

1 UNITED STATES OF AMERICA

2 FEDERAL TRADE COMMISSION

3

4

5

6 THE FEDERAL TRADE COMMISSION AT 100:

7 INTO OUR SECOND CENTURY

8

9

10

11 Friday, October 24, 2008

12 9:00 a.m. to 5:00 p.m.

13

14

15

16 Fordham University School of Law

17 New York, New York

18

19

20

21

22 Reported and transcribed by: Andrea Tournour

23

24

25

TABLE OF CONTENTS

1

2 Welcoming Remarks

3 Andreas P. Reindl, Adjunct Professor.....3

4 Maureen K. Ohlhausen, Director.....3

5

6 The FTC's Competition Mission:

7 Resource Deployment and Effectiveness

8 Leonard L. Gordon, Moderator.....12

9

10 The FTC's International Competition Mission

11 Cynthia L. Lagdameo, Moderator.....91

12

13

14 The FTC's Consumer Protection Mission:

15 Resource Deployment and Effectiveness

16 Lois C. Greisman, Moderator.....141

17

18 The Agency's External Relationships

19 Maureen K. Ohlhausen, Moderator.....222

20

21

22

23

24

25

## 1 P R O C E E D I N G S

## 2 INTRODUCTION AND WELCOMING REMARKS

3 MR. REINDL: Good morning, my name  
4 is Andreas Reindl. I would like to welcome  
5 all of you on behalf of the Fordham  
6 Competition Law Institute. As you know, the  
7 Fordham Competition Law Institute has for  
8 many years organized the International  
9 Antitrust conference and a few years ago, we  
10 expanded our activities and offered more  
11 programs in the summer and fall for agencies  
12 from outside of the United States and we hope  
13 that by doing this we continue our  
14 contribution to better antitrust enforcement  
15 here and around the world. Given our efforts  
16 to expand to new lines of commerce, I'm very  
17 pleased that we are able to host today's  
18 lecture here at Fordham Law School and I  
19 wanted to thank Maureen Ohlhausen and her  
20 colleagues at the Trade Commission for the  
21 opportunity to organize our trip here today.

22 With that, I will turn it over to  
23 Maureen and she's going to introduce today's  
24 programs.

25 MS. OHLHAUSEN: Thank you, Andreas.

1 I'm Maureen Ohlhausen. I'm Director of  
2 Policy Planning at the Federal Trade  
3 Commission. I would like to thank Fordham  
4 International Law Institute and Andreas and  
5 Alice Wong for co-hosting with us today and  
6 their great help in getting this set up.

7 This is FTC at 100 and into our  
8 second century. And in your materials, there  
9 is a speech by Bill Kovacic that kind of  
10 explains his vision for this whole project.  
11 You might say to yourself, aren't you a bit  
12 premature, the FTC doesn't turn 100 until  
13 2014, but the idea is that in the build up to  
14 that momentous occasion, Bill Kovacic thought  
15 we should take a hard look at the agency, do  
16 a self-assessment and figure out how we can  
17 improve, what we should be doing better, what  
18 we can learn from practitioners and other  
19 agencies in the US and around the world about  
20 doing competition and consumer protection  
21 law. So, his vision is that this would be  
22 something that is much broader than a  
23 traditional transition report, but more like  
24 an in-depth self-assessment, so that at our  
25 100th anniversary, our agency will be

1 prepared to go forward into that new century  
2 in the best shape that it can be.

3           So, he posed, basically, six  
4 questions as part of this assessment. The  
5 first one being, when we ask how well the FTC  
6 is doing, we first need to articulate what  
7 the agency should be doing. Are we doing  
8 something really well that really is not  
9 where our energy is directed. An easy way to  
10 think of this, if the FTC were given a report  
11 card, what should the subjects be; what  
12 should we be thinking about working on and  
13 pursuing?

14           Next question is once we identify  
15 those subjects, how do you determine  
16 standards for measuring performance in those  
17 areas? Continuing with the report card  
18 analogy, how do you determine the grades?  
19 What resources, personnel, facilities,  
20 equipment, technology, will the FTC need to  
21 carry out its mission in the future?  
22 Obviously, we are in a time of great  
23 technological change, but on the other hand,  
24 I think we all agree that really good  
25 personnel at an agency is really crucial to

1 its success. So, what kind of mix do we need  
2 of those resources? How should the agency  
3 decide the best way to deploy those  
4 resources? You don't want to be reactive to  
5 whatever is in the news, whatever is coming  
6 in, you, sort of, run and take care of that.  
7 How do you get ahead of the curve through  
8 strategic planning or using research to  
9 figure out what the agency should be  
10 pursuing? Then, how to strengthen the  
11 process for implementing the FTC program.  
12 And, finally, the sixth question, how to  
13 better fulfill our duties by improving links  
14 with governments within the Federal  
15 Government, with the states, internationally,  
16 also with industries, academia, consumer  
17 groups and other interested parties.

18 So, we have been asking these  
19 questions for awhile. We started with our  
20 first workshop in DC in July, followed by  
21 international consultations, a workshop in  
22 Chicago, one in Boston last week, and this is  
23 the final one today in New York. So, what  
24 have we heard already? We have heard from a  
25 lot of great lights of the antitrust and

1 consumer production world, a lot of state  
2 enforcers, academics, other agencies around  
3 the world. So, what have we heard already?  
4 We have heard about the importance of having  
5 a robust but realistic understanding of the  
6 agency's mission. And a really good example  
7 of that is the discussion that occurred  
8 between Tim Muris and Jodie Bernstein at our  
9 workshop in July. They talked about the  
10 problems of having two robust divisions where  
11 we really thought we could do anything and  
12 the cost that imposed on the agency as a  
13 political matter and eventually as a resource  
14 and structural matter as resources were cut.  
15 But, also, on other side, before that great  
16 vision of we can do anything, the FTC at the  
17 previous time, had a very limited vision.  
18 The frosted cocktail glass rule, kind of the  
19 idea we were very caught up in minutia. So  
20 how do you get the right balance from  
21 thinking that you can do everything and  
22 thinking you should have a very narrow  
23 vision? Then we also heard about the value  
24 of using multiple tools. One of the things  
25 that brought it out is Steve Calkins. He

1 talked about how, for example, in our recent  
2 real estate competition efforts, how we used  
3 a very, very wide array of tools from the  
4 FTC; we have enforcement, we have advocacy,  
5 we have research, we have consumer ed, for  
6 example, we had a website that won an award  
7 for being a government communicator. So, he  
8 pointed to that as an example of really  
9 bringing the unique sets of tools that the  
10 FTC has, bringing it to bear on a particular  
11 problem. Developing a research agenda, how  
12 important that is, and also being able to  
13 leverage our resources by letting academia  
14 know about what we are interested in. So,  
15 for example, Michael Salinger brought that  
16 out as a really important point. But one of  
17 the things that we heard was sort of  
18 repeated, was the need to have an enforcement  
19 capability underlying all these other  
20 activities. Lee Peeler, at the July  
21 workshop, brought up the idea of street cred,  
22 right? If we say this and talk about that,  
23 we encourage people to do these good things,  
24 if there is not an underlying enforcement  
25 ability there, we are not going to be as



1 effective as we could be. Paul Luehr, former  
2 FTC staffer, who we talked to in Chicago now  
3 with a private firm also brought that out,  
4 the importance of saying when you're talking  
5 to people, counseling clients and you're  
6 saying, you really should do this, it would  
7 be a good idea, and they say, well, what is  
8 the risk if I don't, if you don't have an  
9 answer for that, we are not going to be as  
10 effective as we could be. And the importance  
11 of planning, that was one of the other  
12 things. Debra Valentine, in our consultation  
13 in London, mentioned how important it is to  
14 have strategies over time that endure despite  
15 leadership changes. We are in a change  
16 period right now; regardless of the outcome  
17 of the election, there is going to be a new  
18 administration. So, how do you develop plans  
19 that endure over time despite changes in  
20 leadership? Peter Freeman from the  
21 Competition Commission in the United Kingdom  
22 had a great quote. He said, time spent on  
23 reconnaissance is seldom wasted. And then he  
24 brought up another quote that said, but all  
25 plans collapse upon first contact with the

1 enemy. So, the idea of this balancing this  
2 need for planning, thinking ahead, but also  
3 responsiveness that the agency needs to have.

4           So, we have four panels today. Two  
5 of them focus on our core competition and  
6 consumer protection missions. And I assume  
7 all these things will recur throughout these  
8 discussions. And we also have an  
9 international panel today. And one of things  
10 we are trying to do in this exercise is to  
11 see not just how we are perceived  
12 internationally, our work with other  
13 organizations, how we are seen, but also how  
14 do our counterparts do things. How do  
15 agencies or organizations with a similar  
16 mission carry it out and what we can learn  
17 from that? That is a theme that will occur  
18 in our final panel on external relations. So,  
19 how is FTC doing in reaching constituencies,  
20 letting people know what we are about, what  
21 we are up to, what our capabilities and our  
22 resources are, but also how organizations  
23 that also do consumer protection,  
24 competition, how do they carry out their  
25 functions and what we can learn from them?

1                    Thank you all for joining us today  
2                    and I think we'll start our first panel on  
3                    competition.

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 THE FTC'S COMPETITION MISSION:

2 RESOURCE DEPLOYMENT AND EFFECTIVENESS

3 MR. GORDON: Good morning. I'm Len  
4 Gordon. I'm the Director of FTC's Northeast  
5 Regional Office here in New York and I am  
6 thrilled to take part in this exercise.

7 It is a pretty unique thing for a  
8 public entity to engage in this amount of  
9 self evaluation and planning and I think it  
10 is really worth while. Our panel today is a  
11 wonderful cross-section of some of the  
12 constituencies for the agency. Their  
13 biographies are in the packet, but I will try  
14 to hit the highlights. Joe Angland is a  
15 leading antitrust lawyer here in the City, he  
16 is a former past president of the ABA's  
17 antitrust section and has a broad and wide  
18 practice in counseling and litigating  
19 important antitrust issues.

20 Molly Boast is a partner at  
21 Debevoise and a former director of the Bureau  
22 of Competition.

23 Harry First is a very noted  
24 antitrust scholar and also the former head of  
25 the New York Attorney General's Antitrust

1 Division.

2 David Scheffman is a well-known  
3 industrial organization economist; a fellow  
4 that served several terms at the agency  
5 including two stints as the Director of the  
6 Bureau of Economics.

7 Our first topic today is the  
8 optimal use of the Agency's enforcement,  
9 research, advocacy and educational tools. As  
10 we had our planning call to try and figure  
11 out what that optimal use was, Professor  
12 First asked a question, how did we get here?  
13 And it is a fair question. Why is the FTC  
14 here, and, as we approach our second century,  
15 what was it in the first century that caused  
16 Congress to create the Agency and is it  
17 worthwhile to take a look at that to try and  
18 figure out what the course should be for our  
19 second century? And being a good student, we  
20 agree with the professor, so, we'll turn it  
21 over to him.

22 MR. FIRST: Well, thanks, Len, I  
23 really don't have anything more to say than  
24 that since I said it all in the call. But,  
25 what really triggered it in getting the call

1 from Len saying the FTC is 100, and I said,  
2 God, my math's always bad, let's see, 1914 to  
3 100, actually, the Commission started work in  
4 1915, if you want to be exact, so, as Bill  
5 Kovacic is a little ahead of the curve, but  
6 then, he is always a little ahead of the  
7 curve, which is good. What I also thought is  
8 that the title shows great optimism because  
9 it does assume the FTC will be here at 100.  
10 And that actually isn't -- I mean, you could  
11 say in a political calculus, that's probably  
12 going to be true, but not necessarily true.  
13 And there had been efforts over time to  
14 change that and times even when there had  
15 been proposals to do away with the FTC's  
16 antitrust jurisdiction. Originally, when the  
17 FTC was started, when there was debate over  
18 the Federal Trade Commission Act, there was  
19 some sentiment to do away with the Justice  
20 Department. You people would like to hear  
21 that, right, because this is a much better  
22 idea. But, that's another possible way. You  
23 could align, you could move around the  
24 enforcement resources in many different ways.  
25 And another way, could be to end the

1 Antitrust Division, move cartel enforcement  
2 to the criminal section because they're not  
3 doing much more than that, although, they do  
4 merger review. But, then put all the merger  
5 review in one agency. Wouldn't that make  
6 much more sense? Put everything in the FTC.  
7 You might want to think about that as  
8 something for the FTC as 100. But, the  
9 chances are it is not going to change because  
10 things change slowly in Congress. It is a way  
11 of thinking about what the Agency's  
12 comparative advantage is in the enforcement  
13 structure, because, as everyone knows here,  
14 the US has a relatively unique enforcement  
15 structure for antitrust; not just two  
16 government enforcers, we have got fifty-five  
17 state government enforcers, and it is a very  
18 complicated world. And the FTC has certain  
19 comparative advantages. And I think Bill's  
20 statement tries to underline that about what  
21 the role should be. The original role, the  
22 Justice Department was going to be the agency  
23 of repression. There is a quote like that,  
24 they would be enforcers in court, and the FTC  
25 would be the policemen on the beat getting

1 things beforehand, monopoly in the embryo was  
2 one quote in the language. So, as the  
3 Commission is thinking about the role  
4 generally, maybe it is useful now, it used to  
5 be bad to think about administrative  
6 agencies, we thought we could go without any  
7 government at all. But, maybe that's not the  
8 case. So, maybe thinking more of the agency  
9 as an administrative agency. One legal  
10 benefit of that is maybe things were done  
11 differently as this planning process may be.  
12 Maybe the Agency would, as they say, get some  
13 respect in court where courts don't defer to  
14 the Commission's decisions at all at this  
15 point. Maybe that could change if the  
16 Agency, sort of, embraced its administrative  
17 role more.

18 MR. GORDON: We will get back to  
19 the administrative process in a bit. One of  
20 the topics they asked us to cover today is  
21 the role of strategic planning, especially in  
22 the competition mission. Serving in the  
23 region, I have had the benefit of watching  
24 both the competition and the consumer  
25 protection mission, and there is certainly



1 more strategic planning historically on the  
2 consumer protection side; I think that  
3 reflects on the continuity in upper  
4 management and, perhaps, a lack of political  
5 differences about the role over consumer  
6 protection. But, first to Molly and then to  
7 David, I would like you to touch upon the  
8 types of strategic planning that was done  
9 while you were at the bureaus and then, more  
10 importantly, if you go back, if you were to  
11 go back, what would you do differently  
12 regarding strategic planning going forward.  
13 Molly?

14 MS. BOAST: Thanks, Len. Of course  
15 this question comes to me because the short  
16 answer to the strategic planning done by the  
17 Bureau of Competition during my tenure: there  
18 was none. I distinctly remember a meeting  
19 with Jodie Bernstein where she advocated her  
20 views that strategic planning had all kinds  
21 of benefits. It wasn't that difficult. She  
22 really believed that for the Commission as a  
23 whole, and for the bureau, it was the right  
24 thing. And we just looked at her and said  
25 with what resources? Now, that was an

1 extraordinary time because it was a peak of  
2 the merger wave where we were totally  
3 drowning in work and our ability to leverage,  
4 even conduct cases, was challenged. But, the  
5 way we thought about it, and I will answer  
6 the question of what I would do differently,  
7 the chairman at the time, had the view that  
8 every antitrust law should be enforced. So,  
9 his case generation mission was focused on  
10 making sure that none of the statutes were  
11 dormant. And we looked long and hard for  
12 examples to find a Robinson-Patman case, but  
13 he firmly believed that was part of what he  
14 should be doing. It contrasted fairly  
15 obviously with what was going on at Justice  
16 where very important cases where major  
17 sectors of the economy were being pursued;  
18 the Microsoft case, Visa Mastercard case,  
19 American Airlines case. But, at the same  
20 time, when opportunity came along, I think we  
21 did use them in a very strategic way, even  
22 though they might have not been planned for.  
23 The best example of that is the Hatch-Waxman  
24 cases. After considerable internal turmoil  
25 and debate and serious interest in getting it

1 right, we persuaded the Commission that we  
2 did not know where the cases would come out  
3 over the long haul, but the costs of doing  
4 nothing were sufficiently great that we had  
5 to act. I would do more of exactly that kind  
6 of thinking. I think it is challenging, but  
7 not impossible, to identify the sectors of  
8 the economy within the industries that the  
9 FTC is known for where it is known for its  
10 expertise to think about. And then we can  
11 talk in more detail as we move along, how you  
12 would get that information. But, think about  
13 the kinds of cases where it is unknown. It  
14 is not, you know, the enforcer role in the  
15 DOJ sense, as Professor First was  
16 identifying, but we are not sure. So, we  
17 ought to take a hard look at this. We ought  
18 to put together a list of those areas. We  
19 ought to then start to think about what the  
20 evidence will look like to prove it and then  
21 make a judgment call about taking the  
22 resources, using it and bearing the risk of  
23 being wrong. Instead of always having to be  
24 sure we are right. I think the big challenge  
25 in the strategic planning sense of that kind

1 of approach is, by definition, hearing me  
2 describe the way I think about it, you would  
3 consume considerable resources, so, you would  
4 have to balance that against everything else  
5 you thought would be appropriate.

6 MR. GORDON: Thank you. David?

7 MR. SCHEFFMAN: To start with  
8 strategic planning, I will say that I teach  
9 at Vanderbilt Business School and when I  
10 talk, it is not big on strategic planning,  
11 but it is very important and there are  
12 different approaches. I would say there is  
13 some basic lessons, which is, don't be driven  
14 by the inbox. It is very easy in any  
15 organization, particularly with the FTC, to  
16 do what just comes in the door. The FTC  
17 actually is a very unusual government agency.  
18 It has tremendous latitude in what it can  
19 choose to use its resources for. Even on the  
20 competition side, a lot of its resources go  
21 to merger enforcement, but it is quite  
22 elastic, as we see, because, as Molly was  
23 saying, there were a lot more mergers during  
24 the Pitofsky Commission than, say, in the  
25 last few years, but the staff hasn't changed.

1 It's gone down a little bit, I think. So,  
2 there is tremendous elasticity of how you use  
3 the resources. And even when it was really  
4 busy in the Pitofsky Commission, he had a lot  
5 of time and resources to do a lot of  
6 different things. So, you have to plan -- so  
7 the basics of strategic planning is don't be  
8 driven by the inbox. I go out of my way to  
9 talk to new appointees that come into the  
10 Commission and say the most important thing  
11 for you to do is to decide what you're going  
12 to accomplish once you're here because it is  
13 such an interesting job that you can just go  
14 with the flow and just work on the  
15 interesting stuff, and that would be  
16 interesting for you but you will never  
17 accomplish anything. I learned that from my  
18 first stint with the FTC, which, as I grew  
19 from staff to head of the Bureau of  
20 Economics, I was pretty much driven by the  
21 inbox. And then I worked with the certainly  
22 the most effective, strategic chairman in a  
23 formal sense at the Commission. It is  
24 interesting, we had two of the most  
25 successful commissions in history, the

1 Pitofsky Commission and Muris Commission;  
2 both highly effective and very different in  
3 approach. Tim Muris knew what we wanted to  
4 do. He communicated to get buy-ins from the  
5 Commission and he had to get buy-in's from  
6 his staff and he listened to them and  
7 somewhat modified, as Lois will recall, what  
8 he did occasionally. But, he had a very  
9 definite idea of what he wanted to do for  
10 each commission; work on enforcement, on  
11 research and other sorts of things, they got  
12 communicated to his managers, they were held  
13 accountable for it. He knew what he wanted  
14 to do and when it was supposed to be done.  
15 That's the other important thing about  
16 planning; have actual goals and targets that  
17 you can tell whether you have got there or  
18 not and you can monitor. So, it is very  
19 important in the commission. And the other  
20 thing interesting about the commission is  
21 that things we are talking about here are  
22 largely going to be driven by who the new  
23 appointees are; what agenda do they come with  
24 and how effective are they in achieving it.  
25 And I think the agenda will change, no doubt,

1 somewhat, in the next administration. But, I  
2 think we can certainly learn a lot from the  
3 Pitofsky and Muris commissions about having a  
4 focused disciplined approach about deciding  
5 what you want to do and actually achieving it  
6 no matter what the resource constraints are.

7 MR. GORDON: Joe, if the new  
8 chairman would call you and elicit your sage  
9 advice on how the agency could optimize its  
10 resources in enforcement, research, advocacy,  
11 education, what would you tell them?

12 MR. ANGLAND: Well, I would  
13 probably back the question up and pick up  
14 what Harry was talking about to begin with.  
15 Harry's observations, although they were  
16 radical, it is probably right. Once every  
17 100 years or so somebody should at least  
18 think about it. So, it is sort of a Rube  
19 Goldberg version of antitrust enforcement  
20 that you have in the United States. It is  
21 even more bizarre because in addition to  
22 having two Federal agencies and fifty plus  
23 state antitrust enforcers, we have fifty  
24 plus, or almost fifty, separate state unfair  
25 competition laws. And in many industries, we

1 have a regulatory commission, that is  
2 supposed to consider competition in making  
3 its judgments and then we have the overlay of  
4 treble damage actions. I recall several  
5 years ago before he assumed his present  
6 position, Bill Kovacic talked about how  
7 difficult it was when he was out  
8 proselytizing the world about antitrust  
9 enforcement, how difficult it was to explain  
10 what the rationality was behind the rather  
11 bizarre system we have here. It's difficult  
12 to come up with an answer. Frankly, no one  
13 would invent the system we have now if we  
14 were starting with a clean slate. There is  
15 really no, as far as I can see, code or  
16 rationale -- and I would address in a moment  
17 the one that's most mentioned -- for having  
18 this type of overlapping jurisdiction in  
19 antitrust. The closest I have heard to an  
20 argument that it makes sense to have  
21 competing enforcers is the value of  
22 competition. Different groups come up with  
23 different ideas. So, having the DOJ and FTC  
24 both working on the very same matters is a  
25 good idea. I think there are two problems



1 with that. First, the geographic market has  
2 been defined too narrowly. We have got 110  
3 enforcement agencies around the world, so, we  
4 are talking about the difference between 110  
5 and 109, not the difference between two and  
6 one. Even if you limited it to sophisticated  
7 enforcement agencies, you still have many  
8 more than either agency in the US believes it  
9 is necessary to create competition in the  
10 marketplace. But, secondly, the fundamental  
11 fact that distinguishes this situation from  
12 marketplace competition is the Darwinian  
13 process is not at work. The premise of  
14 competition in the marketplace, as in nature,  
15 is not that there will be variations, but  
16 only more successful variations will survive.  
17 The concept of competition as an unlimited  
18 good, doesn't apply when both the good and  
19 the bad -- assuming that either agency in the  
20 US was better than the other -- both of them  
21 can go about their merry way, the whole  
22 theory of the competitiveness is largely  
23 diluted. So, I do think at the 100 year  
24 mark, it might make a great deal of sense for  
25 people to think hard about what to do. It

1 doesn't mean have two agencies, but maybe  
2 something about jurisdiction. And Harry  
3 really anticipated all the comments that I  
4 was going to make. You can go in different  
5 directions. You can have DOJ take care of  
6 cartels and nothing else. Let everything  
7 else fall on the FTC's back. Or you can have  
8 the FTC have a more of an entrenched position  
9 getting out of adjudication, looking more on  
10 policy making and leaving litigation to not  
11 only the DOJ, but the force in the US,  
12 private actions. I think that's a  
13 fundamental question. And getting back to  
14 the question you asked, Len, how this is  
15 resolved. Obviously, it's resources. I  
16 think the question should not be how the FTC  
17 can allocate its resources, it should be how  
18 the United States should allocate its  
19 resources. You're sub-optimizing if you  
20 simply look at what the FTC can do to make  
21 the best of the resources it has.

22 MR. GORDON: Thank you. I think  
23 Harry has a comment.

24 MR. FIRST: Just to follow-up. I  
25 might have anticipated what Joe said, but not

1 the conclusion. It is true that no one could  
2 have or would have designed the system we  
3 have, and I have often thought this because  
4 it seems so bizarre. But, actually, as I  
5 think about it anyway, I think that's a  
6 virtue. Organizations and institutions are  
7 actually pretty complicated. The idea that  
8 we can plan them perfectly from the beginning  
9 and that it would stay that way forever is  
10 probably not likely or even good. So, I don't  
11 mind the evolution in that sense, and in some  
12 sense the complexity. Every complexity is  
13 not perfect nor is every single approach  
14 perfect. When we started with the  
15 commission, there was some notion that the  
16 Justice Department needed some supervision  
17 frankly. One section of the Federal Trade  
18 Commission Act, which I would love to see the  
19 Commission reinvigate is Section 6, which  
20 gives the Commission the power to review  
21 Justice Department consent decrees. Now, the  
22 Commission did this in its early days in a  
23 number of very important industries --  
24 aluminum, tobacco, and meat packing -- issue  
25 reports, and as one commentator said, then

1 the Justice Department ignored them. So,  
2 things maybe haven't changed over time, but  
3 those were reports issued to Congress. There  
4 is a useful competitive function; they can't  
5 duplicate everything, nobody's got the  
6 resources. But, it is nice in the farming  
7 cases that we had the FTC around. It is nice  
8 in the Section 2 report that we have the FTC  
9 around. So, it doesn't have to be  
10 competition in everything, but some back  
11 stopping function and different viewing is  
12 very good. There is also a provision that I  
13 would love to see used more, which is more  
14 sort of a joint effort provision, which is  
15 Section 7 of the Federal Trade Commission  
16 Act, which allows courts to appoint the  
17 commission as special master in chancellery  
18 to come up with remedies in Justice  
19 Department civil cases. This would be an  
20 opportunity for the Commission to actually  
21 use its administrative capabilities, maybe in  
22 ways that courts can't, and in sort of a  
23 joint venture, improve things and come up  
24 with better remedies. So, I think there are  
25 areas for competition that are very useful. I

1 wish other countries had more different views  
2 on competition policy, frankly. Seeing  
3 someone who is working at the JFTC, I would  
4 love to have Japan have two antitrust  
5 enforcement agencies. Maybe we would get  
6 more enforcement. So, if I were Bill  
7 Kovacic, I would proselytize for that and not  
8 be embarrassed by having different views in  
9 antitrust.

10 MR. ANGLAND: One quick follow-up.  
11 I agree with you in the farming area, it is  
12 good having the FTC around. But, I don't  
13 know if that's an argument for having two  
14 agencies around. It is easy to say in the  
15 farming area, it is really unfortunate the  
16 DOJ is around. In other words, you can pick  
17 any issue where the Agency is split, look  
18 inside the Agency that has the view that you  
19 and say, it is wonderful that there are two  
20 agencies. But, there is an equal and  
21 offsetting disadvantage in the areas for  
22 having the second agency around. So, I don't  
23 know that I have ever seen any situation  
24 where I thought having two agencies is better  
25 than one. Having multiple ideas is great,

1 but you don't need multiple agencies. Take  
2 the Section 2 report, for example, let's say  
3 somebody at the FTC has one view, but look,  
4 the DOJ has another view, so, there is a  
5 virtue of having the DOJ around. Well, it  
6 was a wonderful job of synthesizing  
7 information, but there was nothing new in the  
8 DOJ report that academics have not been  
9 talking about for the last couple of decades.  
10 Basically, the agency performed the function  
11 of getting them together and writing a  
12 coherent description of what they said. So,  
13 it is not as though there would only be one  
14 voice in town if there was only one agency.

15 MS. BOAST: I don't want to spend  
16 the whole morning on this topic because it is  
17 not forward-looking enough for my tastes, but  
18 I can't resist. First of all, this is not  
19 the only legal area in the economy that has  
20 multiple enforcers. I spent my summer  
21 dealing with the SEC, DOJ on the criminal  
22 side, US Attorney's Office on the criminal  
23 side, State Security Administrators, state,  
24 you know, all kinds of regulators, all for  
25 one client. It was vastly more complicated

1 than any agency antitrust matter that I have  
2 been involved in. Secondly, if I were to  
3 look for an area of redundancy in competition  
4 enforcement, I wouldn't be debating FTC  
5 verses DOJ because there are almost no  
6 instances where they were doing the same  
7 thing. They were some times, like in the  
8 Hatch-Waxman area, it matters under  
9 investigation, but ultimately, one of them  
10 deferred to the other and enforcement went  
11 along rather efficiently. I would, instead,  
12 look at the competition mission within some  
13 other regulatory agency like the FCC or even  
14 the SEC. I'm not sure I would take it away.  
15 But, if you take XM Sirius, where it is  
16 abundantly clear that while the FCC had tools  
17 of its own to block that merger, on the  
18 fundamental competition issue, it did nothing  
19 until DOJ acted. So, what was the point? I  
20 do think, just to go back to the chairman's  
21 and Maureen's agenda, there are, as Harry  
22 pointed out, wonderfully unique things about  
23 the FTC and the history of the statute and  
24 the agency that allow it to deploy multiple  
25 sets of tools to the advantage of consumers.

1 And thinking about some of those things, you  
2 know, there are little ways that the agency  
3 can leverage its resources. The studies are  
4 one good example. But, one thing I would  
5 like to see the FTC do going forward is spend  
6 more time on the Hill. The agency's  
7 interface with the Hill tends to be more  
8 reactive; they want something, they call you  
9 up and you defend yourself. I think it would  
10 be great to see the FTC fulfill that part of  
11 its mission by a more proactive effort to sit  
12 down with relevant committees and their  
13 staffs, educate them about what agency can't  
14 and can do. We can't roll back prices, like  
15 gasoline prices, we don't have cease and  
16 desist authority. And really do some  
17 affirmative education with the staffs and  
18 committees and relevant leaders, and second  
19 piece of that, that would be education about  
20 what the agencies best strengths and tools  
21 are, but also find out a little bit more  
22 about what is on their minds. Now, Congress  
23 is so reactive I'm not so sure you would  
24 learn a lot, but I'm sure there would be  
25 issues coming through their office that would



1 be worth understanding, very street level  
2 consumer issues. The second thing is that --  
3 I'm sorry to keep going back to this -- let  
4 me use a different example. When people go  
5 out and do another kind of outreach and speak  
6 to audiences and business people, I mean, you  
7 can do the same thing with the press. When  
8 you go out and speak to them, I think what  
9 makes the most difference is not when you  
10 say, I'm going to tell you about what a great  
11 job we have done in these three different  
12 areas. It is when you say, this is what I'm  
13 looking at today, this is what is bothering  
14 our staff. These are the things we are  
15 seeing. We don't know where we are going to  
16 come out, but we are concerned about it.  
17 Because what happens is, and if you do one of  
18 these speeches, you will see people will  
19 start stirring in their chairs. And then the  
20 companies involved, firms involved,  
21 attorneys, whoever it is, will kind of go  
22 back and, say, wait a minute, I better take a  
23 look. I think one area where you saw, kind  
24 of, prophylactic effect from enforcement  
25 actions was in standards where a lot of

1 companies started to look for business review  
2 advice, a lot of standards organizations  
3 looked back at their own practices. You get  
4 a tremendous amount of leverage. That  
5 happened to be an enforcement action, but  
6 even if you're just foreshadowing, which is  
7 what happened with the standard setting. I  
8 think you got some corrective action at a  
9 very, very low cost.

10 MR. SCHEFFMAN: I agree with what  
11 Molly said. I think focusing on dual  
12 enforcement is a waste of time. Congress is  
13 going to have its agency and the executive is  
14 going to have its agency say one thing, and,  
15 yes, it has its pluses and minuses. Yes, it  
16 is going to make a difference what agency you  
17 get or which attorney you got to make a  
18 difference. There is pluses and minuses. I  
19 think we should focus more on a different  
20 question. I'm worried sometimes that the  
21 focus on dual enforcement is sending the  
22 wrong message. I doubt, Joe, if you believe  
23 you have a single agency, you have less total  
24 resources than you do between the two  
25 agencies.

1           MR. ANGLAND: Unless there was  
2 economies of scale, but I think that wouldn't  
3 be much.

4           MR. SCHEFFMAN: So, I think there  
5 is broad agreement that resources should be  
6 at least what it is now and maybe a good case  
7 for higher in some sense. I know, I haven't  
8 been -- I first got to the Commission in the  
9 late '70s. What we have seen, I think, is  
10 the number of really top attorneys that stay  
11 at the agencies for any length of time on the  
12 competition side has gone down dramatically  
13 over time compared to what I recall what the  
14 attorneys we had in the late '70s on the  
15 competition side that have stayed there a  
16 long time. Now, given the financial  
17 incentives on the outside, we have star  
18 attorneys in the commission and in the  
19 antitrust division. But, I think much more  
20 we lose those people because of the different  
21 financial incentives, and I don't know how  
22 you fix that given Government's pay scale.  
23 But, there is a real resource issue in terms  
24 of turnover, the talent in the agency, it is  
25 a real problem in thinking about resource

1 allocation.

2 MR. GORDON: Let me pick up on  
3 David's comments and Molly's comments about  
4 the Hill and resources. We do have a big  
5 birthday coming up. So, if we were to ask  
6 the Hill for some birthday presents, besides  
7 asking for more, are there tools that we  
8 would like, especially in a competition  
9 mission, for Congress to give us or to  
10 clarify authority in areas that might help us  
11 optimize our resources?

