to pursue  
8 disgorgement remedy. In purposes of practical and  
9 legal restrictions on getting private treble  
10 damages, increasing obstacle to class actions,  
11 sometimes it's simply hard to prove the harm to the  
12 relevant persons. And so it seems to me that there  
13 are plenty of cases where there is a need for  
14 deterrence that is not provided by private treble  
15 damage actions, especially because the courts are, I  
16 think, a bit more hostile to private actions than to  
17 government brought actions. And in addition it  
18 seems to me a disgorgement remedy could simply result  
19 in proceeds that are put into escrow to be paid  
20 against any treble damages. If in fact treble  
21 damages come and the damages exceed three times the  
22 total harm actually caused by the conduct, then it  
23 would be paid out by the disgorgement fund rather  
24 than by the companies. So I don't think the  
25 argument is particularly strong that the agency

1       should not seek disgorgement because of the  
2       availability of treble damages.

3                       And you might want to ask it the other  
4       way which is are other injunctive remedies that the  
5       agencies have that affects and seems to me a lot of  
6       concern that structural remedies are often  
7       inefficient because even if there was bad conduct  
8       may be inefficient by the time the case is resolved  
9       to break up some company. It may have achieved some  
10      independent efficiencies or all or nothing kind of  
11      choices. It's hard to only pare off the portion  
12      that was caused by anticompetitive conduct. So  
13      concern about structural remedy but also concerns  
14      about behavioral remedies in the agency's  
15      pronouncement very often full in force, monitor, and  
16      firms often sort of violate them unless the penalty,  
17      you're told comply with them next time around.

18                      So given often problems with structural  
19      and behavioral injunctive remedies, disgorgement  
20      might be a nice alternative relative to the easy to  
21      enforce you just have people, firms pay up money, so  
22      it doesn't raise a big monitoring problem, and it  
23      doesn't impede other efficient behavior. They can  
24      extend bigger scale more efficient but could deter  
25      the conduct better than not having disgorgement in

1       lots of cases.

2                   MR. HEIMERT:   Bob.

3                   MR. LANGER:   My concern about  
4       disgorgement is the multiplicity of remedies that  
5       are already available when you combine private and  
6       public both state and federal.  I deal with this  
7       stuff on a daily basis.  And the states will  
8       sometimes come in and say we want disgorgement.  
9       We're looking for restitution or some type of damage  
10      remedy, and we definitely want civil penalties and  
11      monetary forfeitures on top of that, and it becomes  
12      a piling-on issue.  Criminal issues aside.

13                   So I would be going back to the issue I  
14      mentioned before, civil fines, in trying to parse  
15      that out as a way of greater deterrence rather than  
16      adding to sort of the plethora of compensatory  
17      remedies seems to me something that ought to be  
18      considered.  But I just see the numbers of matters  
19      where you have this multiplicity.  Maybe that's a  
20      good thing.  Maybe deterrence is created as we all  
21      know through the interim effect of the multiplicity  
22      of civil and criminal remedies state and federal and  
23      private.  But I have not been, even when I was in  
24      government, I was not a big fan of disgorgement  
25      remedy.  I need to read more.

1                   MR. HEIMERT: Let me follow up on that.  
2                   You see a difference between fines that might  
3                   specify a unit 10 percent of turnover as a maximum.  
4                   How would you set a fine if not based on some sort  
5                   of disgorgement measure?

6                   MR. LANGER: The way we did it was on a  
7                   per violation basis.

8                   MR. HEIMERT: A thousand dollars or  
9                   10 thousand, whatever the number.

10                  MR. LANGER: State antitrust act it was  
11                  up to \$250 thousand and under UCA goes up to \$5,000  
12                  violation. So it depended upon the nature of the  
13                  violation and whether it's antitrust or consumer  
14                  protection. I have often seen disgorgement, at  
15                  least in the matters I have been involved in, really  
16                  was nothing more than different way of looking at a  
17                  damage model. And the question is are you double  
18                  dipping, frankly.

19                  MR. HEIMERT: Thoughts?

20                  MS. GREENE: No.

21                  MR. ELHAUGE: Let me respond. I think  
22                  disgorgement is quite different than regular damages  
23                  action. It's not based on measuring the harm to the  
24                  victims but based on measuring the total profits  
25                  gotten by the wrongdoer. There are many cases where

1 it's easier to figure out the total profit earned by  
2 the wrongdoer than figure out the harm to the  
3 individual victims. Perhaps I would distinguish  
4 disgorgement from restitution. With a restitution  
5 claim it is more of a question whether going back to  
6 my general theme of what can the FTC  
7 distinctively -- restitution also requires you to  
8 figure out the harm to the individual victims so  
9 less easier to see why agencies play a distinctive  
10 role when they have to prove the same thing an  
11 individual plaintiff would have to prove. But  
12 disgorgement is different since you don't have to  
13 prove the individual harm. It can be just money put  
14 into the treasury.

15           And to address the piling-on problem, I  
16 would go back again to my escrow, just money that  
17 would be put in escrow. Wouldn't be in addition to,  
18 and it seems to me courts have in fact created these  
19 offsetting remedies just to make sure that there is  
20 some relief, and if somebody else brings a treble  
21 damage action, some other kind of action that leads  
22 to excessive penalties, then the money that is held  
23 in escrow would be used to pay off those liabilities  
24 rather than remaining in the U.S. Treasury.

25           As to civil fines, I agree with

1 Andrew's comment that the question of how you  
2 measure them. It seems to me the easy -- the  
3 percentage of turnover measure has been largely  
4 ineffective in the sense there is many cases where  
5 it's profitable to engage in the conduct and if you  
6 can increase your profits by 50 percent, a penalty  
7 of 10 percent of turnover can just be a cost of  
8 doing business and not a reason not to pursue the  
9 illegal activity.

10 So there might be some cases where  
11 disgorgement itself is an insufficient remedy  
12 particularly if there is low detection and perhaps  
13 even larger civil fines. But civil fine regime  
14 seems so far not to work that well.

15 MR. HEIMERT: Let me press a little more  
16 on your view of the role of disgorgement. FTC current  
17 policy -- I forget their three criteria -- but one is that  
18 it's a clear violation to measure damages. Sounds like  
19 you would flip that and disgorgement role might best be  
20 used in a case where perhaps the law is not as clear  
21 and damages are less likely to be easily calculated.  
22 It's sort of the challenging cutting edge case where  
23 you might see the best rule because you have private  
24 damages. If a case is clear, say it's price fixing  
25 case or something close to price fixing, you know

1 it's a violation but you also know there are going  
2 to be private lawyers likely to be able to obtain  
3 treble damages or some measure of damages. Am I  
4 understanding correctly?

5 MR. ELHAUGE: I think you're right.  
6 The FTC guideline of disgorgement tilts heavily  
7 against disgorgement. It seems to me in various  
8 ways it has strong presumption against it. I don't  
9 think it makes that much sense today. Maybe made  
10 more sense back then when private actions were more  
11 vigorous and when there was more faith in  
12 alternative injunctive remedies that the agencies  
13 might get. But I think it has changed and limiting  
14 it to clear violations actually never made that much  
15 sense to me. I could see why you want to start with  
16 the clearest cases just as a matter of allocating  
17 enforcement authority, but if you have a case you  
18 think the conduct is more harmful than beneficial  
19 even if not crystal clear, that's conduct worth  
20 deterring. And if the disgorgement remedy is the  
21 best avenue to deter it because you don't think  
22 private damage action are likely to be that  
23 effective and you don't think alternative injunctive  
24 remedy will be effective, I think it's a shame to  
25 put it off to the side.

1                   MR. HEIMERT: Let me ask about  
2 coordination with state AGs, Bob may be best suited  
3 to talk first on this.

4                   MR. LANGER: We only have 20 minutes.

5                   MR. HEIMERT: We'll run over if  
6 necessary. But one of the challenges, the FTC has  
7 had, I think it's done a decent job, but perhaps  
8 there is room for improvement is coordination with  
9 state AGs and actions where state also want to be  
10 involved in the case. If there is, always been some  
11 tension in that relationship but are there ways to  
12 improve that. Particularly I think from a  
13 procedural side but maybe also from a substantive  
14 side. Part of the disagreement on substance of what  
15 is an antitrust violation issue. If you can put  
16 aside procedural question, why the state AG is  
17 called at all, why is it necessary.

18                   Your thoughts.

19                   MR. LANGER: I spent my entire career  
20 thinking about this issue. First of all I would  
21 love to have had Kevin here because having gone  
22 back, having been an assistant attorney general in  
23 the '70s and then during the Reagan years, Kevin and  
24 the late Janet Steiger were the two most  
25 instrumental persons in my view who improved

1 dramatically the level of cooperation and  
2 coordination with the states. And that occurred  
3 during the time when I chaired the NAAG task force  
4 so I feel personally indebted to Kevin and the late  
5 Chairman Steiger for their efforts because I don't  
6 think it would have happened, quite frankly, without  
7 them.

8           So there was a period of time when  
9 there was no coordination and there was quite  
10 significant, animus may be too strong, but I'm not  
11 too sure. And the level of coordination I think has  
12 improved quite significantly and appears from the  
13 outside now to continue to a great degree.

14           I do think on the antitrust side that  
15 there has been virtual substantive convergence. I  
16 mean except for this minor issue of resale price  
17 maintenance which we don't have time to talk about but  
18 obviously we have the differences the states have,  
19 but with regard to horizontal behavior much of the  
20 vertical behavior except for around the margins from  
21 my perspective, at least when it comes to antitrust.  
22 That's not true in consumer protection. There has  
23 been not that much difference.

24           I think the states may interpret their  
25 merger guidelines differently but even there the

1 differences that existed in the '80s compared to  
2 where things are is dramatically different. So  
3 there has been a tremendous amount of improvement.  
4 I go back to the principal issue which is our  
5 federal system of government, and I know I read  
6 former Commissioner Leary's comments about state law  
7 and state attorneys general and state enforcement,  
8 but it is a reality and I think it's highly  
9 improbable considering the origins of antitrust law  
10 that state law and state enforcement will ever be  
11 preempted as such. Although I think there are  
12 exceptions to that rule which we probably don't have  
13 time to go into today. That we are dealing with a  
14 political dynamic that needs to be managed as  
15 opposed to simply we should have all federal  
16 enforcement.

