BEYOND LITIGATION: STUDIES, GUIDELINES AND POLICY STATEMENTS

SPEAKERS: ROBERT D. ATKINSON

J. HOWARD BEALES, III

HILLARY J. GREENE

WILLIAM J. BAER

COMMISSIONER JON LEIBOWITZ

MODERATOR: MAUREEN K. OHLHAUSEN

MS. OHLHAUSEN: Will everyone please start taking their seats and my panelists come up to the front so we can get started on the next panel.

Hello, I would like to welcome you to the next panel, which is "Beyond Litigation: Studies, Guidelines and Policy Statements." I'm Maureen Ohlhausen, the acting director of the Office of Policy Planning at the Federal Trade Commission and this panel is basically going to talk about nonlitigation activities of the Commission in both competition and consumer protection areas.

I have found that one unifying factor is that these activities tend to generate really a lot of questions. We get questions on why does the Agency
engage in these activities, what's the value of these activities to the Commission itself, to consumers, to the legal profession, to businesses and to other government policy makers.

Questions like, is the Agency overstepping its bounds? Or conversely, is it unnecessarily limiting its discretion? And not forgetting the "beyond litigation" part of the title, do these activities advance the goals of the Commission in ways that litigation, or litigation alone, cannot.

As the moderator, I've done the easier task, which is raising a bunch of questions, and now my panelists have the harder task of answering them. Their biographies are in your materials, and I will just hit on the highlights to give them maximum time to speak.

First we have Rob Atkinson; he is the vice president of the Progressive Policy Institute and director of its Technology and New Economy Project, where he has been active in the area of barriers to e-commerce, among a variety of topics.

Second, we have J. Howard Beales of George Washington University and former director of the Bureau of Consumer Protection at the FTC whose history with the FTC goes, I would say, way back.

Third, we have Hillary Greene; she's a researcher at Harvard University and formerly part of
the FTC's general counsel office's policy studies group.

Fourth, we have FTC Commissioner John Leibowitz, who recently joined us from the Motion Picture Association of America. Prior to that, Commissioner Leibowitz was the democratic chief staff counsel and staff director for the Senate Antitrust Subcommittee where he focused on competition policy and telecommunications matters.

Finally, we have Bill Baer; he's currently the head of Arnold & Porter's antitrust practice. Bill also has many years of FTC experience, including serving as the head of the Bureau of Competition for a number of years.

I'll just give you a few words on logistics. Our first three speakers are what we call presenters and they will speak on a particular topic for a few minutes, and then we will have our discussants, Commissioner Leibowitz and Bill Baer, who will offer their own observations on the topics, and probably ask our presenters and perhaps even the moderator a few questions. And finally we hope we will have some time left over for audience questions. We have a staff member going around with cards, so if you have a question, you can write it on the card and they will bring it up.

So, let's get started. Rob?
MR. ATKINSON: Well, thank you, Maureen, it's really nice to be here. I am pleased to speak on this issue which is near and dear to my heart and one that I could talk for days about, but I only have 12 minutes.

In the new administration, the FTC started taking a significant interest in the whole issue of how middlemen and other intermediaries were unfairly blocking e-commerce competition, particularly from new incumbents.

Bricks and mortar middlemen were unfairly trying to structure the playing field. PPI wrote a report in 2001 called "The Revenge of the Disintermediated: How the Middleman is Fighting E-commerce and Hurting Consumers," that documented a long list of cases, most of them in my view, pretty egregious and pretty one-sided in terms of what the real story was. And that report spurred a lot of interest.

I think Chairman Muris read it and got interested in it and then Ted Cruz who was your predecessor.

MS. OHLHAUSEN: Right.

MR. ATKINSON: Ted was very interested it and we met with Ted and as a result of that and certainly other people's work, the FTC started a major initiative on looking at barriers to e-commerce, where I think they have played a very important role, not obviously by
litigation, but by, shedding the light of day on these shady, and frankly, under-the-radar-screen practices.

One of the things they did hold was a two-day workshop where they looked at a wide array of these cases. The one I enjoyed the best was protectionism in the casket industry, where there were a number of states where funeral undertakers were passing rules or laws or encouraging them to be passed where you couldn't buy a casket online. Well, it turns out that buying a casket online saves us a lot of money.

What's at stake here? What's really at stake here, I would argue, is the future of the digital economy. We estimated a few years ago that these restrictions, and we were very, very conservative, cost the economy $15 billion a year. Since then, I think those numbers have gone way up.

PPI wrote a subsequent report that looked at this whole issue in the real estate industry, and we estimated if you had E-transformation of the real estate industry, consumer would save $40 billion a year, but there are all sorts of interesting protectionist barriers in that industry.

Why is this important? Why does the FTC need to play a role here? Why don't legislators and the judiciaries sort of understand this issue? I think there are three main reasons. One is regulatory capture
at the state level. The case I really love the best
is autos. Consumers can buy a computer from Dell, but
can't buy a Ford from Ford, because it's illegal in
all 50 states to buy a car from a manufacturer. Why
is that? Because car dealers have political power.
Well, why do they have all this power? It's because
they're in every single state legislative district
and they influence state legislators. You can't even
buy a car from the manufacturer in Michigan.

So, you have regulatory capture at the state
level. You also have regulatory capture in trade
associations and industry associations, which I think is
a very, very troubling prospect. Who regulates legal
practices? Lawyers. Who regulates the auction
industry? Auctioneers. Who regulates the real estate
industry? Real estate brokers. And they all have a
very clear stake in protecting their piece of the pie
against e-commerce competition.

Third, these issues are very complex, they are
under the radar screen, most people don't know about
them, and because of this, most policymakers,
decisionmakers,
legislators, members of Congress, don't really
understand these issues very well.

Therefore, I think the role of the FTC in
issuing reports, in doing hearings, in filing briefs, in
filing other sorts of documents with states play a very
critical role. The FTC brings objective, neutral
credibility based upon very good objective evidence.
And the other thing they bring is the clear
sense that they're representing consumer interest.
And the problem in these debates is the consumer
interests aren't represented, because consumers are
so widely diverse and don't have power.