12 MS. BOAST: I have one suggestion,  
13 at least, on that. And, again, it seems like  
14 a small thing, but it really resonates with  
15 me since I'm a litigator. One of the things  
16 I had admired by the Bureau of Economics,  
17 they try to run the shop as a tool of support  
18 for the various missions in the agency and  
19 the commission, but also as a research and  
20 study and academic organization. And in the  
21 Bureau of Competition, I think we kind of  
22 miss that piece, which, to me, translates  
23 into much, much better training. There is  
24 clearly a training program in the Bureau of  
25 Competition, most internally when I last had

1     any insight into it.  And what I would ask  
2     for is the money to outsource that into the  
3     hands of really, really, good people and have  
4     just one heck of a great litigation training  
5     program that I think would be a terrific  
6     recruiting tool.  Because, frankly, law firms  
7     don't train that well either.  And help  
8     people.  Some of it would be skills training,  
9     some of it would be standard learning; how to  
10    write a brief, how to take a deposition, how  
11    to do an oral argument, write a case, and  
12    some of it would be on how to think about  
13    evidence; what is it that motivates a judge,  
14    what is it that makes a case move.  Really  
15    strategic.  And I think if you had money, and  
16    this could be done at DOJ as well, if you had  
17    money to create a blue chip training function  
18    in the agency, you would probably want to  
19    have consultants help you build it, you can  
20    do it internally, but, I think you can also  
21    buy it.  I think it would be great for the  
22    enforcement mission, great for morale and  
23    great for recruiting.

24                   MR. GORDON:  Other thoughts on  
25    things that we should be asking Congress for

1 on the competition side?

2 MR. ANGLAND: Certainly, it is a no  
3 brainer to get rid of exemptions.

4 MR. FIRST: Authority to pose civil  
5 fines. I think this is a lack in antitrust,  
6 not necessarily as a general matter. The FTC  
7 could probably use it more generally than the  
8 Department of Justice. If you're talking  
9 about going out to counsel, which is the  
10 earlier statement, going out to counsel and  
11 saying what is going to happen, nothing, or  
12 there is going to be a long proceeding that  
13 is going to pay my legal fees, I don't know.  
14 But, if there is a civil fine in the end, you  
15 can think of cases that the commission has  
16 brought because its civil nonmerger docket  
17 had been larger than what the Justice  
18 Department had brought. But, cease and  
19 desist orders are the only thing at the end  
20 of the day, having that ability to actually  
21 impose a fine, but it is not a criminal case,  
22 might be quite useful. And I don't think the  
23 commission has considered it really at all.  
24 The Justice Department rejected it, but they  
25 have their own reasons. I think the

1 Commission could think more fully about that  
2 authority.

3 MR. GORDON: Let me follow-up with  
4 that. Any thoughts on how those fines would  
5 be calculated? We have civil penalties at  
6 eleven thousand bucks a pop and then  
7 mitigating factors, but I'm not quite sure --

8 MR. FIRST: My thoughts are, gee,  
9 that's a really hard question. And I don't  
10 have a full answer. Every jurisdiction -- it  
11 has to be a combination of economic harm and  
12 fault, sort of along the lines of sentencing  
13 guidelines. Every jurisdiction has to be  
14 looked at -- and Europeans do it broadly all  
15 the time, they do it for cartel and abuse of  
16 dominance cases. This is a hard problem.  
17 So, my answer is part Molly's. You know, it  
18 has to be large enough that people will pay  
19 attention to it, to grab the attention. It  
20 has to be related to sub-optimal penalties  
21 and there has to be some notion of, you know,  
22 something about so it might be for persistent  
23 violators. You could take that into account.  
24 Beyond that, I don't have a definite formula  
25 at the moment.

1           MR. GORDON: Joe?

2           MR. ANGLAND: It is an interesting

3 and good idea. I think you have to be

4 careful, though, as I said about the optimal

5 deterrence plan because in contrast to the

6 EU, we have the treble damage situation here.

7 And at a certain point, if there were no

8 offset or no attempt to synthesize the FTC

9 fine and the treble damages, a question would

10 arise about whether you got too much

11 deterrence. Now, again, I know there are some

12 people, Bob Lande, for example, according to

13 his work, we under deter right now; the level

14 of treble damages is not enough, at least in

15 cartel situations, to create the proper

16 deterrence. If that's right, maybe having a

17 fine that creates quadruple damages is a good

18 thing. If you move away from cartels and

19 talk about more modest things, maybe clients

20 will be fined then, I don't know. I worry a

21 bit about whether you get over deterrence.

22 So, my only point there is, you can't look at

23 the FTC to finalize the situation, you have

24 to view it as part of a larger package. I

25 completely concur with Harry's point about



1     what you advise clients. When I have a client  
2     approach me who is talking about something  
3     and they raise antitrust concerns, the first  
4     question is, is there any chance of a  
5     criminal prosecution? That's number one; if  
6     there is any hint of that even being an  
7     issue. Number two is treble damages. Maybe  
8     they ask if the FTC would be concerned for  
9     number three, but most times they don't.  
10    Because, look at it this way, it is not that  
11    they are indifferent to what the FTC would  
12    do, but if it is something the FTC cares  
13    about, probably the plaintiff's firm is going  
14    to care about it too and that takes care of  
15    the treble damage is concerned. So, once you  
16    get outside the merger area, you can stop the  
17    deal. Outside the merger area, there is not  
18    a lot of fight.

19           MS. BOAST: Just to follow-up on  
20    that. First of all, I agree with Harry for  
21    the agency to be able to yield some kind of  
22    economic penalty would be a very powerful  
23    addition to the enforcement tool kit, whether  
24    it is in the form of a fine or a disgorgment  
25    analogy doesn't make much difference. And

1 I'm also agnostic on whether there should be  
2 a set off for disgorgement against civil  
3 penalties. I could go either way. Let me  
4 put it that way. But, the thing about the  
5 fines is that it is hard, when you look at  
6 some of the numbers, particularly for the  
7 size of the firms involved, they are chump  
8 change. They are a very high level fine, but  
9 still, essentially, a cost of doing business.  
10 So, I'm not totally sure that the money is  
11 ultimately the right deterrent and that the  
12 continued, sort of, oversight through the  
13 consent decree may have to be part of it.  
14 Frankly, you need to create more shame around  
15 some of these activities, but related to  
16 ongoing enforcement, once the consent decree  
17 is out there, the other thing I might ask  
18 Congress for is to correct some of the case  
19 law on how the violations, eleven thousand  
20 dollars a day, are calculated, which allows  
21 them so much latitude to reduce those fines  
22 to a meaningless amount that a violation is a  
23 cheap shot.

24 MR. GORDON: Molly mentioned  
25 disgorgement, and I'm curious, with or

1 without the use of civil fines, do you find  
2 or do you think, going forward, that the use  
3 of the Commission's disgorgement authority  
4 optimizes its resources and enforcement  
5 capabilities?

6 MR. FIRST: I'm not a great fan of  
7 disgorgement. I would rather call it a fine  
8 for the little additional impact. That means  
9 if it is a civil fine, it is also clearly not  
10 deductible by the corporation, so, that adds  
11 to the deterrent effect. And, you know, the  
12 Commission claims disgorgement authority now,  
13 but hasn't really made much use of this  
14 authority. And I would rather be a little  
15 clearer on what is being done. Also, I am a  
16 little concerned about spillover. It is what  
17 it is Joe's talking about and what Molly  
18 mentioned, but I think there is some danger.  
19 The treble damages action is under assault  
20 from various places that there is a spillover  
21 danger and I would be careful about the  
22 setoff because it is not clear where  
23 disgorged money goes. And I really think the  
24 treble damage money needs to go to those who  
25 were harmed. And I, frankly, like to have

1 the fines go to the Federal Trade Commission  
2 and support some of these additional missions  
3 that people talk about.

4 MS. BOAST: Good luck with that  
5 one.

6 MR. GORDON: I'm sure many people  
7 in the audience feel likewise.

8 MR. ANGLAND: That wouldn't create  
9 a wrong set of incentives now.

10 MR. FIRST: It would actually align  
11 incentives because the Commission -- what are  
12 they supported now by, HSR funding. It is a  
13 bureaucratic tax on mergers. It would be  
14 better to align their interests with  
15 enforcement so they make money out of  
16 enforcement. What a number of the states,  
17 actually, get to keep parts -- and there are  
18 all sorts of problems with this, of course --  
19 but, in sort of a fundamental way, I think it  
20 aligns the incentive correctly.

21 MS. BOAST: I can see that. But,  
22 the reason I think about disgorgment and,  
23 again, I'm sort of agnostic about it, but  
24 thinking about the notion that a violator has  
25 to give up everything they gained so that

1       there is nothing to be gained, even in the  
2       short term, or long term, where you take it  
3       all back, you do the whole thing. That, to  
4       me, is appealing. What are you going to get  
5       from this? Nothing.

6               MR. ANGLAND: Are there really that  
7       many cases where private civil actions have  
8       accomplished the same thing?

9               MS. BOAST: Sure.

10              MR. ANGLAND: We are the FTC. In  
11       other words, lots of cases get settled in  
12       small amounts. But, a situation where the  
13       FTC would prevail in court, then presume more  
14       times than not that the private party to  
15       prevail in court and that should affect the  
16       amount of settlement.

17              MS. BOAST: Perhaps, but I think  
18       there is, first of all, there is a huge cut  
19       for attorney's fees. The question is, who  
20       gets the money and where does it go and what  
21       is the signal that it sends to the  
22       prospective violator? And it seems to be  
23       abundantly clear that private civil action is  
24       -- and more so it is not around the cartel  
25       cases anyway, which is not what the FTC is

1 concerned with.

2 MR. ANGLAND: Most of my work is  
3 not cartel work, it is mainly joint venture  
4 work, that sort. And, I guess, in my  
5 experience, private civil action, you can  
6 debate whether treble or quadruple damages is  
7 the right level. But, my view is, people who  
8 engage in cartel activity should be sent away  
9 for a lot longer than they are sent away for.  
10 I would increase those penalties. You know,  
11 they are applying the same penalties for  
12 somebody that misjudges whether a joint  
13 venture will be net pro- or anti-competitive  
14 is troublesome, same civil penalties for a  
15 joint venture, reasonable people could  
16 disagree, is little bit troublesome to me.  
17 It is in that context I worry about adding  
18 another layer of damages without at least  
19 thinking about the added treble damages.

20 MS. BOAST: I agree it should be  
21 studied.

22 MR. GORDON: Let me try to move us  
23 a little bit. During the introductory  
24 remarks Mr. First mentioned, perhaps, the FTC  
25 should be functioning more as an

1 administrative agency, and I think I know  
2 what you mean by that, but, let me make a few  
3 observations and try to move the discussion a  
4 little. The Agency has propagated new Part 3  
5 rules for trying to speed up Commission  
6 matters, and Commissioner Rosch has made some  
7 statements at the ABA Master's Programs about  
8 what the reasonable belief standard means,  
9 and, perhaps, lowering that standard to  
10 encourage the agency to bring more cases,  
11 which, I'm assuming will be litigated in  
12 Part 3. My first question to Professor  
13 First, are those the types of things you're  
14 thinking about, if not, what are you thinking  
15 about? And I'd also like to have a little  
16 discussion about the Part 3 reforms and what  
17 it means to have a slightly lower reasonable  
18 belief standard.

19 MR. FIRST: Well, I think I was  
20 thinking more about the investigative and  
21 research mission of an administrative agency,  
22 so, I'm going to leave the Part 3 stuff for  
23 the people who actually litigate, although  
24 that would be part of it if it is done right.

25 MR. ANGLAND: When I was at the

1 master's course, I thought it was an  
2 interesting proposition. Basically, without  
3 purporting to describe exactly how he  
4 internally decided to vote, he said, just  
5 assume as a model for today it takes -- you  
6 have to be ninety percent sure of the  
7 violations to vote yes in favor of the  
8 proceeding. Whereas, how about a world where  
9 Part 3 proceeded much more quickly?  
10 Therefore, there was not as big a penalty if  
11 there was an action brought, but, eventually  
12 the parties were vindicated. In that world,  
13 maybe you only use a sixty percent threshold.  
14 More likely than not, you bring an action  
15 then. And that I think, you know, makes some  
16 sense, if that initial probability  
17 assessment, the sixty percent, winds up being  
18 objective in some sense. For example, let's  
19 assume every commissioner voted when he or  
20 she thought there was a sixty percent chance  
21 of liability. But, when you trade all the  
22 cases through, there were only judgments in  
23 favor in twenty percent of the cases. Then  
24 what you would say, maybe there is perfectly  
25 understandable prosecutorial bias in terms of



1 thinking you have a good case. In the same  
2 way, it seems to me, I don't know what I  
3 would do, but most of my colleagues think all  
4 their clients are right all the time. But, I  
5 don't see a reason why if really there is a  
6 sixty percent chance there is a violation,  
7 the commission shouldn't proceed against  
8 something. And I do think, however, that his  
9 point is well taken, that the price for doing  
10 that ought to limit the harm of false  
11 positives in bringing actions by  
12 substantially shortening the Part 3 process.  
13 As he pointed out in his speech, when  
14 litigating in Federal Court, courts may not  
15 get cases ready that quickly. Let me answer  
16 one slight qualification, which is, if you go  
17 to Whole Foods and the 13(b) standard that is  
18 articulated there, not debating whether it is  
19 right or wrong, but I do think it is a fact  
20 that it is pretty hard -- the Commission  
21 doesn't just bring merger cases with no basis  
22 at all. People might disagree with their  
23 evaluation of a given merger, but it is hard  
24 to say, in most cases, it is not some  
25 plausible theory. And really the test that

1 is articulated in 13(b) is pretty close to  
2 saying if there is any plausible theory that  
3 you get a PI. And that environment, even if  
4 Part 3 gets a lot quicker, that would still  
5 kill a lot of deals. So, in a merger  
6 context, it is a little bit troublesome to  
7 combine both a lower threshold for bringing  
8 an action and a much lower threshold for  
9 being able to block the deal.

10 MR. GORDON: David?

11 MR. SCHEFFMAN: I have a high  
12 regard for him and I have known him a long  
13 time. He was a client of mine. I think he  
14 doesn't have his finger on what the real  
15 issue is. While the commissioners of the  
16 agencies can vote, the executives can vote  
17 out whatever they want. The issues is really  
18 at the staff level. The FTC staff was very  
19 conservative in their approach and there is  
20 good reasons for that when you think about  
21 the bureaucratic reasons. They perceive  
22 themselves correctly, in many cases, as being  
23 blamed if they bring a case, no matter how  
24 meritorious, and they lose. And it is how  
25 it's litigated. The main thing is that you

1 can blame the economist expert, of course,  
2 but you actually can't blame that. You can  
3 blame the staff. The staff is very  
4 conservative. The FTC has done very good job  
5 on anti-competitive practices and when we got  
6 there Unocal was there and Rambus was there  
7 and a number of other things was there, and  
8 they were very conservative in believing  
9 whether those should be litigated, and very  
10 rightfully so. Those are really hard cases.  
11 It is not a surprise as to how they turned  
12 out, but they were worth bringing. But, it  
13 took a lot of pushing, and this is no  
14 criticism of the staff, by Chairman Muris to  
15 get those cases out the door. Because the  
16 people that are involved in case generation  
17 at the staff level are really very  
18 conservative and want to be quite sure they  
19 are the ones that can be quite sure they are  
20 going to win and that's the problem. There  
21 isn't any problem once it gets above as to  
22 what the executives can make the decision.  
23 The issue is what people get, what comes up.  
24 You had on your outline, are we going to talk  
25 about case generation?

1 MR. GORDON: Yes, we will. Molly?

2 MS. BOAST: I completely agree with  
3 David. I actually don't understand what this  
4 proposal is designed to achieve. And I think  
5 that we all know, I quote David on this, the  
6 staff investigates matters to death. Why do  
7 they do that? They do that because they are  
8 so afraid of surprise. I remember these  
9 conversations where staff would say, well,  
10 here is our response to that but we haven't  
11 told them yet. And I would say, why not.  
12 Well, because we might need to use it in  
13 litigation. I would rather know what they  
14 are going to say in response to our arguments  
15 now. But, the point of the story, there was  
16 this incredible tentativeness and  
17 nervousness. Obviously, some of that comes  
18 from having a five commissioner body to one  
19 experienced enforcer saying that this is  
20 where we are going to go. But, at some  
21 point, I would assume Commissioner Rosch is  
22 addressing the need to truncate the extended  
23 investigation, get into court and figure out  
24 an answer. I wouldn't be troubled by a  
25 twenty percent win ratio. And I think this

1 is part of what David was saying. The losses  
2 are very important. If you're bringing  
3 frivolous cases, of course not. But, the  
4 standard setting cases; Rambus, Unocal,  
5 Hatch-Waxman cases, all of those cases were  
6 very difficult cases. It was very important  
7 to know what the courts think about them.  
8 That is really a service to consumers and  
9 businesses as well. Was it costly along the  
10 way, sure.

11 MR. SCHEFFMAN: I don't know how to  
12 fix that problem, again, because the people  
13 that bring the cases aren't going to be there  
14 anymore, the people that voted them out are  
15 not going to be there. So, the staff is  
16 going to live with the losses. The FTC as an  
17 agency is very, very gun shy about losing  
18 cases. They lost a few merger cases in the  
19 '70s, rightfully so, and that dramatically  
20 changed their approach. But, it is  
21 institutional, and it goes to the institution  
22 and the staff as to how you fix the agency.  
23 And the FTC is very, very conservative on  
24 losing cases. So, I don't know. I wasn't  
25 there after the cases you talked about were

1 lost, so, I don't know how much effect that  
2 was; whether the staff realized, we knew  
3 those were hard cases and stuff like that.  
4 But, certainly, losing for sure, losing cases  
5 that aren't real hard really has a dramatic  
6 effect.

7 MS. BOAST: But, I think it is  
8 apropos that the chairman and Maureen are  
9 saying what are the things we should be  
10 asking ourselves to measure. One of them is,  
11 you know, one touchstone is how do we train a  
12 staff over the next hundred years so that  
13 they shed some of that conservatism.

14 MR. SCHEFFMAN: It is not training.  
15 It is really an HR issue. You can train and  
16 tell the people all you want about bringing  
17 cases and you're going to do the best job you  
18 can and we are going to win or lose. They  
19 know they're going to be there and you're  
20 not. I don't know how you fix that problem.

21 MS. BOAST: When I say training, I  
22 mean, shifting the mindset.

23 MR. ANGLAND: As the only person up  
24 here who has never worked at an enforcement  
25 agency, the one thing I don't have a sense of

1 is I know the FTC, for example, has over the  
2 last decade upgraded its litigation  
3 capabilities. There is thought that Robby  
4 Robertson, and now his predecessors, I don't  
5 know how they interact with the staff  
6 actually working on a possible merger. But,  
7 I would think somebody, and just taking  
8 Robertson as an example, who comes in with a  
9 lot of trial experience, would be less  
10 gun-shy, if you will, then where he is not  
11 faced with a situation of recommending one  
12 case every four years and if it goes bad, he  
13 has got four years of shame. He is in the  
14 business of trying cases. I would think that  
15 the people that come from that perspective,  
16 if they were involved early in the process,  
17 might also shift some of the blame, if you  
18 will, that if you're the person in the health  
19 shop deciding whether to recommend a  
20 proceeding, if you got from the very  
21 beginning, litigators saying, yes, let's do  
22 it, at least you will have company.

23 MS. BOAST: I think that's a fair  
24 point. Part of it is help them shape the  
25 evidence early on because what you worry

1 about the most, frankly, are the things that  
2 get buried. If you're sitting in management  
3 at the Bureau, you don't necessarily see  
4 everything that's coming across the desk of  
5 the staff. During the merger wave, we had  
6 these triage conversations because we  
7 couldn't deal with everything. We said,  
8 don't take a pass on it without telling us,  
9 please, we need to, at least, know that  
10 you're going to let something go because you  
11 don't have the resources for it. And,  
12 similarly, we want to know when you have one  
13 that comes and reports to you on a case, you  
14 want to make sure they are not presenting  
15 that in a way that is designed to make  
16 mistakes and say, we really shouldn't go  
17 after that.

18 MR. GORDON: My sense of what  
19 Commissioner Rosch proposed is to address the  
20 point that David made, by lowering the  
21 reasonable belief threshold, trying to  
22 institutionalize some change and some of the  
23 aggressiveness in willing to try cases.  
24 Whether that's going to change the culture is  
25 an obvious open question. But, we want the



1 agency to litigate more.

2 Let me move on to the second large  
3 topic, which is case generation and  
4 selection. Obviously a large part of the  
5 Bureau of Competition docket gets dictated by  
6 the mergers that come across the HSR process,  
7 but there are choices that have to be made  
8 regarding those filings and on the conduct  
9 area, there is a fair amount of discretion  
10 that the Agency has on what cases it brings.  
11 So, I will throw it open to the panel. How  
12 should the Agency go about building its  
13 docket? David?

14 MR. SCHEFFMAN: Well, let's talk in  
15 concrete terms. The next administration,  
16 certainly, Section 2 enforcement is going to  
17 be a major thing and maybe FTC Section 5.  
18 And I just tell you the people that are going  
19 to come in and making these decisions aren't  
20 going to be there very long, maybe four  
21 years. And if we talk to the people, I doubt  
22 they are going to be there that long. They  
23 better have a good idea what specific case  
24 they want to bring or it is not going to get  
25 done in their time and they're not going to

1 control it. So, it would be very good if  
2 they had an idea about who the respondent was  
3 going to be and what the case was going to be  
4 about. When people come in from private  
5 practice, they don't even know who that might  
6 be because it does take a lot of time to  
7 investigate a complicated case. You better  
8 be confident 90 percent that you're doing the  
9 right thing because what I see is the likely  
10 appointees are going to be the ones that  
11 might disagree with some individual  
12 decisions. They're going to be careful and  
13 they're not going to bring cases that they  
14 think are going to be counterproductive.  
15 They better hit the ground running and not  
16 start with a case generation task force  
17 because it can't get done in the time that  
18 they have. They can look at what is within  
19 the Agency. I think we did that pretty well  
20 when we were there about what the staff had  
21 been looking at, but there might be some  
22 things that we didn't pursue that they would  
23 in Section 2. So, I would look at that. I  
24 would look and see if private litigation if  
25 it stimulates a public Section 2 enforcement

1 case they would support. They better find  
2 something really quick if they want to have  
3 any effect.

4 MR. ANGLAND: Well, I'm not sure if  
5 this falls in this category. I think case  
6 selection would be critical. But, back to  
7 the point I made before, it is private action  
8 where as things are structured now, you don't  
9 have any substantial civil fines. So, the  
10 Commission has more ability to influence the  
11 law by effecting the rules of law that will  
12 be applied in a private action. And, if you  
13 do so, we are using many fewer of its  
14 resources than it would actually do in a  
15 merger case. So, for example, I applaud the  
16 Commission for looking into the state action  
17 area of the law where I thought, and still  
18 think, that the courts are a little too  
19 permissive and took the exemptions too  
20 broadly and if you see the briefs there, they  
21 constitute two percent of the amount that  
22 would take to bring one case and probably, in  
23 the end, was much more good.

24 MS. BOAST: I actually think that's  
25 a quite useful point. This feels like

1 strategic planning, so I want to duck under  
2 the table because it is something we did not  
3 do really well. It is true that you can  
4 spend a lot of time thinking about case  
5 generation. Clearly, the agency has areas of  
6 expertise that ought to continue to build on;  
7 franchise, energy, pharmaceuticals. I think  
8 you can talk to those agencies. I think  
9 talking to other government agencies because  
10 they don't see things the same way, but, what  
11 are the trends in their industry is one  
12 helpful way of trying to anticipate problems;  
13 look for the kinds of issues that might  
14 ultimately require collective action, you  
15 might take a look at. And then we have all  
16 these economic sectors, as we become more and  
17 more digital, that are just begging for  
18 monopolies. Any one of them will do.

19 MR. FIRST: I would like to build  
20 on what Molly said. As I was listening to  
21 David, it seems to me there are two levels;  
22 one is a general overall, what areas are you  
23 interested in. I think that's particularly  
24 the area where you want to come in not  
25 fighting fires, but thinking more globally

1 and more strategically. That doesn't tell  
2 you which cases to bring. It may tell you  
3 what areas are more important. What struck  
4 me as sort of interesting, since I didn't  
5 operate in the FTC, is God, how slow that all  
6 goes. When you say four years, if you can  
7 say anything about state enforcement, you had  
8 to move quicker than that. And it was not --  
9 it was a time frame, but not a forever time  
10 frame. And one of the ways that maybe hasn't  
11 been mentioned here on generating the  
12 specific cases, is to make it clear you are  
13 open for business. Competitors complain.  
14 And, basically, what you have over your  
15 office is, we don't believe competitors,  
16 you're just not going to hear that  
17 information. And just from a limited  
18 perspective of New York State, competitors  
19 came in and complained about things; we heard  
20 about things in health care, we heard about a  
21 number of different cases. Not all of them  
22 were good complaints, they are competitors.  
23 But, you do learn things. And I think it is  
24 very important, as a tool, not just to talk  
25 to other government agencies, which is,

1 obviously, important, but to try to generate  
2 that and part of it may be articulating areas  
3 that are interesting.

4 MS. BOAST: That's how the  
5 Hatch-Waxman case was started. But another  
6 thing that one might consider, as I said,  
7 this is the hardest, most difficult topic on  
8 our agenda. It is clear to me over the last  
9 seven years, Europe has become a more  
10 prominent player in competition enforcement  
11 with some influence over the other countries  
12 relative to the United States. And I'm not  
13 here to suggest that we continue to be the  
14 bullies with our standard or anything like  
15 that. But, what we see is agencies around  
16 the world looking at different kinds of  
17 things that we probably kind of dismissed as  
18 competitive problems. Some of that as a  
19 result of competitor complaints, and it might  
20 be worth looking at some of those matters  
21 because maybe they are not wrong.

22 MR. SCHEFFMAN: I should have  
23 mentioned that complaining competitors are  
24 going to be and are there. I think what had  
25 changed most in my thirty years doing this is

1 the level of investigation of complaining  
2 competitors, so, those don't get lost. They  
3 come in, they have high powered lawyers and  
4 economists come in. They get funneled to  
5 anti-competitive practices or health care in  
6 the FTC depending on what area they are in.  
7 Those are looked at and followed up. So,  
8 they are sitting there. There might be cases  
9 in the current mix that weren't pursued  
10 because they weren't going to bring this  
11 particular case that someone else in a new  
12 administration might want. They might find  
13 something like that. But, my guess it is  
14 probably not going to be there and it's not  
15 because there weren't complaining customers  
16 in there. So, I think they better have a  
17 pretty good idea and don't expect they are  
18 going to find it there ready for them to  
19 bring a case that wasn't brought in the  
20 previous regimes.

21 MS. BOAST: Now that you remind me,  
22 Rambus was a competitor complaint.

23 MR. FIRST: So was Microsoft.

24 MR. GORDON: In thinking about case  
25 selection more than case generation,

1 everybody wants "big cases" that have a lot  
2 of impact. But, there are different ways of  
3 measuring impact; one is the impact that a  
4 particular case has on doctrine. Is this a  
5 case, though it may have relatively small  
6 dollar impact on a particular litigant, that  
7 is important because it moves the law in the  
8 way the Commission thinks it should be moved,  
9 or should the focus be more on big dollar  
10 cases? There are two different ways of  
11 thinking about big cases. I'm curious about  
12 the panel's thoughts on how those two  
13 intersect in case selection.

14 MR. ANGLAND: Never having gone  
15 through the exercise, I would think it would  
16 be doctrine rather than dollars because if  
17 there are a lot of dollars, probably private  
18 plaintiffs are going to be ready to do it.  
19 So, in some ways, that's the least important  
20 area that the government can enforce the FTC  
21 or DOJ to try to steer those cases right.  
22 But, I think you take an area like Hatch  
23 Waxman, where it is just an extraordinarily  
24 important issue, and I think that whether or  
25 not it happens that there are large dollars



1       there, but somehow even the dollars were  
2       quantifiable in some sense, you would want to  
3       get in there because, to me, it is a pretty  
4       fundamental doctrinal issue about how you  
5       compete -- you can characterize as an  
6       agreement not to compete. And following up  
7       on one point, I concur with Molly when she  
8       says having a low winning percentage doesn't  
9       necessarily mean you shouldn't be bringing  
10      cases. I agree. It depends why you're  
11      losing. If you're losing because they are  
12      hard issues and the court's grapple or take a  
13      different philosophical point, well, then  
14      clarify that. If you're losing them because  
15      judges make dumb decisions, that shouldn't  
16      fall to you. Again, but if you're losing  
17      them because time and again you say, oh no,  
18      entry is hard here and time and again courts  
19      say, no, entry is possible here, then I would  
20      want to at least think really hard about  
21      whether I am analyzing properly.

22               MR. GORDON: Other thoughts? Okay.  
23      Next broad topic is burdens imposed by the  
24      agency's enforcement efforts. We talked a  
25      little bit about this, but I want to talk

1 about the current commission's reinvigoration  
2 of the 13(b) standard. And you now have a  
3 commission literally interpreting that  
4 language and the previous efforts to come to  
5 some congruence with the Department of  
6 Justice regarding the standard to enjoining a  
7 merger has clearly been abandoned, and, I  
8 imagine, Joe has clients coming in and the  
9 first question has got to be which agency we  
10 think is going to get this deal.

11 MS. BOAST: More likely they'll  
12 say, could you please steer us.

13 MR. GORDON: Is there a real burden  
14 or not?

15 MR. ANGLAND: Well, the playing  
16 fields are tilted very differently in two  
17 ways; from my perspective, tilted in one and  
18 not tilted in the other if you adopt the  
19 Whole Foods view of 13(b). Again, maybe  
20 that's what Congress intended. I haven't  
21 read the legislative history. But, clearly,  
22 as applied by the DC Circuit in Whole Foods,  
23 it is an extremely easy standard to meet to  
24 get a preliminary injunction. If one has  
25 extraordinary competence in the

1 administrative agency, is only going to bring  
2 actions, stuff like that, very likely to be  
3 correct, then maybe that makes sense. Maybe  
4 the threshold determination by the commission  
5 to bring an action gives one sufficient  
6 comfort. On the other hand, I would look at  
7 the loss percentage a bit; in a world where  
8 there is a 50 percent win-loss percentage, 50  
9 percent of the deals could, you know, wind up  
10 -- if you had -- let me back up. What I'm  
11 really talking about, if there would be a 50  
12 percent win-loss percentage on the merits.  
13 Trouble is, if you have a 50 percent chance  
14 of winning on the merits, you might have a 99  
15 percent chance of winning at the preliminary  
16 injunction stage. The question is, do you  
17 want to create what is essentially a fatal  
18 bar to the transaction just because the  
19 commission issues a complaint? That, you  
20 know, I think the commission is pretty good  
21 about what it chooses to challenge, but it is  
22 not perfect. And it is a pretty -- I  
23 personally do not believe that standard  
24 should be adopted. I'm not saying that the  
25 language of the statute doesn't permit it.

1 But, if I were writing on a clean state, I  
2 would probably bring the same standard to the  
3 DOJ or FTC for preliminary injunction  
4 standard. Now, I bring all the bias of  
5 someone standing only on one side of the  
6 issue, but, I do begin, in these days it is  
7 hard to say, with market-based confidence,  
8 all other things being equal, I would like to  
9 put the burden of proof on something to stop  
10 the actions from doing something.

11 MS. BOAST: Well, I have, of  
12 course, a slightly different view. First of  
13 all, the space between the DOJ standard and  
14 the FTC standard, I think, is exaggerated a  
15 lot by the Whole Foods litigation. But,  
16 pretty routinely, in the merger challenges  
17 with the DOJ, the permanent injunction and  
18 preliminary injunction are combined in one  
19 proceeding. So, the ultimate burden of  
20 persuasion for the entire injunctive  
21 proceeding is at issue. That's a higher  
22 burden than a traditional PI standard. And  
23 that's what creates this perception of a  
24 difference. And, frankly, it is a problem  
25 for DOJ to try to satisfy that. I have asked

1       them at different times why they always agree  
2       to that consolidation, but I think they feel  
3       like they don't have much choice when a judge  
4       is staring at them, so, that's the first  
5       point. The second point is, the 13(b)  
6       standard has application beyond merger  
7       enforcement. When I saw the Whole Foods  
8       decision, even though I don't in any respect  
9       consider myself an FTC nerd on the law, it  
10      just felt wrong to me. I just thought it was  
11      the court just got it wrong. I blamed it all  
12      on Dr. Scheffman who was incredibly  
13      effective. He got a whole opinion written  
14      about his work. But, I think in terms of the  
15      burden on the party, it just takes us back to  
16      the fundamental questions we have been  
17      discussing all along. Is there a special role  
18      for the FTC in competition enforcement. I  
19      don't see how you can say there is. I think  
20      if you take away the 13(b) standard and sort  
21      of start to homogenize everything, you start  
22      to underline what the agency is all about.  
23      That's for Congress to decide. The other  
24      thing about merger enforcement, one could  
25      disagree or agree with the guidelines, but it

1 is fair to say if the merger enforcement is  
2 being pursued, the efficiency that one might  
3 worry about have already been taken into  
4 account. As I said, you can disagree with  
5 the efficiency analysis, but, once you get to  
6 enforcement, if there are efficiencies that  
7 would offset the competitive effect, they  
8 will have been weighed. So, there isn't, in  
9 my mind, this huge cost to the possibility  
10 that the parties would walk away from a  
11 transaction. And we certainly know from long  
12 years of various people's studies of mergers  
13 that they tend to not be as durable as the  
14 merging parties would like you to believe in  
15 the beginning. I think the other way to  
16 think about it, is there a different way --  
17 and it goes back to point we have already  
18 touched on -- is there a different way to  
19 handle merger proceedings so they aren't  
20 investigated to death so that the run up to  
21 the enforcement action isn't as long or,  
22 alternatively, a Part 3 proceeding is much  
23 shortened. And it used to be the case,  
24 according to folks that worked at the agency  
25 lots longer than I did, that 13(b) standard

1 cases were tried on paper. There was no, you  
2 know, two week long trial. And there are  
3 lots of different ways that I think the  
4 agency could and should think about, you  
5 know, shortening that process.