17 I also think that some competition  
18 among the agencies, state and federal, is not a bad  
19 thing. I know in the years when I served in the  
20 attorney general's office and we thought at the time  
21 that the federal agencies took a too narrow view of  
22 certain enforcement initiatives, the state stepped  
23 up, and I think but for that there would not have  
24 been the national task force that continues to this  
25 day that sought to exercise some authority matters

1 that probably at the time should have been better  
2 handled by one of the two federal agencies.

3           Having said that, in terms of whether  
4 there can be further coordination, I have been a big  
5 proponent for much of my career but certainly since  
6 the late '90s, and I've written on this subject  
7 pretty extensively that there ought to be a more  
8 formal allocation, market allocation among the  
9 states and feds. Whether Professor Lande's proposal  
10 about sort of the local impact looking at mergers in  
11 that way and things that have particular types of  
12 industries and the retail side and leave everything  
13 else to one of the two federal agencies. I don't  
14 think politically that really works, it just  
15 doesn't. We can talk at some great length about why  
16 it doesn't, but that is the dynamic of the attorneys  
17 general.

18           I do think that the net effect of the  
19 combination of Microsoft and the tobacco cases  
20 changed the relationship of the staff of the  
21 attorneys general offices to the Ags where at the  
22 time when I was punitively in charge of the task  
23 force. There was tremendous deference accorded to  
24 folks like me to get things right. And the state's  
25 AGs often would not direct things. They generally



1 I think it's unlikely that it can be improved much  
2 beyond where it is right now, considering the state  
3 of the law and the state of politics.

4 MS. GREENE: I agree completely that  
5 competition among enforcement agencies is actually a  
6 good thing. I was struck by your comment about the  
7 incredible degree of substantive convergence between  
8 the state and the FTC. So I'm just curious about  
9 whether there is more consistency between the states  
10 and the FTC and between the FTC and DOJ. But that's  
11 a whole other issue.

12 In terms of the coordination issue. I  
13 can't speak in any way to the level of detail that  
14 Bob has. We hate to see the notion of coordination  
15 become a euphemism for the states fall in line with  
16 sort of the federal directive and policy which is  
17 not in any way, which is not how Bob meant it, but I  
18 wouldn't want coordination to become a sort of tag  
19 line for things happen along the federal way.

20 MR. ELHAUGE: I've spent some time  
21 since you asked the question about these issues. So  
22 I guess I'll limit it to a few things. One is I  
23 just spoke at a conference, National Association of  
24 Attorneys General last month and I thought they were  
25 an impressive group of people. Certainly the kind

1 of people you want to coordinate with in a world of  
2 limited resources as a way of getting more leverage  
3 of resources that the FTC has. Also important to  
4 have buy-in from local government officials and it  
5 can help in things like competition advocacy when  
6 you have some antitrust state regulation it may be  
7 hard for the FTC coming in from DC to be that  
8 persuasive. If it had strong relationships with  
9 local state antitrust officials can get the kind of  
10 witnesses who might be more effective in those  
11 cases.

12 And my sense was at least on Section 2  
13 the National Association of Attorneys General is  
14 closer to the FTC than the FTC is to the Department  
15 of Justice.

16 MR. HEIMERT: Hillary, I know you  
17 wanted to talk a little more are transparency. You  
18 had a lot to say about guidelines, but perhaps there  
19 is something more about transparency. When I think  
20 about it, I think of particularly closing statements  
21 that is something the FTC has increased and DOJ has  
22 as well in recent years. Obviously there are limits  
23 to what we can do, but is there any good value to be  
24 had there for putting in the efforts to developing  
25 closing statements in cases where we don't bring an

1 action, recognizing it can be a challenge to  
2 especially with five commissioners come up with a  
3 reason for closing a case or a list of reasons upon  
4 which they can agree. It may be obvious to staff  
5 but the commissioners may have different views as to  
6 why a given case shouldn't go forward.

7 MS. GREENE: The example of the closing  
8 statement for cases that aren't brought I guess the  
9 most common instances in which folks are calling  
10 broadly for greater transparency, and you of all  
11 people know this better than anyone having come from  
12 the Antitrust Modernization Commission. My take on it is  
13 that sort of the ball is in the FTC court in this regard.  
14 There have been sort of calls repeatedly for greater  
15 transparency in that regard, and I'm going to just  
16 mention sort of an interesting exchange between  
17 Warren Grimes and John Mannix in the Buffalo Law  
18 Review in 2003 and what they sort of talked about  
19 were cost of transparency. There was a resource  
20 restraint issue, confidentiality, concerns regarding  
21 practices that would undermine agency discretion in  
22 future cases. And then the difficulty as you were  
23 alluding to explaining decisions that are based on  
24 sort of administrative factors or mixed motives.

25 Why do I say it goes back to the FTC,

1 because I think that when I am asked sort of is  
2 greater transparency worth it in some sort of larger  
3 tally of cost benefits. I guess I would be curious  
4 to know what does the agency, the FTC, think of in  
5 terms of those various costs, because that would  
6 then impact my sense of whether or not the  
7 transparency, the additional transparency is worth  
8 it.

9 I am going to actually segue back a  
10 little to the part of our discussion on the  
11 guidelines and just say that that is also an  
12 instance in which I think transparency would be  
13 valuable. What does transparency mean within that  
14 context? One of the things is that under the  
15 current regime the agency promulgates their  
16 guidelines under potentially widely varying models.  
17 The health care guidelines that were allotted didn't  
18 have opportunity for public comment. The IP  
19 guidelines did have opportunity to public comment.  
20 Just sort of the one example.

21 Additionally, I think that because the  
22 guidelines are so clearly geared towards framing the  
23 terms of the debate and influencing courts among  
24 others, I think it would be sort of a public  
25 service, if you will, to actually sort of flag and

1 make transparent within the guidelines where they  
2 diverge from the law. That might, you know, on some  
3 level you think that might make them less effective  
4 because they're flagging discontent or flagging  
5 disagreement. But there is precedent for it. The  
6 IP guidelines do that a little bit.

7           So I think that when I think of  
8 transparency it's not just about the closing  
9 statements. It's about all of the information that  
10 we put out there, or we -- I'm not at the FTC  
11 anymore. All of the information that the agency  
12 puts out there, to what extent is it as sort of  
13 complete as possible. And I think that goes not  
14 only to issues of the agency has decided not to  
15 pursue a case but sort of potentially give greater  
16 information as to why that is the case, but also  
17 when you make policy determination we can be candid  
18 about sort of the costs and benefits that we  
19 weighed. And the benefit to doing that is that how  
20 we're making trade-offs is really a great part of  
21 our value added, not necessarily just the decision.  
22 It's the thought process that we went through to  
23 arrive there.

24           MR. HEIMERT: Bob or Einer on that?

25           MR. LANGER: My experience at the state

1 level is such that the aspirations that Hillary has  
2 regarding how the agency would act at the federal  
3 level are so far different from where states are in  
4 terms of telling us what happens with a case. I  
5 mean in most states you don't even get a letter that  
6 says the matter is closed. Sometimes it goes into  
7 purgatory or something where years and years the  
8 client will say to you, "What is the status of the  
9 matter?" And you go, "I don't think we should ask.  
10 Just keep your head down." And at FTC and DOJ level  
11 at least you know there is enough transparency to  
12 know it's over, it's not over till it's over, but it  
13 is over. At the federal level. At the state level  
14 it's so frustrating to deal with matters that you  
15 are actually often concerned about, sort of waking  
16 up the sleeping bear, and to get to the level that  
17 Hillary is at the state level would be extraordinary  
18 in terms of really understanding why you took an  
19 action, why you didn't, how does it relate to the  
20 policies. It's so far beyond the pale that I  
21 couldn't even conceive of it.

22 So at the state level it's at a much  
23 more pedestrian level, much more frustrating to deal  
24 with the states. I'm not being critical because I  
25 understand that sometimes matters simply languish

1 because they're not over yet. Sometimes they  
2 languish because people just forgot about them.  
3 There is no tickler system that says we have a duty  
4 to let the folks that we issued the subpoena to know  
5 that we no longer want any information so that they  
6 no longer have to keep these documents and not have  
7 a document destruction program back on which costs  
8 clients enormous amounts of money, as you all know,  
9 when you have to put holds on document destruction  
10 over a period of sometimes 5, 6, 7 years. So I only  
11 would hope that the states get even close to where  
12 FTC is right now.

13 MR. HEIMERT: Einer.

14 MR. ELHAUGE: Well, as an antitrust  
15 case lawyer, I'm more big on closing statements  
16 because as things stand one has a bunch of cases  
17 that may not bear much relationship to modern  
18 enforcement practice and guidelines. That may or  
19 may not be good predictors of enforcement practice.  
20 It would be good not only for my students but also  
21 to provide greater guidance I think to the general  
22 world to have more of these sort of case by case  
23 opinions where one can really figure out how the  
24 guidelines should be applied in a particular era,  
25 what they really mean as applied to concrete cases,

1 and is it actually one place where the EC has an  
2 advantage because the process leads to more of these  
3 sorts of opinions.

4           Unfortunately, it's structured, we get  
5 a lot of opinions from the FTC about why it doesn't  
6 act, and only a very small subset of opinions issued  
7 by the FTC of why it does act. That would go  
8 through judicial enforcement. I think it could  
9 provide more guidance and clarity to have more  
10 elaborate opinion like statements of what is going  
11 on in particular cases.

12           MR. HEIMERT: Bob, we are getting low  
13 on time, and I feel I've cut you off. You wanted to  
14 speak about consumer protection interaction with  
15 competition.

16           MR. LANGER: It really conflates. I  
17 spent half my life in the antitrust and half with  
18 the consumer protection side, and I have this  
19 treatise which sort of chronicled the various  
20 unfairness laws in every single state and try to  
21 match it with what the FTC has done.

22           And here is the issue. In light of the  
23 N-Data case, I really think it's both a  
24 competition issue and the consumer protection issue.  
25 I think they merged because of that particular

1 decision. And it is this. Virtually half the  
2 states have little FTC acts. The other half have  
3 unfair deceptive trade practice acts but are not  
4 patterned after Section 5. And of those states  
5 almost all of them have unfairness authority, not  
6 all of them. Some only have deception authority.  
7 And of those that have unfairness authority  
8 virtually all of them still follow the cigarette  
9 rule to this day. There is only a few states that  
10 follow the policy statement or Section 5(n) of the  
11 FTC Act, the statutory codification of the  
12 substantial injury test.