One example of the FTC's impact is that
because of the FTC hearings, it stimulated Congress
was encourage to have a set of hearings as well.
Chairman Stearns held a hearing and I was pleased to
testify at it. There was one member of Congress who
started off the hearing with the view, that he
didn't really think it was good to buy contact lenses
on the Internet, and by the end of the hearing, he had
completely changed his view and wanted to sign on to a
bill that would have allowed contact lenses to be bought
on the Internet. That bill was passed and signed into
law.

So, decision makers can be educated on these
issues and this can make a big difference.

Let me just briefly go over a few areas where I
think the FTC played other important roles. In a number
of states, attorneys have gotten laws or regulations
passed that say that when you have a real estate closing,
that, gee, lo and behold, the attorney has to be there. As a result, it raises the cost of closing and limits home ownership.

So, the FTC intervened and filed letters in Rhode Island and in North Carolina, and were successful there in preventing those anti pro-consumer laws from being put on the books. They've also intervened in Georgia with the Supreme Court Amicus brief (which they lost) and now there is a current action in West Virginia to do the same.

In contact lenses, the state of Connecticut was considering a bill that would have made it more difficult for consumers to get their prescription filled on line. If you get an eyeglass prescription from your doctor, there's an FTC Rule, I believe, promulgated in 1979, that allowed consumers to get their prescription and file it anywhere. Consumers have that same protection for contact lenses and as a result optometrists were charging their patients much more.

And so the State of Connecticut was considering passing protectionist legislation and they heard mostly from optometrists. However, the FTC weighed in with a letter and was able to win the day up there.

With regard to casket sales, they've intervened in Oklahoma, and in that case didn't win. But when Tennessee was considering similar rules on the behest
of the undertakers, and the FTC was able to prevail there.

The last case, and it's the one that we'll be hearing about in the next couple of months, is the wine issue. Over a third of American consumers are unable to buy wine over the Internet, because of state restrictions. The case in the Supreme Court now that's being heard addresses restrictions in the state of Michigan. In Michigan, you can buy wine on the Internet, as long as it's from a Michigan winery. It sort of protects young people from drinking, but I guess it's okay if they drink Michigan wine. But in reality, with the right rule, young people can't buy wine on the Internet because they have age restrictions that you have to show you're 21 to get wine.

In any case, there's all sorts of, misleading information flying around. The FTC did a very careful study last year, I believe, looking at Internet wine sales, and comparing them to physical wine sales in stores in Virginia. That study showed that consumers have more choice and on particular kinds of wine actually can save significant money.

That study, I would argue, is going to play an important role in the Supreme Court case. The Supreme Court will judge these two conflicting things, underaged drinking and states rights with something else, and the
something else has been clearly documented by the FTC, which is consumer choice and consumer savings.

So, let me just finish up by saying, there's a lot more work to be done here. I certainly praise the FTC's work in the area. If it wasn't for the FTC taking steps in these areas, we would be a lot farther behind where we are. But so far, the industries that they've looked at, and I don't mean this at all in a critical way, have been minor industries. Caskets is not a huge industry, for are contact lenses and wine.

I think the next step for the FTC is are some big industries with e-commerce barriers. It's about time we really started looking at them very carefully. And I would put real estate as number one. This is a -- as I said, I think an $80 billion industry in the real estate transaction industry, it's controlled by, frankly, the inside players. Recently NAR, the National Association of Realtors, through their board, in controlling the MLS, the Multiple Listing Service, tried to pass rules that essentially would have made it very difficult for Internet discount brokers, like E-realty, to compete. When consumers go to E-realty or Zip or others like that, they can view the full MLS, can go to the home yourself and it saves realtors a lot of money. It ends up saving E-realty a lot of money because they don't have to be with consumers
every time they look at a house. So, they wind giving consumers anywhere from a two percent to three percent rebate, off of six percent. So, instead of paying a six percent commission, you're really paying three or four. That's a huge savings when you're buying a $300,000 house.

When, NAR was trying to pass these rules, the FTC did weigh in on that, as did DOJ, and they were able to preclude those rules from being implemented that would have really put a very significant damper on this e-commerce realtor competition. But that case is not resolved, they still could do it, and there are a whole other slew of other issues in the real estate industry that I think are very important to look at.

The second industry is cars. The whole way we sell cars, everything from relevant market area rules to these e-commerce restrictions, are essentially designed to protect car dealers and to keep mark-ups high. There's an enormous benefit that could be gained by consumers by the FTC really looking at these rules.

A third industry, which maybe would be a joint SEC/FTC issue, is the securities industry. There are, an enormous number of barriers in the securities industry erected by securities brokers and the exchanges, including NASDAQ and the New York Stock
Exchange, that make it hard for Internet exchanges like Island and Archipelago and some of those exchanges to get off the ground, and they're really the same issue there. They're bricks and mortar people who benefited significantly from the current system, they erect rules and they keep these new incumbents, these new competitors from getting off the ground.

Finally there have been significant changes in the last couple of years, in e-commerce. So, I would encourage the FTC to look at this again, and look at some other industries. I think it's very important, and again, I commend the work the FTC has done. It's been very important. So, thank you very much.

MS. OHLHAUSEN: Thanks, Rob.

(Applause.)

MS. OHLHAUSEN: Howard?

MR. BEALES: Thanks, Maureen. It's a pleasure to be back, even if I haven't been gone for very long. Today I want to talk about the role of policy statements at the FTC, and in particular the policy statements addressing the Commission's unfairness authority and its deception authority. They were adopted within a fairly short period of time, one in 1980, one in 1983, and they're relatively unusual in the
things regulatory agencies do, because both of them
really narrow the Agency's options.

    Now, usually if you think about rules versus
discretion, it's better to have more choices. You never
know what choice you might want to make at some future
time, and agencies are traditionally reluctant to give
up options that they might have. That argues for a
vague and expansive standard, as a legal standard, and
then relying on prosecutorial discretion to make sure
that you don't bring bad cases or pointless cases.

    Agencies tend to see those advantages, and they
tend to try to preserve their options. And that's
especially true for a prosecutorial agency, like the FTC
has increasingly become. But there's a trade-off with
broad general standards, both externally and internally.
Externally, I think the trade-off is overdeterrence of
conduct that may seem to be illegal, but may be cases
that the Agency would never bring. It's very hard to
convey that message of, yeah, it's illegal, but we don't
really care. And it may lead people to not do things
that certainly wouldn't be harmful, and may actually be
helpful.

