

1           **This transcript has been lightly edited for clarity**

2 WRAP UP: 90 YEARS AND TWO DAYS IN 45 MINUTES

3

4 SPEAKER: STEPHEN CALKINS

5

6           MS. BAILEY: Now we come to the last but  
7 broadest section of our program. We have Steve  
8 Calkins, who is our former general counsel from 1995 to  
9 1997 and is currently a professor at Wayne State  
10 University School of Law in Detroit who's going to  
11 summarize it all for us -- 90 years in two days and 45  
12 minutes, on what have we learned. Thank you, Steve.

13           MR. CALKINS: Thank you. Thank you to the  
14 audience, and thank you to Bill for inviting me to do  
15 this. It's a great pleasure to be here. You could ask,  
16 "What is the point at this point of getting up here and  
17 having somebody come on and simply summarize what you  
18 have already heard?" And why would Kovacic want somebody  
19 to come up and simply recap?

20           The answer is very simple. I'm the junior  
21 author on the Antitrust Law and Economics in a Nutshell  
22 just on the street about two or three weeks ago -- by  
23 Gellhorn, Kovacic and Calkins -- and I think that I'm the  
24 junior author, Bill guessed that I would be obliged to  
25 put in a plug: "Every lawyer should own this, under \$30,  
26 a good purchase."

1 UNIDENTIFIED SPEAKER: Is there an 800 number for  
2 that?

3 MR. CALKINS: www.west.thomson.com. You think I  
4 joke, but, actually if you think about that, what other  
5 book had all three authors appearing on this program?  
6 You know, that's not a coincidence.

7 I'm going to make three points about this  
8 program. First what did I not like? Second, what did I  
9 like? And third, I'm going to talk about the fact that  
10 the Federal Trade Commission is at risk.

11 We start with what I did not like. There's not  
12 much, but there were one or two things. In particular,  
13 this was an odd way to have a party. I mean, I brought  
14 down some party hats. I had balloons. I was ready to  
15 sing some songs. I actually prepared a couple of  
16 questions figuring we would have a game show or  
17 something or other.

18 I've got it right here, suitable for  
19 participating in an FTC game. I've got a number of  
20 questions for that favorite contest, "Name That  
21 Commissioner." Here I'll let you try one. Ready?

22 Which attractive Commissioner, playing the game  
23 Jeopardy in the FTC, when told that the answer was false  
24 and deceptive, quickly said that the correct question  
25 was, "What is my hair color?" Talk to your friends if  
26 you don't remember that one.

1           Another one, ready? "Which FTC Chairman, called  
2 up before the Attorney General, Robert Kennedy, and  
3 accused of hiring cronies, quickly (at least reportedly)  
4 answered, "They may have been cronies, but they were  
5 your brother's' cronies."

6           Which Commissioner is famous  
7 at least in legend for having one of those sessions when  
8 people come around to pitch their case, or, more  
9 specifically, say, "Don't sue me" -- you know those sessions  
10 in the Commissioner's office -- the questions is: Which  
11 Commissioner is famous during one of those sessions for, in  
12 the middle of the pitch, standing up and going and beginning  
13 ostentatiously to pack up his ski equipment to take off  
14 for the weekend, saying, "Don't mind me, just carry  
15 on?" Talk to your friends.

16           So I missed the fun and  
17 games part of the party, and I regret that.

18           What did I like? Boy, there was an awful lot.  
19 It was really a terrific two days of consistent high  
20 quality, and people should be very, very proud of  
21 organizing it and participating in it.

22           Let me just go through things that caught my  
23 eye, and I'm going to leave out as many great things as  
24 I include. Let's see, Mark Winerman, just an amazing  
25 article that he published and helped inspire all of  
26 this. Just as an example, what a commentary that it was

1           only in 1950 that the Commission stopped having a  
2           rotating chair -- and how much the structure influenced the  
3           behavior of the agency! The concept is that if you change  
4           the chair every year, it's just a totally different place  
5           than it is today.