13           And the reason that's problematic is  
14 the breadth of the cigarette rule applied to a host  
15 of anticompetitive behaviors and consumer protection  
16 deception behaviors or unfairness conduct. When you  
17 add private enforcement with damage actions and  
18 punitive damages, you end up an array of cases,  
19 thousands of cases, our state alone has the largest  
20 body of unfairness law in the United States by far  
21 and probably have a total of 5 to 7,000 opinions all  
22 told.

23           The point I'll get to, if the  
24 Federal Trade Commission could bring a series of  
25 adjudicatory actions under Section 5(n) that would

1 demonstrate that the substantial injury test can be  
2 utilized. There is almost no case law regarding  
3 unfairness since for a very, very long time. I  
4 think it could have a really narrowing and helpful  
5 effect upon what's happened at the state level which  
6 have diverged completely from what was an initial  
7 model of patterning substantive law after the  
8 Federal Trade Commission. It doesn't exist anymore.  
9 Obviously I have written 400 pages on this, but we  
10 narrowed down to 30 seconds.

11 MR. HEIMERT: We'll go a little longer.  
12 Do you have a reaction to that, Einer, or I'll give  
13 you a couple of minutes for any other thoughts that  
14 I didn't tease out of you yet, you have to get off  
15 your chest or off your tongue as the case may be.

16 MR. ELHAUGE: I think you squeezed it  
17 all out.

18 MS. GREENE: I just wanted to thank you  
19 very much for letting me participate and to sort of  
20 agree with Einer. This is a wonderful undertaking.  
21 I think that Chairman Kovacic and the agency  
22 are just doing a great thing that is going to  
23 serve well going into the future.

24 MR. HEIMERT: I'll thank you on behalf  
25 of the Federal Trade Commission, each of you, for

1 participating and taking some time out of your day  
2 to help us in this project. The audience was  
3 broader than the numbers that we have in this room.  
4 This will be transcribed, and we'll have it on our  
5 website. And all will be mentioned and will be part  
6 of a report and part of a larger project taking  
7 place over the next few years. It goes beyond and  
8 we'll see where it takes us. It's important to make  
9 the agency better than it is. I think the general  
10 assessment so far is we're doing a good job, but  
11 there are always ways to improve. And that's  
12 ultimately the goal. Thank you to each of you again  
13 and we enjoyed your remarks.

14 (The proceedings adjourned at 12:13 p.m.)

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1                   MEASURING THE WELFARE EFFECTS OF THE  
2                                   FTC'S COMPETITION EFFORTS

3                   MR. SALINGER: Well, welcome to  
4 everybody. On behalf of Boston University we'd like  
5 to welcome the FTC here.

6                   This is really a fabulous project the FTC  
7 has started, to undertake a serious self-assessment  
8 and to reach out to its various constituencies and to  
9 reach out to the academic community for help on  
10 getting a serious answer to the question of whether  
11 it's doing its job well and whether it's doing its  
12 job as well as it can.

13                   Our topic for this afternoon is a very  
14 ambitious topic. It's the topic of how to go about  
15 measuring the welfare consequences of the  
16 Commission's actions.

17                   We have an outstanding panel to help us  
18 address that topic. Denny Yao, a former FTC  
19 commissioner from the early 90's, the Lawrence D.  
20 Fouraker Professor of Business Administration at  
21 Harvard Business School.

22                   And I think he's almost unique among FTC  
23 commissioners and has the sort of academic background  
24 that's useful for understanding what sort of studies  
25 and assessment would be helpful in guiding the

1 Commission's actions.

2 I also learned just yesterday that he had  
3 a previous career as a car product man at Ford which  
4 is a level of practical business experience that  
5 economists and lawyers don't have.

6 We also have Nancy Rose, professor of  
7 economics at MIT and for many years the director of  
8 the National Bureau of Economic Research program in  
9 Industrial Organization, a highly prestigious  
10 academic group that covers the general areas of  
11 interest to the Federal Trade Commission and can  
12 speak to the issue of how to get interaction between  
13 the government and the academic community to do  
14 assessments of what the agency is doing.

15 And we have Keith Hylton, professor of  
16 law at Boston University. Keith is both a lawyer and  
17 has a Ph.D. in economics and, again, a rare  
18 combination of talents that can be useful for helping  
19 to answer these questions.

20 So even though we have a specific mission  
21 today, which is to understand or to talk about how to  
22 measure the welfare consequences of Commission  
23 actions, there's really, as Alden was explaining in  
24 his introduction this morning, a broader mission of  
25 the FTC at 100 project which is to try to figure out

1 a way to institutionalize the self-assessment.

2 And so if the conversation wanders off  
3 into that broader topic, that would be just fine. So  
4 let's just start with a very general question.

5 The agency is interested in the welfare  
6 consequences of its actions. Of course its actions  
7 have many dimensions and so there might be particular  
8 pieces of it that we want to focus on.

9 So I just throw it out to the panel.  
10 are there particular areas of agency actions that you  
11 think are particularly interesting or fruitful for  
12 talking about measuring the welfare consequence?

13 And Denny, since you've been on the  
14 inside and the outside, we'll start with you.

15 MR. YAO: Okay. Thank you very much,  
16 Michael. Let me just remark something about being an  
17 academic in the FTC environment.

18 One of the first things that you learn is  
19 that speculation may not be a great idea. So as  
20 professors we always speculate.

21 So I wandered into the halls and I  
22 started speculating about things and people started  
23 listening, and that was a little bit dangerous.

24 And so I wondered whether or not the  
25 various chairs of the FTC, who were all professors in

1 recent rounds, whether they also had the same problem  
2 when they came in, although I think all of them had  
3 previous experience in the FTC before they became  
4 chair.

5           Okay. I thought that I would begin by  
6 talking just a little bit about consumer protection  
7 since our group probably will talk mostly about  
8 antitrust, so let me just put the consumer protection  
9 side out there.

10           One of the things that I think would be  
11 quite beneficial for the FTC to do -- and I believe  
12 it has done some of this -- is to do an analysis of  
13 the effects of the advertising program.

14           I know that with advertising there's the  
15 use of marketing copy tests and things like that to  
16 try to assess whether consumers are being misled by  
17 various kinds of advertising, but one of the things  
18 that I think less work has been done on is the effect  
19 of the remedies to these various kinds of problems.

20           So in particular the FTC has often times  
21 chosen to have remedies that required more  
22 qualification to the various advertising statements,  
23 and it's not clear to me -- and I'd like to know -- I  
24 suppose maybe this is part of the speculation part --  
25 whether these qualifications actually work.

1           This kind of analysis is usually -- I  
2     think they might most interest marketing people and  
3     not so much economists, but I think it's actually  
4     quite valuable to understand both whether or not  
5     there's liability in some sense, whether there's harm  
6     being caused, and also whether or not our remedies  
7     will work.

8           So that's an area I think that would be  
9     worth learning more about in terms of measurement and  
10    trying to understanding the welfare consequences of  
11    our actions. So that was just the consumer  
12    protection side. I'll leave the antitrust comments  
13    to the others.

14           MR. SALINGER: Keith, I know in our pre-  
15    discussions there was a piece that seemed of interest  
16    to you, so why don't you go next.

17           MR. HYLTON: Sure. Well, you've framed  
18    the question generally as one of thinking about the  
19    major areas that the FTC is involved in and what  
20    areas the FTC is likely to be most effective.

21           And maybe I should take this moment to  
22    link what we're doing here with the previous panel.  
23    And there was a discussion, a suggestion, in the  
24    previous panel that the FTC focus on its areas of  
25    comparative advantage given that we have the DOJ

1 already focusing on certain things like the  
2 monopolization cases.

3 And you think about the original purpose  
4 of the statute, of the FTC Act. It was to create  
5 this agency that would have the power to go  
6 underneath -- in a sense underneath the Sherman Act,  
7 because the Sherman Act has these stiff evidentiary  
8 hurdles for plaintiffs to have to beat.

9 And so the statute creates this agency,  
10 the FTC, that can sort of the go under those  
11 evidentiary hurdles and still have a case under the  
12 FTC Act Section 5.

13 So that would suggest to me that,  
14 yeah, that if the FTC were to look to its areas of  
15 comparative advantage, they would be broadly in the  
16 area of price fixing or collusion, not as a very --  
17 in a very general sense did it facilitate practices  
18 to everything that's related to collusion and  
19 thinking about ways the FTC could put pressure on  
20 segments of the economy in which that's a problem and  
21 pressure that couldn't be brought under the Sherman  
22 Act because of the evidence requirements, the hurdles  
23 that are in the way of someone who tries to use the  
24 Sherman Act under Section 1 since Section 1 of the  
25 Sherman Act requires proof of conspiracy, and that

1 requires pretty good circumstantial evidence of  
2 conspiracy.

3           It may be FTC Section 5 -- Maybe courts  
4 will -- although courts have a mixed record on this,  
5 maybe they'll be willing to let the FTC come in with  
6 evidence that doesn't quite meet the requirements  
7 under Section 1 of the Sherman Act and put pressure  
8 on certain industries or parts of the economy where  
9 collusive practices or facilitating practices are  
10 pretty clear.

11           I think to give you one example -- I'll  
12 give you one of my favorite examples that I mention  
13 to my students.

14           Before the days of the internet, you  
15 know, offers -- Before the days in which car sellers  
16 were making offers over the internet, it was very  
17 hard to get any car dealer to think of bargaining  
18 with you over the phone about a car.

19           If you got an offer from one dealer and  
20 then you called up another dealer and said, "Hey,  
21 Sam's Car Dealership down the street just offered me  
22 this new car at price X, are you willing to offer it  
23 to me for X minus 1 dollar," you would have gotten the  
24 response, "Well, we don't like to bargain over the  
25 phone. Please come down here and let us give you our

1     spiel and show you the cars in here and then maybe  
2     we'll think about -- you know, you'll see we can do  
3     better but come down here."

4             And it was -- It's well-known that that  
5     practice was designed to get people into the showroom  
6     so they had to spend at least two hours in the  
7     showroom and then you couldn't shop around.