    I think the more serious consequence, though, is
internal, and that's a lack of focus on the part of the
Agency staff. The legal standard doesn't just tell the
private sector what's going on, it also directs the
staff as to what kind of conduct they should be looking for, and tells them what questions need to be addressed in the course of an investigation. Questions that don't have to be answered in order to address the legality of the conduct may be questions that are never seriously considered.

They may be important questions, but the legal standard, if the legal standard doesn't make people address those questions, they can easily get overlooked. And if the law permits anything, it's much harder to rule out bad ideas and it's much harder to direct resources to the problems that the Agency really should be addressing.

I think both policy statements were quite successful in addressing those trade-offs. There's really two precursors to the policy statements that I think it's important to put them in context. One is the rise of rule-making. In the 1970s, the Commission launched a number of inquiries for rule-making proposals in a wide variety of industries. Some of them were sound and sensible, some of them were broad efforts to restructure entire industries. And what those rule-making proposals did externally was to raise the cost of mistakes.

There's a lot of further options to reconsider a decision in any individual case, if you get it wrong and
are proceeding on a case-by-case basis, it's much more difficult to do that in the context of rule-making. And what happened in the course of the rules was they gave rise to a political response to the rule proposals, and I'll talk more about that in a minute, but especially those based on fairness.

Internally, I think what rule-making demonstrated was the cost of a lack of focus. A lot of the rules were started without being very clear about what the legal theory of the rule was. And as a result, it wasn't clear what was important in the rule-making inquiry. Anything could matter. There was no clear sense of what questions really had to be answered, and so not only were they very broad proposals, but they were very broad inquiries in which nothing could be ruled out or ruled in as stuff that absolutely had to be addressed.

Partly as a result of that and for other reasons as well, rule-making proved to be incredibly resource intensive, in terms of the Agency's efforts. The second precursor was the rise of economic analysis. In the late 1970s -- and particularly economic analysis on the consumer protection side -- in the late 1970s, partly prompted by the significance of some of the ongoing rule-making proposals, economists really started getting seriously involved in consumer protection issues for the
first time. And what that brings is a different set of questions. The economist core questions, what are the costs and benefits of proposed rules or proposed cases, were issues that lawyers were likely to consider as questions of prosecutorial discretion, if they were willing to consider them at all. And there were some who were at the time not willing to consider them at all.

But those two precursors, I think, laid the groundwork for okay, let's rethink the standards and develop some clearer articulation of what's legal and what's not.

Let me turn first to unfairness. Early unfairness doctrine was not very often used as a distinct concept, and there were really no very clear criteria for unfairness until the Cigarette Rule in 1964. That standard was quite broad. It asked whether there was substantial injury, whether a practice violated public policy, whether it was immoral, unscrupulous or unethical, and it was never very clear whether you had to answer all three of those questions or whether any one would do. And that certainly contributed to the breadth of the standard.

Those standards were seemingly endorsed by the Supreme Court in the footnote, in dicta, in the 1972 case of Spherion/Hutchison, and the Agency took that
endorsement and ran. And where it ran was in
rule-making. Rule-making proposals made clear the
enormous potential breadth of the concept of unfairness,
and also the lack of clarity about what criteria were
essential to a finding of unfairness.

The straw that I think broke the Camel's back
was children's advertising, and the proposal to ban all
advertising on children's television. That proposal,
joined with others, provoked a tremendous political
outcry. The Agency was shut down for lack of funding
for a period of several days. When it was funded, its
ability to use unfairness as a basis for rule-making was
restricted.

The Commission was faced with the very real
possibility of losing it's unfairness authority
entirely, and in response to that, and to forestall
that, a unanimous commission adopted a policy statement
in December of 1980. It emphasized that consumer injury
was the key element of unfairness, and it elaborated
that analysis into the three-part test that we know
today. Whether the injury is substantial, whether
there's offsetting benefits to consumers or competition,
and whether it's an injury that consumers cannot
reasonably avoid.

The policy statement limited the use of public
policy, but didn't rule it out entirely. It did abandon
entirely the immoral, unscrupulous and unethical. Now, the three-part injury test was incorporated into a statutory definition in 1994, as something that the Commission had originally recommended in 1982. It's something that since then has been used very sparingly, and that in the last few years we had tried to revitalize unfairness, based on the policy statement on the statute and make it into a workable legal tool that the policy statement really made possible.

Let me turn then to the deception statement. It had a very different genesis, as it was much more internal than external. When Jim Miller arrived as chairman of the FTC, he not only proposed a statutory definition of unfairness, he proposed a statutory definition of deception as well. That was based on the numerous examples of the past use of deception that really just don't make sense. Based largely on extreme interpretations of advertising, in a rule that became known as the fool's test.

Everybody has their favorite examples. The Clairol case where the Commission said that hair dye wasn't permanent unless it would color hair that hadn't grown out yet. Columbia Desktop Encyclopedia, which the Commission solemnly found did not contain everything you ever wanted to know about every conceivable subject.

The claim for yogurt that it was nature's perfect food
that science made better, that the Commission thought meant that you could live on a diet of yogurt alone. Or my personal favorite, the automatic sewing machine guide where the Commission reasoned that people knew about automatic washers, you put the clothes in, you turn it on, they came out clean, automatic sewing machines should work the same way, you put the cloth in, you turn it on, you go away, the clothes come out. Not very reasonable standards.

The deception policy statement didn't explicitly disavow those statements, but it tried to articulate the legal standard in a different way where it would be much more difficult to bring those kinds of cases. What the statement said was that a practice is deceptive if it's likely to mislead consumers acting reasonably in the circumstances to their detriment, whereas it was later phrased about a material issue.

It was adopted by a three to two vote, a highly controversial three to two vote. It was subsequently adopted and litigated in Commission cases, and has been cited in numerous of our district court cases since then.

It's worth looking a little bit at the controversy, because there was no real disagreement that many of the silly old cases were not appropriate subjects for FTC action. And as I said, the policy
statement only disavowed those cases by implication, it simply didn't cite them. It cited and relied on different cases with much more reasonable articulations of what the legal standard was than the cases that articulated it as the fool's test.