6                        Second -- and I've got ten things to give you (sort  
7           of advance warning) as I go through -- the Cigarette Rule  
8           story. What a great story! We heard about this from  
9           Teresa Schwartz. We heard about it again from Judge  
10          Posner and probably others: the concept that you  
11          would have the Surgeon General issue a report on  
12          smoking, and then you would have three Commissioners in  
13          here on a Saturday reading that report thinking about  
14          it, what to do about it (Rand Dixon putting out his  
15          cigarette saying that's the last cigarette he's going to  
16          smoke) and then deciding to do something -- and very  
17          quickly, within a week, coming up with notice of  
18          proposed rule-making, and not long after that coming up with  
19          the Cigarette Rule! Rand Dixon -- villified by some people  
20          -- but in that one, courageously saying, "We're prepared to  
21          stand up to the tobacco industries." Judge Posner told me  
22          last night that he believed that in fact there were calls  
23          from the White House, and Rand stood up to those and  
24          proceeded  
25          ahead in a very courageous way to take on a terribly  
26          important industry and prepare a document that people

1 still read to this day, and that led indirectly from  
2 that one to the S&H case, to the Kid-Vid Rule and all the  
3 excitement from that, to the 1980s policy statements -- and  
4 all going back. That weekend really must have been an  
5 incredible weekend, and that whole process was quite a great  
6 story and an important part of FTC history, so it was great  
7 to hear it laid out.

8 Third, for me it was just fun to hear Bob and  
9 Tim at lunch up here carefully showing respect for each  
10 other and trying so hard not to criticize each other.  
11 They would recognize that they had a totally different  
12 approach on privacy, and Bob could cheerfully say  
13 everybody agrees that the right way to go is to have  
14 notice and then choice, and Tim just let it go. We have  
15 on vertical mergers different approaches, and again  
16 folks just let it go. It was just nice to see.

17 More substantively, a series of different  
18 speakers came up with interesting and potentially useful  
19 categories, I thought. Susan Creighton's "cheap exclusion"  
20 certainly is a useful concept that I think is a nice way  
21 to go thinking about things, but that wasn't all.

22 John Delacourt on the public interest, public  
23 choice draft of his, putting all these different cases  
24 and statements along there and trying to look at  
25 evolution. I'm not sure it will play out that way, but  
26 it's an interesting way to think about it.

1            Luke Froeb and John Baker both came up with  
2 categories dividing the world. Pauline, in those  
3 wonderful kind of charts looking at the difference  
4 between the way that the FTC and the FDA approach  
5 things, very helpful and interesting.

6            And then finally you had Bob Pitofsky voice an  
7 opinion that he hasn't really voiced that much, which  
8 is this notion of access -- saying that he really cared a  
9 great deal about access, and talked about Time Warner,  
10 Toys "R" Us and the Chrysler case. That's just a somewhat  
11 different way to think about antitrust than some others do  
12 some of the time, and it was interesting to have him put  
13 that particular kind of categorization on the missions that  
14 he had done.

15            Number 5, we have to say that David Balto was  
16 certainly interesting, and I'll leave it at that, and  
17 move on to number 6.

18            For number 6, wasn't it good to have Phil Elman  
19 get some recognition? He really was one of the talented  
20 people in American legal history, and so it was very  
21 gratifying to have people tell the story of how  
22 he decided that the Cigarette Rule was something that  
23 ought to be done -- that it was an important  
24 mission for the agency -- and to have people remember the  
25 really powerful dissents that he issued about some  
26 Commission opinions that may not have been as wise

1 as they could have. The way that he recruited Judge Posner,  
2 and then Judge Posner observing that that may have  
3 influenced the course of his life -- that he didn't go into  
4 private practice but came down here. That also was sort of  
5 inspirational. And then you get into the whole work with  
6 the Cigarette Rule. Phil Elman really was remarkable  
7 talent, and it's so uplifting to have a non chair  
8 commissioner be somebody that can be remembered all these  
9 years later, and I think deservedly so. So I like the  
10 recognition of Phil Elman.

11 Number 7, we got some very interesting insights  
12 about people that were fun, if nothing else. Those of  
13 us from Detroit really sort of felt good when Tom Leary  
14 emphatically said he wouldn't be caught dead in a car  
15 with a foreign nameplate, God bless him. It really was  
16 true. I mean, the auto companies are a huge slice of  
17 the American companies, and to be a card carrying left  
18 wing liberal claiming that you're worried about  
19 unionized workers and then going off and buying a car not  
20 made by unionized workers -- I don't think that's wholly  
21 consistent. So I think Tom's got his heart in the right  
22 place.