8             And so that refusal to bargain with  
9     consumers was an industry practice and probably still  
10    remains to some extent.

11            And those are the kinds of things where I  
12    think the FTC could take a crack at saying, We can  
13    inject more competition into the economy by breaking  
14    up practices like this which are sort of understood  
15    among the dealers, among the players in the industry,  
16    to be ways of blocking consumer efforts to get the  
17    sellers to compete on price against each other.

18            So that strikes me as a major direction  
19    for the FTC to sort of focus on areas of its  
20    comparative advantage under the statute given what  
21    the statute says.

22            I know there's more to your question but  
23    I think that just goes to the first question about  
24    what kinds of focus -- what are sort of the areas in  
25    which the FTC should be looking in general for its

1 biggest impact.

2 MR. SALINGER: Nancy, perhaps from an  
3 academic perspective are there aspects of what the  
4 FTC does that you view as being particularly ripe for  
5 involvement by the academic community in assessing  
6 what it does?

7 MS. ROSE: So thanks, Michael. I'd like  
8 to take off from Keith's mentioning of the Chicago  
9 panel that got into the discussion of how one might  
10 measure antitrust effects or effects of FTC antitrust  
11 enforcement on a substantial scale and pull that into  
12 this question of how we might think about measuring  
13 it and, perhaps on a very practical level, how we  
14 might think about improving the academic  
15 collaboration with the agency.

16 I think that while the FTC has done a  
17 number of detailed retrospectives of either classes  
18 of actions or particular actions, one has the  
19 potential to leverage the quite large academic  
20 community interested in competition policy,  
21 interested in regulatory policy, interested in  
22 government agency behavior and its consequences,  
23 perhaps to get more traction on some of these  
24 questions.

25 And so let me say a little bit about

1 where I maybe see that potential being greatest and  
2 how one might begin to think about accomplishing  
3 that.

4 When Mike first asked me to be on this  
5 panel he explained the mission of the roundtables  
6 that you're having in various places as expressed at  
7 the beginning of this panel to understand the welfare  
8 effects of the antitrust system or particularly the  
9 FTC action within that system.

10 And my initial reaction, which has  
11 remained my reaction to this point, is that measuring  
12 that on a grand scale is inherently, I would say,  
13 impossible.

14 The antitrust system, like much of the  
15 legal system in this country, is fundamentally a  
16 deterrent system. Assuming that works, then the  
17 largest effect is in discouraging firms from taking  
18 actions that we've deemed to be illegal or hopefully  
19 deemed them to be illegal because they're not in the  
20 public interest.

21 And we don't have a good counterfactual.  
22 We haven't a developed economy-without-competition  
23 policy or without-enforcement-of-competition policy.  
24 Even in the experience of the U.S. you'd have to go  
25 back to the turn of the previous century to have a

1 example of an economy where at least there was some  
2 uncertainty about what was allowed under the Sherman  
3 Act and its successive antitrust statutes.

4 And if we look across economies there are  
5 some variations in competition policy but they're not  
6 substantial relative to no-competition policy versus  
7 some-competition policy in my opinion.

8 And there are a lot of other differences  
9 across those economies that would make it very  
10 difficult to infer that differences in competitive  
11 outcomes, they were a consequence of the competition  
12 policy legal environment.

13 So what I'd like to urge a discussion  
14 around maybe in the agency in particular to think  
15 about is trying to understand how its enforcement  
16 policy as it presently exists -- or we could take  
17 some time period and look at changes in that policy  
18 over time -- but how those affect -- how that policy  
19 affects the operation of our economy.

20 And again, assuming this deterrence  
21 system works, then if we base this analysis on  
22 observed cases, those cases I think are going to fall  
23 into one of four categories.

24 They're either going to be situations in  
25 which firms decide that what they're doing isn't

1 consistent with policy but their expected benefits  
2 from deviating from that policy outweigh the  
3 likelihood that they'll get caught and the cost of  
4 getting caught if they do.

5           They could be cases that arise because  
6 firms have just made a mistake. They could be cases  
7 that arise because there's an action that's very  
8 close to that line demarcating what's acceptable and  
9 what's not and there's a difference of opinion  
10 between the agency and the firms on which side of the  
11 line the action falls on.

12           And there could be cases that arise  
13 because there's a change in where that line is drawn.  
14 So in particular I have in mind in that situation  
15 fundamental changes in, say, approaches to mergers  
16 that have led to discrete changes where government's  
17 perceived line is with respect to mergers and that's  
18 led to then changes in the type of mergers or the  
19 numbers of mergers that we see proposed to the  
20 agencies.

21           And I think that with that variety of  
22 cases one could look at the effects of current FTC  
23 policy on a variety of competitive outcomes and hope  
24 to understand where we're currently drawing the line;  
25 does it seem to be at a place where, at least

1 relative to incremental changes, we're generally  
2 getting things right or we're being too lenient or  
3 we're being too harsh.

4 So let me throw that open as a  
5 possibility and then maybe we can talk more  
6 specifically about that as people react to it.

7 MR. SALINGER: Denny.

8 MR. YAO: This interest in variation over  
9 time caused me to think about how the number of  
10 mergers can change dramatically and yet the budget of  
11 the agency can be basically the same which then  
12 creates the movement of the line that you're talking  
13 about.

14 So I'm not sure whether the FTC has  
15 already done these kinds of studies or maybe some of  
16 the academics have, but that seems to sort of fit  
17 into the kind of variation that you're talking about.

18 MS. ROSE: So you're thinking about  
19 mergers that aren't challenged because we don't have  
20 the resources to challenge ten times the number that  
21 we challenged last year but we're getting ten times  
22 the applications.

23 MR. YAO: Right. You get a sudden burst  
24 of mergers. It's somewhat exogenous but not  
25 completely exogenous, right? Because we know that

1 mergers will come about because we'll anticipate  
2 merger policy being a certain way.

3 But there are events that occur that  
4 could suddenly spike these things. I think we saw a  
5 huge run-up in mergers in the 90's, mid 90's, right?  
6 2000.

7 And I don't know about the budget of the  
8 agency but my guess is that the budgets did not run  
9 up in nearly the same way and that the agencies were  
10 probably forced to say, You know, we're not going to  
11 do this one. We might normally do this one. We're  
12 not doing this one. Because you just can only do so  
13 many things.

14 Now, it's possible that the agency could  
15 also take some shortcuts. I don't know about that.  
16 And that's something that I think people inside could  
17 determine but maybe that's a possibility.

18 MR. SALINGER: What would have to happen  
19 to get that -- What could the agency do to get that  
20 study done? You can debate whether or not that's a  
21 natural experiment on enforcement but within the  
22 seminar room it's close enough to a natural  
23 experiment given the strong desire to find natural  
24 experiments and to perhaps bend the rules.

25 As far as I know that study hasn't been

1 done. So is there something -- If that's something  
2 that should be done, what should the agency be doing  
3 to make sure it happens?

4 MR. HYLTON: So the approach that I think  
5 I would favor is trying to create some sort of  
6 enforcement index, something that sort of varies or  
7 measures the quality of enforcement or the threat of  
8 enforcement, something that sort of tracks the  
9 expected penalty that someone would have to face if  
10 they violate the law in some way.

11 Now, I agree with Nancy in having or at  
12 least in being a little afraid that you can't do  
13 much, that the data just aren't there, and it would  
14 be very hard to tease out the effects of changes in  
15 competition policy from larger effects that are  
16 swamping everything.

17 In fact, I view this question as a bit  
18 like trying to measure the effect of the death  
19 penalty because there are so many things that  
20 influence crime, influence decisions to commit a  
21 homicide, that aren't measured that have nothing to  
22 do with the death penalty all.

23 It's very hard to tease out any effect of  
24 the change and there's so few executions, it's very  
25 hard to tease out any effect of changes in the death

1 penalty or the changes in executions on the number of  
2 murders committed.

3 Same thing here trying to figure out the  
4 effects of changes in competition policy or changes  
5 in expected penalties on competitive outcomes because  
6 there are so many influences there, so many  
7 influences there that one has to be doubtful that you  
8 could get anything useful out of that kind of study.

9 Yet at the same time you have to think  
10 there must be some impact. In the case of the death  
11 penalty you'd say well, that's raising the price of  
12 committing a crime so it has to have some impact  
13 you'd have to think but you just can't find it in the  
14 data.

15 Maybe that's true in this area as well,  
16 that we think that changes in enforcement in either  
17 the size of the sanction or in the likelihood of  
18 enforcement have some impact though it's very hard to  
19 tease that out.

20 But if you were to going to try to tease  
21 out, I guess I'd be in favor -- rather than using say  
22 retrospective studies on merger enforcement, which I  
23 think I'm fairly pessimistic about, though even that  
24 would be better than doing nothing -- I guess I would  
25 be in favor of trying to find some measure that

1 tracks the expected penalty, that first phase.

2 And so one broad approach that I thought  
3 of is trying to get a variable that measures the  
4 likelihood of enforcement based on the historical  
5 records of enforcement action.

6 This could be by the Department of  
7 Justice or the FTC. Something that tracks the  
8 changes over time in the range of penalties or the  
9 size of penalties that could be based on historical  
10 evidence of the actual penalties imposed in certain  
11 cases or it could be an index that simply tracks the  
12 range of penalties or changes in that range of  
13 penalties.

14 And then something that I've been  
15 involved with -- in fact, I created a web site that's  
16 devoted to trying to measure the scope of antitrust  
17 law, something that measures the likelihood that  
18 you'll get into trouble in the first place under the  
19 antitrust laws, some kind of index that measures the  
20 scope of the law, the number of different ways in  
21 which you can get into trouble under the antitrust  
22 laws.

23 And so I guess my tentative view toward  
24 an enforcement index would be something that's a  
25 product of those three variables; of the scope of the

1 law, the enforcement zeal, and the expected penalty.

2 But that's just one approach and I  
3 imagine that there are -- first of all, there are  
4 probably better approaches and there are  
5 alternatives, but it seems to me something that  
6 measures the change of expected penalties that's out  
7 there now might be better than trying to look at the  
8 effect of merger enforcement that's happened in the  
9 past and given the quality of the data that are out  
10 there.