The disagreement was really over the wisdom of articulating the standard differently than it had been articulated in the past, and fear that the statement's emphasis on extrinsic evidence on the meaning of communications to consumers would pose insurmountable hurdles in litigation.

I look back at the dissenting statements when the policy statement was issued and they're interesting. Let me read you a few excerpts. The policy statement was totally inadequate and indeed embarrassing. It made new law that is destined to confuse and confound its readers. It could substantially narrow the Commission's authority to prosecute a wide range of dishonest and deceptive conduct, and that was from the Republican.

The other dissent said the statement promises to foster a great deal of mischief until it can be corrected by some future commission. It said there's a marginal segment of American commercial life, promoters of instant weight loss, bust creams, baldness remedies, purveyors of quick fortunes in land speculation and pyramid screens, sellers of miracle cancer cures which
exist only because they're unsophisticated consumers. It worried that the introduction of reasonableness in the policy statement was deregulation at its most reckless and pointless form.

I don't think any of that has happened. The policy statement has instead been the basis of a very strong bipartisan consensus about what kinds of cases the FTC should be bringing. It certainly hasn't ruled out explicit, false, fraudulent claims that are the mainstay of BCP actions. It was really the beginning of a clear recognition that the real test of meanings is consumers themselves, and they're often the best evidence to determine that meaning is copy testing.

Cases that require that, and a lot of cases obviously can be and are brought without copy testing, even under the deception policy statement, but the cases where it's harder to tell what the meaning is are more resource intensive. We ought to be asking is this case really worth it in a harder way. They're simply less attractive a target.

In conclusion, I think the policy statements were very useful ways to revisit areas where the law was vague or the law was overly broad, compared to the kind of cases that the Commission should be bringing, and the Commission thought it should be bringing, and was in fact bringing.
Deception has been very heavily used, and was very successful in achieving the internal focus on the appropriate kinds of cases. Unfairness has been less used so far, but I think it provides a firm foundation for revitalizing the doctrine, and making it a useful legal tool going forward. So, thank you.

(Applause.)

MS. OHLHAUSEN: Thank you very much, Howard. I promised you that we would do both BCP and BC and Hillary Greene will now address the merger guidelines.

MS. GREENE: First of all, it's an absolute pleasure to be back. I look out and see all my old colleagues and it's great to be back here and it's a real honor. I won't say anymore, because I don't have enough time for that, Maureen.

MS. OHLHAUSEN: Sorry.

MS. GREENE: But it's so good to be able to do that as a participant rather than having to listen to people complain.

My topic is obviously guidelines, and what I am going to do is briefly focus on two related dynamics, how the distinctive nature of the FTC as an institution influenced the nature of the antitrust guidelines it promulgated and the second is the role of the antitrust guidelines, the role they have played in the growth and development of antitrust law. And I have flagged a
current working paper of mine that focuses particularly
on the second of these two issues, if anybody is
interested in a 12-hour rather than 12-minute summary.

And with that, what exactly is a guideline?
It's a, as you all know, it's a description of an
enforcement policy which serves to guide and educate as
well as editorialize. Bill Kovacic, among others, have
discussed extensively how antitrust is open textured,
which is to say it's got a broad statutory base and
relies heavily on common law development.

And these guidelines, these public statements of
enforcement policy that are articulating how and why the
agencies navigate the legal discretion available to them
really provide a degree of direction to the Agency
staff, as well as a degree of predictability to the
public, given that environment.

And because the law is invariably unclear, or in
conflict, some of the topics that the guidelines address
will necessarily be unsettled, and therefore the
guidelines cannot help but be sort of implicit
commentary on the state of the law itself.

Now, obviously the interesting thing about all
of this is that the guidelines, which we know have had a
tremendous effect, are technically nonbinding. They're
certainly not binding on the courts, and they are as a
matter of law not binding on the agencies themselves.
Obviously there's a little slight of hand in there and they, in fact, do exercise a lot of power through persuasion, among other ways.

One thing that I did not mention about the definition of guidelines was how they have to be promulgated or what they should include in terms of their content. And that's because guidelines are an amazingly flexible policy device, and as you can see, the FTC's initial reliance on guidelines was decidedly industry-specific.

And Commissioner Philip Elman, for whom Judge Posner was an attorney advisor, was one of the key architects of the FTC's early guidelines. And his quotation on the slide really explains this particular focus. Namely, how the FTC entered into a process of educating itself regarding an industry so that it could educate the industry regarding its enforcement policy.

Now, the other thing that's readily apparent when you look at the early efforts is that they are also merger specific. If you consider that the guidelines are meant to bring increased predictability, and the fact that merger law in the 1960s was not, shall we say, at its most consistent, it seems quite fitting that the focus of merger law would be the focus of the early guideline efforts.

The Elman quotation from the prior slide
actually came from a 1964 Commission ruling in re: Permanente, which is a cement case, and I am going to very briefly spend a minute on the cement industry guidelines, because they were essentially the first guidelines, antitrust guidelines issued.

In the 1960s, there was a merger wave in the cement industry which led to a large number of cases. The FTC responded with an industry investigation, a staff report, followed by hearings, which culminated in the enforcement policy. And these guidelines themselves were intensely factually specific, and a couple of examples are listed on the slide.

In fact, the guidelines were so specific, so tied to the industry, so into the facts, that some argued that they said too much, and so what that resulted in was a challenge based on prejudgment, and that is to say that the guidelines included a number of factual determinations. The challenge ultimately failed, and the Commission was able to proceed, and I just love Elman's quote there with respondents are entitled to have their cases adjudicated by commissioners with open minds, not empty ones.

(Laughter.)

MS. GREENE: Now, almost concurrently, but after the FTC, I will add, DOJ issued their own merger guidelines. In terms of basic information, all of this
is an incredibly well-known part of history, Don Turner was the author of the guidelines, and they covered all manner of mergers.

Now, I don't want to lead everybody to believe that just because the antitrust agencies were adopting the guideline policies concurrently, that the phenomenon was without critics, and such criticism is suggested, obviously, by this New York Times article. And, you know, without going into the specifics of who the aids were and that type of thing, my point is merely to underscore that the litigation approach to policy formulation was very well entrenched, and as discussed yesterday and earlier, litigation is the type of thing that it's really easy to keep score. It's really easy to track how the Agency is doing.

