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UNITED STATES OF AMERICA

Federal Trade Commission

The FTC's Competition Mission

Boston University School of Management

Boston, Massachusetts

October 14, 2008

10:00 a.m.

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Measuring the Welfare Effects of the FTC's Competition Efforts Page: 84

Moderator:

Michael Salinger

Professor/Everett W. Lord Distinguished

Faculty Scholar, Finance and Economics

Department, Boston University

Panelists:

Keith N. Hylton

Paul J. Liacos Scholar in Law and Professor of

Law, Boston University School of Law

Nancy L. Rose

Professor of Economics, Massachusetts Institute

of Technology

Director of the National Bureau of Economic

Research program in Industrial Organization

Dennis Yao

Lawrence E. Fouraker, Professor of Business

Administration, Harvard Business School

1 OPENING REMARKS

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

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

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

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

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

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

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

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

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

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

1 and asking six questions, and these questions are:

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

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

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

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

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

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

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

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

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

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

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

1 collaborations.

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

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

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

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

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1 THE FTC'S COMPETITION MISSION:
2 RESOURCE DEPLOYMENT AND EFFECTIVENESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 businesses and their counsel anticipate outcomes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 So that to me suggests a few things,

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

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

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

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

1 do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. ELHAUGE: In terms of thinking

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Hillary, anything?

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

1 all of these factors can dovetail.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And before I am quiet on this issue, I

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

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

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

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

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

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

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

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

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

1 interesting question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 instances. Perhaps we could participate more.

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

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

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

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

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

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

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

1 lots of cases.

2 MR. HEIMERT: Bob.

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

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

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

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

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

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

19 MR. HEIMERT: Thoughts?

20 MS. GREENE: No.

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

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

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

25 As to civil fines, I agree with

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

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

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

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

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

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

4 MR. LANGER: We only have 20 minutes.

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

18 Your thoughts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. HEIMERT: Bob or Einer on that?

25 MR. LANGER: My experience at the state

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

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

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

13 MR. HEIMERT: Einer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Commission's actions.

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

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

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

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

1 a way to institutionalize the self-assessment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 requires pretty good circumstantial evidence of
2 conspiracy.

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

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

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

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

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

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

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

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

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

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

1 biggest impact.

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

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

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

25 And so let me say a little bit about

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. SALINGER: Denny.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 tracks the expected penalty, that first phase.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But if we want to go through

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

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

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

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

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

1 creates some trouble but --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 This circles back to Mike's original

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

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

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

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

25 And it might be even institutionalizing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But at the same time they don't have

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

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

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

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

1 up across the board on antitrust cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. HYLTON: Under FTC Section 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SALINGER: Anyone else want to pick

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

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

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

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

1 of evidence can be extremely illuminating.

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

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

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

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

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

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

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

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

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

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

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

25 MS. ROSE: They're increasingly being

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

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

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

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

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

1 those areas more public or more open to researchers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. HYLTON: They do.

23 MR. YAO: Right?

24 MR. HYLTON: They do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. SALINGER: Nancy.

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

1 community in a very significant and real way.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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15 CAROL DIFAZIO, RPR

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