11 Maybe I'll stop there and I'm sure this  
12 is an open issue that we're going to have to come  
13 back to so I'll stop there.

14 MR. SALINGER: So if I understand what  
15 you're saying, you're saying that the Commission  
16 should, rather than measure directly the welfare  
17 effects of its actions, it should have a program of  
18 measuring the likely deterrent effect of what it's  
19 doing.

20 MR. HYLTON: I think that's the first  
21 step. The second question is what's the variable  
22 that's become affected. How would you measure the  
23 welfare? By some data on price cost margins, by  
24 industry, or do you choose some other variable out  
25 there?

1           The World Economic Forum produces a  
2 survey which codes people's responses to how  
3 competitive do you think -- codes the responses to  
4 business people to how competitive the economy is.

5           So there are all sorts of ways you could  
6 try to measure. You get a variable that tracks  
7 welfare price cost margin, some measure of price,  
8 maybe some other variable; innovation, for example,  
9 some way to measure innovations to see if enforcement  
10 is affecting that.

11           So there are a bunch of different  
12 components you could think of in trying to assess  
13 welfare effects but to me I think none of them is  
14 precise. None of them gets precisely what you want  
15 to get at, but maybe you can use all of them.

16           And the other question, the bigger  
17 question to me, is just what's the independent  
18 variable out there that you're trying to identify,  
19 that you would like to track.

20           MR. SALINGER: So the issue of what the  
21 likely deterrent effect is -- in my experience is a  
22 huge issue with the consumer protection policies and  
23 also to some extent with the unilateral conduct  
24 policy, so we'll circle back to that later.

25           But if we want to go through

1 systematically the various things the agency has to  
2 deal with, you've got antitrust, you've got consumer  
3 protection and its various advocacy and information  
4 programs.

5 So if you focus on the first two, within  
6 antitrust you've got mergers and unilateral conduct.  
7 What would a specific program look like --

8 MR. YAO: I wondered -- I'm still trying  
9 to think about this across-time variation. Is it  
10 possible that there are enough mergers in some  
11 industries that you could sort of get a matched pair  
12 between some merger that was challenged and one that  
13 wasn't challenged because of this spike. I'm trying  
14 to use this spike. And then look at the -- try to  
15 assess the differences on what happens in prices.

16 This is out of my element but I was  
17 trying to see if there was some possibility. Because  
18 with lots of local industries, you have lots and lots  
19 of markets so I guess that this is what we always do  
20 now.

21 But we also I guess have the potential  
22 that in any given time there might be a number of  
23 mergers that would go on, some of which might be --  
24 so then we could maybe match them up better. Of  
25 course there are different markets so I guess that

1 creates some trouble but --

2 MS. ROSE: I think the place where that's  
3 been done actually is the airline industry, in part  
4 because when the airline industry was deregulated the  
5 DOT was given authority over merger policy and in the  
6 1980's the DOT really hadn't met a merger it didn't  
7 like it appeared in that industry.

8 So the standards were perceived to be, I  
9 think correctly, much more lax than they were either  
10 generically for mergers, more than they were once  
11 that authority was returned to the DOJ, and so you  
12 might be able to do something with that.

13 It's going to be hard to do a matched  
14 merger analysis because of course the types of  
15 mergers that were proposed in the mid 1980's wouldn't  
16 even get proposed I think later because they would be  
17 perceived to be so unlikely to go through.

18 MR. YAO: So I was thinking maybe  
19 something like health care or something like that  
20 where you've got lots of different cities that might  
21 be roughly similar and then they have market  
22 concentrations that might be roughly similar but the  
23 mergers that would be proposed might occur at  
24 different times.

25 I was also wondering -- I don't know if

1     this goes back to Keith -- I'm doing this speculation  
2     business now -- about whether or not one could look  
3     at how second requests changed as a function of the  
4     spikes, whether the second request kind of looked the  
5     same or not.

6             And maybe that group gives us something  
7     to focus on, you know, whether we do anything or  
8     whether the consents that come about when they do in  
9     those matters could be compared.

10            That's strikes me as one of the hard  
11     things that I can easily imagine the agency, as a  
12     result of a budget crisis, being a little bit easier  
13     on the consent it would accept and that would be very  
14     hard for us to figure out unless you have some  
15     suggestions.

16            MR. SALINGER: Well, what -- Do we have  
17     questions from the floor on this? There's no reason  
18     not to, is there? The speaker is Mark Rysman who's a  
19     professor of economics at Boston University, highly  
20     regarded industrial economics scholar.

21            MR. YAO: Do you want to sit up here?

22            MR. RYSMAN: No, but it would be nice to  
23     know which cases the FTC would have taken but didn't  
24     during these spikes and, you know, Michael was asking  
25     what can the FTC do to help us do this study.

1           And I think it would be some kind of  
2 really detailed information on how the FTC makes its  
3 decisions to be made available to academics.

4           Talking about this indexing -- I'm not  
5 sure if this is the same index but -- here's how we'd  
6 like to take this case and maybe if -- can't just  
7 give it a number -- maybe even the notes or something  
8 about how this decision is made. I actually don't  
9 know whether that's publicly available or secretive.

10           MS. ROSE: I think that's a very  
11 interesting point and I know Dennis Carlton was  
12 pushing that in his paper on doing merger  
13 retrospectives, and the difficulty of when you select  
14 a sample to look at, knowing what the selection rule  
15 is for whether a merger's challenged or not, so he  
16 was pushing very hard for having more detailed  
17 information about how the agency was making decisions  
18 about second requests or challenges or what not.

19           And that does strike me as something  
20 where I imagine there are substantial political and  
21 legal barriers to doing it, but if that existed that  
22 would be extremely attractive to academics, to be  
23 able to use something like that and study the effects  
24 of a merger policy.

25           This circles back to Mike's original

1 question which was how do you get academics to buy  
2 into this. And I'm trying to think of constructive  
3 things to say and not to be too pessimistic about  
4 what drives academic success.

5 I will say I think in the current  
6 environment the thrust of empirical research in  
7 industrial organization has tended to be toward  
8 complex econometric models that are perhaps not  
9 ideally targeted to a question like this.

10 So you have to find some way to convince  
11 scholars that there are significant rewards to them  
12 as researchers from undertaking this kind of analysis  
13 when it's not the style that's perhaps perceived to  
14 generate the greatest rewards just within academia.

15 I think we're very driven in academics by  
16 the availability of data and particularly new data  
17 that hasn't been analyzed and so something like  
18 Keith's index, perhaps even more -- something more  
19 fundamental like Mark's suggestion that we have some  
20 idea about where cases were in the ranking or what  
21 determined which cases were over the threshold that  
22 would let us then look at how moving that line  
23 affects outcomes might be something that would move  
24 researchers in that direction.

25 And it might be even institutionalizing

1 something like a periodic conference that really  
2 focuses on questions like this. Sometimes that  
3 convinces somebody to jump-start a research project  
4 because they know they'll be able to present their  
5 work at a hearing, maybe influence policy and have an  
6 outlet for it.

7 But it is -- I think it is a challenge to  
8 foster that connection in a way that's really going  
9 to move people off what they would have otherwise  
10 done research on.

11 MR. SALINGER: So if you take what Denny  
12 was talking about -- actually, what he was describing  
13 is the preferred method of doing retrospective within  
14 the Bureau of Economics, that it's something that's  
15 easier to do in some kind of industries than others  
16 and it's easiest to do where there are local markets  
17 and you have a merger that affects some local markets  
18 but not others, and you identify what you allege is a  
19 comparable market and see whether the change after  
20 the merger is -- in the market affected by the merger  
21 is any different from other cases.

22 And it was precisely that exercise that  
23 led to the Evanston case because the Commission as  
24 well as the Department of Justice had lost a whole  
25 series of hospital cases, and not because of lax

1 agency enforcement but because the courts had imposed  
2 a tough standard and so they did this kind of  
3 retrospective.

4 Now, what is not done very much of these  
5 days is this sort of cross-sectional -- I mean, the  
6 question of in periods where the mergers were  
7 swamping the agencies, what deals were tried that  
8 wouldn't otherwise have been tried.

9 And my guess is that the agency isn't  
10 going to come out and say, Well, we really would have  
11 liked to have challenged this particular merger.

12 But it's something that's susceptible to  
13 modeling. It's not that difficult to model the  
14 probability of a challenge. The Commission publishes  
15 data on -- in fact, it publishes a model you can use  
16 to predict the probability of a challenge. So that  
17 can be done.

18 Suppose there were going to be an annual  
19 conference, that the FTC were to commit to a  
20 conference to -- with the broad agenda of assessing  
21 the appropriateness of its merger policy and it  
22 wanted to enlist the broader community, how should it  
23 go about doing that? Who should it contact? Who  
24 should be invited? How should it -- What should be  
25 the process for soliciting topics?

1 I'm only looking at you because you've  
2 been the director of the National Bureau of Economic  
3 Research.

4 MR. RYSMAN: They held a conference this  
5 year, right? It wasn't exactly --

6 MS. ROSE: They've got one coming up  
7 November 6th and 7th. That I don't think is  
8 particularly focused on this question but one could  
9 imagine having it be more targeted.

10 I would say you apply competition, right?  
11 So you do a pretty broad call for papers and you have  
12 a selection committee that at that time takes the  
13 responses to that.

14 And I would say you probably want fewer  
15 papers rather than more because you want to get the  
16 best and you want the perception to be that this is  
17 someplace where being on that program is a plus.

18 And people will come not just from within  
19 government but -- also not just from academics but  
20 there's a mix of players across those two boundaries.

21 My guess is that you might find an annual  
22 conference tougher just given the fairly long  
23 research process in empirical IO these days, that it  
24 might be hard to get enough really high quality  
25 papers on an annual basis. Maybe not, but something

1       like that might at least put it on the screen.

2               And I want to say there are people that  
3       are doing some of this kind of work, so Craig Peters  
4       who is at the DOJ has a paper in the Journal of Law and  
5       Economics that looks at airline mergers and manages  
6       to bridge this difficulty of research rewards going  
7       to papers that are econometrically more sophisticated  
8       with important policy questions by asking the  
9       question we've got all of these demand models that we  
10      use to simulate merger effects; how well do they do?