Guidelines, by necessity, owing to their nonbinding nature, among other things, are very hard to keep track of in terms of their impact. And but that doesn't mean their impact is not as great or potentially greater.

Now, as I say, the cement policy and the merger guidelines were issued within one year of one another, and the FTC's policy was preceded by the report and hearings, not so with the merger guidelines. As a caveat, let me just say that the FTC does not always have reports and hearings prior to issuing guidelines,
and likewise the antitrust division has conducted broader inquiries and drafted comments, and more recently they have taken increasingly to joining the FTC in the conduct of hearings and issuing reports.

But what's most striking about the cement guidelines versus the merger guidelines is that the different approach really does translate into radically different target audiences for the guidelines and contents of the guidelines. And if you think back to the cement guidelines that we just saw, there's nothing even remotely approaching that in the '68 merger guidelines. You don't have a fact in sight. Certainly not a discussion of how many, you know, pounds of cement you buy per year puts you in a certain category which triggers certain results.

So, the guidance in the cement industry was more concrete, and that pun was intended.

(Laughter.)

MS. GREENE: Now, I will say that Commissioner Elman, who obviously played a key role in all of this, he appears to have considered and rejected a path that was closer to that taken by the Department of Justice, and he said the following: "To be most useful and meaningful, merger enforcement guidelines must be specific, concrete, and related to particular markets and industries. If they merely indicate in a general
way areas of concern to the prosecuting agency, individual businessmen will be in the dark as to whether they will lawfully undertake mergers."

Now, I've changed the slide and we've moved forward 15 years, and the next wave of guidelines obviously came in '82 on the same day when the FTC issued its statement regarding horizontal mergers and DOJ issued their '82 merger guidelines.

And I also wanted to mention in passing that NAAG also issued guidelines during this general time frame. The NAAG guidelines differed substantially from FTC and DOJ guidelines, which in turn differed somewhat from one another.

Now, I know somebody said this, and I don't know which scholar it was, so if you're in the room, claim credit, because I'm trying to search for your name, but it really is important, because what this quote suggests is the state attorney generals needed to gain legitimacy, they needed to get back in the game, and the way in which they did so was they promulgated their own guidelines. That was showing that the guidelines were increasingly framing the terms of the debate.

Whether the guidelines were used or not, they weren't heavily relied on, shall we say, is not as important as the impulse that they felt to promulgate them.
In terms of the 1980s merger policies, it's pretty clear that a different level of comparison is warranted in the 1980s. If you go to the 1980s merger policies, there is obviously a different type of comparison you need to do in terms of the '82 merger statement and the '82 merger guidelines.

If you think back to what we were discussing in the 1960s, those were very different animals, the cement guidelines and the '68 guidelines. The merger statement and the merger guidelines were more like distant cousins. And what we see is that, among other things, one of their key features was that they shared a key economic framework, and that was really important, because one of the -- now I'm lost. Sorry about this.

What the two different sets of policies shared was a shared economic framework. Let me add that they still had radically different approaches to implementation. One of the more obvious examples would be with concentration. Prior to 1982, concentration ratios were typically "CR-4". That was how opinions were written and arguments were made.

In the guidelines, however, the Department of Justice endorsed HHIs, the Herfendahl index. But what they did, they not only endorsed the index, but they also set up very specific thresholds. Now, when they did that, the FTC sort of hung back. They merely acknowledged the
need to further refine how we approach concentration. They mention the HHI as one possibility, and as a consequence they did not advance any additional standards.

Very briefly, institutional contexts. The FTC may have had more abstract guidelines, because it has this joint prosecutorial and adjudicatory role. As Tom Campbell has said, "Judges are not inclined to state in advance what they will consider important," one must learn that by a case-by-case basis. Also, the FTC is a multi-member body, you've got to get everybody together. When you look at the merger statement, you will see that there are instances (in the footnotes) where some of the Commissioners, actually the Chairman, sort of dissents a little from the text of the guideline. So, that would also account for them being more vague. And finally, joint agency jurisdiction.

Now, closing thoughts. Owing both to the FTC, DOJ and the court's increasing reliance on DOJ's more specific framework -- which is to say the merger guidelines -- and because predictability requires the agencies separate actions to also sort of make sense together, you have the next phenomenon, where I will conclude, which is that of joint guidelines.

In ten words or less, one of the things that's interesting about the health care guidelines is that in a very attenuated way, they represent a sort of harkening
back to the industry guidelines that we saw in the '60s. They cover lots of areas other than mergers and they were promulgated during a very intensely political environment. But they are industry-specific with all of the attendant pluses and minuses.

And then finally, the Competitor Collaborations Guidelines. These actually harkens back even more strongly. Because what we saw there was we had under Pitofsky an interest in globalization and innovation. He sponsored hearings, and as a result of the hearings, there was a recognition of the need for increased guidance with regard to collaborations, and from that, you had the guidelines promulgated.

And so that sort of demonstrates how the FTC has an important role to play in terms of our approach to educating the public about what our enforcement policies are. Thank you.

(Applause.)

MS. OHLHAUSEN: Thank you very much, Hillary. We now turn to our first discussant, which is Commissioner John Leibowitz.

COMMISSIONER LEIBOWITZ: Thanks, Maureen. I suppose it's ironic, and hopefully humorously ironic, that I've been at the Commission about nine working days, and here I am musing about 90 years of FTC history. But the truth is, I followed the Commission
closely for many years, I have an enormously high regard
for its work, including its studies, its reports, its
guidelines and its advocacy.

Rob has talked about the importance of our
e-commerce work, Hillary the merger guidelines, Howard
the unfairness and the deception statements. I think
all of those have resonated with policy makers, with the
public, and with I guess what I would call FTC
constituencies.

But for me, when I think about the Commission's
leadership role in policy matters, it's the Commission's
reports on the marketing of violent entertainment to
children that jump to mind.

As some of you may know, I joined the Commission
from the Motion Picture Association, but when the
Commission's first marketing report came out in
September 2000, I was still working in the Senate. That
report shocked a lot of people, including me, as the
then parent of two young girls. I am still the parent
of two young girls.