6 MR. SCHEFFMAN: I have some  
7 investment in the Whole Foods, but I will try  
8 not to talk about that. In the typical  
9 merger investigation, Whole Foods, in  
10 particular, and particularly at the FTC, it  
11 is preposterous that they shouldn't go for a  
12 permanent injunction. How much more  
13 discovery could you have in a case? And then  
14 going into Part 3 in the FTC courts is  
15 preposterous. Three of us make a lot of  
16 money, I'm sure, on a process which is  
17 unbelievably burdensome, which is the merger  
18 investigation process. The reality is, in  
19 most cases, fairly early the staff knows  
20 where they are going to end up. They may  
21 need to wait to get the documents but they  
22 are incredibly quick to get the documents,  
23 they talk to competitors. So, in a typical  
24 case, you know, the staff knows where they  
25 are going to end up and they have more time

1 to do it. I don't think there is any basis  
2 at all for thinking that we can do a better  
3 job in say the investigation stage than in  
4 other jurisdictions that have much less  
5 burden than that. We can do the same thing  
6 at much less cost. We might make different  
7 decisions sometimes, but it is not worth the  
8 incredible cost.

9 MR. GORDON: How? Do you have  
10 thoughts on how you would cut those burdens?

11 MR. SCHEFFMAN: We have tremendous  
12 discovery here compared to other  
13 jurisdictions for very little reason because  
14 you can ask for the right people researching  
15 the right sorts of documents and you're  
16 usually going to find it; the data requests  
17 are often ridiculous and it is not even used,  
18 and in some cases, that's not true, the data  
19 isn't actually used. A lot of thought  
20 doesn't go into what the data are and what  
21 you're going to do with them. The thing goes  
22 on for a long time, always past deadline  
23 takes a long time to put the burden of  
24 discovery requests and then particularly if  
25 the FTC, getting a lot more time. You don't



1     need that much discovery or time to make a  
2     decision. I think that's where Commissioner  
3     Rosch says, where he is he should be strongly  
4     advocating and truncating the merger  
5     investigation.

6             MR. ANGLAND: I completely concur  
7     with David's point that you should be ready,  
8     at least, very soon after a date is set for a  
9     preliminary injunction. You should be ready  
10    to try the case to a permanent injunction;  
11    maybe give two more weeks to dot the last I  
12    and cross the last T. And that's what, I  
13    think, Molly said, she wondered why DOJ  
14    agreed to consolidate the two and then  
15    observed that the DOJ says it is hard to do  
16    otherwise when the Federal judge is looking  
17    down at you and demanding it. The reason  
18    they demand it is because it is not that  
19    hard. It happens all the time in other  
20    cases. And given that, it strikes me as  
21    particularly bothersome if you get a very  
22    diluted standard for a preliminary  
23    injunction, apply really on a record that's  
24    almost the record you'd have to judge a  
25    permanent injunction. It creates a really

1     bizarre situation, as far as I can see. And,  
2     you know, the DOJ doesn't have that luxury  
3     because ultimately the Federal judge is going  
4     to make the decision on the merits, whereas  
5     the FTC reverts back to Part 3. So, I think  
6     these points interact. It is because the  
7     preliminary injunction cases are so close to  
8     being a full trial on the merits that having  
9     a very diluted standard for them is, to me,  
10    problematic.

11           MS. BOAST: I agree with David that  
12    staff's views tend to be formed pretty early  
13    in the process and tend not to shift very  
14    much, notwithstanding a lot more information,  
15    but clearly able to collect evidence that  
16    helps support it and it is certainly not  
17    unheard of for them to ultimately conclude  
18    that there is no enforcement required. But,  
19    in terms of how the bureau interacts with the  
20    courts in merger cases, it's always been the  
21    policy, as far as I'm aware, when the action  
22    is filed, the defendants decide what the  
23    schedule is going to be. So, if they say, we  
24    want to go to trial in two weeks, the agency  
25    will do so. If they want six weeks of

1 discovery, the agency will do it. It's  
2 always been the operating assumption that  
3 when PI is filed, we are ready to try the  
4 case the next day. Maybe that should change.  
5 I think this was reflected in one of Chairman  
6 Majoras' merger commentary, one of the  
7 proposals or the standards that came out.  
8 Maybe we can shorten up the second request.  
9 But the trade off is going to be you need to  
10 let us have a little more latitude when we  
11 get into court.

12 MR. SCHEFFMAN: I want to pick up  
13 on what Molly said before. One of my  
14 initiatives when I was in my last stint  
15 there, which didn't survive one day after I  
16 left, was to promote transparency,  
17 particularly on mergers. Tell the parties,  
18 this is what we are thinking, here are the  
19 documents we are concerned about, what is  
20 your answer. That didn't survive. I had to  
21 do that personally, but it didn't survive.  
22 What you said, the staff, I don't know why  
23 you can't convince the staff. If they do  
24 that, they would know, and usually the other  
25 side is not going to have an answer. It's

1 not going to kill your case. Sometimes it is  
2 going to kill your case, but it would be good  
3 to know that. There is no real exchange of  
4 views, you know. You go into the commission  
5 and DOJ often and clearly headquarters  
6 doesn't know what your case is. It is news  
7 to them. And, second, you don't know what the  
8 staff's case is because they haven't told you  
9 the specifics of it.

10 MS. BOAST: I'm kind of a broken  
11 record on this topic, but when I give talks  
12 in Europe, for example, one of the things I  
13 always talk about is the kind of evidence  
14 being used for these cases. Because, in  
15 Europe, they are just unfamiliar with it. The  
16 answer is the most reliable evidence. One  
17 piece for the research mission agenda that  
18 the agency could well do and Europe could  
19 well do is actually go back and look at  
20 existing case law and see what the courts are  
21 citing. I would take Whole Foods out of that  
22 because they just cited Mr. Scheffman. But,  
23 what the District Court did in that case was  
24 review the expert testimony and then go back  
25 to the documents to find support for them,

1       which is kind of the reverse of what most  
2       courts do.  But, when the parties come in to  
3       answer the question that David wants to put  
4       to them, they should understand, and the  
5       staff should understand, that they have to  
6       think about it this way too.  What I want is  
7       for you to take me through your evidence.  I  
8       want you to tell me how you are going to  
9       prove it.  The most effective presentations I  
10      saw by the partners were the ones that said,  
11      as I understand that your case rests on these  
12      three propositions; let's start with  
13      proposition one, here is what we understand  
14      your evidence to be, here is what is wrong  
15      with the evidence.  I think if you can go and  
16      look at the cases, you will see this.  One of  
17      the most difficult pieces of evidence to get  
18      the court to buy into is the expert evidence  
19      because it is always full of flaws pointed  
20      out by the other side.

21               MR. GORDON:  Let me pick up on  
22      Molly's elegant segue there.  Our next topic  
23      is the competition research agenda.  And the  
24      FTC is doing some of that, but should it be  
25      doing more and what should it be focusing on?

1 How do you go about doing competition  
2 research? I will throw it out to Professor  
3 First.

4 MR. FIRST: One topic to focus on  
5 generally is to try -- this could be in the  
6 context of how the FTC and the Justice  
7 Department have been perceived recently --  
8 which is to focus on the remedies part of  
9 antitrust and to begin to gather -- the ABA's  
10 been doing it semi-sporadically over the last  
11 few years, but to look much more closely at  
12 antitrust remedies are, to start thinking  
13 about what is effective, what is not  
14 effective, to review -- it goes back to even  
15 that commission power -- to review the  
16 decrees that are out there. This is a  
17 difficult task, but it could, at least, start  
18 with the canvass of what people are thinking  
19 about in this area. There is probably a  
20 broader institutional problem in antitrust  
21 research, which is how it gets done. Private  
22 business has a real interest in having  
23 antitrust research come out right. So, when I  
24 read case after case about two sided markets,  
25 payment systems, I think, gee, what cases are

1 involved in this that generates how many  
2 articles or journals about it. Or Richard  
3 Epstein's book about consent decrees, which  
4 was funded by Microsoft. Not that they  
5 reviewed the documents. He said that they  
6 didn't and he has got an acknowledgment of  
7 that. But, somehow, the FTC needs to think  
8 more broadly, institutionally, about how it  
9 could, sort of, partner with the research  
10 capabilities that are also outside the  
11 commission and stimulate research in areas  
12 that it thinks is important, topics that are  
13 important, not just have it defined by firms,  
14 frankly, that are interested in generating  
15 things that will never be useful in  
16 litigation.

17 MR. GORDON: David?

18 MR. SCHEFFMAN: Well,  
19 retrospectives, I think, are the most  
20 important things that can be done. Now, a  
21 lot of economists say it is really too hard  
22 to figure out in retrospect. What are we  
23 talking about? We make decisions whether a  
24 merger is competitive and we can't figure out  
25 afterwards whether it was? I mean, that's

1 ridiculous. So, one thing we can do is  
2 retrospectives. It does take time. I know  
3 in the DOJ, in response to criticism on  
4 Whirlpool-Maytag, get a retrospective. They  
5 presented some interesting data which would  
6 seem to suggest that the merger was not  
7 problematic. At least put some real data  
8 out. But there is something much easier to  
9 do. I don't think DOJ can do it, but the FTC  
10 can do it. We rely a lot on customer  
11 opinions in non-consumer goods mergers. And  
12 the highly flawed divestiture study of the  
13 Pitofsky regime, he was moving in the  
14 direction of retrospective and that got shut  
15 down. You can go, in a systematic way, and  
16 survey customers in industries in which you  
17 did not challenge the merger and you could  
18 find out what they thought. And it certainly  
19 would be very interesting, if it was a  
20 scientifically valid survey, if they thought  
21 there was no effect or there was. That's not  
22 expensive. It's not hard to do. That and  
23 plus some real retrospectives for the mergers  
24 that turn out to be lightning rods; like  
25 Whirlpool-Maytag or XM-Sirius, those can be



1 done and you don't need a zillion economists.  
2 MS. BOAST: You might, I don't know  
3 whether this is true, but it would be worth  
4 considering, unlinking the retrospective  
5 research from enforcement. So, you head into  
6 the retrospective on the assumption that if  
7 you find a problem, you are going to unwind  
8 the merger. I think you're probably engaged  
9 in a slightly different exercise. If I had to  
10 pick out one topic for research, I wouldn't  
11 know how to do it. I would confess that  
12 right up front. That would aide the  
13 competition enforcement mission and that  
14 would be direct effects. You know, if we  
15 could resolve the debate about proving  
16 relevant markets and have some consensus  
17 around the direct effects as an appropriate  
18 standard and then say what we think they  
19 should be, what they should look like in  
20 order to qualify, I think it would be  
21 tremendously useful.

22 MR. GORDON: Let me get to our last  
23 topic before we run out of time. How do we  
24 evaluate the effectiveness of the  
25 Commission's enforcements and other efforts

1 in the competition area? Are the metrics out  
2 there, should it be more broad? It is a very  
3 hard topic to get to. How do you measure the  
4 effectiveness of the FTC?

5 MR. SCHEFFMAN: This was discussed  
6 in the DC sector. The government agencies,  
7 they have to provide a GPRA report that they  
8 have to come up with metrics that they claim  
9 is consistent with goals that they are going  
10 to achieve and whether they have achieved it.  
11 There is some use to that, I think, and the  
12 FTC has that. I remember we had spent a lot  
13 of time on it. The metrics have changed  
14 somewhat and they continue to be. I still  
15 think the court of public opinion is going to  
16 decide. We have very interested parties  
17 here; the private bar and AAI and others like  
18 that. But I do think my idea about using the  
19 surveys could be an effective thing. Your  
20 clients are the American consumer, or in  
21 mergers, the purchasers from merging parties,  
22 I think that would be very interesting  
23 evidence about whether your clients are  
24 thinking you're doing your job right or not.

25 MR. GORDON: Any other thoughts?

1 MS. BOAST: I don't have any  
2 brilliant insight on that other than to look  
3 at one example where the agency has gone  
4 through a process of showing results but in a  
5 different way than one might expect and  
6 that's in gas prices. There were several  
7 investigations in different geographies in  
8 response to different market conditions over  
9 the years. Looking at gasoline prices with  
10 considerable continued pressure from the Hill  
11 to find a solution to this problem. And what  
12 came out of that, as it post-dates my time  
13 there, a pretty extensive project in BE that  
14 monitors gas prices. To me, that's a great  
15 outcome. They couldn't find a case. There  
16 were tons of resources being put in to the  
17 investigations that were going nowhere. There  
18 was even the risk of ill will being created  
19 by repetitive investigations with no outcome.  
20 So, the response was, we will just keep it  
21 under watch permanently. I don't know how  
22 you measure that, but, I think you have to  
23 make sure you have to look at a lot of  
24 different kinds of output to take account of  
25 measuring success.

1           MR. FIRST: Picking up on David's  
2 retrospective, maybe one of the things that  
3 the commission, or any agency, should do is  
4 prospective when bringing a case to make  
5 clear both to it and to whoever it's been  
6 brought before, the goals of bringing the  
7 case and what their remedies are supposed to  
8 achieve. It is very hard to figure out  
9 whether you have been successful if you don't  
10 know exactly what you were about and what you  
11 were trying to achieve. It is also hard to  
12 be honest about what you're trying to  
13 achieve. So, this is not the easiest thing  
14 in the world. So, on a going-forward basis,  
15 there has got to be a way to do better in  
16 articulating what a case is supposed -- what  
17 the outcome is supposed to achieve so that  
18 you could look back and say, this is what we  
19 set out to do and we either didn't get to it  
20 or we did. Until we do that, it becomes very  
21 difficult. Even if you can do the technical  
22 work of retrospectives saying what you were  
23 trying to do.

24           MR. GORDON: Thank you. Now, do we  
25 have any questions, from anyone?

1                   QUESTIONER: On the retrospective  
2                   note -- I work for the Federal Trade  
3                   Commission as an attorney in the Northeast  
4                   Region Office, but we do sometimes go back.  
5                   We have, in the past, gone back and analyzed  
6                   what we could have done on a case  
7                   differently. But, more importantly, because  
8                   there is just a few minutes left, what I  
9                   would like to say is that the comment on the  
10                  statement that staff is conservative or timid  
11                  or, perhaps, has a fear of failing and, at  
12                  least from my perspective as having served in  
13                  the Northeast Regional Office for nine years  
14                  now, maybe it is different from headquarters,  
15                  from my perspective, it has to do with who  
16                  our audience is. I have worked in private  
17                  practice and it depended on our audience  
18                  whether we were trying to push a case, was  
19                  the client or upper management. When I worked  
20                  for Harry at the New York AG's office, it was  
21                  whether Harry would go for it or whether  
22                  General Vacco or General Spitzer would go for  
23                  it. Now, I work for the chairman of the FTC.  
24                  And to me, it has to do with whether or not  
25                  the chairman and the people that they have

1 appointed will be supportive of our case.  
2 So, again, yes, we are thorough and we are  
3 careful, but I think it has much more to do  
4 with whether or not we think management is  
5 going to be supportive.

6 MR. SCHEFFMAN: Let me be clear  
7 because I think I wasn't. It is not that the  
8 staff is timid, they are responding to the  
9 signals they get from above and who gets  
10 blamed if it doesn't work out. They are  
11 responding to the human incentives of the  
12 system and the process.

13 MR. GORDON: I think when the  
14 Commission is not litigating a lot of cases,  
15 it has to take a lot of courage to bring  
16 cases that have issues because you don't want  
17 to lose the only case the Commission tries  
18 that year. That's not a career advancement  
19 move. Yes.

20 MR. SWIRE: I'm Peter Swire. I'm a  
21 law professor and I teach antitrust also.  
22 Question on research. What about research  
23 efforts that can help persuade the current  
24 judiciary which has been skeptical of FTC?  
25 The district court in Whole Foods didn't look

1 at hot documents very favorably and they  
2 didn't really mention them. Is there any  
3 intellectual cases for that or other learning  
4 that's happened that maybe helps explain a  
5 little bit more of court decisions? Is there  
6 research for building an intellectual  
7 predicate in showing what categories of  
8 evidence are persuasive that can be done that  
9 might be helpful in a range of cases as  
10 litigation goes forward?

11 MS. BOAST: You mean so that not  
12 every court says, you didn't bring me  
13 Staples-type evidence and, therefore, I can't  
14 go with this merger?

15 MR. SWIRE: That's a pretty high  
16 standard.

17 MS. BOAST: I think that's a  
18 completely legitimate point. It is a better  
19 articulation of what I was trying to say  
20 about direct effects. Putting it in terms of  
21 research and studies is much more elegant  
22 than my taking a hammer and thong sort of  
23 approach. But, I think the only thing I can  
24 think of besides building the research, which  
25 other people are better than I am, would it

1 look a lot like the flip side of Harry's  
2 concern, the industry funding research to  
3 advance.

4 MR. FIRST: That seems to have  
5 worked.

6 MS. BOAST: Right, but, is it any  
7 different for the Commission than having an  
8 economist testifying in Commission cases,  
9 which happens all the time.

10 MR. SWIRE: This is the hundred  
11 year thing, so, maybe there are broad  
12 intellectual trainers and there are people  
13 who fund certain kinds of research on various  
14 sides and maybe there has been the same level  
15 of intellectual research by all the people  
16 that can be involved.

17 MS. BOAST: I guess if it would be  
18 done in BE, which is an obvious starting  
19 place. My sense is the economists, when they  
20 are undertaking research, they tend to pick  
21 topics of their own choosing as opposed to --

22 MR. SCHEFFMAN: No, that's not  
23 really true for things they do as part of  
24 their job. I don't know what the legal issue  
25 and the specific example you talked about.



1 If you bring an effects case, whatever the  
2 documents, I think you better be able to  
3 prove the effects. And I think there are  
4 flaws in the district court's opinion in  
5 Whole Foods. But, the fact is, clearly, the  
6 FTC brought an effects case, had an expert  
7 testify, clearly the way the judge treated it  
8 is fairly not credible, not proven. So, you  
9 bring an effects case with hot documents and  
10 you don't prove it to the judge? At least,  
11 from my point of view from an economist, what  
12 weight should you give the documents if you  
13 can't prove it with the numbers? In Staples,  
14 there were hot documents, but it was the  
15 numbers that won the case. Basic numbers on  
16 the prices convinced the judge, yeah, this is  
17 right, they price differently when they're  
18 competing against one another. That is what  
19 was missing in the proof, clearly missing,  
20 missing in the proof to the judge in Whole  
21 Foods, he viewed the evidence before the FTC  
22 as not proven. I don't know. You can argue  
23 whether it is right or wrong, but that is the  
24 main part of the FTC case.

25 MS. BOAST: That was part of why I

1 was suggesting if you go back and look at the  
2 actual case law, you get some sense of what  
3 works. Courts start with one proposition and  
4 they go through the categories and you can  
5 see what they accept and what they don't. I  
6 happen to have a merger right now at DOJ  
7 where I first heard that it is sort of a big  
8 transaction where there are some local  
9 problems. When I first heard the market  
10 shares and prices of the couple of  
11 localities, I just put down my pen and said  
12 oh, well, now what are we going to do.

13 MR. GORDON: We should wrap up.  
14 Please join me in thanking the panel that  
15 came out today.

16 (Whereupon, a short recess was  
17 taken.)

18

19

20

21

22

23

24

25

1 THE FTC'S INTERNATIONAL COMPETITION MISSION

2 MS. LAGDAMEO: Welcome back and  
3 thank you for taking the time out of your day  
4 to participate in this roundtable discussion  
5 on international competition issues. I'm  
6 Cynthia Lagdameo, Counsel for International  
7 Antitrust at the Office of International  
8 Affairs. We are delighted that we were able  
9 to get the four of you in the same room at  
10 the same time given how difficult it is to  
11 catch you all in the same country.

12 We are going to spend the next  
13 ninety minutes asking you to share your  
14 perspectives on prioritizing international  
15 efforts, the FTC's international program, and  
16 lessons that we can learn from other  
17 competition agencies around the world.

18 We are going to start with a couple  
19 of questions at the general level and then  
20 focus on the FTC's international efforts and  
21 areas for improvement. I hope to reserve a  
22 few minutes at the end for each of you to  
23 offer any concluding remarks. Asking the  
24 questions is the easy part, or Len made it  
25 seem so. The hard part is answering them,

1 but we really have assembled a panel that I  
2 am confident is up to the challenge. We have  
3 Andreas Reindl, Adjunct Professor of Law and  
4 Executive Director of the Competition Law  
5 Institute here at Fordham; Georges Korsun,  
6 Director of Economic and Statistical  
7 Consulting at Deloitte; Eleanor Fox,  
8 Professor of Trade Regulation at New York  
9 University School of Law; and Michael  
10 Blechman, Partner at Kaye Scholer.

11 We have a lot to discuss today, so,  
12 let's get the conversation started. Our  
13 first question is, how should an agency  
14 respond to international developments that  
15 shape competition and consumer protection  
16 policy? To address this question, we'll  
17 start off with Michael Blechman.

18 MR. BLECHMAN: Thank you, Cynthia.  
19 Rather than take the question in a broad,  
20 abstract manner, I thought I would focus  
21 attention on one particular development. As  
22 I was driving in today, I heard that the  
23 stock markets around the world are, once  
24 again, in a free fall panic, the NYSE market  
25 thinking about limiting the extent to which

1 the futures can be traded because the panic  
2 is so bad. So, if you open the windows and  
3 look out as to what is happening in the  
4 world, the thing that is on most people's  
5 minds is the current financial crisis which  
6 has triggered an unprecedented international  
7 cooperation in the financial arena. But, so  
8 far, I have not heard or seen much focus on  
9 the international antitrust aspects of it. At  
10 a meeting of the International Chamber of  
11 Commerce Commission a couple of weeks ago,  
12 Commissioner Rosch did begin to broach the  
13 subject and noted that one of the issues that  
14 emerges, as you begin to wonder about some  
15 mergers, are you creating bank mergers -- are  
16 you creating banks too large to fail and is  
17 that something that the agency should take  
18 into account? Shortly after that, I saw in a  
19 German news magazine, Der Spiegel, an article  
20 that questions whether the German banks were  
21 too small to survive and focused on Dresdner  
22 Bank and the fact that the Landesbanken all  
23 over Germany were regarded as very solid  
24 institutions and were failing right and left  
25 and had to be supported. You have a

1 situation, not only in other countries, where  
2 banks are being -- government is acquiring  
3 major financial institutions in them that  
4 happened, in part, through a process, as I  
5 understand it, where the Treasury and the Fed  
6 sat with the biggest banks in the United  
7 States and said, here is a one-page agreement  
8 where we are going to acquire 20 percent, or  
9 whatever it is, of your equity. You have to  
10 the end of the meeting to decide whether  
11 you're accepting, which they all did, which  
12 is, from an antitrust lawyer's perspective,  
13 raises some interesting issues. But, more  
14 questions have been raised as to the  
15 viability of markets, and the interface  
16 between regulation and competition is  
17 changing dramatically from day-to-day and  
18 week-to-week.

19           So, in the ten minutes that we  
20 have, I don't think we can respond to how  
21 antitrust ought to adjust itself or be  
22 reconsidered to take into account this new  
23 challenge to the economy, but, I think it is  
24 something rather than the more incremental  
25 kind of issues that antitrust lawyers in the

1 agency tend to deal with, this is something  
2 that requires attention and it requires and  
3 deserves international attention because as  
4 much as the financial response has been  
5 international, I think the competition  
6 response is going to need to be  
7 international, too.

8           So, my modest suggestion is that  
9 this is something that ought to be focused on  
10 by the agency now, internally, it is  
11 something that should be focused on in some  
12 sort of an international conference soon  
13 where the various major countries around the  
14 world can think of how it affects their  
15 systems and it is something that we ought to  
16 be focusing on.

17           MS. LAGDAMEO: Thank you. Anyone  
18 have a reaction to Michael's comments?

19           MR. KORSUN: The phenomenon of  
20 forced mergers is interesting. There is a  
21 second cite that has to do with pressure to  
22 lower standards so the analysis of the value  
23 of a merger, the potential harm in  
24 competition resulting from a merger, there is  
25 a different filter on that question that has

1 to do with externalities that are really  
2 difficult to capture on the global effects on  
3 markets and so on.

4 So, I think this is a question  
5 which needs some thought, which is, a merger  
6 now has a dimension which we don't really  
7 know how to evaluate very well, we haven't  
8 thought about evaluating very well.

9 MR. BLECHMAN: It also occurred to  
10 me with respect to the mergers, when you see  
11 what has happened as a result of Lehman  
12 Brothers, you know, the kind of equanimity  
13 with which the law addressed the failure of  
14 the company, is something that I think needs  
15 reconsideration in terms of a huge impact on  
16 the economy and everybody for the country.

17 MS. FOX: I would press more to  
18 have a seat at the table and to be consulted  
19 more before other areas of the government  
20 take action that is truly anti-competitive  
21 and pressure firms into anti-competitive  
22 mergers. At least the FTC ought to be the  
23 competition advocate; when one sees the  
24 events currently taking place, pressing for  
25 further measures, some of which are surely



1 anti-competitive, one wonders where is the  
2 FTC? Neelie Kroes gave a speech out front,  
3 competition law is out front by any one  
4 actual law policy in the United States. We  
5 have disserved ourselves by cordoning off  
6 competition law from other policies, and,  
7 therefore, it doesn't have the necessary  
8 links to be at the table. We know that most  
9 huge mergers fail. Others are going to be  
10 creating market power. Some might be  
11 necessary to save the nation. I'm not sure  
12 if this will be the case, but we need the  
13 voice of the FTC to call attention to what is  
14 anti-competitive, and what is possibly  
15 pro-competitive.

16           So, both things: a voice within  
17 our own system, and an international  
18 conscience as well. I had another point I  
19 want to make as well about the question that  
20 you asked not on the financial crisis.

21           MR. KORSUN: Eleanor, can I just  
22 jump in because this strikes the kind of  
23 advice that people who do sort of technical  
24 assistance in antitrust and competition  
25 reform. One of the first things you do in a

1 new agency is to talk about the advocacy role  
2 and to talk about the importance of being at  
3 the table. It is a different situation in an  
4 environment where we are talking about  
5 private firms, which is exactly the opposite,  
6 perhaps, but the key point, there is  
7 competitive impact that the agencies who are  
8 dealing with this, whether they be industrial  
9 planning agencies or treasury, whatever,  
10 don't really understand the competitive  
11 implication that we are talking about. So,  
12 the environment, economic climate, has to  
13 come full circle.

14 MR. REINDL: One comment. And what  
15 you have all said about advocacy is correct,  
16 but it doesn't, perhaps, emphasize really an  
17 important point. There is a trend that  
18 started long before the financial crisis. In  
19 the last decade or so, competition  
20 authorities had an unprecedented support in  
21 their mission and to be advocates for market-  
22 based solutions here, in Europe and  
23 elsewhere. But in the last year or two, that  
24 has started to change. Good competition  
25 authorities have picked it up long before the

1 financial crisis; people like John Fingleton  
2 or Philip Lowe. And, so, agencies have  
3 recognized that advocacy is becoming more  
4 difficult today. It is not just a matter of  
5 sitting at a table and giving a speech. That  
6 is going to change -- more now as a result of  
7 this crisis. So, I think an international  
8 response from competition authorities needs,  
9 perhaps, more of a recognition of these types  
10 of issues and a building up of unofficial  
11 consensus or reaction to the fact that it  
12 will be much more difficult in the future, at  
13 least under the current circumstances of  
14 competition authorities, to get their views  
15 across.

16 MS. FOX: I have another point  
17 regarding the question, how should the agency  
18 respond to international developments that  
19 shape competition. Michael mentioned there  
20 are incremental developments. There are, of  
21 course, incremental developments every day.  
22 I think right now the FTC is on top of  
23 probably most of the important ones, but I do  
24 want to say that's not always been the case.  
25 The United States was totally asleep in the

1 period leading up to Boeing/McDonnell  
2 Douglas, totally asleep to what was going on  
3 in Europe competition policy until we were  
4 awakened. "Our" merger was being challenged  
5 and then everybody got excited and said we  
6 ought to tell the Europeans they are wrong.  
7 We went to sleep again until GE/Honeywell  
8 awoke us.

9           So, my point is, EU developments  
10 were happening all along. It just so  
11 happened that our merger was on the table at  
12 the time. It is very important now, more  
13 important than ever, to have the information  
14 tool of people keeping abreast of all of the  
15 developments because the incremental  
16 developments that happen day-by-day are  
17 hugely important and they shouldn't just  
18 suddenly rise up and hit us in the eye.

19           One development many Americans are  
20 still unaware of, and this is a means by  
21 which Europe constantly expanding the scope  
22 of the European Law, particularly in free  
23 trade agreements. Almost every free trade  
24 agreement they have with another country  
25 incorporates EC competition policy to be

1 applied in the free trade area when the  
2 competition problem arises. I think that is  
3 still a sleeper in the United States and the  
4 United States hasn't thought about whether  
5 the United States ought to consider more  
6 seriously competition policy in its bilateral  
7 agreements.

8 MS. LAGDAMEO: Do you have one more  
9 point?

10 MR. BLECHMAN: I have one more  
11 quick point. Besides developments that  
12 affect competition and, I think, the economy,  
13 there are developments that relate to  
14 competition law which affect basic human  
15 rights and one of them is the right to  
16 privilege and the right to counsel.

17 Within the United States, the  
18 Justice Department has changed its position  
19 dramatically in the last year so as not to  
20 require companies to get credit for  
21 cooperation to give up the attorney client  
22 privilege. In Europe, they axed that  
23 decision and raised the issue and the EU took  
24 the position that the privilege does not  
25 extend to inside counsel, which in the view

1 of many businesses, and in my view, threatens  
2 the privilege entirely. In my view, just as  
3 foreign countries take positions as amicus  
4 curiae in the United States Supreme Court,  
5 like in the Empagran case, not just business,  
6 but private groups in the United States and  
7 also the Federal Trade Commission and the  
8 Justice Department, as representatives of  
9 American values in a broader sense, ought to  
10 make this country's views with respect to the  
11 privilege issue heard as well.

12 MS. LAGDAMEO: Let's turn to our  
13 second topic -- and maybe we can spend a  
14 couple of minutes on this before moving on to  
15 the FTC's international program -- how an  
16 agency should prioritize its international  
17 efforts.

18 Andreas, can you share with us your  
19 thoughts on how a competition agency should  
20 determine its involvement and the resources  
21 it should dedicate to multilateral  
22 competition and consumer protection fora?

23 MR. REINDL: I have a few ideas  
24 and, perhaps, I should introduce these ideas  
25 by speaking to Mike's last comment on this

1 privilege issue, and, perhaps, taking a  
2 slightly different view on that, and to some  
3 extent disagreeing with him. I think the way  
4 an agency is to determine where it wants to  
5 put its resources internationally really has  
6 to be by asking the fundamental question, how  
7 does international activity help the agency  
8 to become a more effective, better agency,  
9 meet its staff goals more effectively and  
10 protect its domestic stakeholders more  
11 effectively -- and that's, essentially,  
12 consumers in the jurisdiction? And if you  
13 apply that principle to determine where you  
14 want to put your resources, I think you can  
15 justify that intervention by the European  
16 commission in cases like Empagran, which  
17 clearly had an impact on domestic enforcement  
18 efforts. But I think it is a very hard case  
19 to say the Federal Trade Commission should go  
20 out and intervene, as not only would that put  
21 it exactly in opposition to another  
22 enforcement agency, but also it is not clear  
23 to me how that would really increase the  
24 effectiveness of the Federal Trade Commission  
25 in its own enforcement efforts. So, that's

1 the first question to ask: How does any  
2 international effort improve the domestic  
3 competition policy? A second question to  
4 ask, because you referred to international  
5 fora, is to take a step back and say, okay,  
6 as to international institutions or  
7 international fora, what could we accomplish  
8 at the moment and what could they accomplish  
9 in three, four, five years going forward if  
10 we have some influence in shaping their  
11 agendas? I think one problem for  
12 international efforts is that we have a  
13 mushrooming of international meeting places  
14 conferences, ICN, OECD, ECN and you name it,  
15 plus multiple resource organizations that  
16 have more functions. So, there is a tendency  
17 to have, especially for larger agencies that  
18 have larger resources, to say you just want  
19 to be everywhere. I think a good question to  
20 ask is, if you need to allocate scarce  
21 resources, what do we need to do  
22 internationally?

23 A third question to ask would be  
24 what kind of resources does an agency want to  
25 send to international fora? Is it always



1 necessary to send the head of an agency, and  
2 all the international agencies to each and  
3 every event? There is a tendency to have the  
4 head of the agency travel once a month or  
5 more to some international event, and the  
6 question is, if you want to get more  
7 substance, isn't it better to shift more  
8 emphasis to bringing in deputies working on  
9 cases, specializing in cases, to go to  
10 international events for getting out what the  
11 agencies' views are? And, if I may add that,  
12 of course, requires if you have an agency  
13 where everyone is reading a message when  
14 everyone is sent to an international event  
15 that they can say what the mission of the  
16 agency is and its three or four main  
17 enforcement goals. If you have that, if  
18 everyone in the agency agrees with what the  
19 agency is doing and what the mission of the  
20 agency is, it is very easy. You can send out  
21 deputies; you can send out the substantive  
22 people. Some agencies are very good at that,  
23 and others, perhaps, not.

24 And the last thing is picking up on  
25 a topic that came up in the first panel, even

1 for international efforts, it does make sense  
2 to step back and see what we have done in the  
3 last couple of years. We have sent all the  
4 same people out to the same things. How much  
5 can we actually say these resources have  
6 supported our efforts to becoming a more  
7 effective law enforcement agency, and can we  
8 determine where we want to spend our money in  
9 the future?