11              So let's run those models out. Let's  
12      then simulate the effect of airline mergers that  
13      actually occurred, compare them to what we observed  
14      in terms of price responses and say something both  
15      about how well those models do in terms of predicting  
16      price responses and maybe something about why they  
17      don't match or in what direction do they not match.

18              My sense is that could be a very  
19      interesting line of work to sort of push people  
20      toward that, encourage these kind of retrospectives.  
21      Mark's smiling.

22              MR. RYSMAN: I was thinking of myself as  
23      one of the contributors of this problem, too much  
24      econometrics, and I want to say the FTC makes great  
25      data available.

1           The econometrics will come too. The  
2 research awards will come, that this kind of insider  
3 data on how would be really interesting and it will  
4 attract all the right people to do all the stuff.

5           MS. ROSE: I'm trying to think of how far  
6 you do it, if you couldn't get those data --

7           MR. RYSMAN: I was sitting here thinking  
8 of Michael's idea of just trying to model yourself,  
9 how the FTC's making these decisions.

10           If you could get a data set on every  
11 merger, if it had to be declared to the FTC and just  
12 try to model yourself whether they took action in  
13 trying to create for yourself a merger that would  
14 have been challenged but weren't because of whatever,  
15 because of a change in policy or change in the budget  
16 or something like that.

17           You could do it even without the FTC  
18 posting the inner working of how it made its  
19 decision, but I do agree with Nancy's point that  
20 anything the FTC makes available is going to bring  
21 people to work on this area. It's a great way to  
22 bring interest.

23           MR. SALINGER: Denny, your hand's up and  
24 you probably have something specific to say, but in  
25 addition to what you're going to say you raised

1 earlier the issue of getting expertise from areas  
2 other than the areas where you usually get expertise  
3 which is the legal community and economics community,  
4 so if you could address that question as well as who  
5 should be invited to these conferences.

6 MR. YAO: Let me start with the economics  
7 part. So another possibility, if you can't get the  
8 sort of more established researchers, is to try to  
9 pull in some of the doctoral students because they're  
10 looking for data. They're desperate for new research  
11 agenda.

12 If you brought them in, it would be  
13 pretty low cost because they've got time, they're not  
14 out doing these things. They could come in and they  
15 could play.

16 And having the right advisors, you could  
17 expect to get a pretty good product. And maybe  
18 they'll continue to do this for the next five, six  
19 seven, eight years. So I think that's another  
20 possibility is to work it that way.

21 Also in terms of getting people for a  
22 conference, of course the FTC and the DOJ have a very  
23 large network now of economists in the industrial  
24 organization field so it's easy to sort of get the  
25 word out and have people try to get their

1 colleagues -- to encourage their colleagues to do  
2 this and to give them the assurance -- give the  
3 colleagues the assurance that this would be an  
4 exciting and worthwhile event for these economists  
5 who -- the academics who might not be so clear as to  
6 I'm going to go talk to these government guys in this  
7 conference and is that worth doing?

8           So you do have this nice feature that  
9 there's been a lot of flow of people in and out that  
10 can be used as a network.

11           Switching to the other question about who  
12 else to invite, maybe I'll start by -- with a remark  
13 about what other types of expertise I think might be  
14 useful to have within the agency both for consumer  
15 protection and for antitrust.

16           One of the things I always worried  
17 about -- and I think this is because I've spent so  
18 much time in business schools -- is whether or not  
19 the agencies have enough people who understand  
20 business strategy, for example, or marketing in the  
21 case of these advertising programs.

22           Going back to the business strategy part,  
23 there's a lot of interpretation of what it is that  
24 the companies are doing. They come in and say,  
25 Here's why we're doing the merger. Here are the

1 efficiencies you're going to get. Here are all these  
2 documents. And then you have to sort of figure out  
3 what all this stuff is.

4 Economists actually for the most part can  
5 assess of course the marketing vocations of these but  
6 may not have the vocabulary and the way of thinking  
7 to kind of put themselves into the shoes of the  
8 managers who are making these decisions.

9 And yet, trying to understand how they're  
10 thinking could actually be valuable in interpreting  
11 what it is that these documents mean; when they mean  
12 something, when they don't mean something, and could  
13 help I guess the agencies feel more comfortable with  
14 believing or not believing the various proffered  
15 reasons for a merger or for other non-merger areas,  
16 other actions.

17 So I think it might be useful to do that.  
18 At a minimum I think it would be useful for some of  
19 the attorneys and economists to spend some time  
20 learning about this.

21 You could self learn, because actually  
22 everyone in the FTC is pretty good at this to some  
23 degree because they've had so much direct experience  
24 with it and they've talked to people.

25 But at the same time they don't have

1 maybe the -- what I call the intellectual academic  
2 framework to understand some of what they're being  
3 told, which is also -- I think is very valuable for  
4 understanding what the managers at least think  
5 they're trying to do and maybe to ask better  
6 questions of the managers to figure out whether  
7 they're not really thinking that or thinking  
8 something else.

9 I can switch to the consumer protection  
10 side. I would just say that having marketing experts  
11 would also of course be helpful in understanding the  
12 effect of advertising on consumers.

13 I think that's fairly straightforward and  
14 I guess the FTC has had or maybe continues to have  
15 one or two marketing people that they bring in, but  
16 the real question is is there enough understanding  
17 within the various parts of FTC to -- I guess to draw  
18 on outside experts when you need it, to understand  
19 things that maybe do require some framework to  
20 assist. So that's a question that --

21 MR. HYLTON: Strikes me there's a broader  
22 issue there that Dennis is getting at -- and maybe  
23 I'm going in a direction that he didn't want to go  
24 with this -- but you have the issue of internal  
25 e-mails and hot documents and all those things coming

1 up across the board on antitrust cases.

2 And maybe if it's true that marketing  
3 experts could provide some way of looking at those  
4 things that lawyers and economists couldn't, well  
5 maybe that applies generally to antitrust enforcement  
6 efforts where these internal documents are often  
7 presented as the basis for either enforcing or not  
8 enforcing.

9 MR. YAO: A remark about the -- I  
10 actually think that most economists think that they  
11 understand better how businessmen are making  
12 decisions than they actually do. I won't speak for  
13 the lawyers but I believe the --

14 MR. HYLTON: Lawyers don't claim to  
15 understand it all.

16 MR. YAO: You spend all this time talking  
17 with people. You actually know stuff but -- and the  
18 reason I think that they know less is because we've  
19 had a lot of experiences at our business school  
20 bringing people in who are trained as economists to  
21 do strategy.

22 And there's a pretty big gap between what  
23 they know as economists and what they need to know to  
24 I think understand how managers are setting strategy.  
25 So -- and this goes at all levels. It's not just the

1 youngsters coming in. It also includes many of the  
2 people who are quite established economists. So I'm  
3 not sure that -- My experience is that there is this  
4 gap.

5 MR. SALINGER: So one of the perennial  
6 issues at the Commission and presumably also with the  
7 Department of Justice is how to evaluate claims of  
8 efficiencies for mergers which -- if you look at the  
9 expertise within the Commission which is the  
10 economists and the lawyers, they're not particularly  
11 well -- they don't have the background that lends  
12 itself easily to evaluating the efficiencies.

13 And there's this general presumption that  
14 you should be skeptical of efficiencies and that  
15 they're very hard to evaluate.

16 Should the Commission -- Is there a group  
17 of people that the Commission could consult that  
18 would help it better evaluate claims of efficiencies?

19 MS. ROSE: Could I answer not that  
20 question but answer that in the context of something  
21 that Denny said earlier which is one thing the  
22 Commission could do is look at cases where it saw  
23 efficiencies as a reason for allowing a merger to go  
24 through and then try to understand the extent to  
25 which those actually were realized.

1           Because I think the problem -- it might  
2 well be that people with experience in business would  
3 be better able to evaluate those claims from the  
4 perspective of running companies.

5           But one of the things that we know from  
6 merger analyses on the broad scale is that often  
7 managers are excessively optimistic in what the  
8 benefit of a particular merger is going to be, and  
9 that if we look over large numbers of mergers, many  
10 of them seem not to realize the benefits that people  
11 expected them and that could be -- expected them to  
12 realize.

13           That could be because circumstances  
14 change but my sense is that there's often excessive  
15 optimism or maybe they were just selling it more  
16 optimistically than they actually believed it, but it  
17 might even be that people with business expertise  
18 aren't quite the right way to get at some of those  
19 questions.

20           And one thing that would be  
21 extraordinarily interesting and useful I would think  
22 would be, as we've been more willing in deciding  
23 antitrust cases, merger cases, to put weight on  
24 efficiency and so in some case that's been  
25 dispositive.

1           As Denny said or actually Keith I guess  
2           said that the FTC's got some different standards in  
3           terms of how it approaches cases than the DOJ does.  
4           I'm sorry. That was your point, Keith.

5           MR. HYLTON: Under FTC Section 5.

6           MS. ROSE: Exactly. And it might be --  
7           and particularly in cases where there's been some  
8           kind of consent so there's ongoing involvement, maybe  
9           you could collect the data that would let you assess  
10          did we actually see the kind of efficiencies that we  
11          expected to see.

12          I think that would be something that  
13          could have an enormous impact on the effectiveness of  
14          policy going forward and be quite interesting in  
15          terms of assessing the effectiveness of policies that  
16          currently exist.

17          MR. SALINGER: Did you have more to say  
18          on that, Denny?

19          MR. YAO: I think Dennis Carlton had  
20          talked about this idea of trying to understand what  
21          is it that the FTC thinks will happen and what  
22          actually happened which fits into that.

23          And I think that's really important to  
24          figuring out whether your decision-making is biased  
25          in some way. It's completely clear to me, too, that

1 the economists can hold the business people's feet  
2 on the ground sometimes with respect to the  
3 possibility --

4 MS. ROSE: I think having both  
5 perspectives could be extremely important but I think  
6 validating everybody's perspective with here's what  
7 happened could be educational for us all.

8 MR. HYLTON: The big thing about taking  
9 efficiencies into account is that looking at it from  
10 the perspective of changes in the law over time,  
11 that's a big change since the traditional position  
12 for a long time in the merger area had been  
13 efficiencies would not count in general.

14 And that was the position that the  
15 Supreme Court took in the Brown Shoe opinion and we  
16 had that in the law for a while and then efficiencies  
17 worked their way into the law, into the case law.