23 Then the idea that he won't wear dungarees  
24 unless he's on a horse, what a great concept that is!  
25 That he thinks most breakfast cereal is inedible, as he  
26 said, that was good. And then also the candid

1 observation that when it comes to weight loss, there's  
2 enough of a problem out there that at least some in the  
3 Commission are encouraging the industry to engage in  
4 self regulation, perhaps even sort of sending a message  
5 that we can go out and lessen competition a little bit  
6 in order to try to solve a very serious consumer  
7 protection problem. I don't know if you have the kind of  
8 attention that he perceives, but it was an interesting  
9 observation -- to see him thinking about things in that way.  
10 So I thought that was interesting of Tom Leary.

11 On Tim Muris, it was just wonderful to have the  
12 candid description of Tim going back and abolishing OPP  
13 in order to reclaim the corner office that Bob Reisch  
14 had finagled away from the Bureau early on -- once again,  
15 geography being destiny (and those of us who have been  
16 in the General Counsel's office know all about that --  
17 what a great office!).

18 Then the wonderful enthusiasm of Ken Elzinga --  
19 who many people cited here as being a teacher or  
20 somebody who had written a seminal article -- but yet the  
21 enthusiasm he showed for just going back and learning a  
22 little more about the Morton Salt case! It's great  
23 to see somebody of that stature having sort of child  
24 like enthusiasm to go out and learn something new, and I  
25 thought that was good, too.

26 Number eight, we had really terrific insights

1 from people who were, to reuse the old phrase, "present  
2 at the creation" -- and new things really there. We got  
3 some really nifty contributions. Ed Cox was very  
4 special. The notion that one of Nader's Raiders was  
5 driving around town, unable to use a stick shift, running  
6 red lights and looking over at Ralph Nader right there  
7 without a seat belt, ready to get knocked off, sleeping  
8 four hours a week in his brother's place while they were  
9 madly trying to get this report out -- and then observing  
10 that this was actually the beginning of the whole Nader  
11 empire (which some of us may not think ended up so well  
12 at the end, but for awhile there it was a celebrated  
13 empire). And then his observation that every agency  
14 has DNA from its birth, and I thought that was an  
15 interesting insight with a lot of truth to it -- so I  
16 thought hearing from Ed Cox was a real treat.

17 For that matter, hearing from Bob talking about  
18 sitting around with the General Counsel and the Chairman  
19 watching those these TV sets and ignoring the programs  
20 but waiting for the commercials to come on, and in a  
21 single evening coming up with several national  
22 advertising cases! Between the networks being the easy  
23 things you can watch and the notion of the three of them  
24 getting together and doing that, it was just a wonderful  
25 little slice of where the Commission advertising program  
26 came from.

1           You can go on. You had David FitzGerald going  
2 back to the beginning of the 13(b) program; Claudia  
3 Higgins talking about the carve-out settlements;  
4 Howard Beales going back on the birth of the deception  
5 and fairness statements; Mary Lou Steptoe going back and  
6 ruminating about Detroit Auto Dealers and the  
7 bulletproof vest cases that may be about choice more  
8 than she realized at the time; David Scheffman going back  
9 and saying he was here when the agency was bringing all of  
10 these creative economics based cases like Ethyl and Cereals  
11 and DuPont and such, and reminding everybody that just  
12 because it's got the word economics on it doesn't mean that  
13 God declared that it was going to work out and be a big  
14 success, and teaching people at least to have a healthy  
15 dose of humility. I'm not sure David got that lesson as  
16 strongly as he stated it.

17           Bill Baer I thought had a wonderful, wonderful  
18 reminder going back. We hear so much about how the  
19 Commission went off the track in rule-making, and Bill  
20 reminded us that, no, it also got in great trouble on  
21 advocacy, and the buzz storm was about the insurance  
22 industry and about real estate.