10 MS. LAGDAMEO: Michael?

11 MR. BLECHMAN: Now, on the  
12 privilege issue, the FTC's mission to promote  
13 competition law requires, as a first line of  
14 response, not in the FTC itself, but what  
15 happens in law offices and inside counsel  
16 offices around the world; lawyers advise  
17 their clients on how to comply with the  
18 antitrust law. And that shows that dialogue,  
19 in my view, is critical to antitrust  
20 enforcement, and I agree this would be a  
21 position that would put the US at odds with  
22 the EU, but I think if you measure everything  
23 you do strictly in someone else's shoes, it  
24 limits severely what you can do effectively.

25 MS. FOX: First I want to go back

1 to Andreas' remarks about the agency  
2 measuring its success and I want to take a  
3 different point of view. I will say a few  
4 more words a little later about the new  
5 world. In the new world in which there are  
6 so many international transactions that  
7 really require a network response, a global  
8 response, and thinking about the consumers of  
9 the world in terms of concept. I think that  
10 the FTC does have a public role to play:  
11 helping others in the world and trying to  
12 make them a more seamless network of  
13 antitrust in the world. This can't be  
14 measured by payback. In fact, it probably  
15 can't be measured. The FTC already does take  
16 on this role. Helping others, technical  
17 assistance, is one point, but also thinking  
18 forward about how to get a more seamless  
19 antitrust enforcement in view of world  
20 markets and how to be part of a network that  
21 executes a good result for the whole market,  
22 which transcends our borders, which is a very  
23 important role with which the FTC can and  
24 should take leadership.

25 MR. REINDL: I absolutely agree

1 that recognizing distinct markets and things  
2 that come up is absolutely what a good agency  
3 should do. But, then the question for any  
4 agency is, does that mean going into ten  
5 different small countries, say in Latin  
6 America, Africa, as a way of allocating  
7 scarce resources? In the end, you may say,  
8 yes, for whatever reason, but I think the  
9 question needs to be asked: if you have to  
10 decide where you put resources, is that where  
11 you want to put your resources?

12 MR. KORSUN: I also agree that  
13 markets are international and it affects  
14 impact to international, but the kind of  
15 notion where the world consumers thought  
16 about clearly a forum like that introduces a  
17 really ugly concept which has to be with  
18 economical issues and these are things we  
19 ought to be thinking about along with the  
20 negotiation of how do you really measure the  
21 impact overall, what is best. But, there is  
22 a distributional issue that's involved that  
23 can't be ignored and we don't know what to do  
24 about it because it is about equity and all  
25 sorts of things. Maybe lawyers have a better

1 handle on equity, but economists have a very  
2 hard time with it.

3 MS. LAGDAMEO: Let's turn to the  
4 next topic. We are not afraid to hear  
5 criticism. It is always nice to hear what we  
6 are doing well, but the point of this  
7 exercise is to learn what we can do better.  
8 Eleanor, would you tell us, how would you  
9 rate the FTC's international efforts, and  
10 what are areas for improvement and what  
11 changes do you see ahead?

12 MS. FOX: Yes. I rate the FTC's  
13 international efforts most highly. I think  
14 it has done a spectacular job. It is a  
15 leader and it is recognized as a leader in  
16 the world.

17 I want to move on to the next part  
18 of your question, which is the changes ahead,  
19 because the world has changed. The position  
20 of the United States in the world has  
21 changed. The position of the United States  
22 in the antitrust world has changed, as  
23 Chairman Kovacic has recognized. I want to  
24 link my comments to a world problem first  
25 before an antitrust problem, a more general

1 problem. Fareed Zakaria recently wrote The  
2 Post-American World, which opens saying,  
3 "This is a book not about the decline of  
4 America, but rather the rise of everyone  
5 else." It is about the great transformation  
6 taking place around the world. There has  
7 been a recognition that the place of the  
8 United States as the hegemonic power has  
9 changed and the hegemonic paradigm is giving  
10 way to a more networked horizontal paradigm  
11 where lots of nations are in this together  
12 and everyone must pull their own oar.

13 I think a relevant question to ask  
14 of the FTC is, what will the antitrust  
15 landscape look like in 2025 to 2050? I think  
16 it is likely the landscape will be much more  
17 horizontal, less hegemonic and the role of  
18 the FTC and the US is going to be as a team  
19 player to carry out the tasks necessary of  
20 the network. New agencies used to look  
21 almost solely to the US. They are now  
22 looking more to the EC. With China and India  
23 coming on board, nations are going to look to  
24 China and India and how they unfold in doing  
25 their antitrust law.

1           So, let me mention five points that  
2     I think the FTC might usefully think about.  
3     Number one is part of what I said before in  
4     the new era. We have national law,  
5     international transactions. It is important  
6     to mimic what a good antitrust law that  
7     covers the whole market, which might be the  
8     world, will look like. Think of mergers and  
9     merger enforcement; are we going to continue  
10    having national enforcement in fifty or more  
11    countries or are we going to look forward to  
12    team work, integrate work, maybe even one  
13    jurisdiction that's going to be the  
14    jurisdiction of most contacts as the lead  
15    jurisdiction? What is the best place to  
16    consider impacts all over the world, to  
17    consider harms that occur in other  
18    jurisdictions, especially those without  
19    resources to be heard and to develop relief  
20    that would be good relief as if the whole  
21    market were its our own nation? The ICPAC  
22    report recommended something of this sort as  
23    we look forward, not for today. I hope that  
24    the FTC will look back at some pages of the  
25    ICPAC report about how this teamwork can

1 play. ICPAC was trying to look at a  
2 cosmopolitan pick of where the teams of  
3 nations are working together. That was  
4 number one and really number two because my  
5 number two was teamwork. Number three sort  
6 of fits in with that one. Things that ought  
7 to be thought about is the FTC ought to be  
8 citing some non-American authorities from  
9 time to time. Why not cite European  
10 authorities when we are looking for ways to  
11 constrain state anti-competitive action? Why  
12 not look at some European authorities when we  
13 are looking at the interface between  
14 competition law and regulation? Other  
15 nations cite our law; we ought to cite other  
16 nations' laws. Four, on research agenda, and  
17 this adds on to the panel that was before. I  
18 think that joint research with other nations  
19 on joint problems would be very useful. For  
20 example, there might be research on optimal  
21 cartel deterrence in the world. There might  
22 be joint research on assumptions on how  
23 markets work and how they even tend to form  
24 the law and whether those assumptions are  
25 based on realities, and if, indeed, there are



1 different realities, how to think about  
2 convergence in view of that. And number  
3 five, think network and think more networks.  
4 Of the large group of networks to think  
5 about: one is education and one is academics.  
6 And I know that Chairman Kovacic thinks about  
7 this a lot. Various nations in the world  
8 must build up their academic institutions to  
9 train people so the competition authorities  
10 are going to have people that are well  
11 trained that they can bring into the  
12 competition authorities. The FTC could be  
13 part of networks that focus on education and  
14 academic training and networks of academic  
15 law and economics as well as the other  
16 networks they are working on. Just to  
17 conclude, I think we are living in a  
18 networking world and I can see the FTC as a  
19 leader, an important leader, in helping the  
20 networks work.

21 MS. LAGDAMEO: Thanks, Eleanor, you  
22 have given us a lot to think about and a lot  
23 to talk about. Anyone have any reactions?

24 MR. BLECHMAN: I have an area for  
25 improvement and it has to do with language. I

1 was at the last ICN meeting and at one of the  
2 dinners, I sat with antitrust enforcers from  
3 Latin American and our whole conversation  
4 over dinner was in Spanish because, as weak  
5 as my Spanish is, their English was weaker.  
6 I asked them how they were able to follow  
7 what was said in the ICN meeting, which was  
8 translated to English to Japan and back  
9 again, and the answer was, they didn't. It  
10 jumped out at me that more translation should  
11 be done. Another thing, the FTC itself,  
12 every time I have a merger and it involves  
13 documents in German or French or some other  
14 language, I'm always struck by the fact they  
15 have to be translated because the FTC does  
16 not routinely have lawyers who speak  
17 something besides English. I was in Brussels  
18 about ten days ago for a meeting with a  
19 German antitrust association, and Philip Lowe  
20 was at my table and he got up and gave an  
21 after dinner talk in German, and I suppose he  
22 does equally well in French. And I think, as  
23 the world is moving, if you're looking for a  
24 rather simple area of improvement, that would  
25 be it.

1           MS. LAGDAMEO: Certainly, in the  
2           ICN, we have tried to translate some of our  
3           documents into French and Spanish, and we  
4           have talked about doing regional workshops  
5           and we should give that more thought.

6           Other thoughts before we move on to  
7           our next topic? We want to talk about the  
8           FTC's role in multilateral organizations,  
9           such as the ICN, OECD, something Andreas  
10          raised in his prior comments. How do you  
11          view the FTC's role in these organizations,  
12          these networks, and how can it be improved?

13          MR. REINDL: Obviously, as Eleanor  
14          mentioned, it is easy to say that the Federal  
15          Trade Commission's reputation in the  
16          international fora is very good, but the more  
17          interesting question is, how can you improve  
18          it and what are the fundamental building  
19          blocks in being considered a leading agency  
20          in such international fora?

21          One thing I have observed is that  
22          the role of the FTC and of both US agencies  
23          fundamentally depends on consistent  
24          well-written substantive submissions to  
25          international fora. Unfortunately, that has

1 become less consistent over the last couple  
2 of years, and there may be a number of  
3 reasons for that development. But, it is  
4 very clear that if you expect to be accepted  
5 as one of the leading antitrust agencies, it  
6 is very hard to stay in the front once you  
7 have become inconsistent. And one issue that  
8 could, perhaps, play into this, and I want to  
9 be careful about this, people may have  
10 different views about this, but one risk for  
11 the standing of the Federal Trade Commission  
12 or both US agencies in international  
13 organizations is the relationship between the  
14 two agencies here in the United States. We  
15 all know that agencies can disagree and  
16 that's fine. That's a good thing and that  
17 generates discussion. But, my sense is that  
18 the differences between the two agencies have  
19 sometimes now played out on such a personal  
20 level in various international fora that it  
21 has affected the type of submission the US  
22 can make. And if the two agencies cannot  
23 agree, their submission may just be a  
24 two-page summary of US case law. This  
25 undermines the leadership role of the

1 agencies. It is very interesting to contrast  
2 that with other countries. We have a number  
3 of countries where you have at least two  
4 enforcement agencies, and typically, they  
5 don't really like each other too much. An  
6 example is the UK. Everyone knows there is  
7 not a lot of love lost between the  
8 Competition Commission and the OFT, but you  
9 have to listen very, very carefully to hear  
10 their differences. They exist, but it is not  
11 so obvious. It is completely different from  
12 the way the US agencies' differences are  
13 playing out in the international fora and if  
14 you become, sort of, the soap opera of  
15 international antitrust, it starts to  
16 undermine your leadership role. So, that's  
17 one important point.

18 A second point that I think is  
19 important for your question about  
20 international fora is that it is, obviously,  
21 very important to contribute to whatever is  
22 on an agenda, but I think the much more  
23 important role for the Federal Trade  
24 Commission would be to come up with a vision  
25 and a program of what should happen going

1 forward with all the different networks that  
2 now exist. And, again, there is a risk of  
3 falling into a mechanic allocation of  
4 resources and of just following an agenda of  
5 proceeding with the activities of the last  
6 five years over the next five years or  
7 putting people in or sending people to Zurich  
8 or wherever the next meeting of the ICN is,  
9 rather than international institutions  
10 actually deciding how their agendas should be  
11 set going forward. I think that's a  
12 tremendously important task for any agency.  
13 What should be the different roles for the  
14 ICN and OECD going forward to maximize the  
15 impact that they can have?

16           And one last point, again, on the  
17 role of the FTC in multilateral  
18 organizations. The role of the FTC will  
19 mostly be influenced by consistent and sound  
20 domestic enforcement and regulatory policy.  
21 The development that is more important than  
22 any appearance at any international  
23 organization is a clear domestic agenda and  
24 enforcement record and an ability to develop  
25 decisions that reflect the agenda and reflect

1 policy developments. Just to give you one  
2 example, perhaps, the second one if there is  
3 time, I mentioned at the beginning of the  
4 day, we start our summer programs here at  
5 Fordham, we bring in enforcement officials  
6 here from other countries to discuss  
7 competition policy and enforcement issues. I  
8 was really surprised to learn this year from  
9 people who work, like, in the general  
10 counsel's offices of other enforcement  
11 agencies that they came here also to learn  
12 more how to research US cases and US agency  
13 decisions. And that struck me because it is  
14 not that they usually cite FTC cases or  
15 Supreme Court cases, but there are case  
16 handlers who want to read FTC decisions and  
17 it is not that they want to exactly follow  
18 the outcome of those cases, but they want to  
19 see a well-researched and well-written  
20 opinion that combines economic theory and  
21 empirical evidence and comes to a sound  
22 judgment. As long as the FTC can produce  
23 that kind of case record of enforcement, its  
24 leadership role will be accepted in a lot of  
25 different agencies.

1           Very quickly, a second example that  
2       I came up with as I was thinking about your  
3       question: when I teach during these forums,  
4       or seminars for European judges, we talk  
5       about horizontal agreements. I always like  
6       to mention that if someone has a hard case  
7       and needs to think about how to correctly  
8       analyze it, I always point them to Tim  
9       Muris's opinion in the Three Tenors case,  
10      which is a masterpiece of combining empirical  
11      evidence, economic theory and decision making  
12      theory. These types of decisions contribute  
13      to the position of the FTC as a leading  
14      agency and these types of decisions are  
15      necessary to maintaining that role in  
16      international fora.

17           MS. LAGDAMEO: You mentioned that  
18      an agency needs to send experienced agency  
19      staff to international events. Do you have a  
20      view with respect to how the US is doing in  
21      that regard? Are we sending the right  
22      people? Too many people?

23           MR. REINDL: Of course you are  
24      always accommodating at any international  
25      event. Obviously, given the recognition that



1 the FTC has, yes, you apparently send the  
2 right people. But, I think going forward,  
3 the question is more, again, what do you  
4 expect from these international discussions  
5 in the future? If you want more substantive  
6 outcomes, if you want to get away from the  
7 more formal discussion that you find at the  
8 ICN and you want to have more expert  
9 opinions, I think there is a strong case for  
10 sending more of the regulars who work on  
11 substantive or policy issues. If there is a  
12 good reason for a chairman not to come, then  
13 send someone else. I think that can, going  
14 forward, be good policy.

15 MS. LAGDAMEO: Michael, did you  
16 want to share your perspective?

17 MR. BLECHMAN: Yes. Looking at  
18 what the FTC has accomplished in the  
19 international fora over time, just to take a  
20 lead from Eleanor, going back, I can remember  
21 still back in the '80s, it was when US  
22 international relationship with the rest of  
23 the world in antitrust was the rest of the  
24 world enacting blocking statutes because they  
25 thought we were being imperialistic in our

1 views on antitrust. More recent than that, I  
2 recall the animosity of the EU and US  
3 disagreements on doctrine about specific  
4 cases. What I see happening through these  
5 international fora, I think, more and more, I  
6 think it is attributed to the FTC  
7 participating in these best practices and  
8 other agreements on antitrust, which I think  
9 has been a healthy thing for the development.  
10 Also, taking Eleanor's perspective of looking  
11 twenty years, thirty years, whatever, down  
12 the pike, when you consider that there are  
13 over a hundred antitrust agencies around the  
14 world, the first reaction is to say gee,  
15 that's great, but it is not a foregone  
16 conclusion that it's great. I remember maybe  
17 it was fifteen years ago, I was at a  
18 conference talking with businessmen about  
19 their country's new trade commission. One of  
20 the businessmen said, why would you want  
21 that? Every government body we have in our  
22 country is corrupt and you have to pay them.  
23 And this would be another group of people  
24 that you would have to pay. If that's true,  
25 I said, then you're better off without that

1 trade commission.

2 Then fast-forward to last year. I  
3 was looking at a compliance manual of a  
4 European client and on the first section  
5 talking about antitrust compliance, there was  
6 a map that showed all the new countries in  
7 the world that had adopted antitrust laws,  
8 huge areas of gray and black, depending on  
9 how recently they had done that. And then I  
10 turned to a section on bribery and there was  
11 a map of the world including the worst  
12 countries with respect to corruption. And the  
13 maps overlapped. But, notwithstanding that  
14 -- so, it could be a disaster to have a 100  
15 antitrust agencies around the world, but my  
16 impression is that's not what happened. At  
17 least I don't hear, as I do mergers, from  
18 local counsel saying there has to be a  
19 payment here. I just don't hear it. Now,  
20 maybe I'm lucky or maybe it is where we are  
21 on the curve, but I think a part of why that  
22 is is, first, if you will, there has been  
23 more antitrust compliance around the world  
24 where people have adopted the US view on  
25 that. I think it is also because the

1 influence of the EU on the eastern European  
2 countries that had an effect, but I think  
3 part of it is through the constant  
4 interaction and peer pressure from our own  
5 agencies. I think antitrust enforcement is,  
6 on the whole, extremely healthy. There may  
7 be policy aberrations where politicians  
8 influence the result. Those are in isolated  
9 countries and I'm not, as I said, I'm not  
10 sure why we are doing this, but I think the  
11 international outreach and the salutary  
12 influence of the American agencies have a lot  
13 to do with it.

14 MR. KORSUN: Just one more comment  
15 on the one organization. I'm fairly familiar  
16 with ICN and the work of the FTC there to the  
17 extent the ICN has accomplished or made  
18 progress to drive to certain common standards  
19 across the world. The FTC has some  
20 significant responsibilities and deserves  
21 credit for that. And if you think about a  
22 virtual organization of agencies, you think  
23 about the free rider problems in getting  
24 things done and you think about the  
25 constraints that the smaller agencies around

1 the world who want to participate have in  
2 terms of staffing and resources and  
3 technology. The reality is a great deal of  
4 the work is done by FTC staffers and it is a  
5 significant contribution and we shouldn't  
6 forget that.

7 MS. LAGDAMEO: Thanks. Eleanor?

8 MS. FOX: I agree the FTC has taken  
9 a wonderful contribution.

10 I want to make a point on the "soap  
11 opera" comment. My point is a little  
12 different because I want to ask: what is the  
13 converse? Is the converse suppression of the  
14 fact that there are different perspectives  
15 and different points of view, that everything  
16 gets suppressed, so, therefore, the US speaks  
17 with one voice, everybody's on the same page?  
18 And then the US usually says now everybody  
19 converge towards us. That is very misleading  
20 and also inappropriate. So, I think there  
21 shouldn't be a rift and there shouldn't be  
22 hostility, but there should be channels where  
23 the expression of different points of view  
24 can be productive. If one has, say, two  
25 points of view and one is the view of very,

1 let's say, laissez-faire antitrust sided  
2 against Section 2 action and the other is  
3 more sympathetic towards the idea that  
4 markets don't work so well and firms with  
5 market power do exploit and exclude in ways  
6 harmful to consumers, the very fact that  
7 there is that second point of view, which  
8 incidentally, might resound more with  
9 countries that don't have markets that work  
10 too well, I think that's productive. I think  
11 that it's not to be hostile and have talks  
12 that are sympathetic and respectful for both  
13 parts before going to international fora, but  
14 not to pressure the one point of view.

15 MS. LAGDAMEO: Thanks. Let's turn  
16 now to our last topic, although, in the last  
17 few minutes we talked about the value of the  
18 international outreach: technical assistance  
19 and how would you evaluate the success of it  
20 and, also, should the FTC expand its role and  
21 the scope of technical assistance activities?  
22 Finally, what type of technical assistance do  
23 you consider most valuable? George?

24 MR. KORSUN: Three-part question,  
25 okay. In terms of evaluating success, a

1     rather difficult challenge because we have  
2     very few sorts of measures of how to evaluate  
3     success in providing technical assistance. If  
4     we talk about it very narrowly in terms of  
5     was the teacher in that workshop good or not,  
6     there are plenty of ways to do that. But, the  
7     real question is, how much of an impact, how  
8     much have you added to the marginal benefit  
9     to social welfare as a result? That is the  
10    unknown which we will never know. So, there  
11    is something in between which has to do with  
12    impacts, to my mind, what is important in  
13    trying to think about whether an intervention  
14    or a series of interventions is working.  
15    Really the end result has to be the impact of  
16    the quality of the decisions that the agency  
17    is reaching. That's one kind of measurement.  
18    Second might be the priorities, the agenda  
19    that the agency is setting in whether or not  
20    that's changing in a sort of more rational  
21    way given the context of economy of technical  
22    assistance. Those are two kinds of impact  
23    measures which we don't collect or don't have  
24    which, I think, are unknown but are important  
25    to tell us whether technical assistance is

1 doing a good job or not. So, in terms of  
2 looking forward, we have to concentrate on  
3 what we can handle because we haven't gone  
4 through that very well. But, with respect to  
5 the FTC's success, I think the record is  
6 pretty mixed. There have been many, many  
7 success stories and just too many instances  
8 where a lot of money, a lot of technical  
9 assistance has gone through into a country  
10 and when you look at individual decisions  
11 when you're a party effecting a decision and  
12 you see the level of analysis that went into  
13 the logic of the decision, you don't consider  
14 that to be legitimate. So, to be fair, a lot  
15 of factors that determine whether or not  
16 intervention is successful or not are  
17 completely outside of the control of the  
18 agency. It has to do with politicians,  
19 resources, individual agendas, donors,  
20 competition, all sorts of things that the  
21 agency doesn't control. I will say, in my  
22 experience, without fail, every single person  
23 in the international division has been  
24 extraordinarily knowledgeable, dedicated and  
25 resourceful and committed in trying to



1 improve competition throughout the world.

2 So, I think, in focusing the question about

3 what to do next, how to improve this, it

4 comes down, for me, a measurement question

5 leaning to thinking about how we can design

6 programs that are much more successful. The

7 second question had to do with whether the

8 FTC should expand its role in technical

9 assistance. I think it is unquestionably,

10 yes. I think the FTC, first of all, there is

11 great need, even though agencies are maturing

12 and getting more sophisticated, I think the

13 need for technical assistance is increasing.

14 I think the nature of it might change

15 drastically and it might be more of a two-way

16 interaction, but it is an on-going process if

17 we think about technical assistance as a

18 dialogue as opposed to one-way information.

19 But, the FTC is unique. They have more

20 expertise, particularly in the area of

21 economics. The tools you can bring to

22 analyze cases that is independent of legal

23 regime, it is not independent of local

24 economics or income, but the FTC is ahead of

25 the world in how to analyze cases, and what

1 it does in how to analyze cases. And, I  
2 think, interesting enough, in my experience,  
3 the FTC is probably the least dogmatic of the  
4 agencies that I have run into in doing  
5 technical assistance around the world. It  
6 doesn't necessarily always know what is best  
7 and it often may make mistakes, but it  
8 doesn't do that through inflexibility but  
9 through an approach that's redirected. I  
10 think that's a critical factor in why we are  
11 standing.

12 Third question has to do with what  
13 is effective, what works, what doesn't work.  
14 We have, by now, built up received wisdom  
15 about principles that are important to  
16 follow. We need to have lots of local  
17 knowledge before we do a piece of technical  
18 assistance. We need to understand conditions  
19 in that country, we need to take the key  
20 reform agents, we need to know the country or  
21 agency has a general appetite for reform, we  
22 need to understand the context in which  
23 competition reform is occurring relative to  
24 other reforms. We need to clearly understand  
25 and accept the level of maturity of the

1 agency and its absorption capacity. So, that  
2 leads to a set of principles that are fairly  
3 obvious but still bear repeating. The  
4 technical assistance that works well is one  
5 that is designed well in the first place. I  
6 think it has to be designed on the basis of  
7 real needs by the agency. And very often,  
8 there is a competition between there is sort  
9 of a three-way competition between agency and  
10 donor and provider and not all incentives are  
11 properly lined up. So, I think it has to be  
12 well designed. There cannot be misalignment  
13 of the incentives along the parties and I  
14 think in order to be successful, it has to be  
15 adoptive and reactive to changes in the  
16 conditions. So, long term, I don't mean  
17 long-term advisors as opposed to short term.  
18 I mean, there has to be a long-term strategy  
19 about reform because it is such a  
20 comprehensive topic, it needs to consider all  
21 facets and think about what is appropriate  
22 for the conditions at the time and what is  
23 going to change. So, I'm pretty agnostic  
24 over long-term workshops versus seminars. I  
25 think all these things have a place, but I

1 think what is important is this kind of well  
2 thought out design.

3 MS. LAGDAMEO: Thanks. Eleanor?

4 MS. FOX: Technical assistance  
5 needs rethinking -- even the term technical  
6 assistance sounds like a one-way street and  
7 maybe for a lot of countries, it is, like, 99  
8 percent or 95 percent a one-way street, but I  
9 think the FTC and others ought to consider,  
10 perhaps, "cross-fertilization" visits as well  
11 as technical assistance. The FTC people  
12 probably have something to learn about what a  
13 statist or post-statist economy looks like  
14 that has a lot of corruption. If we are  
15 looking towards the possibility of somewhat  
16 more complete principles of antitrust to  
17 which we all agree we certainly have to  
18 include in that problems of a great number of  
19 countries with which the United States is not  
20 familiar. I think it was John Fingleton who  
21 said in your London hearings that Americans  
22 will go abroad with a packet to give  
23 technical assistance and say now the main  
24 problem, we want to tell you about is  
25 cartels, how to catch them. It doesn't

1 probably represent people in the FTC, but, in  
2 any event, what cartels? We don't even have  
3 competitors; we have monopolies. This is  
4 very important for our uncovering of the  
5 blind spot and learning and, perhaps, it  
6 ought to be the case that when an agency goes  
7 on a technical assistance mission, there is a  
8 write-up of what the individual has learned  
9 that they didn't otherwise know. Just one  
10 other point. I think we shouldn't forget the  
11 very informal and I think usually useful  
12 technical assistance that the FTC does and  
13 always being available to give information  
14 and prospective analysis to other countries  
15 and even paring up to other countries when  
16 they need it.

17 MS. LAGDAMEO: Andreas?

18 MR. REINDL: One thing, perhaps.  
19 Looking forward, it might be more interesting  
20 to rephrase the question a little bit.  
21 Should the FTC do more? The answer should  
22 be, yes. But, the question going forward is  
23 how enthusiastic should the FTC be in doing  
24 technical assistance? There might be a group  
25 of countries where you want to provide

1 technical assistance only as part of a larger  
2 reform program, or if you're satisfied that  
3 your efforts can contribute somehow to the  
4 better performance of an economy. This is  
5 related to the idea of holding technical  
6 assistance recipients accountable. We are  
7 not very good with this. We go to a country  
8 and pool our resources and don't check what  
9 happens afterwards. But, it may be an  
10 interesting question going forward whether  
11 there are countries -- whether it is wise to  
12 go in and provide technical assistance or  
13 whether you should go in only if you're  
14 satisfied that the broader economic criteria  
15 are such that providing technical assistance  
16 has some measurable benefits, even in a  
17 medium term, rather than everybody,  
18 essentially, going to the three people that  
19 form the competition authority and telling  
20 them everything they want to know about  
21 competition law and being particularly weary  
22 about economic situations in the next three,  
23 four, five years. That should be built into  
24 how you allocate your agency's resources for  
25 technical assistance.

1 MS. LAGDAMEO: I think we have a  
2 few minutes left where you can make whatever  
3 remarks you would like. Eleanor, would you  
4 like to go first?

5 MS. FOX: Thank you. I think the  
6 FTC is doing a wonderful job. It really is  
7 important to institutionalize the strengths  
8 of the FTC and the great leadership of Bill  
9 Kovacic. The strengths and the performance  
10 must be carried on in the future. Secondly,  
11 I think it very important to carry on what  
12 the FTC is doing in terms of realizing it is  
13 not just give, but it is also take and having  
14 respect for the way other countries do  
15 things. And, third, recognizing that there  
16 is a tectonic shift of plates and we are in a  
17 new era of horizontal networks. The FTC can  
18 and should be a leader in the world in the  
19 new era.

20 MS. LAGDAMEO: Thanks, Eleanor.  
21 Michael?

22 MR. BLECHMAN: I would like to  
23 second what Eleanor said, but add some  
24 particular remarks about the future role of  
25 the business community, if you will, in the

1 workings of these international  
2 organizations. I think that the FTC in  
3 particular has been wonderful in terms of  
4 interacting with NGA's and getting through  
5 that perspective of people from the business  
6 sector, private bar, academia and so on.  
7 However, with some organizations, like, for  
8 example, the OECD, business, as an  
9 organization, has more of a role. In the  
10 ICN, on the other hand, the ICC doesn't  
11 really have a formal role. People in the ICC  
12 really participate as NGA's. But, I think  
13 that, just as I think BIAC has been very  
14 helpful to the OECD, the ICC, for example, as  
15 an organization which has become broader than  
16 just North America and Europe, is one useful  
17 organization to bring the perspective of the  
18 international business community into the  
19 ICN's deliberations in a more formal way.

20 MS. LAGDAMEO: Andreas.

21 MR. REINDL: Two points. Obviously,  
22 I agree completely with Eleanor that the  
23 institutional setup or the relationships  
24 between the institutions is changing, but I  
25 don't think that affects my one basic point,



1       which is, the leadership role that the  
2       Federal Trade Commission is playing in the  
3       international arena depends primarily on its  
4       ability to have a sound competition policy  
5       and enforcement record at home.  So, I think  
6       that making that transparent and making it  
7       accessible to other countries is key.  Some  
8       other countries are more successful in  
9       presenting their own philosophies.  And the  
10      second point which I think is important,  
11      picking up on something Mike said earlier, is  
12      that there is an increasing number of  
13      networks and fora that support international  
14      antitrust work today.  I think the key for  
15      the FTC is to be not only a participant, but  
16      also the shaper of what these fora can do and  
17      to become very, very wise in how you get  
18      benefits from certain fora that you would not  
19      get elsewhere -- in other words, realize what  
20      you can get from certain international  
21      arrangements, institutional programs and make  
22      sure you maximize the impact they can have  
23      for the institution.

24                 MR. KORSUN:  Certainly, I agree  
25      with the point that the FTC's record at home

1 is quite important in terms of credibility  
2 abroad. Part of how the FTC demonstrates  
3 intellectual logic is in the way it presents  
4 its cases, and that's something that has to  
5 continue, and something it has to bring to  
6 everything it does. And in the spirit of  
7 Chairman Kovacic's original speech of the FTC  
8 at 100, I paraphrase two points. One, he  
9 wants to engrain the habit of periodic  
10 self-evaluation and he wants to create a  
11 template. So, my closing comments are about  
12 that, focusing on technical assistance needs,  
13 to do that the FTC needs to self-evaluate its  
14 technical assistance programs much more  
15 focused on real measures of impact, not just  
16 things that are easily attainable and it has  
17 to find a way to wed that to every single  
18 technical assistance program or delivery that  
19 it does. And the goal there is that it be  
20 consistent, it come up with the kind of  
21 protocols to measure the impact of what the  
22 agency is doing as, at least, as a first  
23 step, in order to feed the negotiation that  
24 there ought to be a set of protocols in  
25 designing technical assistance. Again, I

1 talked about some things that everybody  
2 agrees to. I think that's enough to begin  
3 with. But, I think a rigorous program of  
4 self-evaluation will firm this protocol in  
5 project design and I think there is a lot to  
6 be done. Again, bring in the business  
7 community, the academia and the agency's own  
8 staff in designing this protocol. And I  
9 think the last point, it has to demonstrate  
10 this commitment by a budgetary commitment and  
11 my notion has always been, if you do this  
12 right, if you spend maybe two to three  
13 percent of your budget up front designing an  
14 evaluation of impacts in a way that's  
15 integrated with the design of the project,  
16 you're going to know in the end what you have  
17 accomplished and you will have a much better  
18 sense of what to do the next time. And those  
19 are, kind of, concrete things that the agency  
20 could undertake, not in the next fifteen  
21 years, but in the next year or two. Thank  
22 you.

23 MS. LAGDAMEO: Thank you. I really  
24 appreciate your support for what the FTC is  
25 doing internationally, particularly in the

1 ICN. And, Michael, we welcome the ICC's  
2 participation as an NGA in the work we are  
3 doing there. We also appreciate your  
4 concrete and candid suggestions in helping us  
5 with this self-assessment. I want to  
6 especially thank Andreas and Fordham  
7 University School of Law for co-hosting this  
8 roundtable and to each of you for taking the  
9 time out of your busy day to come here and  
10 speak with us. Thank you.

11 (Whereupon, a short recess was  
12 taken.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE FTC'S CONSUMER PROTECTION MISSION:

2 RESOURCE DEPLOYMENT AND EFFECTIVENESS

3 MS. GREISMAN: Good afternoon

4 everybody. Welcome back from lunch. I'm  
5 Lois Greisman. I'm Associate Director of the  
6 Division of Marketing Practices in the Bureau  
7 of Consumer Protection.

8 We have what I know will be a very  
9 lively program this afternoon. We'll have an  
10 hour-and-a-half to figure out consumer  
11 protection, which will be quite a challenge,  
12 but a lot of fun. Let me briefly introduce  
13 the panelists and tee up where the discussion  
14 will go. I'm going to go in the order here.