18 It's apparently through the merger  
19 guidelines and then courts began to adopt that  
20 standard and say, Okay, we're going to look at the  
21 efficiencies as well. And that's a fairly recent  
22 change.

23 So over the longer term it strikes me  
24 that's an enormous benefit to potential defendants,  
25 that potential defendant that knows that they can

1 bring in this efficiencies evidence, well, they ought  
2 to know ahead of time to hire the best consultants  
3 you can find and you put a lot of effort into trying  
4 to drum up the best evidence you can find.

5 And that suggests that the enforcement  
6 agencies should have a skeptical eye toward  
7 efficiencies evidence because it opens the door  
8 pretty wide for the firms to take advantage of  
9 information they have that the agencies don't have  
10 and also to take advantage of the agencies, too.

11 So I guess the short answer I would give  
12 is that given the asymmetry in information there,  
13 that it makes sense for the agencies to take a  
14 skeptical approach toward the efficiencies evidence  
15 now and in the long term.

16 MS. ROSE: Could I say I think entry is  
17 another area where we've seen this kind of sea change  
18 in terms of the application of the guidelines and the  
19 merger case law.

20 And that might be another example of  
21 something where if we were looking at a merger that  
22 we might have expected to be anti-competitive given  
23 the increase in industry concentration post-merger  
24 but we allowed it because we expected either the  
25 threat of entry or actually try to keep operations

1 down, you know, doing a retrospective of what  
2 happened could be quite illuminating.

3 MR. SALINGER: Movie theaters in  
4 Las Vegas. It was a famous decision.

5 MR. YAO: Also Keith's comments caused me  
6 to wonder about if a merger was blocked I would also  
7 be interested to see what the companies did after  
8 that. Because they're claiming, I need to do this in  
9 order to attain these mergers.

10 Well, they have alternatives and they  
11 always talk about these other alternatives and it  
12 would be nice to know what did they then do.

13 MR. HYLTON: That's interesting. That  
14 would be an interesting study.

15 MR. SALINGER: If we can move over to the  
16 consumer protection side, Keith raised the issue of  
17 trying to understand the deterrence effect of agency  
18 actions.

19 There are a bunch of standard kind of  
20 consumer protection cases that the Commission brings.  
21 There are the weight loss cases. There are the phony  
22 business opportunity cases. There are the debt  
23 consolidation schemes.

24 Take weight loss cases. Should the  
25 Commission have an agenda of trying to measure the

1 effectiveness of that -- of those activities and what  
2 would that look like?

3 MR. YAO: Weight loss is hard. I was  
4 thinking -- I can imagine us weighing a bunch of --  
5 no. I was thinking, you know, one thing along these  
6 lines of deterrence is sometimes the FTC takes an  
7 approach to try to rip out the infrastructure that  
8 supports fraud.

9 So instead of trying to pull up all the  
10 bad weeds, it sort of tries to make the ground less  
11 fertile by getting rid of the companies that provide  
12 information to potential fraudulent actors or that  
13 provide money laundering or something like that.

14 Is it possible, if you rip out one of  
15 these things, to then see what level of bad actors  
16 are popping up in the particular area that would have  
17 been affected by the pulling out of the  
18 infrastructure?

19 That would be kind of interesting. I  
20 don't know if it's possible but that seems a little  
21 bit easier than the weight loss thing. Even though I  
22 think that is -- you know, this program I think is a  
23 really good program but I don't know exactly how  
24 weighing the evidence --

25 MR. SALINGER: Anyone else want to pick

1 up on that? Weight loss is hard. Are there areas  
2 where --

3 MR. YAO: I could add another thing about  
4 that. I thought about this infrastructure thing but  
5 I also wondered about consumer education. So it  
6 could be that consumer education has greater impact  
7 per dollar from the FTC than some of these other  
8 programs. I don't know that.

9 So in thinking about where to put the  
10 resources, it would be useful to see if some of these  
11 programs had bang. How do you figure out whether  
12 consumer education programs have bang? I guess we're  
13 going to have to ask the marketing guys. I don't  
14 know.

15 MS. ROSE: Well, we're -- increasingly  
16 there are experimental -- We're looking at questions  
17 like this and particularly people working at the  
18 intersection of -- with behavioral economics which is  
19 a fairly broad label for a variety of different kinds  
20 of activities, but trying to understand I would say  
21 consumer household decision-making, not necessarily  
22 let's see exclusively through the lens of  
23 neoclassical economic models and sometimes  
24 understanding that or the implication that was  
25 through experiments and I think sometimes that kind

1 of evidence can be extremely illuminating.

2 MR. YAO: So I kind of imagine a field  
3 study that sort of looks as follow: So the FTC does  
4 a lot of consumer education in Florida or something  
5 like that.

6 And before it does a consumer education  
7 it runs some sort of -- one of these false ads  
8 because I think in the past some agencies have  
9 actually run these ads and then people call in and  
10 then when they call in they get some message, Gee,  
11 this is your friendly state regulator -- I don't know  
12 if it's the FTC but -- your friendly state regulator  
13 and you should know better than to answer these ads.

14 And I wonder if you could then use  
15 something like that and actually run an experiment  
16 to see whether or not the number of call-in's or  
17 something has gone up or down. I don't -- That  
18 doesn't go to purchase. That doesn't -- but at least  
19 it's a beginning of an indicator of some effect.

20 If nothing happens, I guess consumer  
21 education wasn't working. But something like that.  
22 You could design a field experiment.

23 MR. HYLTON: I like Nancy's suggestion  
24 and also Dennis's suggestion of the experiment. I  
25 don't teach consumer protection issues at all so this

1 is something that I haven't given time to think  
2 about.

3 But there's one experimental study of  
4 payday loans. I think Carlin is the author -- I  
5 think there's a co-author -- and looked at whether  
6 people were worse off under something like the payday  
7 loan or, you know, high interest rate loans.

8 So you could do studies like that to see  
9 whether people are actually worse off under some  
10 controversial marketing program or effort that  
11 companies are using and if sometimes you might be  
12 surprised.

13 Sometimes you might find out there are  
14 some people worse off but there's a bigger group of  
15 people who are actually better off after all.

16 And then that raises questions about  
17 whether the FTC -- I don't know -- should the FTC  
18 clamp down on some marketing activity that hurts a  
19 small segment but benefits a larger segment? I don't  
20 know.

21 MR. SALINGER: Well, it's certainly an  
22 issue that the agency wrestles with. The question is  
23 how -- is it feasible to go about doing those  
24 studies.

25 MS. ROSE: They're increasingly being

1 used in development economics to advise foreign  
2 governments about how to design a variety of  
3 interventions and programs, and it seems a shame that  
4 we've as a profession exported that to other  
5 countries but don't take advantage of it perhaps as  
6 much as we could here.

7 MR. SALINGER: Well, any other thoughts  
8 on consumer protection before we circle back to the  
9 unilateral conduct?

10 MS. ROSE: I just want to say I think  
11 that in terms of the academic economists, that the  
12 consumer protection activities of the FTC really fly  
13 under the radar screen.

14 Academic researchers in economics  
15 understand about antitrust policy. They know about  
16 mergers. They may be a little fuzzy on what's the  
17 FTC and what's the DOJ domain in those areas but they  
18 have a pretty good understanding -- IO economists  
19 have a pretty good understanding.

20 I think consumer protection is one where  
21 there's been very little information that's  
22 percolated out to the academic community and that  
23 might suggest the greatest potential gains from doing  
24 a little more outreach from perhaps making some of  
25 the information about the agency's activities in

1 those areas more public or more open to researchers.

2 I like Denny's suggestion about trying to  
3 get students while they're looking for research  
4 topics for dissertation topics because often they're  
5 more open to new ideas at that point, and if you can  
6 connect them with the agency you do potentially have  
7 them on a four-, five-year run of research as they  
8 run through their initial investment.

9 And there might be some real gains to  
10 engaging people on the consumer protection side  
11 there.

12 MR. SALINGER: Let's turn to the  
13 unilateral conduct issue, back to antitrust. Keith,  
14 you raised the issue of actually trying to measure  
15 the disincentive effect that the laws provide with  
16 respect to unilateral conduct, as you know, because  
17 we wrote an article about it --

18 MR. HYLTON: That's right, we did.

19 MR. SALINGER: There are also concerns  
20 about the effects of the antitrust provisions with  
21 respect to unilateral conduct on pro-competitive  
22 activity.

23 Is there a feasible research program that  
24 would help the Commission understand both the extent  
25 to which the antitrust was deterring anticompetitive

1 activity and whether there was any chilling of  
2 pro-competitive activity?

3 MR. HYLTON: That's a good question and I  
4 don't think I have a good answer to that right away.  
5 I suggested that you could take, for example,  
6 whatever variable you're using to measure enforcement  
7 activity or the expected penalty that firms face, and  
8 you could see how that impacts some proxy for  
9 consumer welfare.

10 If it's, for example, price cost margin  
11 data, if it's -- you know, if the data are good  
12 enough or innovation measures -- and I don't know  
13 exactly where you would get those from, whether it's  
14 patent filings or whether it's -- there are survey  
15 data, some survey data on innovation.

16 So that might be one way of getting at  
17 the over-deterrence effect, the sort of false  
18 convictions problem, does it deter innovation, though  
19 it's doubtful -- I'd be skeptical that the data would  
20 be able to pick that up too.

21 But maybe you could find some variables  
22 out there that might pick up this deterrent effect or  
23 maybe it's right there in the price -- Maybe you see  
24 prices go up as a result of enforcement -- For  
25 example, one of the complaints about predatory

1 pricing actions all along has been that the firms are  
2 afraid of being punished for cutting their prices.  
3 Well, they won't cut their prices. They'll keep  
4 their prices high. So in that case you'd expect the  
5 reverse effect.

6           If you could somehow isolate the effect  
7 of the expected penalty for price cuts, which is a  
8 function of the likelihood that the court can't  
9 distinguish good price cuts from predatory price  
10 cuts, maybe the effect of that is to cause prices in  
11 the affected market to be higher. So it's a tough  
12 question.

13           I don't know -- and I'm inclined at the  
14 start to fall back on your initial question which is  
15 how do you get people to research this and how do you  
16 find data on this, because it seems to me a  
17 worthwhile question to look into if someone could --  
18 I mean, obviously a worthwhile question to look into  
19 if you could get the data and get people to focus on  
20 it.