(Laughter.)

COMMISSIONER LEIBOWITZ: Many companies have
been actively targeting violent entertainment to kids,
something that's not only wrong, but absolutely
unacceptable, and if you take the film industry as an
example, and by the way, it wasn't the worst offender by
any means, a majority of violent R-rated movies sampled by the Commission were marketed to children who were under 17. And ads for the movies didn't include rating reasons.

So, for parents who were concerned about violence but not profanity or sex, or sex but not profanity or violence, it was sort of hard to tell why a movie was rated R, or for that matter why a movie was rated PG-13.

Well, that report and the attendant publicity got the industry's attention and the studios made a commitment, I think, to change the way they had been doing business, or they were doing business. A series of follow-up reports ensued, all showing some progress, at least as to the film industry, and the most recent follow-up, which was released just this past summer, found that none of the studios targeted advertising for violent films to kids and that rating reasons are routinely disclosed in ads.

So, the Commission's study, it seems to me, and its reports, helped keep these issues on the front burner and to my mind have provided a real and tangible benefit to parents.

Now, when then Chairman Pitofsky first announced that the Commission would conduct a marketing study under some pressure from Congress, people like Senators
Kohl and Lieberman, and Brownback, and from the White House, and I think Chairman Pitofsky alluded to that yesterday in his lunch talk, a few people raised questions. I mean, why is a law enforcement agency doing a study like this? Isn't this sort of a frolic and detour for the FTC?

But the truth is, you can trace the Commission's study and advocacy role back to the earliest days of the Agency. These are by no means frolics and detours. Looking now back at the Commission's first annual report, in 1916, which my staff and I did after getting a suggestion or a hint from Judy Bailey, it's funny just how little things have changed.

Even back then, the Senate was calling on the Commission to investigate the petroleum industry, and the FTC conducted literally a massive study of the price of oil in Oklahoma and how it compared to the price nationally. The study consumed over 10 percent of the Commission's annual budget and it took three years to finish.

The 1916 report notes, and I'm just going to read a little excerpt, that an extraordinarily rapid advance occurred in the price of gasoline, and many complaints were made to the Commission concerning discriminations in the price of gasoline in different localities. This advance in gasoline prices was a
matter of wide public concern.

Now, all of this sounds very familiar, especially to those of us who are still undergoing the confirmation process.

(Laughter.)

COMMISSIONER LEIBOWITZ: Coming back to the present, though, it is remarkable how many FTC studies, reports and guidelines have created either good public policy or at the very least provoked critical or crucial debate when so many government studies and agency studies and reports seem to sort of just disappear up into the ether. And I suppose as the new commissioner on the block, I would like to try to understand from the panelists and maybe from some people in the audience how the Commission has been so effective in translating its studies in advocacy into action and how we can maintain that reasonably good success rate.

But before I ask any questions, I want to hear what the eminent and distinguished veteran of the FTC -- young and eminent and distinguished veteran Bill Baer has to say.

MR. BAER: Thank you, John. For those of you who are not used to Commissioner Leibowitz's careful use of the English language, eminent, distinguished and veteran can be translated as old guy at end of table.

(Laughter.)
MR. BAER: That's me. This is a fascinating panel, because it gets to some of the issues which threatened the future of the Commission in the late '70s, as Howard was saying. I was, as many of you know, at the Agency between '75 and '80 and had the privilege of directing the congressional liaison when we were in the firestorm. I was there when the bubble -- the energy that came out of the first Kirkpatrick report, the Nader report, rule-making got going, lots of activity, both on the consumer protection and competition side -- actually burst.

We, ran into a buzz saw up on the Hill. Most of the criticism was directed, as Howard indicated earlier, at rule-making, but a fair part of the criticism was directed at the advocacy program, the non-law enforcement efforts of the Agency. Congressmen were infuriated by a study that had been done by the Bureau of Consumer Protection about life insurance policies, suggesting that, indeed, whole life insurance policies might actually benefit the issuer more than the insured.

There was a little nondescript Bureau of Economics study going on into agricultural cooperatives which allegedly threatened the farming industry and brought great pressure on the Hill. That criticism of the advocacy efforts of the Agency spilled over into
the '80s. There was a lot of congressional furor over allegedly unsolicited advice to state legislatures, local governments. I remember taxi cabs was one of the big issues.

Even I was a critic at one point, indicating that I thought advocacy had overshadowed the Commission's law enforcement mission. I read something this morning that I had written about 15 years ago in which I made the somewhat uncharitable comment that at times it seems like the cop on the economic regulatory beat has been replaced by a little man on a park bench dispensing free advice to anyone who will listen.

(Laughter.)

MR. BAER: That was a bit over the top then and now --

(Laughter.)

MR. BAER: But so atypical of me. A question I think that would be interesting to hear the panel talk about a little bit, is how do we get from that point in the '70s and '80s when the advocacy efforts of the Agency, the nonenforcement law enforcement activities of the Agency got it into such trouble, and how you get from that point to today where the use of industry guidance, competition and consumer protection advocacy, hearings, reports, is widely applauded.

Obviously, individual reports create
controversies, but there is a measure of respect and
credibility and legitimacy today that really didn't
exist when I was here in the late '70s, and in the early
part of the '80s.

Part of how I would answer my own question is
that the effort to articulate limits, to provide
guidance as to how the Commission's Section 5 mandate
would be used, helped give some legitimacy to
enforcement efforts, and study efforts. That is really
Howard's point, the unfairness and deception statements
actually did cabin in a little bit the Agency's broad
and potentially unlimited jurisdiction.

Another, answer is that the increased use of
hearings, which began about ten years ago, or the return
of hearings as a mechanism to develop policy and to
provide guidance, actually provided an opportunity for
stakeholders to buy into the process, to get their views
heard. It was a less threatening way of helping to
develop public policy, and I think that was a laudable
approach as well.

But as I say, the question, I think, for the
panel that I would ask is, how do we avoid the problems
that we encountered in the '70s or '80s. Are there
limits? As Rob has talked and forcefully argued that
some of the big areas, the big industries, it's really
Internet stuff, hasn't yet been taken on to his
satisfaction, but are there limits to what an agency
like the FTC can and should be doing?