15 To my immediate right, Jerry Cerasale, Senior  
16 Vice President of Government Affairs for the  
17 Direct Marketing Association and I will note  
18 the only former FTC person on this panel. To  
19 his right, Joy Feigenbaum, Bureau Chief of  
20 the Consumer Frauds and Protection Bureau at  
21 the New York State Attorney General's Office.  
22 To her right is Peter Swire, Law Professor at  
23 Ohio State and Senior Fellow of the Center  
24 for American Progress. To his right is  
25 Jeffrey Greenbaum, Partner in the

1 Advertising, Marketing and Public Relations  
2 Group at the Frankfurt, Kurnit firm. And  
3 last, but hardly least, Andrea Levine,  
4 Director of the National Advertising Division  
5 and Senior Vice President of the Council of  
6 Better Business Bureaus. And I should say  
7 both a former regulator, as well as self-  
8 regulator.

9           So, I'm a New Yorker, as most of  
10 you know, and it is wonderful to be here.  
11 And as I was thinking about how to tee this  
12 up, as a New Yorker, one of the things I love  
13 is diners. One of the reasons I love them is  
14 the menu goes on for pages and pages. It is  
15 hard to make a choice. And the menu actually  
16 reminds me of the FTC's consumer protection  
17 agenda, or, at least, the potential for the  
18 consumer protection agenda. So, let's take  
19 pages one through five and let me touch on  
20 some of the things that it could entail:  
21 privacy, national advertising, food  
22 advertising, health advertising, green  
23 marketing, marketing to children, something  
24 near and dear to Andrea's heart. We can move  
25 to world of financial practices; subprime

1     lending, pay day lending, debt collection,  
2     debt negotiation. We could shift over to  
3     another page and look at fraud, and there is  
4     no shortage there; spam, spyware,  
5     telemarketing, business opportunity,  
6     foreclosure scams, and let me not forget, Do  
7     Not Call, because if anyone should forget its  
8     association with the Federal Trade  
9     Commission. Then we go to several pages  
10    later in the menu and we look at the tool kit  
11    and various different ways to look at this  
12    agenda or programs that one might pursue at  
13    the Federal Trade Commission. You could sue  
14    somebody, sue them in Federal Court, could  
15    sue them administratively. Regulatory  
16    rulemaking, or something less formal, issue  
17    guides. You could self-regulate, could  
18    really stand up there and say self-regulation  
19    is important and then spend a chunk of time  
20    talking about that. You could educate;  
21    business education and consumer education.  
22    Advocate; opinion letters, issue reports.  
23    The food marketing report that came out a few  
24    months ago, is really a tremendous document.  
25    So, here you have a big menu; tastes differ,

1 people have different preferences. How do  
2 you figure out what to do? How do you do any  
3 strategic planning? That is something that  
4 Jodie Bernstein really brought to consumer  
5 protection with a passion and a vengeance,  
6 and it can be daunting. So, let's start off  
7 and figure out how you set the agenda, and  
8 then, equally important, how do you figure  
9 out if it is effective. Does it work?

10 So, let's start with Jeffrey  
11 Greenbaum from the national advertising  
12 perspective, does the FTC have the right  
13 enforcement agenda, right priorities and  
14 right tools?

15 MR. GREENBAUM: First of all, I'm  
16 so pleased to be here. I am so happy to be a  
17 part of this process, which is such an  
18 admirable endeavor. And I have such respect  
19 and admiration for the work of the FTC, as  
20 well as the specific individuals that I have  
21 dealt with. It is an impressive idea that we  
22 have decided to go through this process and  
23 do this kind of strategic planning. And if  
24 only all business, all agencies can do this.  
25 I was thinking about how relieved I was for



1 not being invited to speak at a program for  
2 the Consumer Product Safety Commission.  
3 Because I was thinking what would you say  
4 that is positive? Here is an agency that  
5 lost its way, sort of, forgot that it is  
6 supposed to protect consumers. And I was  
7 thinking about the FTC. And I was thinking  
8 the FTC hasn't lost its way. The FTC gets  
9 it. It's light years from where it was, say,  
10 thirty years ago. And they have set clear,  
11 articulated standards that advertisers can  
12 follow. They have done, over that period of  
13 time, an incredible amount of enforcement in  
14 all areas; education and outreach. But,  
15 fundamental to all of this, they haven't lost  
16 sight of the basic mission which is the  
17 protection side. I think it is clear to those  
18 of us in the national advertising community,  
19 this is something that is really a focus.  
20 When I think of, from the national  
21 advertising perspective, is the FTC setting  
22 the right priorities, the answer is,  
23 unequivocally, yes. If you look at what the  
24 FTC has focused on in the last few years,  
25 through deceptive health and weight loss

1 claims, financial and credit scams, evasive  
2 marketing practices, such as spam and  
3 telemarketing, privacy information and  
4 security. These are all areas where  
5 consumers need the most protection. Consumers  
6 are vulnerable. Maybe they are relying on  
7 the pretense that they have no idea how to  
8 judge themselves if the claims are true.  
9 Maybe they have no way to ensure themselves  
10 that their privacy is protected. And I think  
11 it is an incredible thing that the FTC has  
12 recognized that maybe what we really need is  
13 to focus our efforts is on the most  
14 vulnerable. I love to talk about the  
15 difference and debate with people on the  
16 reasonable consumer standard versus a state  
17 consumer standard and I think that's  
18 something very significant that has happened  
19 in the FTC. They have said, we need to  
20 protect the ignorant, unthinking and  
21 incredulous consumer, and, perhaps, helpless  
22 consumer. And the fact that we have a  
23 reasonable consumer standard under Section 5,  
24 maybe the ones we need to protect are the  
25 ones that are most vulnerable. Certainly,

1 from the national advertising perspective,  
2 that's good for competition. We need  
3 legitimate messages in the marketplace. We  
4 need to know we are competing against other  
5 advertisers that are judged by the same  
6 standards that ours are and are regulated the  
7 way we are. So, I think from an advertiser's  
8 field, how important it is to ensure there is  
9 this level playing field if you're trying to  
10 promote a health product or some other type  
11 of product out there. There aren't the, sort  
12 of, fraudulent marketers who are getting away  
13 with something that we would not. So, I  
14 think from the fraud perspective, from the  
15 vulnerable consumer perspective, it is not  
16 only protecting both consumers, but it is  
17 good to preserve competition, preserving a  
18 consumer's ability when they look at these  
19 claims to know how they judge them. That  
20 being said, I think, of course, the FTC has  
21 brought many important cases involving  
22 national advertising. Those in the health  
23 area, those involving technology, and I think  
24 those are all cases where I think people  
25 genuinely feel that there had been real

1 consumer harm and substantial numbers of  
2 consumers really were being affected. And I  
3 think the FTC has chosen the right types of  
4 cases to bring and I think everyone expects  
5 that they will. I think, from that  
6 perspective, they have chosen the right  
7 authority and focused in the right place,  
8 but, I think you can't -- you can't look at  
9 that because you're only looking at half the  
10 puzzle and you have to look to see who is  
11 sitting to my right and say, this only works  
12 because we got this self-regulatory system  
13 that we know Andrea is going to talk about.  
14 But, to say that self-regulation is working  
15 is just an incredible understatement. It is  
16 not that it is working, it is a huge part of  
17 the system. It is a widely effective and  
18 widely respected system. And we are proud of  
19 it and we are proud of them. And clients  
20 today, you know, clients first question they  
21 ask is not, what does the FTC think about  
22 this or what does the State Attorney General  
23 say about this, they want to know what does  
24 the NAD say about this. And that, sort of,  
25 people, they know the NAD is out there and

1 solving these problems. So, I think it is an  
2 important part of the puzzle here, that we  
3 really have a widely effective  
4 self-regulation system. I guess, to tie it  
5 all together then, they have sort of set the  
6 right priorities, but it is more than setting  
7 the right priorities because that is only on  
8 the enforcement side. I think the FTC is  
9 more than just about enforcement, it is about  
10 education and outreach. And when I think of  
11 what the FTC's efforts has done on the  
12 education and outreach side, technically,  
13 with respect to national advertising, we  
14 realize that outreach has made a significant  
15 difference. A number of materials on the  
16 website, the business briefcase that  
17 everyone's always handing to you, the fact  
18 that the FTC has made it such a point and  
19 such a priority to be at every possible  
20 conference. Leslie Fair is sort of the FTC  
21 superhero. You know, you show up at a  
22 conference and there she is, changing in the  
23 phone booth and then she's out there. And I  
24 find myself quoting Leslie all the time. And  
25 that, certainly, goes with everyone at the

1     FTC. You see someone from the chairman down  
2     to the staff members all over the country.  
3     People of the FTC are willing to be out there  
4     and they understand the importance of  
5     outreach in the business community. And you  
6     can reach so many people. And I think the  
7     fact that the FTC has made this commitment of  
8     going to conferences, talking to people and  
9     being available, serving on bar committees,  
10    reaching out to the business community that  
11    has a tremendous impact. And I know that  
12    because clients ask me. They go to the  
13    conferences where people are speaking, and  
14    they say to me I heard about this and what do  
15    we need to do. I think it's made a huge  
16    impact and I think it will continue to. So,  
17    that's a start.

18                 MS. GREISMAN: Thank you. One of  
19    the wonders of this panel is that we have  
20    different perspectives. There's the private  
21    bar, some with a more savory and less savory  
22    client base, so, we'll hear from different  
23    angles. Why don't we go to the state  
24    perspective, Joy, and give us a sense of  
25    whether the FTC is tackling the right kinds

1 of issues, the right types of frauds and how  
2 it's working.

3 MS. FEIGENBAUM: Thank you. And  
4 let me just say it is an honor to be here  
5 today. I'm so pleased to be able to share in  
6 this important discussion. During my twelve  
7 years at the Bureau of Consumer Frauds at the  
8 NY Attorney General's Office, we he have  
9 worked in cooperation with the FCC, the FDA  
10 and the FTC all in pursuing the common mission  
11 of protecting the integrity of the  
12 marketplace and protecting consumers from  
13 fraud, dangerous products, drugs, and food.  
14 And what the FTC is doing at the national  
15 level is what each of the State Attorney  
16 General's Office hopes to achieve in their  
17 own state to ensure a safer marketplace and  
18 to educate consumers so they'll have the  
19 tools to protect themselves. So, let me just  
20 speak for a moment about what we think is  
21 working, and we think a lot is working quite  
22 well. The FTC, as Jeffrey said, is tackling  
23 some very important issues affecting  
24 consumers today in the area of data  
25 protection, security and identity theft.

1 These continue to be important areas that the  
2 FTC should devote its resources to as society  
3 increasingly maintains information from  
4 consumer data, both medical and financial, in  
5 electronic form. And I commend the FTC for  
6 the use of its unfairness jurisdiction to  
7 investigate companies who have committed  
8 security breaches to make sure that the  
9 companies take adequate steps to protect the  
10 security of consumers' personal information  
11 in the event of theft or security breaches.  
12 This is an area that the New York Attorney  
13 General has been pursuing as well, so, we  
14 share the commitment to that area. Likewise,  
15 identity theft, again, is such an important  
16 area. The FTC is doing tremendous work with  
17 training law enforcement, consumer education,  
18 wonderful materials for consumers, and  
19 workshops and participation on the  
20 President's Task Force on Identity Theft.  
21 So, these are important areas where the FTC  
22 is working where we hope to see FTC continue  
23 with its resources. Likewise, children's  
24 privacy, such as the settlement with one of  
25 the social networking sites that is targeting



1 tweens. I guess, the younger audience with  
2 the increasing prevalence of social  
3 networking sites for children, this is an  
4 area that is not going away. Our office,  
5 with its settlements with Facebook and  
6 MySpace, we think this is a very important  
7 area to keep working on. The FTC has done  
8 rulemaking in this area this year, and,  
9 again, I commend the FTC for their efforts.  
10 And we think they can, and should, continue  
11 with that. Green marketing, that's such an  
12 important area with the prevalence of green  
13 marketing claims. We want consumers to  
14 purchase environmentally safe products, but  
15 they have to understand the claims. Law  
16 enforcement has to understand the claims and  
17 evaluate the substantiation, understand  
18 consumers' perception of the claims, give  
19 guidance to industry, so, everybody can  
20 properly evaluate the claims. And the FTC  
21 has done a number of public workshops on  
22 green marketing claims and we look forward to  
23 -- I'm sure we are going to see enforcement  
24 in the coming year, and, you know, our office  
25 will be happy to work with the FTC in

1 pursuing green marketing claims. And we are  
2 going to look to the FTC for that expertise  
3 as we evaluate the claims as well. Other very  
4 important work is in deceptive spam and the  
5 FTC recently announced an enforcement action  
6 against the largest spam gangs doing, among  
7 other things, selling drugs from India that  
8 they claim to be FDA approved. In  
9 settlements with companies that were offering  
10 free gifts that weren't free, these are all  
11 important areas for the FTC to be using its  
12 resources. Likewise, telemarketing fraud.  
13 And telemarketing is not just an  
14 inconvenience, but it is a significant medium  
15 from which consumers suffer real economic  
16 harm through a variety of scams. I know the  
17 FTC recently commenced an enforcement action  
18 against a list broker assisting telemarketers  
19 conducting credit card scams, supplying  
20 unencrypted consumer financial data. The FTC  
21 has done extensive consumer education in this  
22 area in how to avoid being a victim of  
23 telemarketing fraud. Likewise, another area  
24 that we think is a great use of FTC's  
25 resources is in deceptive prepaid calling

1 cards. It is an area that the Attorney  
2 General is looking at as well and I know FTC  
3 has brought enforcement actions this year  
4 against distributors who are targeting recent  
5 immigrants. In 2007, it established a joint  
6 Federal task force addressing deceptive  
7 practices in the industry and has supported  
8 important legislation in this area. So,  
9 again, we commend the use of the FTC's  
10 resources in this area. And, very  
11 importantly, the financial schemes, such as,  
12 credit repair and just yesterday, the FTC  
13 announced Operation Clean Sweep, a joint  
14 Federal and State effort and the FTC brought  
15 seven enforcement actions against credit  
16 repair companies that are falsely promising  
17 to scrub your credit of accurate negative  
18 information for a fee. And the FTC has done  
19 important work in the area of consumer  
20 information on financial literacy. So, these  
21 are all very important efforts where we think  
22 they are a very good use of the FTC's  
23 resources. If you ask me what is not  
24 working, you know, it's hard to say from the  
25 State perspective, but one area that I would

1     like to see the FTC take a closer look is in  
2     the area of alcohol marketing, particularly  
3     with dangerous products such as alcohol  
4     energy drinks. This is an area where the  
5     States had been active. These are products  
6     that have no purpose but to encourage binge  
7     drinking, both from the product itself and  
8     the marketing and promotion of the product.  
9     And that's an area that we would truly like  
10    to see the FTC get involved in as well.

11           MS. GREISMAN: Let me shift to you,  
12    Jerry, from a different perspective, the  
13    trade association perspective, caring  
14    enormously about telemarketing, among other  
15    things. Is the agency putting its resources  
16    in the right place? Joy and Jeff have been  
17    very supportive.

18           MR. CERASALE: First, thank you for  
19    having me here. But, second, I'm going to be  
20    partially supportive because I think in the  
21    area of fraud and deceptive practices, I  
22    think you should probably put more resources  
23    there. One of the important things that a  
24    legitimate marketer trying to market needs is  
25    a fair marketplace. As Jeff was saying, if

1 someone's being deceptive, it hurts the  
2 entire marketplace if someone's engaging in  
3 fraud. So, we clearly think that we want you  
4 to go forward and push hard. As a matter of  
5 fact, there is an area, I think, we are all  
6 worried about, costs, nowadays and the size  
7 of the do not call registry and cell phones.  
8 One of the things that's happening, and  
9 currently some State AG's have actually  
10 called me up saying, what is happening here.  
11 We are starting to see phone calls to cell  
12 phones for usually car warranties. This is  
13 an area where consumers are truly hurt  
14 because you're using minutes or it is costing  
15 them one way or the other because that's the  
16 model we have. Very different from the land  
17 line where it is a flat fee, we don't have  
18 it. So, I think that alone, right now, is  
19 creating a very negative approach towards  
20 anybody doing any kind of telemarketing by  
21 legitimate companies and I think we should go  
22 after them. And I think your Telephony  
23 program, those are great and we support them  
24 tremendously. I do think, as you look at  
25 resources and where you're putting things,

1 and this one I have to give a "clear the air"  
2 since the FTC was actually working on a  
3 motion of the DMA when a response came out,  
4 is the area of prerecorded messages. I want  
5 to raise this trying to think more broadly on  
6 the effect on an industry. There is a new  
7 regulation that is out that you need  
8 permission to have a prerecorded message,  
9 permission from someone there. And starting  
10 in a year, we are going to have right in the  
11 beginning of the piece, one thing if a live  
12 person answers, another thing if it is  
13 answered by the answering machine, telling  
14 them you can get onto the company's specific  
15 do not call list. But, these are already for  
16 people who have given express permission. We  
17 think it is an increased expense to the  
18 business. We are going to follow it. It is  
19 an increased expense for businesses but not  
20 really increasing consumer protection since  
21 express permission is required. We think,  
22 along that line, you may be taking a step too  
23 far and we would love to have you doing more  
24 on the fraud side. I think the idea of a  
25 town meeting to discuss, rather than jump

1 into regulations, is a very good idea. Now,  
2 whether or not the town meeting is set up the  
3 way you want it, but the kind of idea of  
4 going forward with new technology, to talk  
5 about new technology, what is out there is  
6 very important, particularly as we are  
7 looking at marketing. You have an  
8 infrastructure that is already established  
9 and we have to try and figure out how to get  
10 consumer protection in it, but how not to  
11 turn off this economic generator. And I  
12 think it is a really difficult program and  
13 problem and you're doing it correctly by  
14 asking some questions and looking at it. And  
15 I think, to the credit of the Federal Trade  
16 Commission, as we have gone through the  
17 issues of cookies, as we have looked at parts  
18 of spam, as we are now looking at behavioral  
19 marketing, that you are accepting of  
20 technology changes that are coming rapidly  
21 and taking a deep breath before you jump  
22 because if you try to fix a certain  
23 technology, you really hurt the marketplace  
24 and hurt your enforcement. So, that's a real  
25 positive that the FTC has done and I think,

1 as we look at self-regulation, it is  
2 important. We have different marketers since  
3 1972. We have ethics programs on  
4 self-regulation and we think that can change  
5 very rapidly; more rapidly than laws can  
6 change and that works especially along with  
7 technology. But, the thing to remember about  
8 self-regulation, it is usually corrective, it  
9 is not punitive. So, people who want to  
10 punish someone who has done something wrong,  
11 at least, in our view, self-regulation is not  
12 where it works well. You try and fix it so  
13 it doesn't happen anymore, to get them to  
14 correct the problem is how we look at it. I  
15 think, going forward a little bit, we have,  
16 as we hit mobile marketing as where that is  
17 going, if you look at the next hundred years  
18 at least the first ten or fifteen, I can't  
19 really look beyond that too much, we have to  
20 figure out how we are going to fit there and  
21 where is it going to go. Because with mobile  
22 marketing, screens are smaller, you're all  
23 over the place. You're not going to take  
24 time to look and read things. Anything you  
25 have in written form probably is not going to



1 be as effective. And Peter and I at lunch at  
2 this great diner, which you had talked about,  
3 we discussed, you know, I have talked to you  
4 about webinars to teach people, but what  
5 about voice warnings, voice statements and so  
6 forth. The thing is to be careful, but is  
7 very difficult to say in a law school, if the  
8 lawyers wrote it, it's probably no good as  
9 far as consumers because they're probably not  
10 going to understand it. So, that's it on  
11 that. On education, do you want a little bit  
12 of that or wait?

13 MS. GREISMAN: Let's wait. Staying  
14 just on a notion of how you pick priorities,  
15 I will ask Peter and then Andrea to give us  
16 some authorities on that.

17 MR. SWIRE: I would like to  
18 continue to heap praise on the FTC, Chairman  
19 Kovacic for leading this process and the idea  
20 of, you know, it will be 2014 when the one  
21 hundred birthday comes up. The idea that a  
22 government agency is looking six years ahead,  
23 is a remarkable thing. I have written  
24 remarks about this that I hope to forward.  
25 In terms of priorities, it seems from a

1 common sense sort of thing, the FTC, on the  
2 consumer protection side, should go after  
3 important issues and especially focus on  
4 things that other people aren't going to do  
5 very well. So, where the FTC has expertise  
6 over something that's national in scope or  
7 international, they need the FTC in a  
8 particular role to play. I wrote an article  
9 on my website, and others, about enforcement  
10 and under enforcement for online harms. There  
11 are reasons to think that online doesn't fit  
12 an earlier model where states lead or  
13 counties lead in consumer protection; that  
14 was where it started. A local used car  
15 dealer in New York City, New York State,  
16 there is a history of the States AG's being  
17 absolutely vital and seeing local things and  
18 being able to respond to those problems. So,  
19 at least, one thing for the FTC to be  
20 thinking about is where are the places where  
21 it will be relatively hard for the county  
22 enforcers or state enforcers, and then the  
23 FTC goes relatively heavy into those things.  
24 For online harms, as a category, it is often  
25 hard for one state to know about a potential

1 bad guy that is three thousand miles away.  
2 That you don't have a good feel for, if  
3 you're in New York for the Oregon place and  
4 whether that's really a good guy that screwed  
5 up or a bad guy that we have to close down.  
6 If it's all local, you have the sense of who  
7 the worrisome people are. Another thing we  
8 have seen in identity theft is the local  
9 enforcers don't necessarily put as much a  
10 priority on victims who live a thousand miles  
11 away as they do on local victims. And maybe  
12 coordinating across jurisdictions, it moves  
13 down the priority list to investigate that  
14 individual's claim and that's a reason to  
15 have things work across state lines better.  
16 The third thing is technological, which is,  
17 New York State is very big, very  
18 sophisticated and has very big statewide  
19 offices, and other states don't have the same  
20 kind of staff and aren't as tech savvy. So,  
21 when it comes to forensics and new  
22 technology, that's something where a national  
23 level effort is to be helpful; green  
24 marketing and where there are areas where  
25 there are economies of scale where you set up

1 one national source of expertise. A little  
2 bit like the computer crimes office that  
3 Justice does for computer crimes on the  
4 criminal side. So, all of this is in a law  
5 review article that most normal people would  
6 never read, but these are common sense ideas  
7 for how you pick priorities. And the reasons  
8 to think that the FTC having the resources  
9 and being ahead of the curve on technology, I  
10 suggest having a chief technology officer for  
11 the commission, would be a sensible thing.  
12 But, doing the technology and looking for  
13 places where other actors would step in,  
14 that's a general point to keep in mind.

15 MS. GREISMAN: Thank you. Andrea?

16 MS. LEVINE: I want to thank you  
17 for the opportunity to tell the government  
18 what I think because I don't think the  
19 government's ever asked me before and I'm  
20 pleased to have an opportunity to share my  
21 thoughts.

22 I want to focus on the FTC's role  
23 in supporting self-regulation. I think the  
24 FTC's done an amazing job of recognizing what  
25 a valuable tool self-regulation is in

1 enhancing and complementing your role in  
2 terms of consumer protection. Having worked  
3 in the regulatory world in the Attorney  
4 General's Office in New York for a decade  
5 before coming to NAD, and I have been there  
6 for almost twelve years, I appreciate the  
7 difference in the roles of the two and what  
8 they can do. And I think what the FTC has  
9 recognized and what has been proven to me, is  
10 that self-regulation is a lot faster. It is  
11 more informed in the sense that industry is  
12 in the best position to know where the  
13 problem areas are and it is a lot more  
14 flexible, case by case. And I'm very proud  
15 that the FTC points to the NAD as one of the  
16 best examples of industry self-regulation in  
17 America today, which is something I never get  
18 tired of repeating. And thank you for your  
19 kind words, Jeff. But, you know, when I came  
20 to NAD, I was very skeptical. I had been a  
21 regulator and I knew what we were able to do  
22 in terms of advertising with the power of the  
23 State of New York and sometimes multi-state  
24 investigations with the power of forty or  
25 fifty states, and I didn't appreciate the

1 fact that self-regulation could be effective.  
2 And, now, when I look at it, NAD handles  
3 about 170 national advertising cases a year.  
4 The FTC handles just a relative handful  
5 because your priorities should be, and are,  
6 directed towards fraud. So, what we have  
7 been able to do is build a huge set of  
8 precedents, almost five thousand decisions at  
9 this point, which provide guidance to the  
10 advertising industry on more of the nuts and  
11 bolts issues that underlie advertising claims  
12 substantiation; what is puffery, you know,  
13 consumer perception evidence, what is  
14 statistically significant? You know, the  
15 real things that advertisers, and those that  
16 counsel advertisers, have to grapple with  
17 every day. So, I think that's provided a  
18 great benefit to industry and to consumers.  
19 You know, the forum gives -- it is  
20 interesting because as the Federal Trade  
21 Commission and the government was kind of  
22 easing restrictions on comparative  
23 advertising, in tandem, there was a forum  
24 created in which advertisers could quickly  
25 and cost-effectively challenge one another to

1 ensure those comparative claims were  
2 truthful. And, as a result, consumers have  
3 access to what the FTC has determined is very  
4 valuable information, comparative  
5 information, which has some assurance of  
6 being truthful because of this forum is where  
7 they can quickly have that assessed. I think  
8 that the other thing that the FTC's support  
9 of self-regulation has enhanced is our  
10 ability to provide guidance. Companies tell  
11 us they actually use our cases in making  
12 decisions about how to advertise going  
13 forward. So, there is a great repository now  
14 of precedents in advertising law. But, we  
15 recognize that none of this would be possible  
16 without the very, very intense and constant  
17 back up and support that we get from the FTC.  
18 Every time Leslie is out there speaking in  
19 her cape, you know, she tells people, and it  
20 really resonates, that when a company doesn't  
21 agree to come up and participate in voluntary  
22 self-regulation, that they go to the top of  
23 the FTC's pile because we refer those cases  
24 typically to the FTC. We have a 96 percent  
25 voluntary compliance with our decisions,

1     which, given that we have no power, is  
2     extraordinary.  But, the 4 percent that do  
3     get referred on to the Federal Government, we  
4     have tremendous support.  We went through all  
5     the referrals over the last two years and in  
6     at least 90 percent of them, in one way or  
7     another, although it may not be readily  
8     apparent, the FTC had intervened either to  
9     encourage the company to come back and  
10    participate or to comply with what we already  
11    directed, and, in some cases, litigated.  You  
12    know, the Airborne case where if the company  
13    had complied with the NAD's recommendations  
14    four years ago, probably wouldn't be the  
15    subject of a thirty million dollar judgment  
16    today.  So, you know, it is a success that  
17    has flourished because of two reasons; one is  
18    the FTC provides backup and support.  But,  
19    the other thing, and it is really important,  
20    the FTC has not tried to overstep.  The FTC  
21    understands that you need to keep the "self"  
22    in "self-regulation," that it needs to be  
23    industry self-regulation and that if the FTC  
24    were to interfere and it became code  
25    regulations, then I don't think it would be



1       successful because I don't think the industry  
2       would participate. In terms of what the  
3       differences are, I think that NAD's job is  
4       not to punish, which is kind of refreshing.  
5       Because we get to the same place as the  
6       regulatory world, but we get there in a very,  
7       very different way. It is all about what the  
8       message is, what is the support, do they fit  
9       together well. And to the extent they don't,  
10      we try to provide guidance on how to make  
11      changes. We want the advertising to be  
12      truthful and accurate, but we don't need a  
13      pound of flesh to get there. And companies  
14      are more willing to make changes more quickly  
15      when they're not held up for ridicule and  
16      fined and called, you know, having engaged in  
17      deception. You can still get there in a  
18      kinder and gentler way. So, you did ask me  
19      what you can do better. Actually, a lot of  
20      this comes from Lee Peeler, having been at  
21      the FTC for so long and now the head of our  
22      program, really brought an insight that I  
23      didn't have. One of the things that he said  
24      the commission could do better is really  
25      recognize that, in addition to the outlier

1     advertisers which you commonly deal with in  
2     your cases, to recognize there is a huge,  
3     huge advertising bar out there, in-house  
4     counsel and corporations all over the  
5     country, outside counsel, like Jeffrey's  
6     firm, who are constantly reviewing  
7     advertising, making recommendations to their  
8     clients in terms of changes that they should  
9     make. And, you know, what Lee says, it is  
10    not on the FTC's radar that there is this  
11    huge community out there that's actually  
12    looking to them for guidance. And that they  
13    have a big footprint on the choices that  
14    people are making and what they are doing in  
15    their advertising. So, I think that, you  
16    know, you need to look at some of the things  
17    that maybe aren't working. For example, we  
18    did a comparative pricing case using your  
19    deceptive pricing guides several years ago  
20    because they were out there and they were  
21    what the standard was. And we looked at  
22    jewelry and decided that it had never been  
23    sold at the advertised prices and it was  
24    deceptive pricing. And we relied heavily on  
25    your guides in doing that. And we made

1 recommendations for changes and the company  
2 decided not to comply and it was referred to  
3 the FTC. And, although, it wasn't said  
4 publicly and outloud, you basically said, we  
5 have the Internet now, people can compare  
6 prices and this is not an enforcement  
7 priority to us and we are not going to look  
8 at it. To me, if you have guides and people  
9 are relying on your guides and you don't want  
10 to hear about it, then take it out, if it is  
11 no longer relevant. And I think there are  
12 some guides that people are looking to and  
13 relying on that are not that effective. The  
14 testimonials and endorsement issue is a huge  
15 one and they are being updated, which I think  
16 is really, really good. But, for the moment,  
17 all of us are approving advertising which we  
18 know from your own research and investigation  
19 is conveying messages to consumers that they  
20 can expect to get performance that, you know,  
21 in the ad, and we feel hamstrung to change  
22 this. So, I think it is really just a  
23 realization that you have a big voice and  
24 that, you know, to the extent that, you know,  
25 national advertisers and their attorneys are

1 looking to the Federal Government, and NAD is  
2 as well, to the extent things aren't working,  
3 it is important to fix them quickly. And to  
4 the extent things are outdated, get rid of  
5 them.

6 MS. GREISMAN: I want to go back to  
7 something Jeffrey said. You said what your  
8 clients care about is not what the State AG  
9 will think, not what the FTC will think, but  
10 what NAD will think. Does that make sense  
11 from where you sit, Jerry?

12 MR. CERASALE: Part of our  
13 guidelines is follow the law. That's the big  
14 one. It starts up top. So, if they ask us,  
15 we worry about what the State AG's and FTC  
16 will say. So, I think that there are people,  
17 there are companies that won't join DMA  
18 because of the ethical guidelines. They do  
19 ask what does DMA say on this because, in  
20 some areas, the guidelines hit specifics of  
21 what the FTC or states have said outright. I  
22 do think so that they do hit us on the  
23 differences between the FTC and the states  
24 and it creates a huge problem for us as we  
25 deal with small marketers. They do market

1 nationally and internationally through the  
2 internet and also through HELOC, but the  
3 differences are the things that cause us the  
4 biggest grief. But, they will look to us but  
5 they also want to make sure they are not at  
6 cross-purposes with the Trade Commission or  
7 the State AGs.

8 MS. GREISMAN: Joy, does what  
9 Jeffrey said give us pause?

10 MS. FEIGENBAUM: Certainly, through  
11 our Consumer Frauds Bureau, we have been  
12 handling the student lending investigation,  
13 and in recent months focused heavily on the  
14 direct consumer marketing aspects. We have  
15 looked at small marketers, but some very  
16 large marketers, large lenders and,  
17 certainly, enforcement has a significant role  
18 and we do think that, you know, what the  
19 Attorney General, what the FTC is thinking  
20 is, certainly, you know, at least at this  
21 stage, on the minds of advertisers.

22 MR. SWIRE: I also think it is not  
23 that they don't care, they don't ask. It may  
24 be part of the discussion, but the NAD is  
25 such a present part. I'm not trying to make

1 the argument that the FTC or the states are  
2 irrelevant in any way because they certainly  
3 want to comply with state law and FTC  
4 standards as well. But, NAD has become such  
5 a relevant part of everyone's lives that the  
6 first thing we do is we say, there must be a  
7 recent NAD case and there always is. There  
8 has been a presentation that I've been doing  
9 recently on environmental advertising. And  
10 all the cases that I cite are all cases that  
11 the NAD has done over the last seven or eight  
12 years because that's where the cases come  
13 from. I don't think there is any less of a  
14 concern about those issues. We know there is  
15 a tremendous body of work that's come out of  
16 the NAD that's directly about guidance and  
17 national advertising.

18 MS. LEVINE: You know, one of the  
19 big differences between the NAD and  
20 government, having been in both, is  
21 government doesn't provide a whole a lot of  
22 guidance in consent judgments or even  
23 litigation on how it arrived at its  
24 conclusion and why the evidence wasn't  
25 sufficient to support the claims, and, you

1 know, whether the claim was puffery or on the  
2 approval claim. All of the smaller things  
3 that advertisers are grappling with every  
4 day, they're not getting guidance from the  
5 courts or the government in great detail.  
6 And, so, one of the things you might think  
7 about is maybe expanding in your consent  
8 orders to address some of the underlying  
9 substantiation in what the problems were or  
10 why you weren't satisfied or why you think a  
11 certain claim was implied. Because we give  
12 detailed analysis of all the evidence in the  
13 record of all of the arguments, we balance  
14 them and evaluate them and pronounce  
15 judgments on them. And then companies can  
16 say, this is the testing that we have and can  
17 we make the claim. And I don't think they  
18 get that type of guidance from the  
19 government, and maybe that's not the best  
20 place it should come from.