21           That's my effort to sort of grope toward  
22 an answer there and maybe I'll want to come back to  
23 this after I think about it for a few seconds.

24           MR. SALINGER: Okay. Denny, in your  
25 writings, in your speeches, when you were a

1 commissioner you were particularly interested in the  
2 issue of the dynamic effects of the antitrust laws,  
3 which of course as hard as it is to get at the short  
4 run price effects, the dynamic effects are even  
5 harder.

6 Is there a way that the Commission can  
7 systematically evaluate whether its effect on dynamic  
8 efficiency --

9 MR. YAO: I'm afraid I don't have too  
10 much to offer, but, you know, just because the  
11 problem is really hard doesn't mean that we shouldn't  
12 go after it because we know it's really important.

13 And we have to understand things and then  
14 eventually maybe we'll get to the point where we can  
15 start to measure them. Maybe there's some  
16 impossibility lurking in the background. I'm not  
17 sure but I think we should -- we can certainly try.

18 I did have a thought though on Keith's  
19 problem. In some other countries, I think, they  
20 sometimes have statutes that might outlaw various  
21 kinds of business practices.

22 MR. HYLTON: They do.

23 MR. YAO: Right?

24 MR. HYLTON: They do.

25 MR. YAO: So because there's going to be

1 variation there, and it could be that it actually --  
2 you could have a before and after. So you could have  
3 a natural experiment and while it's not the United  
4 States, maybe there's a place to go.

5 MR. HYLTON: For what it's worth --

6 MR. YAO: Is that what you guys did?

7 MR. HYLTON: No, we didn't do that but  
8 for what it's worth I have a web site where we're  
9 trying to sort of codify these changes or these  
10 provisions in the antitrust laws around the world.

11 And so I've got a portion of the web site  
12 that looks at the predatory pricing statutes around  
13 the world, I guess maybe 60 or 70 of them, and they  
14 have different provisions in them and we try to get  
15 the start dates for those.

16 So after this is over I'll give you the  
17 web site. Maybe you should put it into the record  
18 here. Antitrustworldwiki.com. I'm still in the  
19 process of building it up. You can check out the  
20 data there now.

21 MR. SALINGER: It does raise the general  
22 issue of whether if the Commission wants to have a  
23 systematic effort for evaluating what it does,  
24 whether it should just be research on what it does or  
25 whether it should be a collaborative effort with the

1 Justice Department, the European Commission and the  
2 antitrust agencies throughout the world to have some  
3 sort of comparative effort.

4 I suppose that would find -- would  
5 require finding antitrust authorities throughout the  
6 world as enthusiastic for this exercise as Chairman  
7 Kovacic.

8 Moving a little bit orthogonally but  
9 nonetheless important, Nancy, you have a lot of  
10 experience with the National Bureau of Economic  
11 Research.

12 Are there other areas of economics where  
13 there's been an interaction between the academic  
14 community and government community that could serve  
15 as a model to the FTC for how to engage the academic  
16 community in problems of interest to us?

17 MS. ROSE: I think there are. One has to  
18 be a little cautious in this area because so many  
19 industrial organization economists are involved in  
20 antitrust litigation as experts, that it makes it  
21 more complicated perhaps than some of these other  
22 areas.

23 So for instance in public economics which  
24 is concerned with government fiscal and taxation  
25 policy, there's a pretty robust academic policy

1 interaction sometimes housed within a government  
2 agency or department.

3           So for instance the Congressional Budget  
4 Office has an advisory committee that engages leading  
5 academic experts in advising them and evaluating the  
6 programs and things like that.

7           Sometimes it's housed for instance in the  
8 National Bureau of Economic Research which runs an  
9 annual tax policy and economy conference that  
10 commissions academic research that's extremely  
11 policy-relevant but doesn't make a policy  
12 recommendation as is NBER policy.

13           That's held in Washington and attracts a  
14 tremendous number of people from the government that  
15 come to that conference. So that's a way of jump-  
16 starting some of the research that's very  
17 policy-relevant and giving it a home.

18           I think we could think about doing  
19 something more along those lines. I've thought  
20 occasionally about whether the National Bureau of  
21 Economic Research I/O program might -- maybe should do  
22 something like that.

23           I think the challenge is you don't want a  
24 conference where people are relitigating cases that  
25 they testified in, and it sounds kind of trite but I

1 think that is the -- or you don't want a conference  
2 audience where the paper might not be relitigating  
3 that case but the audience includes a fair number of  
4 people who testified on either side and then they  
5 relitigate that case. So I think there are  
6 opportunities.

7           And again, too, I'd recommend perhaps an  
8 FTC conference. There's no reason why it couldn't be  
9 joined to -- why we couldn't think of some joint  
10 activities between say the NBER and the FTC or the  
11 DOJ, and I would broaden it.

12           I think it's fabulous that the FTC is  
13 asking these questions but these questions are not  
14 fundamentally only FTC questions. I think, though,  
15 certainly you want to pull in the DOJ into this as  
16 well.

17           But I think there are opportunities and I  
18 think in particular if we could find ways to get some  
19 researchers into the -- We do get some researchers  
20 into the agency in positions like you had, Mike, or  
21 Dennis has had, but maybe without that level of  
22 commitment needed.

23           So maybe it's a summer to come down and  
24 spend some time and know that at the end of the  
25 summer you'll be able to walk away with not just some

1 knowledge but maybe some data that you could work on.

2           And again, I understand you can't take  
3 the data that's been confidentially given to the  
4 agency but finding a way to make use of that might be  
5 very productive, and some agencies with extreme  
6 confidentiality provisions written into the law that  
7 gives them the data have managed to find a way to  
8 bring academics in.

9           So I think of census researchers who 30  
10 years ago outside academics couldn't get any new  
11 census data. Now that's become routine almost, very  
12 widespread. And that's increased the research that's  
13 relevant to, say, the census department.

14           The BLS has a similar program and maybe  
15 we could figure out some way to jump-start that at  
16 one of the antitrust enforcement agencies.

17           MR. SALINGER: That would require -- With  
18 the census you're able to have people work or at  
19 least work with the data or report in ways that the  
20 identities of the suppliers can't be disentangled.  
21 If you're looking at specific cases, that's probably  
22 not possible to do.

23           If you're looking at having people do  
24 more cross-sectional stuff, it's perhaps not  
25 unsurmountable, although there's the experience in a

1 lot of the business program that you'd have to  
2 contend with but it would require the academic  
3 community to be interested in doing cross-sectional  
4 work, which is not that popular.

5 We are nearing the end of our time, so  
6 I'll give each panelist the opportunity to say  
7 whatever closing words they would like to say.

8 MR. HYLTON: Maybe one word about the  
9 role of lawyers in measuring its -- It hasn't really  
10 come up but when you try to figure out what variables  
11 you want to look into and how to code those  
12 variables, if you need to code them, lawyers might  
13 turn out to be pretty handy, too, because you might  
14 need to figure out what those provisions in the law  
15 say, what are the trigger points, and sometimes you  
16 need people who know something about the law.

17 So don't leave out the role that lawyers  
18 might play, lawyers could play, in this whole effort  
19 to measure or empirically assess the effects of the  
20 antitrust laws.

21 MR. SALINGER: Nancy.

22 MS. ROSE: I'd just like to echo what I  
23 said a few moments ago. I think that it's a terrific  
24 opportunity when thinking about this series of panels  
25 and projects to try and reengage the academic

1 community in a very significant and real way.

2 And I think that may well be the key to  
3 working with people inside the agency who have the  
4 knowledge of how the agencies reach decisions and  
5 make its policy, combined with researchers outside to  
6 increase the visibility of some of these important  
7 policy questions, might well provide us with a way to  
8 jump-start research on some of these significant  
9 questions.

10 Again, I'd like to direct those not to a  
11 grand question of what's the effect of antitrust  
12 policy. I'd probably go a step further than Keith  
13 did in his opening remarks and say that's not like  
14 trying to understand what the effect of the death  
15 penalty is; it's like trying to understand what the  
16 effect of a criminal justice system is and just --  
17 that's -- we've never experienced modern society  
18 without a criminal justice system.

19 We don't experience modern economies  
20 without competition policy. But I think we could  
21 answer important questions about what the effects are  
22 given where we're currently drawing the line, how  
23 moving that line seems to affect certainly short-run  
24 responses like, say, price or various competitive  
25 responses, but maybe even allow us to start to get at

1 some of these longer-term dynamic questions which are  
2 probably ultimately much more important in terms of  
3 social welfare.

4 MR. SALINGER: Commissioner, you get the  
5 last word.

6 MR. YAO: I wanted to start out by just  
7 saying that one of the things that I've always  
8 admired about the FTC is the commitment to learning  
9 about problems, how to do things, studying, better  
10 ways of conducting their policy, and that's something  
11 that is -- it's an ongoing commitment and it's really  
12 a good thing.

13 For me it underscores the sort of notion  
14 of we'd like to be able to measure things if we  
15 could, that would be very helpful for guiding policy,  
16 but we also -- if we can't quite get there, getting  
17 better understanding is crucial. And getting better  
18 understanding requires these kinds of efforts such as  
19 the one we're engaging in I think.

20 It also requires reaching out to various  
21 other groups, even some non-traditional groups, which  
22 I would suggest would be a good thing to do.

23 MR. SALINGER: Great. Well, thank you  
24 very much to the panelists. The Commission asked us  
25 to address very tough questions which is why we

1       needed a panel of this quality to even make a dent in  
2       getting at the answers.

3                 And thank you on behalf of the University  
4       to the Commission for giving us the opportunity to  
5       participate in this event for which we have a great  
6       deal of admiration.

7                 (Whereupon at 2:42 p.m. the roundtable  
8       adjourned.)

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## 1 C E R T I F I C A T I O N O F R E P O R T E R

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3 I HEREBY CERTIFY that the transcript contained  
4 herein is a full and accurate transcript of the notes  
5 taken by me for the Federal Trade Commission at  
6 Boston University School of Management on Tuesday,  
7 October 14, 2008 to the best of my knowledge and  
8 belief.

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10 DATED: 10/20/08

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15 CAROL DIFAZIO, RPR

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15 LINDA J. MODANO, CSR, CM

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