23           He told me afterwards that the moment he liked  
24 was going up on the Hill with Mike Pertschuk and they  
25 were getting yelled at for the insurance effort, and  
26 Howard Cannon called them up and said, "You know, I read

1 your report about whole life, and, you know, you're  
2 really right -- it's a lousy deal -- and thanks a lot, I  
3 had a bunch of it and I've gotten rid of my whole life,  
4 and I sure appreciate it." Then he went ahead and held  
5 the hearing and berated them in public, and on he went.

6 It was a wonderful juxtaposition to have that  
7 paired with Bob Atkinson saying, by golly, the important  
8 thing for the Commission to do is to go and take on the  
9 car dealers and to go and take on the funeral industry  
10 and such, in the world of Internet and real estate, and  
11 it's a caution and a reminder that the Commission gets  
12 in trouble not just sometimes because it may be  
13 overreaching, but also sometimes because it may be  
14 taking on politically powerful operations.

15 It doesn't mean you don't do it, but it does  
16 mean you have to do it with a lot of care and you have  
17 to make sure that, as our newest Commissioner said, it's  
18 a battle that is worth fighting. I say that in the  
19 context of somebody who thinks that whole life is  
20 something that the Commission should have taken on, and  
21 it's too bad it didn't get further, and all that good  
22 stuff. Enough on that.

23 As Mozelle said (getting to my point number 9) a  
24 couple of times we sat back and said, Yes, where you  
25 stand may depend on where you sit. There were a  
26 couple examples of that. In the world of remedies, we

1 had the fun (for those of us at the FTC) spectacle of a  
2 group of people at the Federal Trade Commission saying,  
3 "Yes, indeed, the Federal Trade Commission has it right  
4 and the Justice Department has it wrong." You just  
5 hope that that's not just because of where we all camp out.

6 You had the really great fun of watching Jodie  
7 Bernstein get up there and berating Lee for deliberately  
8 rigging the betting by choosing three rules -- and then  
9 going on (actually both Jodie and Cas Hobbs) saying, "By  
10 golly, the Commission did an awful lot of good: take a  
11 look at the Octane Rule, take a look at the Energy Labeling  
12 Rule, go take a look at the Holder in Due Course Rule,  
13 take a look at the Door to Door Cooling Off Rule. By golly,  
14 the Commission did a whole lot of good things in there, not  
15 to mention that back there in the terrible old days that you  
16 had things like the Ad Substantiation Doctrine."

17 I think Bill Kovacic did say that maybe a Commission  
18 that could come up with the Cigarette Rule wasn't all  
19 bad, and I thought that was a nice reminder that the  
20 world is not simple (the Commission was incompetent,  
21 the Commission was great) but rather it's a much more  
22 complex story, and the Commission actually has a very  
23 rich history in doing a lot of different things.

24 The same point came out in the GM/Toyota discussion  
25 where you had Kathy Fenton, who had worked for the author  
26 of the opinion, saying: by golly, it was a great opinion

1 and well deserved and the dissenters were not people who  
2 were really seeing things wisely. Then you had -- leaping  
3 in -- John Kwoka saying: Well, I worked on the case, too,  
4 and the fact of it is that there was an argument that  
5 this was really quite problematic -- GM should have gone  
6 and paired not with Toyota but with Isuzu -- and John Baker  
7 coming in and saying maybe the efficiencies were overstated  
8 anyways.

9           Myself I think they all missed the boat. I  
10 always interpreted GM/Toyota as one of those very  
11 interesting cases where nobody could talk about what was  
12 really going on, and that was that the Commission (I  
13 thought as an outsider) was saying there's some risk of  
14 anticompetitive harm, but this will let Toyota do an  
15 end run around trade restrictions, and since we hate  
16 trade restrictions and can't take them on in a frontal  
17 way, the advantage of undermining the trade operation of  
18 the U.S. government justifies any risks that might be  
19 there in terms of harming competition. But it all  
20 depends on your point of view.