A second briefer observation I would make before
I turn it back to Maureen, relates to Hillary's
remarks about the value of guidelines. What has
evolved, particularly on the competition side, in my
experience in the Agency and as a counselor, is that
guidelines that have some substance to them, something
of an analytical framework, particularly the merger
guidelines, have been an extraordinarily important tools,
both externally in allowing counselors in the business
community to provide guidance as to what the Agency's
reaction is to a particular transaction is likely to be.
But they also -- and this is elaborating on a point
Howard made -- really provide an analytical framework
which causes the staff and their supervisors to focus
on a common set of questions, to make sure we are asking
the right questions, looking at it transaction by
transaction in a way that is more systematic, more routine.

It also has the added value of creating common
language, a common framework that the outside groups,
the merging parties, the third parties that are
complaining about a merger, and the Agency can sit
around a table and talk about where policy should go or
how policy should be applied in the context of a
particular transaction.
So, I think one of the great achievements out of the Department of Justice and the FTC in the last 20 years is developing a series of guidelines, starting with mergers and in the other areas Hillary has mentioned. And it bodes well for the future because I think it's providing enhanced predictability and consistency of Agency enforcement. Maureen?

MS. OHLHAUSEN: Thanks, Bill.

I will just take a stab at one of your questions as a person who is working on the FTC's advocacy these days. One of the requirements that we have is if there is a bill in the legislature that we are concerned about, we don't come in unless we've been invited by one of the legislators to make a comment. Sometimes we file comments in front of other federal agencies, but that's when they've been put out for public comment, so that there's been a general request to come in and to give comments. We are sensitive that we don't want to be overbearing in certain areas.

As for how we pick the subject matter, I think that our enforcement capabilities on both the BCP and BC side, really give us a lot of areas of expertise and we try to use those and also rely on good empirical evidence -- I haven't given the plug for BE yet -- that BE can provide to us. But I will turn it over to the
other panelists to get their comments.

MR. BEALES: I want to address briefly, I think the credibility question, Bill, because I think it's very important. I think you're quite right, the policy statement has been sort of defining limits, the Commission defining limits is an important part of what it takes to preserve that credibility. And I think the way that works is they make possible the strong enforcement program that really let us, particularly on the consumer protection side, be seen as the voice of consumers, caring about consumers, interested in consumers, and not protecting some other vested interest. And I think that enforcement is a key part of it.

I think there's probably inherently some greater risk. I don't know that it's a limit, but there's inherently greater risk in studies even, in places where we don't have jurisdiction, where there's clearly nothing we could do. They are, which is not say to we should never do that, but I think there's more risk in those kinds of things. I think it's a risk that is highlighted and was highlighted in the '80s by the perception for other reasons that we were overreaching. You know, the agricultural cooperatives and life insurance weren't seen as just information, I think, they were seen as threats. And threats of some more
formal, more structured kind of action. And that's a
credibility issue that comes from the enforcement
program and how well grounded it is.

I think the third thing that's important, and I
think you're quite right about hearings, is that
building the public perception that the Commission knows
what it's talking about. That it's acquired
information, preferably information that's related to
its enforcement efforts, and I think what's maybe one of
the clearest examples of that is the Spam workshop, and
Spam enforcement where we were able to have, the
Commission was able to have a significant influence --
I'm like Tim, I have to stop saying we -- on the public
policy process, because it built the public image that
it knew what it was talking about.

We proceeded on the security cases the same sort
of way, workshops built some understanding on the
staff's part and some perception of the public and then
cases, and then started laying the groundwork for that
with our FID. Where maybe there's an enforcement role,
maybe not. We're not clear yet.

But I think whenever the Commission starts down
one of these roads, it needs to think about what
credibility does it have, how can it get more
credibility, and what are the risks in this particular
area? Because there's a lot of other stuff at stake as
MR. BALTO: Let me ask you this, Howard, following up on what Rob mentioned before as sort of the next series of issues for the FTC to look at, Rob had mentioned real estate and cars and the securities industry. Isn't it one of the lessons, and Bill you said this, too, of the 1970s that you really need to pick and choose your battles?

MR. BEALES: Well, I think it is. I think you can take on even very difficult targets successfully, but you need a strategy for how you're going to do that. You can't jump in with both feet and say here we are. And I'm not -- you know, some of them, and I thought the auto dealers is maybe the clearest example. I mean, there's federal legislation protecting auto dealers that dates back to the '50s. There are strong political reasons for that, you know, it is an area where I think you're exactly right on the policy and the economics, whether it's an issue for the FTC to take on, I think is more problematic. And maybe more difficult.

MR. ATKINSON: Let me respond. Howard talked about some internal changes, which I'm not familiar with, but let me say there are two external factors which make it a much more amenable climate for the FTC to take on these issues than maybe was true 30 years ago.

One is that certainly in the e-commerce world,
taking on these issues, even taking on big issues, I think, the playing field is tilted towards the FTC in being successful. I would argue because people just have a default position that e-commerce is good, and anything that promotes e-commerce should be done.

It's sort of equivalent to, I don't think the FTC intervened in the '20s, but if they did, then the case I like the best was the American Horse Owners Association combined with the Grain Dealers Association, the Stable Association and the Horse Shoer's Association, were able to pass laws making it illegal to park cars on the street. I'm not making this up.

(Laughter.)

MR. ATKINSON: Now, obviously the car industry was small, the horse industry was huge, if the FTC went after the horse industry, everyone would have praised them because everybody knew cars were the future. And so that's where I think this issue is headed. Everyone knows e-commerce is the future, it's easy to see these interests are holding it back.

The second point I would make is this the politics has changed significantly in terms of what we see as the core interest. There's a colleague of mine at UCLA, Michael Storper, who is an economist, who has written very eloquently about the shift to a politics that's centered around consumer interest. That's partly why he
is arguing about why trade is really accepted by most people because we look at it and we look at the world through consumer lenses and not through worker producer lenses. And I think in the old economy there was producer lenses and in the new economy we look through consumer lenses. Because this change just opens up the FTC possibilities significantly, because it is the consumer agency, and therefore if it puts things in those terms. That makes the politics easier to do now than they were 20 or 30 years ago.