21 MS. FEIGENBAUM: I agree with  
22 Andrea on that. Working with Attorney  
23 General Cuomo through the student lending  
24 investigation and through other  
25 investigations, that's the reason why he is

1 taking the approach of identifying the  
2 systemic problems in an industry and  
3 developing a code of conduct that every  
4 single one of the targets under  
5 investigation, whether or not they committed  
6 every deceptive act or other fraudulent  
7 conduct, that they are going to have to abide  
8 by that code of conduct. And we have  
9 developed very, very detailed specific codes  
10 on what claims are deceptive for that reason.  
11 So, I think that is a valid point.

12 MR. SWIRE: I think the division of  
13 labor here may be entirely sensible. It  
14 sounds like people are saying we look, I  
15 think, to NAD and we don't look to the FTC or  
16 the States in the division of labor. So, the  
17 FTC does very big guidelines and maybe  
18 industry-specific at the state level, but  
19 when it comes to the really detailed sorts of  
20 things, it is probably a little bit scary  
21 with the FTC staffing to opine about each one  
22 of those things. You would have been a  
23 little worried about error costs, that you're  
24 getting a little too detailed or you're  
25 locking in to maybe three years, you don't



1 want to lock yourself in. And the NAD has  
2 enough cases, they can do it at that level of  
3 granularity, but, the FTC hasn't achieved  
4 that level. The NAD's answer is that the NAD  
5 is following the law as to what the FTC's  
6 rules are. That's the division of labor and  
7 it sounds pretty sensible.

8 MS. GREISMAN: Certainly, what I'm  
9 hearing, what is the usefulness of consent  
10 orders, what is its weight in terms of  
11 precedent, what does it mean as you advise  
12 your clients. The administrative process  
13 does afford some kind of comment on what a  
14 consent might mean, certainly, in Federal  
15 Court, there is no such process for that. I  
16 do want to get back to guidance, but approach  
17 it through the rulemaking angle. We have  
18 talked about self-regulation and Andrea  
19 offered some suggestions that some of the  
20 guides are not updated.

21 So, rulemaking, something near and  
22 dear to Jerry, what is the proper role of it?

23 MR. CERASALE: Well, I think  
24 rulemaking would be kind of -- this is going  
25 to come out wrong -- a last resort. I think

1 you go down certain steps and you take a look  
2 at self-regulation, you take a look at a  
3 problem and you define it, in a sense, raise  
4 issues about a problem. And self-regulatory  
5 groups, like, DMA, can even take that just  
6 raising the question and then work on  
7 creating the guides. And then take a look to  
8 see whether or not it is working. If it is  
9 not, or if there are holes in it, then I  
10 think you can look towards regulations. But,  
11 also keeping in mind to see where technology  
12 comes in. I think that's the way you go to  
13 regulations. And I commend you in the  
14 behavioral area that you are going in the  
15 direction of seeing if there is a problem,  
16 you have raised it, a lot of us are trying to  
17 work on self-regulation. You're going to  
18 look at that, you will be coming out with  
19 some statements soon on it and give us some  
20 more guidance on self-regulation. And then  
21 you're going to watch what happens to see if  
22 something could be done. It could be that  
23 technology intervenes and takes it away, but  
24 I think that's the way we go with regulation.  
25 And we firmly believe at DMA, if you're going

1 to go with enforcement, FTC enforcement, that  
2 you take the regulation route. You worry  
3 about consent orders, then people worry, do I  
4 have to follow this, I wasn't doing this, but  
5 I had a consent. With Jerry Cerasale's  
6 company and Peter Swire's company doesn't  
7 have it. We prefer, rather than going that  
8 kind of route, to go the route of regulation.

9 MS. GREISMAN: Peter, what are your  
10 thoughts here?

11 MR. SWIRE: I have written on this  
12 and I can do it in short, medium or long, but  
13 I will do it in short. When I worked for the  
14 Clinton administration in 1990,  
15 self-regulation on the privacy side was  
16 something we pushed very hard, and I think we  
17 saw a lot of progress, where practices  
18 evolved rapidly, privacy notices spread  
19 rapidly and the FTC was crucial to helping  
20 the industry move much sooner than it would  
21 have otherwise. That kind of rapid  
22 development period is something that's  
23 different from what we've had in the last  
24 five years for privacy. I don't think  
25 privacy policies are all that different from

1 five years ago. So, some of the rationale  
2 for self-regulation from that period don't  
3 apply much more recently. There are also  
4 some limits to self-regulation. You know,  
5 you start with self-regulation, you start  
6 with markets, that there has to be a clear  
7 market failure before you start to think  
8 about this. But here is one of the problems  
9 the FTC has going forward. The FTC did a  
10 fantastic innovation in the 1990s, which is,  
11 Section 5 became a hook to become the privacy  
12 agency, which meant that anybody that made a  
13 statement is going to be under the Section 5  
14 authority and be held accountable to that  
15 promise. And that depends on whether there  
16 is a clear notice that you can point to. So,  
17 the regulatory regime exists, the consent  
18 decree, hey, come on, you have to do better,  
19 exists around all these cases.

20 Now, in the behavioral space, my  
21 whole seminar this fall was on behavioral  
22 advertising, and at the end of the semester  
23 we are going to post all the students'  
24 comments. But, the one thing that has struck  
25 me, if I go to a typical commercial website

1     today and put in the URL, there are typically  
2     fifteen to forty boxes in that page. And  
3     different parts of that web page are going to  
4     different servers. It is not the case that  
5     the consumer sees forty different notices on  
6     the page. And it is not obvious that's a  
7     wonderful way to go to have forty posted  
8     notices all over the web page. But, if we  
9     don't have an effective way to give notice to  
10    how the different boxes are going to  
11    different places, there is a Section 5  
12    question whether the FTC even has a  
13    regulatory way to talk about it. So, if  
14    Section 5 is not clear how you're going to do  
15    Section 5 with deception because you don't  
16    have promises, then the self-regulatory  
17    approach is not going to work because you  
18    don't have any way that you're under the  
19    regime or the consumers have any idea who to  
20    complain to. So, it at least raises the  
21    possibility that you would want a statute or  
22    reg or some legally binding thing that gives  
23    the FTC back up authority so when problems  
24    develop there, there is some legal basis for  
25    it. And that's going to be an issue on

1 mobile phones and other new technologies.

2 MS. GREISMAN Jeffrey, you're  
3 familiar with our formal business guides, but  
4 how do you assess the role of the guides  
5 versus a rule?

6 MR. GREENBAUM: Well, first of all,  
7 I think that the FTC has used its unfairness  
8 authority very effectively in that. You talk  
9 about flexibility and all that. I think if  
10 you look at the cases that the FTC brought, I  
11 think it has used unfairness in a way that  
12 sort of adapts some of those practices. But,  
13 in terms of guides, you have to take a step  
14 back and say, I have many, many people have  
15 tremendous admiration of the process that the  
16 FTC goes through. And the idea that the FTC  
17 is not jumping into rulemaking and  
18 encouraging regulations, but goes through a  
19 deliberate and thoughtful process that  
20 involves, perhaps, issuing guides; perhaps,  
21 issuing business guides, holding workshops  
22 sort of to figure out how to work out this  
23 process. Just, for example, you look at the  
24 rebate workshop that came out a few years  
25 ago, there were no guides that came out of

1 that, there were no regulations that came out  
2 of that, but it was tremendously beneficial.  
3 Industry heard it, people paid attention to  
4 it, it got the advertising bar talking about  
5 those issues, they issued self-regulatory  
6 guidelines on rebates. And it really lead to  
7 a discussion that, I think, impacted what  
8 people saw, or some people saw, as a  
9 significant problem. So, your using all of  
10 these different ways of reaching businesses  
11 is very, very productive and I think guides  
12 play a very important role. Certainly, there  
13 are a lot of guides that we speak about with  
14 our clients all the time and that are  
15 relevant. I think that being said, there is  
16 certainly an issue of the effectiveness of  
17 the guides if they don't get updated in sort  
18 of a way that is a little bit foreseeable.  
19 What I mean by that, you look at the  
20 endorsement guides as an example. The review  
21 was announced two years ago. Clients call  
22 all the time and say what's the story, when  
23 are these things going to be issued, do we  
24 need to change what we are doing, how do we  
25 feel about these things. I think the FTC

1 needs to take the amount of time that it  
2 needs to take, but, also be transparent, this  
3 is going to come out in December. Well, we  
4 got to December, we need another six months  
5 because we need to do more research. Giving  
6 industries some guidance there is very  
7 helpful. In the same way you look at the  
8 green guides, tremendously valuable. You can  
9 almost stop now, not change the guides. Just  
10 the discussions are going to lead to so much  
11 thought about sustainability, life cycle  
12 analysis, all those things. But, also,  
13 clients want to know what is going on next;  
14 are there going to be more workshops. And I  
15 think just adding some transparency to the  
16 process, will be very, very helpful.

17 MS. GREISMAN: Jerry?

18 MR. CERASALE: On the transparency,  
19 we would love it to, but having worked at the  
20 FTC, staff doesn't control the Commissioners  
21 and, so, you can't. And the problem you  
22 have, oh, we are going to have something out  
23 in September and then it doesn't come out in  
24 September, that creates huge problems for  
25 staff, for the FTC, for people. So, it is



1 difficult to get the transparency you want.  
2 I mean, Lois can have it all done  
3 today and it goes up to the commission and  
4 three months later, you wonder where it is.  
5 So, those kinds of things happen. So, I  
6 think in the defense of the staff, and the  
7 commission itself, you don't have one  
8 commissioner, you have five for a reason, and  
9 that delays things. And I think  
10 transparency, putting a box, I have got to  
11 meet this deadline can create bad  
12 regulations.

13 MR. GREENBAUM: Again, I'm not  
14 arguing that you should issue things before  
15 they are ready. Certainly, you could say, we  
16 are not ready, but here is our new deadline.  
17 But, an ability to have a conversation where  
18 industry knows what is going on, so there is  
19 a level of predictability about it.

20 MS. GREISMAN: Let me move to the  
21 States' enforcement of a lot of FTC rules.  
22 How do you see the proper role of rulemaking  
23 with the FTC, Joy?

24 MS. FEIGENBAUM: Well, we want more  
25 of it and we look to that regulation. You

1 know, there is some discussion here that the  
2 advertisers, when we get to enforcement, we  
3 see the outliers, but without discussing  
4 investigations, as I'm not able to do, we  
5 have some very major advertisers under  
6 investigation in areas, such as rebates where  
7 there may be a lack of regulations, that  
8 would actually assist in our enforcement  
9 efforts where we see some pretty deceptive  
10 practices going on and we are going to  
11 enforce it under the state consumer  
12 protection laws, but, certainly, that's one  
13 area, for example, where regulation would  
14 actually, sooner than later, would actually  
15 serve the public. And, again, it is not just  
16 the outliers out there, but these are trends  
17 that we are seeing in advertising that we  
18 are, in the rebate area, that are moving  
19 without the proper guidance through  
20 regulations.

21 MS. GREISMAN: Sounds like the FTC  
22 has gotten straight A's for how it is setting  
23 its priorities. I would like to now shift to  
24 how you measure the effectiveness. The  
25 agency is doing lots of stuff on the consumer

1 protection side. How do you figure out what  
2 are the costs and benefits of that work and  
3 how does that inform what you're doing?

4 Peter, do you want to take a shot at it?

5 MR. SWIRE: I got to work on the a  
6 lot on the HIPPA medical privacy cost-benefit  
7 analysis, which is the first cost-benefit  
8 analysis of a privacy rule in the Federal  
9 government. There is usefulness to the  
10 process. And then you shouldn't get too hung  
11 up on the numbers at the end because there  
12 are important qualitative things that are  
13 pretty well-known to people who have been  
14 through that process. I think that, going  
15 back to some things from earlier, I was  
16 saying I think that geography is not as good  
17 a basis for some kinds of enforcement as it  
18 used to be because certain things happen  
19 across county and state lines. And then you  
20 end up having functional areas and then you  
21 say, how are we doing on green advertising,  
22 how are we doing on spam, phishing,  
23 functional areas? So, part of the priority  
24 is trying to measure how are we doing on  
25 spam. I'm still getting spam despite CAN-

1 SPAM, but that can't be the measurement. But,  
2 part of the measurement is, how are we doing  
3 on consumer complaints; what are the three  
4 biggest areas of consumers complaints?  
5 That's some measure where the consumer sees a  
6 problem. And I think the FTC looks at that  
7 pretty carefully at least for some hint of  
8 what is creating problems. So, that's one  
9 thing to look at. But, more than that, I  
10 think you probably need to have program  
11 reviews of each program; how are we doing on  
12 phishing, ID theft, whatever the substantive  
13 topics are. And the way you tend to do that,  
14 you have somebody who is not involved in the  
15 day-to-day come in periodically to see how  
16 are we doing on spam, what is the strategic  
17 plan, how does it measure up to what we said  
18 we were going to do in the next three years.  
19 That's the way you tend to do things in other  
20 organizations, and you can bring that up to  
21 the FTC some more.

22 MS. GREISMAN: Andrea?

23 MS. LEVINE: I think the FTC can  
24 clearly measure the impact that its efforts  
25 to encourage health regulation have had. I

1 mean, the creation of the National  
2 Advertising Division, FTC hearings were the  
3 catalysts for this industry for getting  
4 together and creating a forum that handles so  
5 many cases a year. And also in '74, you  
6 know, it was the FTC looking at children's  
7 advertising that forced the children's  
8 advertising industry to get together and  
9 develop the Children's Advertising Review  
10 Unit. We have Wayne Keely and Phyllis Space,  
11 who are the director and associate director  
12 of that program here today. That goes beyond  
13 the law in terms of really, really trying to  
14 restrict the inappropriate messages being  
15 targeted to kids. Your workshop on childhood  
16 obesity was the catalyst for the children's  
17 food and beverage initiative where all the  
18 major advertisers to children are now  
19 committed to reducing their advertising of  
20 junkfood to kids. Your criticism of the  
21 electronic retail industry's inability to  
22 keep a lid on infomercials created the  
23 electronic retail advertising review program,  
24 which is a shortened review program that can  
25 analyze and pull infomercials that are not

1 truthful and accurate off the air. Most  
2 recently, your pressure on the dietary  
3 supplement industry led the Council for  
4 Responsible Nutrition to engage in an  
5 initiative with NAD where they provide  
6 funding for an additional line attorney. So,  
7 I think you can really concretely measure the  
8 huge impact you have had by putting time and  
9 energy into supporting and endorsing  
10 self-regulation.

11 MS. GREISMAN: How do we measure  
12 the fraud program in terms of deterrence  
13 and/or otherwise?

14 MR. CERASALE: I think one way to  
15 look at your measurement, just speaking from  
16 the DMA's ethical code, many of the cases  
17 that come before the DMA are brought by  
18 competitors because I'm following that guy  
19 and she's not and she has a competitive  
20 advantage over me. So, that's how we get an  
21 awful lot of cases. I think you can do a lot  
22 of measurement by talking with businesses to  
23 see, are others following it, do you feel it  
24 is a disadvantage. Those are things that  
25 work. The other aspect that comes is, taking

1 a look on the fraud side, especially in our  
2 area which is direct marketing where you're  
3 buying something that you don't have in front  
4 of you, you can't touch and feel and you're  
5 paying for it before you get it, a remote  
6 sale, look at the consumer trust. If you're  
7 not working, if your fraud things are not  
8 working, our market is going to dry up in  
9 those areas. It is just going to stop. And  
10 I think that it is important on measurement  
11 to go back to the industry you're looking at  
12 to see how well it is doing. Don't ignore  
13 consumer complaints as well, but look at the  
14 industry because the ones that are following  
15 the law can tell you what is happening where  
16 people can't.

17 MS. GREISMAN: Others on assessing  
18 the effectiveness of the fraud program?

19 MS. FEIGENBAUM: Well, I agree with  
20 going to industry, but certainly, looking at  
21 the consumer complaints and seeing the trends  
22 in the consumer complaints, that's certainly  
23 a way that we measure what is, you know, what  
24 the problems are and what has been fixed and  
25 where the new problems are developing. So,

1 we are constantly doing that assessment.  
2 Recoveries is just another quantitative way  
3 that we assess it, but, then there is the  
4 qualitative, you know, just having addressed  
5 a certain industry and then looking at the  
6 television advertising and seeing that, my  
7 goodness, the claims have changed even when  
8 we didn't target that particular advertiser.  
9 So, you know, those are all ways that we do  
10 it.

11 MR. SWIRE: I think fraud can be  
12 called an experience good wherein I buy the  
13 thing, I receive it, it doesn't work, I find  
14 out about it. So, for experience goods,  
15 consumers complaints are a good measure  
16 because they are the victim of fraud. For  
17 privacy harms, computer security harms, you  
18 don't experience it. You don't know how it  
19 happened. Those complaints aren't made as  
20 much even when the problems happen. So, as  
21 you look at these measurements, you need to  
22 see there are some experience situations,  
23 like fraud, where the numbers are likely  
24 pretty good for consumers.

25 MS. GREISMAN: So, as we think



1 about measuring the effects, that raises an  
2 issue of research that should be done in that  
3 area. Are there other areas of research  
4 where the FTC, on the consumer protection  
5 side, should be committing resources? Jeff,  
6 why don't we start with you on that.

7 MR. GREENBAUM: Well, I guess, one  
8 of the questions I would ask on the research  
9 side is, you know, are we going to be looking  
10 at-- in 2014, are we going to be looking at  
11 consumers, judging consumer behavior through  
12 1983 lenses? I wonder whether standards we  
13 set about the way people judge advertising,  
14 can it really not have changed and gotten  
15 even more sophisticated over the thirty-five  
16 years, whatever it was. And I think we need  
17 to look at how would consumers interpret  
18 advertising today. Are they better able to  
19 evaluate goods, do they understand that  
20 business disclosure, that they actually have  
21 to read the disclosure? I think these are  
22 actually interesting questions that affect  
23 advertisers today. The research that the FTC  
24 did on the endorsement side was fascinating.  
25 Essentially, the way I like to oversimplify

1 it was, a disclosure in bold, in red, in the  
2 center of an ad in fourteen point, which is,  
3 of course, a typical disclosure for  
4 advertisers, is not effective. And I'm  
5 thinking, so, what you're saying, is the  
6 headline, essentially, in the center of an  
7 ad, is not going to effectively qualify the  
8 claims in the advertising. If that is the  
9 disclaimer that complies with the law, then  
10 there is a disconnect here. It sort of seems  
11 that the FTC standard, clear and conspicuous,  
12 doesn't actually work. When we see it  
13 demonstrated itself, its own standard doesn't  
14 really seem to work, at least under the  
15 research it conducted. So, I think we need  
16 to take a step back and say, do we have the  
17 correct disclosure statement? Do you feel the  
18 disclosures are working, do you feel that the  
19 system that we have in place, the way people  
20 disclose things, is this really helpful to  
21 consumers? I think these are important  
22 questions because the world is getting more  
23 complicated and people don't necessarily have  
24 the money to place a full page ad in the New  
25 York Times for every single product. We

1 don't have the best system in place right  
2 now. And I think that we can all benefit  
3 from thinking that the dot com disclosure  
4 guidelines were very useful in 2000 and I  
5 think it is time to revisit some of the basic  
6 ways we think about how consumers judge  
7 advertising. I mean, I look at this and I  
8 think it is probably not working in the way  
9 in which we think it is working, it is sort  
10 of a convention today. We sort of say, if  
11 you've got a disclosure and it is sort of  
12 there and it is not tiny, we are going to  
13 assume, for the purpose of argument, that it  
14 works, even though we have some skepticism  
15 about that. Or, at least we are holding  
16 people to a standard which is not a realistic  
17 one, which is, maybe a consumer who does not  
18 read the ad carefully or is watching TV and  
19 making dinner at the same time should also  
20 not be confused about the ad as opposed to  
21 taking the time to read it. So, I think we  
22 need to think about what a potential standard  
23 could be. Certainly, Red Cam was an example  
24 of one idea where they created an eight  
25 hundred number to disclose information in a

1 different way. And it would be a useful  
2 endeavor to think of different ways to look  
3 at disclosure. What if you told a consumer,  
4 there are significant limitations, there is  
5 New York State law about gift cards, that are  
6 there are terms and conditions on this gift  
7 card. Before you buy that gift card, you  
8 need to go and use your resources to learn  
9 what those disclosures are. I wonder whether  
10 it would be a useful endeavor to really look  
11 at other ways we can communicate information  
12 to consumers in a way that would be way more  
13 effective.

14 MS. GREISMAN: And, of course, the  
15 research on the mortgages disclosure area,  
16 that is an area that is asking for more  
17 research to be done. Any other research  
18 areas for the agenda, Andrea?

19 MS. LEVINE: The NAD is always  
20 trying to get out ahead of issues, and I  
21 think it is much harder for the regulatory  
22 world to do that, but it would be helpful if  
23 it weren't always -- I mean, we are getting  
24 this onslaught of green marketing cases and  
25 the Green Guides won't be revised for years.

1 The consumer population is dramatically  
2 changing over the next decade. We are going  
3 to have this huge elderly baby-boomer  
4 constituency of consumers that has spending  
5 power, at least they did two months ago, and  
6 we are watching the development of memory  
7 enhancement products and arthritis cures and  
8 retirement advising and, you know, the youth  
9 kind of marketing with cosmetics. The  
10 product categories are changing as the  
11 population is aging. And assessing the  
12 vulnerabilities of an aging consumer market,  
13 there are so many issues that are coming down  
14 the pike and we are already starting to see  
15 them, and it would be great if the FTC could  
16 get out ahead on that and start the  
17 discussion going on how is marketing changing  
18 because the demographic is changing.

19 MS. GREISMAN: Last call on the  
20 research end. Peter?

21 MR. SWIRE: I have several ideas  
22 and a lot of it simplifies to this. The  
23 disclosure approach has been text-based and  
24 it has been with a sort of rational consumer  
25 model, as the way we talked about it a lot of

1 times. Both of those things are under a lot  
2 of pressure. So, when the FTC educates  
3 consumers, why not have it be video or audio?  
4 But, more generally, an awful lot of the  
5 content that goes out in all sorts of ways is  
6 not going to be text-based going forward.  
7 So, if you're thinking about disclosure for  
8 advertising, how can we process things away  
9 from text? And lawyers are the last ones to  
10 give up on text. It is the last thing we  
11 have. So, then from a rational consumer, the  
12 Chicago school approach as to how people  
13 process things, a lot of research is heading  
14 towards behavioral on various levels.  
15 Consumers can be told things, but they still  
16 don't listen in various ways, so, it becomes  
17 an empirical question about what mechanisms  
18 are useful to reduce fraud and reduce  
19 misunderstanding. So, how to move away from  
20 text and how to take account of behavior are  
21 two big things. One last thing on research,  
22 or two other things. One is automatic  
23 translation to other languages of FTC  
24 materials. The European Union has to deal  
25 with a lot of languages and we might be able

1 to learn from them or others on you how to do  
2 that. And then, a research point, I spent a  
3 lot of time on computer security and the  
4 DMCA, Digital Millennium Copyright Act, which  
5 prohibits a lot of computer security research  
6 unless you get permission from the company  
7 that you are researching. And if the  
8 company's got a bad product, they don't want  
9 you to poke at it. There is an exception in  
10 the DMCA that allows Federal agencies or  
11 research done on behalf of the Federal  
12 agencies to do that kind of research. So,  
13 this is a research point. And in the  
14 consumer space, if the FTC beefs up its  
15 technological abilities, it might be able to  
16 look for broken things, things that have  
17 computer vulnerability, and it requires a  
18 Federal agency to do or respond to the  
19 research in order to take advantage of  
20 exceptions.

21 MS. GREISMAN: There is no question  
22 that my fifteen year old nephew processes  
23 information very differently than I do. That  
24 goes without saying.

25 MR. CERASALE: That's true. One

1 area of research on harm; see where the harms  
2 are, do some research to see where things can  
3 be done. But, I want to raise an issue you  
4 just raised. Both my mother and I were  
5 members of AARP and things were slipping, so  
6 we wanted to try and take over some of the  
7 stock. And my mother basically told me that  
8 this is her life, that I can make my own  
9 decisions, I can do this. So, the point that  
10 came around for my sister and I is when do we  
11 step in, when do we say, you can't make that  
12 decision, mom. It is a very personal  
13 decision that I do not want my government to  
14 make. And, so, that is one, I think, you  
15 have to be careful when you're thinking about  
16 a reasonable consumer, you're going to take  
17 away choices from individuals who may not  
18 want those choices being taken away from  
19 them. So, I think, that as you look at  
20 consumers, especially as us baby boomers  
21 start aging, don't necessarily want the  
22 government to make that choice for me. And  
23 that's a difficult balance to make. But,  
24 don't jump in and get rid of the reasonable  
25 consumer standard because I'm getting old.



1           MR. GREENBAUM: I also think  
2 another area worth looking into, the way of  
3 resolving cases. Certainly, the FTC has  
4 changed the approach in terms of kinds of  
5 damages, the kinds of restitution, the  
6 dollars, you know, looking for really total  
7 disgorgement, pretty much in the fraud cases.  
8 Whether that's going to make these cases  
9 harder to resolve and what are the benefits  
10 and trade offs of that? I wonder about  
11 companies that are forced into litigating  
12 cases and investing more when these could  
13 have been subject to earlier resolutions,  
14 gotten the information out there and moved on  
15 to the next thing. And that's going to be an  
16 important area to look at.

17           MS. GREISMAN: We have ten minutes  
18 left. I'm going to throw out a question to  
19 all of you and, hopefully, save a couple of  
20 minutes for questions from the audience. So,  
21 here is the question. Identify one or two  
22 specific things the FTC can do to improve the  
23 effectiveness of the consumer protection  
24 mission.

25           MR. CERASALE: Produce something

1 for small businesses. I think national  
2 advertisers can hire big lawyers and so  
3 forth. Let's do something, maybe online,  
4 where small businesses can understand what  
5 you're supposed to do, especially with new  
6 rules coming down, we can do it with working  
7 with us. That's an area if you get them  
8 involved, it helps the consumers with their  
9 own rights because they're following what you  
10 want them do.

11 MS. FEIGENBAUM: One area that we  
12 haven't talked about, proliferation of  
13 private consumer class actions. And the  
14 State Attorneys General, along with the US  
15 Attorney General now get notices of class  
16 action settlements under CAFA. And that's an  
17 area where the Federal Trade Commission, with  
18 its tremendous expertise in consumer class  
19 actions, it seems to me, if at all possible,  
20 should be looking at those notices as well  
21 where often the State Attorney General's  
22 offices are strapped for resources. We are  
23 inundated with these notices and we are  
24 reviewing them, but, it is very hard in a  
25 short period of time to assess whether the

1 consumers are getting meaningful relief or  
2 whether there are abuses of the class action  
3 process. And if the Federal Trade Commission  
4 could, likewise, look at these notices,  
5 convene with states when there appears to be  
6 a problem, and, perhaps, intervene, I think  
7 that would certainly advance the mission of  
8 the consumer protection mission. One other  
9 area is Consumer Sentinel. It is a wonderful  
10 resource for law enforcement, but I was  
11 wondering whether -- states can't use those  
12 complaints, just like we can use the BBB  
13 complaints to put in our pleadings and  
14 support our claims when we bring litigation,  
15 we are not able to use the Consumer Sentinel  
16 complaints. And I want to know if there  
17 would be some way of revamping that to assist  
18 in State enforcement.

19 MS. GREISMAN: That's something we  
20 should talk about afterwards. Peter?

21 MR. SWIRE: I think there is a good  
22 chance that the financial regulatory system  
23 will get reshuffled when it comes to consumer  
24 protection and other things in the next few  
25 years. And the FTC has consumer protection

1 expertise and sometimes might be a more  
2 effective advocate in that space. So, the  
3 FTC should play in that discussion. We want  
4 to make sure there is a really good system  
5 that gets established. A second, somewhat  
6 related point is that at the data protection  
7 privacy level internationally, we don't have  
8 a terribly coherent system right now for all  
9 these cross-border data measures that are  
10 happening to consumers. Commissioner Harbour  
11 spoke in Strasburg at the Data Protection  
12 Commission Conference, and I think that a  
13 thoughtful way for the FTC to be a consistent  
14 voice internationally, much like Eleanor Fox  
15 was the international voice and the rest of  
16 the panel this morning was more for  
17 competition. But a consistent voice for  
18 international data protection is something  
19 that the FTC can usefully do.

20 MR. GREENBAUM: I think the FTC'S  
21 already doing tremendous work that is  
22 extremely helpful to national advertisers. I  
23 think if I were to focus on two areas, it  
24 would be, one, do more of what you're doing  
25 on the business guidance side. The guides

1 that the FTC produces are important and  
2 useful to businesses. I think we may need to  
3 focus on that they are up-to-date. And, the  
4 second is, I think -- I don't know that the  
5 business community understands how accessible  
6 people at the FTC are willing to be. Take,  
7 for example, Phyllis Marcus, who spends a lot  
8 of everyday answering questions. This is  
9 someone who has made just a tremendous  
10 difference by answering the phones. She's  
11 out there answering questions from outside  
12 counsel that don't know how to do certain  
13 things. And I think that more people like  
14 that and more positions like that, the  
15 ability for a business, for a lawyer who is  
16 not familiar with the area, to reach out and  
17 get a quick answer to a question is just a  
18 tremendous asset. As Andrea said, there is a  
19 tremendous community out there advising  
20 clients and I think the more the FTC makes  
21 resources available to that legal community,  
22 it is going to have a tremendous effect. It  
23 is going to make an exponential difference.

24 MS. GREISMAN: I want to correct  
25 that we do have to 3:15. Andrea?

1 MS. LEVINE: Maybe it is just from  
2 a distance, it is not clear, but it has  
3 always seemed to me, it's been an imbalance  
4 in the FTC with competition and antitrust  
5 being the big kid and consumer protection as  
6 the stepchild or whatever. And I think that,  
7 you know, the FTC is kind of missing an  
8 opportunity to play a very strong leadership  
9 role in advertising law. I mean, you have so  
10 much power and so much impact. When you  
11 issued the report on junk food advertising to  
12 kids, it is on the front page and antitrust  
13 is on page thirty of the D section. It is a  
14 very powerful tool. The State Attorneys  
15 General quickly recognized that consumer  
16 protection is just a great vehicle for  
17 getting the word out and I think that the FTC  
18 should reflect a little bit on, you know,  
19 utilizing that as a powerful tool, without  
20 enforcement and without all the resources  
21 that it takes to convey a message to the  
22 advertisers, and you will see changes that  
23 will flow from that. And I think it is a  
24 missed opportunity. You have a tremendous  
25 amount of power and you should use it for

1 good.

2 MS. GREISMAN: I have lots of other  
3 questions. I thought we would take a minute  
4 or two and see if there are any out here.

5 MR. COHN: I had a question. And  
6 it is really about consumer harm. I think  
7 Peter actually used the H word for the first  
8 time on this whole panel. And looking at the  
9 title of the panel, how could I say it in  
10 three words, deploying resources effectively  
11 to which any kid would say, why, to enforce  
12 the FTC Act, but, why? And the big harm that  
13 you all read about for the past eighty days  
14 or whatever, it is one thing to say the FTC  
15 doesn't have jurisdiction here, there and the  
16 other place, but a lot of people don't know  
17 that and don't care about that and don't  
18 understand that. So, how could the FTC work  
19 better with those primary enforcers, be it a  
20 State agency or Federal agency or Attorney  
21 General Office, how could the FTC work  
22 together to address the huge consumer harm  
23 that's happening now and happened in the last  
24 downturn and is going to happen in the next  
25 downturn? And the consumer harm that the

1 vulnerable consumers suffer is real. And it  
2 happened in the last downturn and it will  
3 happen in the next downturn given the  
4 jurisdictional bars. So, how can the FTC  
5 work better with the primary enforcers?

6 MS. GREISMAN: Joy?

7 MS. FEIGENBAUM: Certainly, in this  
8 mortgage credit crisis, with the downturn of  
9 the economy, that's an area where the FTC,  
10 together with every other regulator, has to  
11 stay ahead of the curve here on what  
12 legitimately can be done to help consumers  
13 manage their finances and go forward and what  
14 offerings are out there to actually take  
15 advantage of consumers in this area. So,  
16 this is just an area where -- another area,  
17 where, you know, staying ahead of the curve,  
18 research. There are already advertisers on  
19 TV now for seminars on the bailout, and I  
20 think we all need to be observing these and  
21 communicating and we really need to be  
22 sharing information so that we can quickly  
23 step in and see, you know, what is deceptive  
24 and how we can better advise consumers and  
25 enforcement.



1           MS. GREISMAN: I think that your  
2 point is there is economic distress that  
3 re-energizes certain types of fraud. There  
4 is perennial fraud but there are some that  
5 seize the opportunity and that's something to  
6 be on the lookout for.

7           MR. SWIRE: Couple of responses.  
8 Some of the things that are outside the  
9 jurisdiction of the FTC, it may be on some of  
10 the financial things that there will be an  
11 openness of shifting responsibilities in the  
12 next few years. I doubt we'll have the OTS  
13 and the OCC and FED and the FDIC and CFTC and  
14 the SEC all doing the same things five years  
15 from now. And, so, then it will be a  
16 consumer protection back-up role for the FTC,  
17 maybe more broadly than the bank regulators  
18 have thought to date. In comparing  
19 effectiveness of some of the regulators with  
20 effectiveness on antifraud of the FTC, state  
21 AG's. And getting rid of exemptions is the  
22 hardest thing in the universe except when it  
23 isn't. One other quick thing. In terms of  
24 coordinating among agencies and  
25 internationally also, technology is a help

1 here. So, Consumer Sentinel is shared across  
2 lots of borders, email lists,  
3 teleconferences, phone calls. You don't have  
4 to go physically to coordinate the way you  
5 would have in an earlier age. And I think  
6 looking for technology to do that for  
7 international enforcement -- Jerry and I were  
8 talking at lunch -- maybe there ought to be  
9 really good teleconferencing in the FTC so  
10 they don't require a trip to Geneva every  
11 time. You can plan a lot more often and a  
12 lot more consistently if that happens. You  
13 can do it with many of the states. So, look  
14 for ways technology can align cooperation.