21           Finally, in terms of your point of view, we  
22 heard two wonderfully different descriptions of the  
23 Kirkpatrick era Commission. You had Ed Cox saying  
24 that what was going on was that we had a consumer  
25 revolution -- we had a bringing together of the people  
26 in the consumer movement and the people on the Hill and

1 the people who were in staff positions. It was all  
2 coming together, and it was a consumer revolution, and  
3 wasn't it great! In contrast, you had Judge Posner saying  
4 that what happened was you had a Democratic Commission, and  
5 you had a Republican President who was happy to come in,  
6 knock heads and appoint a bunch of people who totally change  
7 the place. I don't know which one of those two perspectives  
8 was right -- probably some of each -- but it was interesting  
9 that they had such very different perspectives on what was  
10 going on.

11 Finally -- point number 10 that I liked -- point  
12 number 10 was that we had, over the course of two  
13 days, a series of really nifty lines that you had to  
14 just sort of enjoy. Ones that I jotted down while I  
15 was listening:

16 You had Marc Winerman quoting Judge Taft  
17 as favoring courts which "are like what we shall meet in  
18 heaven under a just God."

19 You had Ed Cox quoting Jefferson: "We need a  
20 little revolution every 30 years."

21 The irrepressible Mary Carter Jones standing up,  
22 "I'm sorry to intervene, but I am 86."

23 I enjoyed Orson Swindle who came on with the "Law  
24 and Order" music playing, and saying what he thought he  
25 heard was "I heard it Through the Grapevine" -- in a  
26 description of how he learned about these issues!

1           Bill Kovacic had I thought a great line talking  
2 about the importance of measuring the non litigation  
3 kind of outcomes, urging us just to think what the NBA  
4 would be like if they did not measure assists -- and the  
5 NBA's bad enough even when they do measure assists. It  
6 is an important point. One of the problems, unfortunately,  
7 was that everybody said all this stuff is wonderful, but we  
8 still don't do a very good job of measuring things  
9 other than case outcomes.

10           Let's see what else was good. Rob Atkinson: "In  
11 America you can buy a computer from Dell but it's  
12 illegal to buy a Ford from Ford even in Michigan." And  
13 golly, that is silly, isn't it?

14           Just recently we heard Tom Krattenmaker say,  
15 what? "Jefferson lost, Hamilton won." Allan Fels -- just  
16 before me -- I enjoyed immensely the line talking about  
17 moving to the U.S. standards, saying that if they do, we'll  
18 call it convergence, and if they don't, we'll call it  
19 wrong headedness.

20           But in terms of lines that it was a treat to  
21 hear, there was one line that stands out as a line that  
22 I had never thought that I would hear -- and that was  
23 Judge Posner standing up and saying "I'm happy to stand  
24 before you contrite."

25           Point three: the Federal Trade Commission at  
26 risk, and now we get serious for a little bit here.

1       There has been an air of, "this is the best of all  
2       possible worlds" that we've been listening to for the  
3       last two days. There have been times when everybody  
4       agrees with each other so much, and you really do get  
5       the sense that we've reached perfection -- so let me just  
6       throw a little cold water on that. I have several  
7       different points to make.

8               First, a personnel issue. There was a little talk  
9       about economists and whether all of the consulting is  
10      starting to make a problem in terms of economists and  
11      such. So you've heard that.

12             Let me raise another slight issue. It's not  
13      very polite, but compare, if you would, BCP and BC.  
14      They're both great institutions, and I love them both,  
15      right? If you look at BCP, you're looking at a bureau  
16      where you have two deputies who are perfectly talented  
17      people, who have been there long enough to remember a  
18      bunch of mistakes that the agency has made, to have some  
19      institutional memory and to be able to make a real  
20      contribution and to be able to step in easily when  
21      somebody leaves. Look at the people in BCP who are  
22      heading the different divisions, and they tend to be  
23      people who have got a lot of experience, a lot of  
24      ability -- they tend to be career people of great  
25      talent who are doing a great job.

26             You compare that with BC, and you've got people

1 of great ability and great talent, but the reality is  
2 they come in and they leave. They come in and they  
3 leave. I came in and I left -- and I wasn't even in BC,  
4 in fact -- but you do worry at some point. Is there a cost,  
5 too much of having a bureau where people are coming and  
6 leaving and coming and leaving and coming and leaving --  
7 and I don't know for sure if it's a problem, but I worry  
8 about it. I just fret a little bit that it may not be good  
9 for either the career staff on BC. It may not be good  
10 to have leadership that is sort of coming in and leaving  
11 right away, and I just worry sometimes that maybe the BC  
12 model could perhaps benefit from being a little more  
13 like the BCP model -- worrying about that just  
14 slightly.