MS. GREENE: I wanted to jump in on the question of what are some of the limitations of the various policy tools, and I think that somewhat ironically one of the limitations that seems to be splitting up potentially, hopefully not, with regard to guidelines is that we might become a victim of our own success.

By that I mean, you know, the guidelines, their evolution over time has been very cumulative. When they started out in the '60s, the judges, among others, when the guidelines were mentioned to the, say like, what am I supposed to do with that, and you had these transcripts that are absolutely hysterical where the judge is like, so, what does this mean to me and why do I care what the FTC thinks? Et cetera.

And that's pretty fascinating, because if you fast forward now you'll actually find judicial opinions
where guidelines are cited as authority. I personally find the latter to be disturbing. The guidelines are not a restatement of the law, they may coincide with the law, but I think in order for them to be really effective for the Agency and for society, we have to sort of always keep in mind that they are the Agency's enforcement policy, and that the agencies need to keep that in mind when they think about how they're advising them, and people say, well, you can't think about this, you can't think about that, the law is not settled.

Well, that might be true, but if it's an enforcement policy, maybe you can stick your toes into those issues. And then the sort of flip side is that the courts need to constantly bear in mind that the guidelines are an enforcement policy and not treat them as authority.

I think that the tremendous success of the guidelines over time is a positive thing, but it's something that we have to be aware of and not let it change our appreciation of what the guidelines are.

COMMISSIONER LEIBOWITZ: Let me ask you a question, sort of following up on what you said, which is that if the guidelines are clearly about trading off differences between rules and discretion. And yesterday I was sort of struck by listening to former Chairman Pitofsky who said that the guidelines in vertical
mergers are hopelessly outdated and that he routinely
ignored them. And former Chairman Muris has emphasized
in speeches that staff should apply its considerable
expertise in deciding whether to allow a proposed
merger, even if the merger guidelines tell us that a
merger may be a problem.

So, partly I want to ask do the rules sort of
box us in a bit, and how should we treat our own
guidelines here at the FTC?

MS. GREENE: Well, that's just it. That's
exactly what I was going for. We should not allow our
rules to box us in. And what that means is we have to
back up and we have to recognize that they're an
enforcement policy, and maybe that means on occasion
candidly admitting that we're diverging from them and
then articulating the basis of the divergence.

I think that the whole idea of having the
enforcement policy articulated is to give us a sense of
where we are. The agencies should be able to diverge
from them, and they do, but there also should be a
candidness in sort of telling folks that we're diverging
in the following way, and then I think the guidelines
are accomplishing exactly what they want, they're sort
of promoting discussions about what the rationales are.

MR. BAER: At what point, if I can stick with
the guidance point, at what point does the Agency have
an obligation to updates its guidance? On the merger side, you look at the terrific statistical data that the Agency put out I think last December showing what levels of concentration it was enforcing and not enforcing. And there's a huge divergence between the standards set forth in the 1992 merger guidelines and the current enforcement policy, that is we are enforcing a lot less systematically than would have been predicted.

MS. GREENE: I think they do have an obligation to do so, and without discussing those specifics, I think that by far and large the Agency undertakes a lot of efforts to do so. We had the health care hearings where there was a revisiting of some of the guidelines issues. In the intellectual property hearings that we just had, some of the panels dealt with how are the licensing guidelines working? Does it always work, no. Are there areas where we should keep it better up to date? I think the answer is absolutely.

I think we should for one reason which does not actually have to do with Agency enforcement: when a guideline is out there and once the Agency puts it out, they lose control. And so what you find is Agency guidelines find their way into private litigation and they get presented to the courts in ways that are, you know, would probably appall the agencies, but the fact of the matter is they're out there, they're...
not contradicted, and so we need to be aware of these
sort of secondary effects.

And then the other thing that I'll just flag
before I turn it over to my colleagues, is that I think
that what you're hitting on is one of the real
challenges of factually specific guidelines. And I
think that was a real challenge with the sort of slew of
industry-specific guidelines that I mentioned early on.
Those were so intensely factually specific, that once
you had a change in the industry's structure, the sort
of value of them disappeared and it would actually start
to become a disturbance if they were applied.

MR. BEALES: I think for the consumer protection
guidelines, there's been pretty consistently applied a
very good program of reviewing those guidelines and
assessing what kinds of changes are appropriate and
getting rid of lots of them. There is no longer a rule
about the aerosol frosting spray for a cocktail dress as
a result of that process and many other wonderful and
obsolete rules.

But I think the use in private litigation and in
other aura in some ways cuts both ways, and I think
probably the deceptive pricing guides are a good example
of that. They may spur enforcement in some cases where
it wouldn't otherwise occur, but they may also deter
enforcement of standards that would be far worse.
I mean, there's a Canadian case, for example, where the argument, the heart of the argument was you have to sell at least half the goods at the high price. You have to sell more at high prices than you do at low prices, and the economists will tell you that is not going to happen. You cannot meet that standard.

And, you know, the guides may serve a purpose even if they're not the current enforcement posture in some circumstances.

MS. OHLHAUSEN: At this point, I want to mention that as I heard all our panelists speak today, it reminded me that yesterday our general counsel Bill Kovacic gave a speech about the factors that go into making an agency a success. What makes a successful public agency?

Some of the things he talked about are how you have to have a plan to direct the Agency's resources and that you really need to provide transparency for the Agency's thinking, and that you also need to engage in what he likes to call competition R&D where you're increasing the Agency's knowledge base.

As I've listened to all the presentations and the discussion today, it became clear to me that the studies and the guidelines and the policy statements are those kind of activities that Bill recommended that a successful agency do. And so, I hope that these activities helped make the success of the FTC that
we've been celebrating over the past two days.

I want to thank our panelists and our discussants and thank you very much for attending.

(Appplause.)

MS. BAILEY: Two items before we break for lunch. First of all, I would like to thank Alan Fisher for our constant supply of fresh dahlias to decorate our symposium. Thank you, Alan.

And secondly, we have boxed lunches, we said yesterday, they're all pre-ordered and they're listed with your name on them. And we'll start again at 12:00 to hear our distinguished panel of economists.

(Whereupon, at 11:45 a.m., a lunch recess was taken.)