15 MR. CERASALE: The thing comes in  
16 coordination and you are going to have to  
17 have it and as we go forward more into the  
18 mobile and internet marketing where there is  
19 -- you don't even know where the consumer is.  
20 My kids have 703 cell phones, which is the  
21 old Virginia area code. So, you don't know  
22 where they are. So, when I came to the  
23 Federal Trade Commission after a time of  
24 consumer protection retrenchment, one of the  
25 first things I did was to call one of the

1 states, I wouldn't stay away from the states,  
2 and they were just shocked that someone from  
3 the FTC Chairman's office was calling the  
4 state, what are you doing? It is that simple  
5 to get the information. You don't have to  
6 use the telephone, you can do it other ways.  
7 That's how it is going to work. The states  
8 wants the help and the FTC wants the help.  
9 And the only problem that comes in is when  
10 state consumer protection agencies in the  
11 states don't control the state legislature or  
12 the FTC doesn't control the Congress, even  
13 though they would love to, so, you don't  
14 always have the same things. But, it is  
15 simply talking to each other and working  
16 together. And you can see from the  
17 enforcement, FTC comes out and there is a  
18 string of AG's there working with them. And  
19 that's going to continue. As we look now at  
20 the get rich quick ads, save your stocks, how  
21 you can make money in this bad market, we  
22 know all these things that are going to come  
23 around.

24 MS. GREISMAN: You know, it is  
25 interesting. We have talked about

1 coordination, sharing information, consumer  
2 complaints. One of the real challenges with  
3 consumer complaints is these are  
4 self-reported. These are not necessarily  
5 indicative of what is going on in the real  
6 world. The agency has done consumer fraud  
7 surveys to try and tease out that  
8 information, but it is quite a challenge. And  
9 that leads to, as we look at over the next  
10 decade, are there different kinds of things  
11 the agency should be doing to get the kind of  
12 information it will need to stay on top of  
13 consumer protection issues?

14 MR. CERASALE: One of the things we  
15 found in our self-regulation, it can be gamed  
16 sometimes, people can start a program for  
17 complaints against company X and it is  
18 actually company Y that pushed it forward and  
19 you have to watch for that. And, finding out  
20 what is happening is going to be even more  
21 difficult because today, I'm a political  
22 analyst, I'm a restaurant critic, I'm a  
23 reporter, and so forth, because I can put it  
24 on a blog and I endorse products or not, and  
25 who has paid me and so forth makes it

1 difficult, very, very difficult to get that  
2 information. I don't know where you get the  
3 research, but your research has to go -- it  
4 is why many companies use Twitter in order to  
5 find out what people are saying about their  
6 company on the blogs, trying to go back to  
7 respond to this with a quick response, I  
8 don't know if they are all true, what the  
9 responses are. But, I think you have to do  
10 surveys of consumers to see what is  
11 happening. You also have to do surveys of  
12 companies to see what is happening to them  
13 and so forth. And then take a look and maybe  
14 talk about is this really showing what is  
15 happening or -- I think, the proliferation of  
16 everybody is a publisher on the internet  
17 creates a very big problem for knowing what,  
18 in fact, is truth and what is spam and what  
19 isn't.

20 MS. GREISMAN: Andrea, from your  
21 perspective, you react when a complaint is  
22 filed and you take specific action.

23 MS. LEVINE: Consumer complaints  
24 are generally not the source of our cases.  
25 Competitors are in a better position with

1 that. But, the local Better Business Bureaus  
2 all over the country, people don't typically  
3 file complaints with them just for fun or to  
4 jack up the numbers. And I think they have a  
5 huge national website. And, to me, that  
6 would seem to be a very good source of where  
7 consumers complaints and consumer injury is  
8 and I am sure you do use it.

9 MS. GREISMAN: Many of them come  
10 directly into Sentinel.

11 MS. LEVINE: Right. But, to filter  
12 out some of the gamesmanship that goes on in  
13 those kinds of sources from more legitimate  
14 consumer complaints, that would be a good  
15 resource.

16 MS. GREISMAN: Let's fast-forward  
17 to 2014, the FTC is celebrating it's hundred  
18 birthday. What is the top consumer priority?  
19 Anyone want to volunteer?

20 MS. FEIGENBAUM: I think it is  
21 going to be data security protection and  
22 identity theft. With the expanding  
23 technology, these concerns are going to be  
24 more and more difficult to address and that's  
25 where I think enforcement has to be.

1           MS. GREISMAN: Jerry, you are  
2           looking pained.

3           MR. CERASALE: I just think it is  
4           going to be in the mobile arena. My  
5           twenty-eight year old daughter says she's old  
6           because she uses email and doesn't text and  
7           she's right. I think that's probably where  
8           it is. Although parents of teen-agers are  
9           texting because that's the only way they can  
10          reach their kids nowadays, but I think that's  
11          where it is. People, they are going to be  
12          using mobile more than anything else and  
13          that's how you're going to reach them. Today,  
14          one-eighth of households in the United States  
15          do not have a landline telephone and it is  
16          going to be growing rapidly.

17          MR. SWIRE: Half of my students  
18          don't have one.

19          MR. CERASALE: Nobody employed at  
20          DMA under the age of twenty-eight has a  
21          landline. So, I think that's where it is at.  
22          And I don't have an answer. I don't think  
23          marketers have an idea how they are going to  
24          try to do it either. Some of them are going  
25          to have good ideas, some are going to come up

1 with atrocious ideas and that's going to be  
2 the top issue.

3 MR. SWIRE: I don't have a great  
4 answer. We haven't talked about people  
5 stealing advertising games. There was a case  
6 this week in Japan where the husband killed  
7 the wife's role playing person and the  
8 question is whether it counts as murder. So,  
9 there are going to be new realms. But, here  
10 is a problem for consumers: complexity of  
11 contracts. You see it in home mortgages, but  
12 I think partly because we have wonderful  
13 disclosures in the text world at least, the  
14 ability for people to deal with those is  
15 nowhere close to the number of words in the  
16 documents. So, the idea we are just going to  
17 disclose everything just doesn't seem to fit  
18 very well with how consumers are dealing,  
19 when I've got to get my house loan, car loan  
20 kind of things. And we might need to figure  
21 out when hey, it was in the contract, so you  
22 lose, buster, when that's not going to be the  
23 way we go.

24 MR. GREENBAUM: I think it is going  
25 to be a mixture of the technology and privacy



1 and we are going to be communicating with  
2 each other differently and we are going to  
3 require new models to look at the codes put  
4 on packaging, to communicate with people, and  
5 all these things that you can do today. All  
6 of these things, we are going to have to take  
7 a really hard look at how we communicate with  
8 consumers. And, though, the real focus isn't  
9 going to change; there is always going to be  
10 new consumer frauds, always going to have to  
11 be a court focus.

12 MS. GREISMAN: Andrea, the agency's  
13 crystal ball.

14 MS. LEVINE: NAD has concerns about  
15 how the self-regulatory world is getting a  
16 handle on what advertising is in the  
17 marketplace. Used to be you had a print ad  
18 and thirty second television commercial. And  
19 now we can't even begin to start to look at  
20 what the internet, YouTube, all these places.  
21 How will we do any kind of effective  
22 enforcement where advertising is moving and  
23 changing, it is going to be different for  
24 every person it goes to. So, I don't have a  
25 clue. If you have an answer to that, I would

1 really be interested. It is a big concern.

2 MS. GREISMAN: Any last questions?

3 I will ask each panelist to give one minute  
4 closing thoughts. Well, we have covered a  
5 fair amount of ground. We have talked about  
6 the mission of the agency, it's deployment of  
7 resources and effectiveness, any final  
8 thoughts?. I'll start with Andrea.

9 MS. LEVINE: From my perspective in  
10 terms of self-regulation, I would say, keep  
11 up the great supportive work. I think it is  
12 a complementary relationship that's working  
13 really, really, really well and to the extent  
14 we had any small criticisms, just to keep it  
15 moving forward smoothly. We are a great  
16 team.

17 MR. GREENBAUM: I would say don't  
18 look too hard to make sure that everything's  
19 measurable. I think the effects of what the  
20 FTC is doing are seen in many, many ways that  
21 are not measurable. I think the programs  
22 that the FTC does, guides they issue,  
23 business guides, workshops that they attend,  
24 conversations that you have with people in  
25 the hallway. I think these things all have

1       tremendous effect that is very, very  
2       difficult to judge. I can tell as a lawyer  
3       that advises these companies that they do  
4       have an effect and it changes the questions  
5       that the clients ask. Those things you're  
6       not going to be able to measure. You're  
7       never going to be able to know that, yes,  
8       these disclosures are better because of the  
9       guidance. But, I think these kinds of  
10      programs are going to continue to be very,  
11      very, very effective tools.

12                MS. GREISMAN: Thank you. Peter?

13                MR. SWIRE: I think the FTC is  
14      probably the single global leader on consumer  
15      protection. I don't know who you would put  
16      ahead of the FTC. So, I think you should, in  
17      looking forward, say what can the FTC do to  
18      remain the global leader? We work with  
19      states, we work with self-regulators, we work  
20      with international. What do we do so we are  
21      seeing around the corner, so we are being the  
22      single place that feels responsible for being  
23      aware of some of the problems?

24                MS. GREISMAN: Thank you. Joy?

25                MS. FEIGENBAUM: From the

1 regulators' perspective, continued  
2 communication and sharing, it is clear that  
3 no one agency can do it alone. We certainly  
4 look to the FTC for, you know, tremendous  
5 expertise, and states have developed  
6 expertise on various areas, and, so, continue  
7 to share in communication.

8 MS. GREISMAN: Thank you. Jerry?

9 MR. CERASALE: From the direct  
10 marketer standpoint, keep going after the  
11 frauds and go after them hard. But, as we  
12 look forward to 2014, we don't see anything  
13 about pressure on your resources in what we  
14 see coming around. So, when you look at  
15 regulations particularly, know the harm and  
16 also understand what the regulation's effect  
17 will be on the economic generators in the US  
18 economy.

19 MS. GREISMAN: Well, I want to take  
20 this opportunity to thank you each and every  
21 one of you. I have truly enjoyed this and I  
22 appreciate your kind words as well as your  
23 constructive criticism. Please join me in  
24 giving them a round of applause.

25 (Whereupon, a short recess was

1 taken.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE AGENCY'S EXTERNAL RELATIONSHIPS

2 MS. OHLHAUSEN: Here we are at our  
3 last panel of the day focusing on the  
4 agency's external relationships. We are  
5 joined by a number of helpful panelists here  
6 who will represent different constituencies.  
7 We have Michael Kaiser, to my right, who is  
8 the Executive Director of the National Cyber  
9 Security Alliance. Also, I want to mention  
10 in the materials, there are full biographies  
11 on everyone. Next to Michael, there is Kevin  
12 DeMarrais, Senior Business Writer and  
13 Columnist with The Record in Bergen County,  
14 New Jersey. Next is Beau Brendler. He is  
15 the Director of Consumer Reports Webwatch,  
16 Consumers Union, and down on my right is  
17 Daniel Brenner, Senior Vice President for Law  
18 and Regulatory Policy, National Cable and  
19 Telecommunications Association.

20 So, this panel is on the agency's  
21 external relationships. I mentioned earlier  
22 today in my remarks, anyone who was here then  
23 and is here now can think that far back, how  
24 we need to see how we are doing, not just  
25 with, you know, the bar, or not just with

1 other government organizations, although,  
2 they are certainly important, but also with  
3 other constituencies as well. So, my  
4 panelists today represent a number of other  
5 constituencies that we think are important to  
6 reach and we'll be talking about how to  
7 identify other core constituencies,  
8 communicate the agency's goals and outcomes  
9 to our stakeholders and how we advance the  
10 agency's missions through these  
11 relationships.

12 I'm going to ask each panelist to  
13 give a few minutes on their background, give  
14 a little context for our subsequent  
15 discussion of these issues. So, Michael has  
16 the ill fortune of sitting immediately to my  
17 right, so, I'm going to start with him.

18 MR. KAISER: Thank you, Maureen.  
19 It really is a thrill to be here today. I  
20 want to thank you and Chairman Kovacic for  
21 inviting the National Cyber Security  
22 Alliance. Let me tell you a little bit about  
23 what we do because it is important as to how  
24 it fits in with the FTC and what the FTC does  
25 in cyber security. So, we are not as old as

1 the FTC, we haven't been around that long and  
2 the technology that we address hasn't been  
3 around that long, when you think of it, so,  
4 we are kind of newcomers to the game. But,  
5 we are a non-profit organization that works  
6 with government, business and other  
7 non-profit groups, some sitting right here at  
8 this table, from time to time, to really  
9 create a culture that promotes advancement in  
10 cyber security around home users, K through  
11 12 educators, small businesses and the higher  
12 education community trying to make it safer  
13 for everybody to use all the time. So, there  
14 is a lot of overlap in what we do and what  
15 you do.

16 I have to state that it is National  
17 Cyber Security Awareness Month. For all of  
18 you that do not know, you should. It is  
19 important to know, not because it is  
20 something that the National Cyber Security  
21 Alliance promotes, but because the FTC is a  
22 partner in that as well. In fact, I think,  
23 you relaunched On Guard Online on October 1st  
24 in honor of National Cyber Security Awareness  
25 Month, and that's important. But, that kind



1 of tying into that and other efforts that's  
2 being done, both nationally and at a very  
3 much grassroots level at the same time, is  
4 very, very much important. So, that's some  
5 of the things we do.

6 I think we have collaborated, the  
7 FTC and NCSA, since our inception. People  
8 have spoken at our launch events,  
9 participated. We get a constant flow of  
10 information from the FTC. Recently, I will  
11 give a little example, when the bank merger  
12 phishing scam came out, right on the heels of  
13 the Wachovia merger, somebody at the FTC  
14 emailed me that alert and we put that on our  
15 website. I wrote a blog about that. I know  
16 the previous panel talked about impact. But,  
17 a couple of days later when I was at a bunch  
18 of meetings, that scam was talked about at  
19 every single one. So, people talk about how  
20 we measure, how things work. Well, you know,  
21 people knowing about things that are  
22 happening and breaking over a certain time is  
23 certainly one measure.

24 I want to add that I bring a couple  
25 of different perspectives because before I

1 was at the NCSA, I worked in victims services  
2 and victims rights for two decades. And one  
3 of the issues we saw over the last ten or  
4 fifteen years was identity theft. And, for a  
5 long time, and actually still to this day,  
6 there are not a lot of places for victims of  
7 identity theft to go. And the FTC's role in  
8 championing that when local law enforcement  
9 wasn't paying attention and the victim  
10 service providers didn't know what to do,  
11 when people didn't take it seriously enough,  
12 the impact of it and, I think the FTC's role  
13 in that was very, very critical and very  
14 important. And government sometimes plays a  
15 very important role in giving credibility on  
16 issues when other people aren't paying  
17 attention to it and I think the FTC should be  
18 proud in that regard.

19 I will leave it with one final  
20 thought about what we have to do going  
21 forward a little bit is when you think about  
22 the internet, I can say pretty clearly, that  
23 you know, a couple of weeks ago I was in a  
24 meeting with a lot of people who used the  
25 internet, and I asked, how many people did

1 online banking twelve years ago, and two  
2 people raised their hand. How many people do  
3 it now, almost everyone. So, the rapid speed  
4 with which the internet and cyber issues have  
5 come on to the forefront of the public is, I  
6 think, really unparalleled in terms of the  
7 way we developed an infrastructure in the  
8 past. Think about things like roads; it was  
9 a lot more than twelve years before we were a  
10 car culture. So, that gives us a lot of  
11 challenges going forward. So, I will leave  
12 it at that.

13 MS. OHLHAUSEN: Thank you.

14 MR. DeMARRAIS: Unlike the other  
15 three gentlemen at the table, I'm local, they  
16 are national. And I think that brings in a  
17 unique perspective to dealing with the  
18 Federal Trade Commission.

19 My background is both in public  
20 relations and journalism. The last fifteen  
21 years at The Record in North Jersey, we have  
22 a unique distinction, but our circulation  
23 actually went up in the third quarter, which  
24 is very unusual today in newspapers. It is  
25 like one half of one percent, but up is

1 certainly better than down. For the last  
2 fifteen years, I have done a weekly consumer  
3 column every Sunday, haven't missed one, and  
4 I try to be, maybe, a one person consumer  
5 report. And by that I mean, to look at  
6 issues that affect pocketbook issues, not  
7 investments, but pocketbook issues. And in  
8 such, I'm frequently involved in the types of  
9 things that the Federal Trade Commission, as  
10 well as the New Jersey Division of Consumer  
11 Affairs are doing. I'm trying to help my  
12 readers deal with their own problems. I'm  
13 not the problem solver. I'm the person who  
14 helps put things out there to help them solve  
15 their own problems to make good decisions.  
16 And to show that I'm getting into the 21st  
17 Century, three weeks ago I started a blog. I  
18 never looked at a blog before I started doing  
19 it, but now I'm doing a blog, and trying to  
20 engage readers. Take the previous panel  
21 talking about all the new technologies that  
22 are coming out and that's certainly one of  
23 them, to try and engage younger readers to  
24 hit that button and generate money for our  
25 newspaper. But, they had a very long

1 relationship since I began with the Federal  
2 Trade Commission, so, pleasure to be here.

3 MS. OHLHAUSEN: Thank you, Kevin.  
4 Now we'll turn to Beau Brendler.

5 MR. BRENDLER: Thank you for  
6 inviting us. Consumer Reports WebWatch is  
7 part of the Consumers Union and Consumer  
8 Reports Magazine. I wear a bunch of hats,  
9 primarily among them, what we do is consumer  
10 education and investigation of fraud. A lot  
11 of our work is primarily journalism. We work  
12 a lot with other organizations to try to do,  
13 as much as we can, to try to do consumer  
14 education, and I will talk about how that can  
15 be frustrating, I guess later. But, we work  
16 with Harvard's Berkman Center advising them  
17 on the Stop.org project and we are going to  
18 start another project with them on spyware  
19 with their executives in a one-on-one  
20 relationship. We do blogging, we do  
21 investigation of front groups online, so, a  
22 lot of stuff that people were talking about  
23 in terms of disclosure. We have had, I would  
24 say, a good relationship with the FTC. Over  
25 the years, they do tell us when they're doing

1 things. We used to talk a lot more often  
2 than we do now, but part of that is because  
3 Consumers Union has offices in New York and  
4 Washington, so, a lot of the folks in  
5 Washington have most of the contact with the  
6 FTC. I guess I will leave it with that.

7           Prior to coming to Consumer  
8 Reports, we launched WebWatch about six years  
9 ago. My background is in journalism and that  
10 kind of thing. A little bit later, when and  
11 if the theme seems to fit, there is a video  
12 that we released to promote a new online  
13 security hub which we launched with Consumer  
14 Reports and it will illustrate to you some of  
15 the challenges, I think, everyone faces in  
16 consumer education.

17           MS. OHLHAUSEN: Thank you, Beau.  
18 And then Dan can round us out here.

19           MR. BRENNER: Thank you. Always  
20 happy to be the last speaker on the last  
21 panel, and Maureen knows I did stand up, so,  
22 this is larger than most of my audiences.  
23 And because I'm a lawyer, I always had a  
24 reporter present, so, I'm very comfortable in  
25 this format. Thank you.

1           The NCTA represents cable operators  
2           and programmers and suppliers. And my job is  
3           to, the last sixteen years, is to head the  
4           regulatory and legal affairs of the  
5           association in court and before agencies.  
6           And we actually don't deal that much with the  
7           Trade Commission. Well, we have dealt with  
8           them on the most recent network neutrality  
9           inquiry, and I personally participated in the  
10          workshops. A lot of issues that deal with  
11          industry generally are not cable-specific,  
12          so, we might participate through other -- or  
13          cable companies will participate through  
14          other organizations, like the US Chamber or  
15          another group that is more specific to the  
16          inquiry going on. Fortunately, there haven't  
17          been that many cases involving cable  
18          operators in terms of Section 5 prosecutions  
19          or investigations or unfair deceptive  
20          practices. Instead, we spent a lot of time,  
21          and I am a graduate of the Federal  
22          Communications Commission. I spent seven  
23          years there. And, as many of you know, the  
24          cable industry has been under the intense  
25          scrutiny of the FCC on a variety of issues.

1           I have also had a lot of experience  
2     in the copyright office, which is an agency  
3     that rather specializes in a few issues  
4     rather intently and not really focused on  
5     consumer groups. So, I think in terms of our  
6     experience with the FTC, it would be almost  
7     on par with our work with the Department of  
8     Justice, where we are called in from time to  
9     time, particularly the Antitrust Division,  
10    and telecommunication section doing an  
11    investigation, rights organizations and so  
12    forth, and we are asked for our opinions in  
13    those contexts. I will stop there.

14           MS. OHLHAUSEN: So, this is a  
15    question I just want to start off the whole  
16    panel with. We have some other questions  
17    that we will throw to particular people to  
18    begin. So, right now I would say we have  
19    people who represent or interact a lot with  
20    industry, consumer groups and the public. Who  
21    are we missing? Maybe this isn't a fair  
22    question, but what constituencies haven't we  
23    identified that we should be paying attention  
24    to? Certainly, Congress, when we did our  
25    workshop in July, we actually weren't able to



1 get anybody from Congress. They were too  
2 busy. But, we got people that used to work  
3 there. So, adding Congress to the mix,  
4 besides industry, consumers and the public,  
5 is there anybody else who you think the FTC  
6 should reach out to more, that we are not  
7 reaching?

8 MR. BRENNER: I would say the  
9 academics. The stuff you were dealing with  
10 on competitive issues, a number of the  
11 commissioners are remarkably erudite on  
12 complicated questions of antitrust. And it  
13 seems to me that probably the academics and  
14 more serious thinkers at the Trade Commission  
15 are talking past each other when they should  
16 be talking to each other. In my experience  
17 at the FCC, academics are drawn in typically  
18 in important rulemakings to try to give the  
19 Commission, the FCC, some independent  
20 validation of what the paid economists or  
21 paid consultants from the industry have put  
22 forward as the truth. So, academics,  
23 particularly, those that are not identified  
24 with a particular industry or consulting for  
25 them, can be enormously valuable.

1 MS. OHLHAUSEN: Assuming we  
2 identified the universe of people that we  
3 should be reaching, I want to start off with  
4 a question to Kevin. How do you think people  
5 learn about the FTC and what we are doing?  
6 Is it through columns like yours, is it sort  
7 of hit or miss, or is there some other path?

8 MR. DeMARRAIS: I think it is  
9 somewhat hit or miss. I think that there is  
10 a really good website out there. Probably  
11 the way that people learn the most is when  
12 you take enforcement action because that's  
13 what gets in the newspapers. And people see  
14 these scams out there. I wish it were from  
15 columns and stories like mine, although, I  
16 guess, from a local standpoint within my  
17 market, there is a strong readership and I  
18 have people constantly telling me that they  
19 are getting key information from me. But, I  
20 don't know whether they associate it with the  
21 Federal Trade Commission or good practices.  
22 And, frankly, they don't care whether it  
23 comes from the FTC or the New Jersey Division  
24 of Consumer Affairs or out of Kevin  
25 DeMarrais' own mind. They are interested in

1       what the information is and that it is valid  
2       information that's going to help them solve  
3       their problems.

4               MR. KAISER: I would like to add on  
5       that and put on my victims services hat and  
6       say that I know that a lot of people find the  
7       FTC, unfortunately, after something bad has  
8       happened. When you're looking at things like  
9       fraud and identity theft, that's when they  
10      start looking for information as opposed to  
11      on the prevention side of the coin. Which is  
12      a different kind of education. So, I think  
13      that's incredibly valuable information, when  
14      something bad happens, that you really have  
15      good, sound advice about what you should do.  
16      And I think you have that advice for most  
17      people in those circumstances, so, I think  
18      that's important.

19              MR. DeMARRAIS: I think that the  
20      FTC has some excellent products to help  
21      people after something bad happens to someone  
22      else. On the website there are all these tip  
23      sheets and other things that are very  
24      helpful. I try to bring it to my readers'  
25      attention now with the blog with a link

1 saying here's the way to deal with that  
2 problem, go to this link and here are the ten  
3 points that will of help.

4 MS. OHLHAUSEN: So, we have hit on  
5 the website, we have the FTC website and, you  
6 know, some of the other things we have,  
7 information about ID theft, how to protect  
8 yourself. I might pass this question over to  
9 Beau now. What else should we be using, how  
10 can we more effectively reach people? Are  
11 there new forms of communication that we need  
12 to explore to reach consumers and, perhaps,  
13 beyond that?

14 MR. BRENDLER: I think so. I mean,  
15 I think that a standard website nowadays is  
16 pretty much behind. And I think that  
17 organizations that want to get their word out  
18 or get a message across would be better  
19 served by thinking about how to get involved  
20 in social networking. I'm not saying the FTC  
21 should have a MySpace page, maybe it does.  
22 But, that's the kind of thinking that needs  
23 to come forward; that, you know, our younger  
24 generation of folks, you know, they still  
25 look at news sources and other types of

1 information in similar ways that we've known  
2 all along, but, increasingly, they want their  
3 news or information to come through organic  
4 means; whether it is within a social network  
5 environment, perhaps, or through a game or,  
6 perhaps, something that reaches their mobile  
7 devices, something like that. So, I also  
8 would like to jump back briefly to the  
9 question that was asked before. I think  
10 gradations of consumers are important when  
11 considering a question of how and who the FTC  
12 should reach. You know, in a sense being  
13 from Consumer Reports, I was cast in a role  
14 of speaking for consumers a lot, but I have  
15 been working with the internet for fifteen  
16 years. I have a college education. I'm  
17 fairly smart. I have been taken in by scams  
18 in my life, but I'm not a typical consumer,  
19 I'm an educated consumer. I'm an educated  
20 person. And I think a lot of the problems we  
21 see that a lot of consumers tell us, they are  
22 not at the level that we operate at as  
23 professionals, as government regulators, as  
24 well as people in this room, at a very high  
25 level of intelligence when it comes to the

1 web. Whereas, the majority of the people are  
2 really neophytes. They don't even understand  
3 what banner ads are. Even now, in a lot of  
4 circumstances. So, I think we need to remind  
5 ourselves of that.

6 MS. OHLHAUSEN: At some point you  
7 wanted to show something?

8 MR. BRENDLER: This is just a  
9 little walk up to this. The reason I brought  
10 this in, we have been experimenting with  
11 consumers. We are trying to reach people and  
12 educate people. And it's been frustrating  
13 to, sort of, try to engage in consumer  
14 education, but yet, see that people are still  
15 getting ripped off by Nigeria email scams and  
16 online auctions, kind of, no matter how much  
17 you talk about it. We all share in this  
18 frustration. So, we have had some luck in  
19 the past with taking a very simple sort of  
20 humorous approach to these problems, and I  
21 brought this along for a little bit of laughs  
22 on a Friday. It is an original song by Dean  
23 Friedman, along with an animation and it  
24 tries to get the point across about phishing  
25 and auction scams and such in a humorous way.

1 And it worked before.

2 MS. OHLHAUSEN: What response have  
3 you gotten so far? Have you been able to  
4 track, you know, hits on this?

5 MR. BRENDLER: To this particular  
6 video, we have gotten a huge response. It  
7 was just released October 1st. We are still  
8 hoping that more people see it, but this is  
9 like seven or eight in a series of these  
10 humorous videos that Consumers Union has done  
11 on a whole range of topics: prescription  
12 drugs, how to deal with consumer credit. So,  
13 we are a little bit of a -- WebWatch itself  
14 is a little bit of johnny come lately to this  
15 consumer education message.

16 (A video was shown.)

17 MR. BRENDLER: So, that was done  
18 with the New York State Attorney General's  
19 office.

20 MS. OHLHAUSEN: You did this with  
21 the New York AG's office?

22 MR. BRENDLER: Yes.

23 MS. OHLHAUSEN: How did you pick  
24 the topics that you focused on; was it,  
25 obviously, internet related for people using

1 the internet?

2 MR. BRENDLER: Mostly from the  
3 types of complaints we did. So, we have our  
4 own mailbox at WebWatch that we look at, but  
5 we also get writings to Consumers Union for  
6 consumer advice, so, that's where it came  
7 from. Phishing is the biggest complaint, and  
8 spam email.

9 MS. OHLHAUSEN: Let me throw this  
10 question open to the panel. At the FTC, we  
11 do workshops, we do consumer ed, we have done  
12 a few online sites for weight loss and some  
13 mother's day and father's day e-cards you  
14 could send out. But what else are we  
15 missing? Do you folks have ideas of better  
16 ways or other ways?

17 MR. BRENNER: This probably stems  
18 from my fact of being a regulatory lawyer for  
19 a long time. I am not saying it's possible.  
20 My first involvement with the FTC, I was a  
21 young lawyer working on the Children's  
22 Television Advertising issue in 1978, so, on  
23 behalf of CBS, and this was one of your most  
24 publicized consumer-related issues and it  
25 kind of petered out when the commission wound



1 up not doing very much.

2 MS. OHLHAUSEN: Petered out is a  
3 nice way to put it. I think cratered.

4 MR. BRENNER: I think the agency  
5 got a lot of criticism from the Washington  
6 Post, which is typically more pro-consumer.  
7 So, what is the right level of FTC activity  
8 compared to state AGs, compared to local  
9 consumer protection groups, compared to Seven  
10 on your Side type broadcasters? Are they  
11 able to help consumers a lot more and by  
12 feeding those groups, do you actually get  
13 more, quote unquote, work with Consumers  
14 Union, making sure that those points of  
15 public access are present as opposed to  
16 developing a PSA like this through the FTC?  
17 You wonder, what is the best use of your  
18 resources to get at these big national  
19 investigations if these things can really pay  
20 off, if you can get there. If you can get  
21 the public's attention and have them dead to  
22 rights, as they say. But, I'm not sure that  
23 a state AG might, in fact, be a better locus  
24 of that in helping them reaching out locally,  
25 but, I might not be right.

1           MS. OHLHAUSEN: The question of  
2 whether we should be trying to do all of this  
3 ourselves as an agency or leveraging our  
4 expertise and working with others and then,  
5 you know, picking our priorities where the  
6 FTC is really the one that can have the most  
7 beneficial effects. I think that's a very  
8 valid question, particularly for our  
9 self-assessment. We are not entering a time  
10 of unlimited resources, we are probably going  
11 to, as a Government agency, face fairly  
12 limited resources for the foreseeable future.

13           MR. DeMARRAIS: Certainly, the most  
14 successful project is when it is a  
15 cooperative thing. Such as, just yesterday,  
16 the credit card, the credit repair where the  
17 FTC filed seven lawsuits but brought in  
18 actions taken by twenty-two different states,  
19 including, New Jersey. The case that we had  
20 was very similar to the ones that the Federal  
21 Trade Commission did. But, when it is a  
22 cooperative venture, it gets the most  
23 exposure, which, to me, is critical for  
24 getting your message out there. Because  
25 papers all over the country, media all over

1 the country, are going to be interested in  
2 it. Now, as newspapers cut back and  
3 television as well in budget cuts and  
4 staffing, they are stretched further and more  
5 and more of the emphasis is local. While the  
6 New York Times and Washington Post and USA  
7 Today will remain national, a big paper like  
8 ours, we care what happens in North Jersey.  
9 So, if there is a New Jersey tie into this,  
10 then we are going to give it much more  
11 exposure than we would if it was something  
12 purely the FTC does nationally. So, anything  
13 that you could do cooperatively is going to  
14 get your word out much more because I can  
15 write about it then. If it is just the FTC,  
16 then I might be able to use it in a column,  
17 but it is not going to get nearly the play  
18 that it would otherwise.

19 MR. KAISER: I would like to take  
20 it from a slightly different angle. I know a  
21 little bit later we'll talk about partnership  
22 and those kinds of things, but the key is the  
23 consistency of the message to the consumer.  
24 I think we shouldn't look toward any one  
25 group or any one place to be the sole source

1 of any of this. What we have to do is work  
2 in concert, so that the messages that we send  
3 down our various networks, if we can light  
4 them up with this stuff, are the same, so,  
5 the consumers get the same message, like in  
6 the area of phishing. But, that's the key  
7 because no one is going to do it all. There  
8 is no one group that can reach everybody, but  
9 we do want to reach everybody. And together,  
10 combined, collectively, we can do a heck of a  
11 lot. Because Beau raised earlier, some of  
12 these things are kind of confusing. The  
13 messages have to be simple and we have to  
14 share them and use them aggressively  
15 together. And understand the strengths of  
16 our various networks, whether it is a local  
17 newspaper or Consumers Union or the National  
18 Cyber Security Alliance or the website of,  
19 you know, your child's elementary school that  
20 carries the message. It doesn't matter. You  
21 know, it doesn't matter if it is a cartoon,  
22 text, it doesn't matter what it is because  
23 people use all different kinds and they have  
24 to have all those available.