15 ALJs: we talked about the Commission having the  
16 alternative way to litigate and such. At least there  
17 has been some suggestion that ALJs coming to the  
18 Commission do not always come here with a really fully  
19 developed expertise in competition and consumer  
20 protection, and it might be possible in a perfect world,  
21 in the best of all worlds, if you would, to recruit ALJs  
22 who are even more excellent. It's important for the  
23 Commission to adjudicate cases basis effectively, and  
24 that requires excellent ALJs.

25 Last, go back to the cigarette story. Remember  
26 the Cigarette Rule, that great image of the Saturday and

1 the three Commissioners sitting in there and reading the  
2 Surgeon General reports together and deciding what to  
3 do? That could not happen today because the Sunshine  
4 Rule would make it illegal for three Commissioners to  
5 sit there and talk about smoking policy. You couldn't  
6 do it.

7 Now, if you thought about it ahead of time, you  
8 probably could come up with some excuse for doing it and  
9 putting it on the public record and arranging it, but to  
10 do that, you would have had to think about it ahead of  
11 time. You would have to do all the paper work. You'd  
12 have to figure out who was invited. Pretty soon you'd start  
13 inviting more people. Pretty soon there would be press  
14 coverage. It just wouldn't happen. It doesn't happen.  
15 Commissioners don't get together the way that they used to  
16 do in those days -- and so you could put Commissioners of  
17 that caliber on this Agency and they would not have the same  
18 influence on their fellow Commissioners as took place at  
19 the time, and that's really a pity. So I worry that we  
20 really don't have the best of all possible worlds.

21 Next, although we're living in the best of all  
22 possible worlds, there is still some disagreement going  
23 on, and we still do have issues about which some people  
24 are right and some people are wrong. You know, we  
25 did have hints of disagreements about privacy and what's  
26 the right answer. You had the Averitt/Lande emphasis on

1 choice and innovations, things that really are not a joinder  
2 as to where that should go. You had the Jodie and Cas  
3 emphasis on more disclosures, more information going out  
4 to consumers, more rule-making, things like that -- so  
5 we don't have a world whereby (and you should frankly  
6 not pretend that we have a world whereby) everybody is in  
7 agreement with everybody.

8 Third, there are more things that the agency  
9 could be doing. I teach consumer law. That means I  
10 have to teach the Fair Credit Reporting Act. It is  
11 hopeless. It is a completely circular, unintelligible  
12 rule, a statute that just cannot be understood by normal  
13 human beings. Heck I have trouble understanding it, and  
14 I spend a lot of time on it.

15 The Commission used to be in the business of  
16 having both an FCRA official commentary and then a bunch of  
17 Staff opinion letters. The Commission now has solved  
18 the problem of this indecipherable statute by adopting a  
19 new policy that they're not going to give advice on it --  
20 thereby avoiding having their people understand this non-  
21 understandable statute.

22 It's just a bad way to run a country, and it's  
23 not a good thing for an agency to be doing, and it's too  
24 bad we don't have a statute that works. You go  
25 through all of those statutes and rules that Jodie and  
26 Cas talked about, and a bunch of them are nothing to

1 write home about.

2 Truth In Lending, which they didn't talk about  
3 but it's part of what BCP does, is just an absurd  
4 statute whereby when you want to buy a house, you can  
5 find out nothing of any use about what kind of interest  
6 rates you're going to pay, and then after you have  
7 chosen your lender and after you've almost bought the house  
8 and after you've sat down and you're at closing, you're hit  
9 with a ton of paper when you're not going to look at  
10 anything and none of your decisions will be affected.  
11 That's a nutty way to run a policy about one of the  
12 biggest decisions consumers make, and it's too bad  
13 the Federal Trade Commission wasn't able to lead an  
14 effort to try to bring sense to that world.

15 Efficiency labeling: the Commission has tried to  
16 the improve our knowledge of the energy efficiency of  
17 appliances, and I'm told hope is coming and it will go on  
18 the web, but it's taking an awful long time to get  
19 there.