25 MS. OHLHAUSEN: Beau?

1           MR. BRENDLER: Yes. I have some  
2 agreement, but also a bit of a rejoinder to  
3 that comment. I just actually got this this  
4 morning. WebWatch is going through its own  
5 internal analysis. We struggle for funding.  
6 So, we did a competitive analysis and it  
7 turns out our information gurus matched us up  
8 against six sites here; OnGuardOnline, Debt  
9 Net, StaySafe.org and then StaySafeonline.org  
10 and Trustee. So, WebWatch is getting about  
11 six thousand uniques per month, which is not  
12 very much, but we have a family of about six  
13 or seven sites. OnGuardOnline is getting  
14 three, four thousand per month. Debtnet,  
15 seven thousand, StaySafe.org, which is a  
16 Microsoft venture, ten thousand. Ten  
17 thousand for StaySafeOnline.org and four  
18 hundred sixty-nine thousand for Trustee. So,  
19 why are there so many sites doing the same  
20 thing? In my opinion, maybe there should be  
21 a portal or -- I know that's kind of an old  
22 new word at this point -- but with all of  
23 these organizations trying to get this  
24 messaging out, suffering some of the same  
25 frustrations, struggling with funding, maybe

1       there should be a joint type of thing that we  
2       are doing where we are all trying to  
3       accomplish the same purpose.

4               MS. OHLHAUSEN: One question that I  
5       think some of you want to weigh in on. Are  
6       there other government agencies who are doing  
7       a better job of managing their external  
8       relationships, or are there things that we  
9       can emulate, that you think we should be  
10      paying attention to?

11              MR. DeMARRAIS: From my view, the  
12      FTC is far away the best from a media  
13      standpoint. You have very good PR staff who  
14      are accessible and knowledgeable, and this  
15      goes back over fifteen years. I mean, it is  
16      the current people that over two presidential  
17      administrations that I have been involved in,  
18      different people that come and go. Two  
19      things that are particularly good about what  
20      you do is when there is an announcement of  
21      some type of action that the commission has  
22      taken, there is a link to the court papers.  
23      So, I as a reporter, I don't have to take  
24      what the press release says. I can go to the  
25      actual court document and see what the

1 charges are. That's a rarity to have that  
2 standard procedure to have that available.  
3 The other thing that I really like is the  
4 name and the phone number of the staff  
5 attorney who handled the case is included  
6 with the press release. I don't see this in  
7 other agencies. So, that if I have a  
8 technical question about the lawsuit, I can  
9 contact that person and get it. I had an  
10 incident last week with the Social Security  
11 Administration after the cost of living  
12 increase came out and I had a very basic  
13 question about how the formula was revised  
14 and they couldn't tell me, they couldn't tell  
15 me how they came up with this number and I  
16 had never had that experience with the FTC.

17 MS. OHLHAUSEN: Anyone else?

18 MR. BRENNER: As a participant in  
19 your workshop, I don't know if anybody else  
20 was involved, it had a diverse group, and, I  
21 believe, it was a terrible winter storm, but  
22 you managed to get the panelists there and  
23 members of the public there. Very lively  
24 compared to other agencies. I will get in  
25 trouble somewhere along the line, but this is

1 the end of the Bush administration and I  
2 think the Federal Trade Commission has been  
3 blessed with extremely good leadership during  
4 the Bush administration. Other agencies  
5 became notorious during this administration  
6 and that's just not the case with the FTC.  
7 And I think we are lucky, as a country, and  
8 lucky for folks at that agency that didn't  
9 put the agency in the tank, like some of the  
10 government did and some of the other Federal  
11 agencies. So, I think that's another reason  
12 why I think you guys have the reputation that  
13 you have. It is a smart agency that tries to  
14 reach out. In thinking more about what Beau  
15 presented, this is information that the  
16 public needs. I'm not a communication expert  
17 in terms of diffusion theories, but you need  
18 to talk to somebody from a really, really  
19 good communication school to see what  
20 theories and diffusion tell us about getting  
21 information out. My intuition tells me it is  
22 reporters, like local newspaper reporters,  
23 local TV reporters, readers, Consumer  
24 Reports. But, people like me who read that,  
25 are already convinced about the importance of



1     this message. I don't need, in some ways, to  
2     know more. Or I do, but I need it less than  
3     people that don't even think about these  
4     things. So, if you think about the biggest  
5     consumer disaster was of all of these  
6     terrible loans. Now, you're not in charge of  
7     all the disclosure documents and the  
8     information, and even if you were, it is not  
9     clear that would help. But, we did have a  
10    consumer catastrophe because of fraud or near  
11    fraud by people who were anxious to get a  
12    fee. How could a reporter help that? How  
13    could you help that? How could cable  
14    programmers do a better job in reporting  
15    this?

16           MS. OHLHAUSEN: I think that's a  
17    good issue and it kind of leads in to one of  
18    the financial areas. The FTC has a small  
19    role to play, but there are a lot of other  
20    agencies that have roles about informing  
21    consumers and things like that. And on the  
22    enforcement side of the ledger, Beau, you had  
23    mentioned in our phone call some of the  
24    interactions you had with some of the  
25    enforcement agencies, like, the Department of

1 Justice, FBI, and Treasury and some of what  
2 you have learned from dealing with them, in  
3 some of those areas that you might be willing  
4 to share with us.

5 MR. BRENDLER: Sure. It goes back  
6 to consumers. I'm not sure that in the  
7 consumer minds that the FTC is ideally  
8 branded. I think you guys need more funding.  
9 I think there is a consumer perspective that  
10 law enforcement organizations tend to be more  
11 proactive. And I'm speaking solely through  
12 the prism of internet stuff because that's  
13 what I look at. I'm not talking about other  
14 parts of the FTC's mandate. But, I think,  
15 you know, in the course of trying to talk  
16 across my whole organization and get some  
17 feedback from others about the FTC, a couple  
18 of people said on this topic, the FTC has  
19 jurisdiction over nonbank lenders. In a down  
20 economy, there are going to be more credit  
21 scams against consumers and we'll need more  
22 proactive regulatory oversight. This is from  
23 our California office, which also makes a  
24 point that you guys should ask for more  
25 funding. From our Washington office, the

1 commission's enforcement authority's  
2 constrained compared to other agencies and  
3 the FTC to take action -- this is so, kind  
4 of, long, so, I can email it to you if you  
5 want to read more of it. I will just leave  
6 my comments at that.

7 MS. OHLHAUSEN: It is true that we  
8 do not have totally unrestricted  
9 jurisdiction; there is the common carrier  
10 exemption, some limits on non-profits,  
11 banking, a few other things. And one of the  
12 things that has become a topic throughout our  
13 self-assessment is, should we be taking a  
14 look at some of the issues involving our  
15 jurisdiction?

16 MR. BRENNER: I was just thinking a  
17 thought. One of the things that Consumer  
18 Reports does very well is sort of the back of  
19 the book, fraudulent ads or misleading ads.  
20 And then I'm thinking about what William  
21 Proxmire did with the golden fleece award,  
22 how he would identify a government program.  
23 It would be gutsy but, you know, something  
24 like that wouldn't have to be a waiver every  
25 month. But, at some point, the FTC

1 identifies -- you know, you are also a  
2 prosecuting agency, so you don't have the  
3 editorial freedom of the Bergen County  
4 Record. But, there ought to be some role for  
5 that because there is a way to get into the  
6 news cycle some rip-off or something like  
7 that in getting that, with a funny name or  
8 something, you know, might be something you  
9 could do without getting into too much  
10 trouble about judging things before you  
11 complete your investigation.

12 MS. OHLHAUSEN: Sometimes we try to  
13 package cases together into a sweep, like  
14 Telephony, to focus attention on this one  
15 thing and get it, you know, better into the  
16 news cycle instead of dribbling out cases.  
17 But, that's always a challenge. There is  
18 always a lot of news competing for other  
19 people's attention. One of the other things  
20 I want to bring up, the attention,  
21 transparency. Consumers are our only  
22 audience and we also want to reach industry.  
23 Are we getting through to industry? Are  
24 there better ways to publicize what we do so  
25 when trade associations or counsel, you know,

1 private attorneys, are counseling their  
2 clients, that they have a better idea of kind  
3 of where the FTC is on things or how we'll  
4 view things?

5 MR. DeMARRAIS: I think that these  
6 other constituencies are aware of what you  
7 are doing. They have attorneys who are  
8 representing -- there is not an industry or  
9 business that does not have a trade  
10 association that is monitoring everything  
11 that you do. So, if you're taking action on  
12 behalf of consumers, they are aware of it.

13 MS. OHLHAUSEN: Do you agree?

14 MR. KAISER: I would answer more  
15 generally. It is always good to be out  
16 there. In my experience, I have been  
17 involved in the anti-spyware coalition where  
18 the FTC has come to our public events and it  
19 is always great. People want to hear from  
20 government. They want to hear what your  
21 point of view is, what is on the horizon. So,  
22 to the extent that people are spreading the  
23 word and interacting with people, not always  
24 just the trade association people inside the  
25 beltway, but beyond there, because people

1       congregate in all different kinds of places.  
2       It's helpful. I think, consumers like that,  
3       too, frankly. It is not only the industry.  
4       But, that personal face-to-face interface is  
5       really important. A lot of ideas get  
6       generated through those discussions and I  
7       think that's very important.

8                 MS. OHLHAUSEN: Dan, I want to  
9       follow up with you since you operate within  
10      an industry, as you mentioned in your opening  
11      remarks, that doesn't have a lot of  
12      interaction with the FTC. And changes in  
13      technology, regulatory changes, are changing  
14      that landscape, I think. Is there more that  
15      we should be doing? Have we started to make  
16      a dent on consciousness?

17                MR. BRENNER: I think you made a  
18      dent on the consciousness in a big way. The  
19      FTC and FCC have taken pretty different views  
20      on this very controversial, but maybe inside  
21      the beltway kind of special issue of network  
22      neutrality. I think your report and where  
23      the FCC came out, they came out in very  
24      different places and, I think, with a very  
25      different thought process. One huge

1 challenge going back to how people's  
2 behaviors change, three years ago you could  
3 not find your news releases unless -- you're  
4 going back to what, trade reporters --  
5 unless, you had to send somebody down to the  
6 office to pay a service to print out and  
7 deliver news releases. And now you can see  
8 every day, if you're that interested,  
9 everything that is coming out of the FTC on  
10 your news page. And the same thing is true  
11 for the FCC. So, I think the ability of the  
12 public to follow your behavior because of the  
13 web is enormously enhanced and the ability to  
14 the public to comment. Do you have easy  
15 electronic filing of comments in rule  
16 makings?

17 MS. OHLHAUSEN: In rulemaking, yes,  
18 in workshops like that. We don't have as  
19 many rulemakings as the FCC. So, I will tell  
20 you when I was doing the broadband matter, I  
21 got a lot of questions about where is your ex  
22 parte list. We are not doing a rulemaking,  
23 you're thinking about the FCC. But, that  
24 kind of leads me to another question about in  
25 some of our other workshops, roundtables in

1 this process, your last name does not have to  
2 be Schwartz to bring up this point, but it is  
3 interesting that Theresa Schwartz and Ari  
4 Schwartz, who are not related, brought up the  
5 same point. Should we have identified  
6 liaisons to specific industry groups or  
7 specific topics; do people find it difficult  
8 to figure out who in the FTC they should talk  
9 to?

10 You mentioned press, you go to the  
11 press office and if there is a press release,  
12 there is a staff name. But, if it is not to  
13 that point, do you find it hard to figure out  
14 where you go with those kind of inquiries?

15 MR. KAISER: I think it is always  
16 good to be as transparent as possible with  
17 the people who are the experts. And I don't  
18 know all the inner workings of FTC and some  
19 of these issues -- my focus is in cyber  
20 issues and technology. There are  
21 differences. So, malware can be very  
22 different than phishing. So, the person who  
23 is an expert in that, could be different  
24 people. And, so, identifying, you know, that  
25 is good. Now, if all those requests need to



1 be funneled through one place, clearly a  
2 single point of contact, this is where you go  
3 right here, it would be a lot more helpful.  
4 Those of us who work in DC, obviously, over  
5 time, get to know who the people are in  
6 different areas. So, maybe talking to some  
7 of the people who it is not as obvious to  
8 might be something to look at. But, in  
9 general, it is good to have a single point of  
10 contact as long as that person is not  
11 overwhelmed with the amount of requests and  
12 can actually respond.

13 MR. BRENDLER: I think the idea of  
14 a liaison is a good idea. You might also  
15 want to consider, some type of liaison to the  
16 ICANN community. The reason I say that,  
17 there is a lot of, I think, there are a lot  
18 of consumer issues and it is kind of emerging  
19 now a lot of things that consumers don't like  
20 are as a result of name abuse at the  
21 registrar level and it is really hard for  
22 ICANN to grapple with that because it is  
23 captured by the registrar industry. But, the  
24 liaison representing consumers from a law  
25 enforcement perspective, I know the

1 Department of Commerce is already there, but  
2 you may want to consider that.

3 MR. BRENNER: There are really two  
4 kinds of internet issues. Criminal behavior  
5 is one thing; whether you take the  
6 enforcement action or go with the injunction  
7 with the State Attorney General, it is gone  
8 after. There are a whole lot of internet  
9 issues that come up that are really not  
10 ideally suited for prosecution, they may be  
11 subject to rulemaking, but in many ways, they  
12 take the deliberative discussion focus of the  
13 internet, like, ICANN, IETF, other ways in  
14 which these problems of the internet, how  
15 should broadband network providers behave?  
16 What are Google's responsibilities? Some of  
17 this may get legislated, a lot of it is  
18 better worked out other ways. And it seems  
19 to me that the workshop model that was  
20 adopted was a good one by raising the  
21 visibility of the issue, by putting  
22 industries on notice that you're watching,  
23 with a raised eyebrow -- but, in a setting  
24 that says, let's solve this issue, let's not  
25 prosecute. But, it is a function that

1 government will likely perform in these  
2 developing areas, unlike where there is fraud  
3 or where there is cheating. I don't think  
4 you need a workshop on that.

5 MS. OHLHAUSEN: So, it is easy in  
6 the fraud area; we operate, one might say, in  
7 a target-rich environment. But, how do you,  
8 in areas, Dan, if I can paraphrase what  
9 you're saying, in an area where we don't know  
10 what to think about, we don't know what the  
11 outcome is for consumers? We are also a  
12 competition agency. I take it you're  
13 endorsing the model, right? We don't have an  
14 outcome in mind, but, we start to come up  
15 with ways to think about it, think about  
16 whether it is good for competition, whether  
17 it is good for consumers.

18 MR. BRENNER: The Justice  
19 Department issued merger guidelines, which is  
20 a heroic effort. You have to deal with these  
21 when a merger is headed your way. You have  
22 to decide whether to condition it or  
23 challenge it. But, beyond that, you do a lot  
24 of public thinking about it, which is very  
25 helpful. And I think it defines what people

1       should be thinking about in terms of  
2       horizontal or vertical mergers. I think the  
3       internet is going to work a little bit like  
4       that. You may have to decide whether it is  
5       consumer fraud. Does the research of G-mail  
6       -- does everybody know that if they have a  
7       G-mail account, Google is searching the  
8       contents of your email? I wonder if everyone  
9       who signed up for Google email knows it. And  
10      they jump over everybody for privacy  
11      violations. And that's an enormous one if  
12      you put something in your email you would  
13      rather not have people do searches about you.  
14      I'm just saying that's the kind of thing that  
15      ought to be publicly discussed, and  
16      legislation is a lousy way to do it, because  
17      in the end, Congress can't get down to dos  
18      and don'ts. I do think that is a function and  
19      there is such a public interest in that;  
20      televising it, web casting, all of that is  
21      all good.

22               MS. OHLHAUSEN: Does anyone have  
23      suggestions for topics that we should be on  
24      the lookout for, to look for? Mobile  
25      marketing has been mentioned at previous

1 panels. Do people have any thoughts about  
2 what we should be scanning the horizon for,  
3 not just immediately jump in with  
4 enforcement, but to start to educate  
5 ourselves and the Commission about?

6 MR. KAISER: Again, it is hard to  
7 predict every new trend around the corner.  
8 When you think about something like phishing,  
9 it is not something new, it is something very  
10 old. It is a confidence game, it is about  
11 building confidence. That's what con games  
12 have always been. So, the techniques that  
13 people use are going to be new. The vehicles  
14 are what is going to be new. But, I think we  
15 are becoming a digital culture, if we are not  
16 one already. We are becoming a web-based  
17 culture, if we are not one already. How many  
18 people sitting and this room have cell phones  
19 right now talking to the web all the time?  
20 So, we can look forward and ask questions  
21 about what that is going to be and what it is  
22 really going to look like and how some of the  
23 things that are really going on are going to  
24 be spread by that. Because the bad guys are  
25 always going to be ahead of us. They are

1 already putting up the Wachovia bank merger  
2 because they are reading the same press  
3 releases that they're putting out. So, we  
4 have to think about the implications more  
5 broadly, and I think that's part of the  
6 discussion, as opposed to the incremental  
7 pieces and the individual threats that occur.  
8 But, the universe of the threats that might  
9 be out there, I think is a way to start a  
10 discussion, so, we are prepared a little bit  
11 better.

12 MS. OHLHAUSEN: Beau?

13 MR. BRENDLER: It is not a new  
14 problem but I think the person that mentioned  
15 in the previous panel that five years or six  
16 years from now privacy and ID theft are still  
17 going to be a problem. But, I think there  
18 really needs to be some serious analysis of  
19 the privacy issue as it applies to deep  
20 background marketing and some of the  
21 information that companies are collecting  
22 about people through third parties, and I  
23 think we all know all about that. But, I  
24 think there will be a time in the not too  
25 distant future where it is going to be a real

1 problem for consumers and the profiles that  
2 are going to be built about people in the  
3 future are going to be really frightening.

4 MR. KAISER: Can I just say  
5 something really around consent. It is  
6 around consumer consent and how people get  
7 their consent to do things with consumers.  
8 And right now I think the last panel was  
9 talking about this in some way, but didn't  
10 quite go to licensing agreements and the  
11 kinds of things that people click on and the  
12 speed and rapid speed and what the value  
13 proposition is when you're sitting at the  
14 computer and you want that ring tone or game,  
15 that thing and what you're signing up for.  
16 And I think the clarity in that, the  
17 reduction in the words in that, I mean, those  
18 are things that can make it easier for  
19 consumers.

20 MR. DeMARRAIS: I think one problem  
21 is, especially among younger people, privacy  
22 is not an issue. They're not concerned about  
23 it, they're in Facebook and all these other  
24 things where so much is out there and they  
25 don't realize the implications. I have done

1     some talks at local high schools and I bring  
2     up privacy issues, and, so, what is the  
3     approach? And I think that's one of the big  
4     obstacles in improving conditions with any  
5     type of legislation or any type of rules  
6     concerning privacy.

7             MS. OHLHAUSEN: Dan?

8             MR. BRENNER: There was a hearing  
9     on this menu ad plan, which was a program  
10    that's with cable companies and phone  
11    companies we're going to be introducing. I  
12    am not a zealous privacy advocate. I think  
13    it is probably something that's different  
14    cultures, if you look around the world, some  
15    of the privacy debate is your American  
16    cultural issues as opposed to something that  
17    goes to Griswold protection for the right of  
18    birth control. I think there is a difference  
19    between that and somebody sending me an  
20    appropriate ad for a product I might want to  
21    use as opposed to sending me an ad for a  
22    product I have no interest in using. I think,  
23    again, I should have the right to make that  
24    decision, but it is not one that gets me that  
25    upset. I was more upset with advertising to



1 children. You know, so, it is easy to say  
2 about high school students, they have lived  
3 in a culture where everything to the way  
4 young people dress -- and I sound like an old  
5 fogie -- but it is completely different from  
6 when I grew up with what is appropriate for  
7 girls and boys to wear today. And once  
8 you're at that point, what is left of  
9 privacy? Something is, but not much.

10 MR. DeMARRAIS: It becomes a trade  
11 off. They get something good for giving up  
12 some of their privacy. Same as the  
13 supermarket shopper who uses the customer  
14 card and gets a discount on a box of Wheaties  
15 and the supermarket can build a database of  
16 everything you buy. If you want to save the  
17 money, you give away some privacy. And I  
18 think the same thing happens with a lot of  
19 teen-agers now.

20 MR. KAISER: This actually speaks  
21 to a point I'm sort of interested in thinking  
22 about: how these messages get differentiated  
23 and delivered, developing a developmental  
24 way, developmentally appropriate. And  
25 teen-agers is good example. I actually think

1     teen-agers are interested in privacy,  
2     however, adolescent development is not about  
3     privacy. It's about sharing with their  
4     peers. So, for us to say they are not  
5     interested in privacy, is not true. They are  
6     interested in sharing bits of information  
7     about themselves with certain people in their  
8     peer group. And that doesn't look like  
9     privacy to us, but it is in a different kind  
10    of way. So, we have to remember that because  
11    it is hard. Some of us try to forget when we  
12    were adolescents. And in terms of other  
13    behavioral targeting and other kinds of  
14    things, I have some other concerns I have to  
15    raise as a victims advocate. Computers are  
16    not only used by one person. So, in a family  
17    where there may be issues, child abuse,  
18    stalking some kind of things, someone's  
19    searching and they're actually looking for  
20    help. And, so, they are searching domestic  
21    violence, child sexual abuse to find  
22    information and the next person who sits down  
23    at the computer is the abuser and they're  
24    seeing the contextual ads from lawyers. They  
25    are delivering behavioral targeted messages

1 that actually can put someone at risk. There  
2 are other risks that we sometimes don't  
3 understand that involve the computer. I have  
4 to raise this point for something to be  
5 considered.

6 MS. OHLHAUSEN: Well, the issue of  
7 whether teen-agers want privacy, I will say,  
8 they are zealous privacy advocates when it  
9 comes to their parents wanting to see their  
10 Facebook page. They feel pretty strongly  
11 about that issue.

12 At this point, I want to see if we  
13 had any questions from the audience.

14 MS. GREISMAN: This is for Beau.  
15 Is there something, whether substantively or  
16 procedurally, that the FTC is not doing that,  
17 from your perspective, should be doing? Is  
18 there an area that you're involved with, and  
19 that's for you also, Kevin, because you're  
20 reaching out to a very different type of  
21 population.

22 MR. BEAU: I think it would be work  
23 at home advertising on the internet. The  
24 number one complaint that we get is on that.  
25 I know there are FTC guidelines on

1 advertising. But internet advertising, that  
2 is very geared and targeted towards the kinds  
3 of emotions and fears that people are having  
4 right now. We get a lot of email on that  
5 now. So, to the degree the FTC can show  
6 themselves to the consumers that they are  
7 concerned about that, or crack down on that  
8 or be an agency they can appeal to, that  
9 would help. Does that make sense?

10 MS. GREISMAN: So, there you would  
11 look for law enforcement and more targeted  
12 education.

13 MR. BRENDLER: Yes.

14 MR. DeMARRAIS: I can't think of  
15 any specific area. One of the things I said  
16 early on, the readers don't really care if it  
17 is the Federal Trade Commission or New Jersey  
18 Division of Consumer Affairs, as long as  
19 there is someone out there listening. One of  
20 the problems the FTC has, and the state  
21 offices as well, not as well-known as the  
22 Better Business Bureau. Now, in New Jersey,  
23 the Better Business Bureau is terrible. It  
24 lost its franchise. People don't realize they  
25 are franchises, like McDonalds. And they

1 lost the franchises and all the records that  
2 the owner had, the owner kept. So, all the  
3 history of the bad companies was not there.  
4 There is one bureau based in Trenton that has  
5 very little involvement in North Jersey, but  
6 people still have the Better Business Bureau  
7 in mind more than Federal authorities. Now,  
8 I always steer them either to the county  
9 office or the state office, figuring that if  
10 it is really big, it moves its way up to the  
11 FTC. But, as long as there is someone who is  
12 listening and might fight on their behalf, it  
13 doesn't really matter what the issue is.  
14 They just want somebody to represent them.  
15 And it is something that both the states and  
16 the Federal Trade Commission have done pretty  
17 well.

18 MS. OHLHAUSEN: Any other  
19 questions?

20 MR. SWIRE: I will ask a question.  
21 Some of you mentioned behavioral advertising,  
22 that there could be price discrimination in  
23 there; they will sell it at a higher price to  
24 the people. Tell us what ought to happen on  
25 behavioral advertising going forward; what

1       should the FTC do over the next four years as  
2       the ability to follow the advertiser on the  
3       internet becomes a lot greater?

4               MR. KAISER:  I'm not an expert on  
5       the FTC.  One of the things I feel needs to  
6       be done, there has to be transparency.  
7       People have to know.  And the consent can't  
8       be buried down way deep.  It has to be fresh  
9       and new and clear in language that is  
10      extremely simple for people to understand  
11      what is going on and they have to have the  
12      opportunity to say no.  Right?

13             MR. SWIRE:  Those are the first two  
14      current guidelines in the FTC's proposed  
15      guidelines.

16             MS. OHLHAUSEN:  Anybody else?

17             MR. BRENNER:  Again, there was a  
18      hearing that was held, and I think after that  
19      hearing, I think, AT&T and Verizon issued a  
20      statement, I could be wrong, but, I think,  
21      they did issue a statement, and it may have  
22      also been with respect to the two largest  
23      cable companies, as to what would be a  
24      platform for this.  Which, I think, does, I  
25      agree, it does and should include consent.

1 And, I think, it is a several page statement.  
2 I assume you have seen that. And, that may  
3 or may not be incorporated by Congress in  
4 some legislation. They may say, well, if  
5 this is a code of conduct that everybody can  
6 agree to, that's the first step. And then if  
7 you need the FTC to go beyond that and create  
8 a rule that may be better if you have that  
9 standard and you should bring cases on that  
10 factor. The one thing I would say, and I  
11 made a point earlier, but I think it is  
12 important, this kind of advertising, while  
13 it's unusual to have two people using the  
14 same computer, I think that's a good example  
15 where you could have a problem. For a lot of  
16 consumers, this makes a lot of sense. This  
17 is one of the reasons that Google hasn't  
18 gotten in more trouble: because they are  
19 showing ads that are relevant to people;  
20 that's more useful than showing ads that are  
21 not relevant. I think as we move, if we want  
22 mass media, and somebody has to pay for the  
23 internet and somebody has to pay for video,  
24 somehow. Half the revenues of the video  
25 networks comes from advertising. If we

1 continue to see this enormous drop off in use  
2 of video, it is great that everything is on  
3 YouTube, but the networks that provide a lot  
4 of programming have to have a base of income.  
5 So, it can come from subscriber fees or  
6 income, that's the only two places. Let's  
7 remember the 10,000 foot level of the role of  
8 interactive advertising, or that we have long  
9 targeted advertising in this country, right?  
10 People do look at demographic data to  
11 identify who should get -- it doesn't make  
12 sense to send somebody an advertising for  
13 something they don't want or won't be able to  
14 buy. So, that's a long part of advertising.  
15 And the behavioral part, if you could learn  
16 something about that customer, whether they  
17 are willing to be part of that product at  
18 Safeway where you have a card or through the  
19 internet. Some consumers like that and the  
20 value of that can play a role in maintaining  
21 a cyber mass media, just like it plays a role  
22 in the supermarket world.

23 MS. OHLHAUSEN: Beau?

24 MR. BRENDLER: I think you're  
25 talking about different things here when



1     you're talking about relatively benign  
2     products, like chicken nuggets.  When you get  
3     pharmaceutical companies that create websites  
4     that are not transparent about who they are  
5     and they say they are on the community side  
6     of whether you've got psoriasis or not, and  
7     they prompt you to take a quiz and you go  
8     through there and you have given a profile of  
9     your particular medical problem so the  
10    pharmaceutical company can sell product to  
11    you, I find that sort of repulsive.  So, it  
12    is difficult to answer your question or what  
13    you were talking about earlier without some  
14    kind of -- I mean, it is just not an  
15    awareness.  I keep going back to consumers  
16    not being aware of what is going on behind  
17    the scenes of websites, but we have seen it  
18    time and time again over the years.  So, any  
19    kind of education campaign that can shed  
20    light on this privacy issue in this, can be  
21    helpful.

22           MR. BRENNER:  Another example.  The  
23    mischief that I would agree with is the phony  
24    initial website that's gathering the data.  
25    It is not necessarily the fact that people

1 have psoriasis and would like to know about  
2 different products as opposed to people that  
3 don't have it and get those ads if it is not  
4 a product they need or would be interested  
5 in. So, I completely agree if somebody puts  
6 up an ad saying this is Dr. Smith non-profit  
7 health quiz and, in fact, it is a shield to  
8 gather information. That's the mischief. Not  
9 the fact that people may know I have whatever  
10 medical conditions I'm willing to disclose on  
11 the internet and then wind up getting  
12 relevant information about it. Do you see  
13 the difference or am I?

14 MR. KAISER: I would say, to add to  
15 this, the part that is missing, what is the  
16 consumer's expectation? That is what has to  
17 be reviewed. What do they expect when they  
18 do these things? If I go down to the news  
19 stand for a magazine on fishing, I definitely  
20 expect to get ads selling me fishing rods.  
21 I'm not sure that consumers share that same  
22 expectation on the internet; just by going to  
23 different places, somebody is going to start  
24 delivering things to them because that meets  
25 what somebody else thinks they want to see

1 verses what they expect to see. So, I think  
2 that, you know, a great discussion, and the  
3 larger world beyond, sort of, those of us who  
4 thrash around some of these issues on a daily  
5 basis is with consumers themselves. That  
6 would be a really important discussion. What  
7 do they expect when they go out and use these  
8 services? And I think that's really an  
9 essential point of this question.

10 MS. OHLHAUSEN: It sounds like what  
11 you are saying is one of our most important  
12 external relations is to consumers?

13 MR. KAISER: Absolutely.

14 MS. OHLHAUSEN: Determining what  
15 their expectations are.

16 MR. KAISER: I think that's an  
17 important piece of the puzzle.

18 MS. OHLHAUSEN: At this juncture, I  
19 want to give an opportunity for final  
20 thoughts and recommendations, parting shots.  
21 One of the things that this self-assessment  
22 is is not a celebration of the FTC, but  
23 really a chance to identify ways that we can  
24 improve and do a better job. So, I just want  
25 to throw that open to the panel. I don't

1 mean to put anybody on the spot, but, does  
2 anybody want to go first; any follow-ups?

3 MR. DeMARRAIS: I think one of the  
4 things that has been touched on here is  
5 combining some of the new technology with  
6 getting the message out. Certainly, I have a  
7 newspaper, we all know newspapers are  
8 struggling. Younger people don't read  
9 newspapers and you need to get the message,  
10 whether it be blogs or all the different  
11 types of new technology. I think it is  
12 critical to find ways to reach them. Not to  
13 give up on me, because I need the money given  
14 what's happened in the last couple of weeks,  
15 but that's critical. I think that might be  
16 able to develop some type of educational  
17 materials, things you have, but to package it  
18 to reach high school students, who are  
19 uneducated on consumer issues. Some of the  
20 things we are talking about what happens when  
21 you join this Facebook or this page when you  
22 sign up, so they understand the implications  
23 of it. I don't think most of them do. I  
24 think the Federal Trade Commission can do  
25 that without it being a major expense.

1 Because you have all of this. It's a matter  
2 of how you package it, not create it. So, I  
3 think those are two things that are really  
4 important.

5 MS. OHLHAUSEN: Anyone else?

6 MR. BRENNER: Following that, I  
7 think that's completely right. It might be  
8 interesting. You don't have to go out of  
9 Washington. It would be interesting to take  
10 either new employees of the FTC and have them  
11 work on your website for two hours and see  
12 what they can find, what they can't find.  
13 When they are working for people, they have a  
14 familiarity of what they're looking for on  
15 the internet. I have a harder time finding  
16 cases than I thought I would. But, it might  
17 be interesting for new employees, or people  
18 that don't know the subject matter, to see  
19 what they think of your website because they  
20 are consumers and they would tell you what  
21 they can find. And the other thing might be  
22 to try some of these questions with high  
23 school students and see if what you're doing  
24 has any relevance, if you're communicating to  
25 them at all. Because my guess is, you are

1 communicating to the in-the-know type people  
2 and the average consumer may not be able to  
3 use your website that well. It might be a  
4 fun thing to do to see some social science  
5 teacher in the high school and say, try this  
6 experiment with the students and tell me what  
7 you learn.

8 MR. BRENDLER: I guess I would say  
9 that self-regulation is not necessarily  
10 effective in all cases. I know there had  
11 been some statement earlier that people think  
12 that working with the FTC in a  
13 self-regulation environment has been helpful  
14 and useful and all of that, but I think the  
15 most recent scandal has proven to us that  
16 free markets are not great. But, there needs  
17 to be responsible interpretation and  
18 responsible oversight.

19 MR. KAISER: I think I sort of said  
20 this at the very beginning, but emphasize  
21 this at the end as well. Again, the sources  
22 of information for consumers is not my  
23 primary concern. My primary concern is that  
24 they get the message. So anyway of the  
25 strengthening the networks, strengthening the

1 ability for everybody who shares in this  
2 responsibility with NCSA, or anybody else who  
3 is doing this, that we work really in concert  
4 around both of the content of the message,  
5 because I think some of us have different  
6 ideas, as well as being able to push quickly  
7 when we need something. We have to always  
8 get better. Communication is something that  
9 everybody tries to do well and everybody and  
10 every organization could probably work on  
11 their entire life.

12 MS. OHLHAUSEN: I want to thank our  
13 panel. I really appreciate your careful  
14 thoughts on these topics. As always, I want  
15 to thank Andreas Reindl and Alice Wong for  
16 all their help in co-hosting this event. And  
17 I would be remiss if I don't say thank you to  
18 Gregory Luib, the man behind the curtain, on  
19 all these things. Thank you very much.

20 (Whereupon, at 4:55 P.M., the  
21 hearing was adjourned.)

22

23

24

25

CERTIFICATION OF REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CASE TITLE: THE FTC AT 100

DATE: OCTOBER 24, 2008

I HEREBY CERTIFY THAT the foregoing  
was taken in stenograph and transcribed  
therefrom to the best of my skill and  
ability.

ANDREA TOURNOUR