20 National advertising: I don't think all the  
21 problems have gone away. I tried to buy telephone  
22 service recently, and it was just hopeless because  
23 there are all these new disclosures. This is a state fee;  
24 this is a federal fee; This is a such and so fee. I don't  
25 know which of these fees are required and which are not  
26 required. Trying to make an informed decision doesn't work

1 out very well, and so maybe the Commission should go and  
2 litigate a case and figure out once and for all whether  
3 it can do something about the advertising of these  
4 services -- either it can or it can't, and if it  
5 can't, they could have Congress help fix that -- but  
6 there's lots of things the Agency could do. It's a  
7 problem because the Commission at some point is called  
8 upon: you're doing things related to this, why can't you  
9 make the world better?

10 Fourth, the real serious biggest worry is that  
11 the Commission will be a victim of its own success. You  
12 can already see that Congress continues to dump problems  
13 on the Commission saying: You've just done such a great  
14 job. Basically, the strategy seems to be to keep giving  
15 enough assignments so that Commission will botch one.

16 It really is a serious problem. You can see it  
17 in the world of obesity where the clamor is for the  
18 Commission to get involved, and pressure for the  
19 Commission to overreach and do something that's not  
20 sensible there. (And here I am, suggesting there  
21 are other things the Commission should do! It's done a  
22 great job, but there is the problem of overkill.)

23 There's also the problem of overconfidence, and  
24 that goes back to my worry about the tone that I've  
25 heard over the last two days about how well we're doing  
26 and how good things are, people saying the Commission

1 has never been this respected before. People sort of  
2 get a little bit overconfident, overdo it a little bit. Tim  
3 Muris said that the Commission now has an unfairness test  
4 that is a rigorous cost benefit test. Well, that's just not  
5 true. That is how he applies it perhaps, but that's not  
6 how it's written, and it's not how other people may apply  
7 it. You can go on and talk about lots of things --  
8 but we're running out of time.

9 In terms of being overconfident, you heard a  
10 quick mention about courts, and I just want to remind  
11 folks about courts. Back when I was here, I remember  
12 having a conversation with Baer and Pitofsky (and I've told  
13 some of you this) saying, "By golly -- one of us said, I  
14 forget which -- the legacy of the Pitofsky Commission will  
15 be formed by the Ted Turner Time Warner merger  
16 investigation, which was this massive, important  
17 investigation we were working on -- and we really thought  
18 it was important.

19 That is not anywhere near the legacy of the  
20 Pitofsky Commission at all in terms of things with a  
21 lasting impact. What did Judge Posner mention that he  
22 thinks the Commission has done well? The first thing he  
23 mentioned was the Staples opinion, which he really  
24 liked, and, for better or worse, Arch Cole is going to be  
25 one of the legacies of the Muris Commission, and then  
26 there are a bunch of other cases that are on appeal or

1 heading for appeal, and those will be part of the  
2 legacy.

3 If you go and you look at the case books about  
4 what the Federal Trade Commission has done to contribute  
5 to antitrust law, things that were not mentioned at this  
6 conference that are in the Areeda case book (the one I  
7 happened to grab to do this little sort of check), cases  
8 that were not mentioned around here include Indiana  
9 Federation of Dentists, Superior Court Trial Lawyers,  
10 Motion Picture Advertising Service, Tenet Health  
11 Care, Butterworth Blodgett, Bendix, Borden, AE Staley  
12 Manufacturing, A&P, Automatic Canteen and, most  
13 importantly, the Fashion Originators Guild case.

14 And in terms of influencing antitrust law,  
15 that's how the Commission historically has had the most  
16 influence -- and so we can run this agency beautifully, but  
17 if the cases don't come out in a way that improves the  
18 world, it's not going to work out very well at all.

19 Last, the Commission is right now about as respected  
20 as it's been in any of our memories. There's a Modernization  
21 Commission that Congress created to look at the antitrust  
22 laws. (The FTC cynic would say that it tends to be over  
23 weighted with people who are alums of the Justice Department  
24 Antitrust Division.) The ABA has a task force to create  
25 comments to give to the Modernization Commission on what  
26 issues to address (and I'm on that body), but there

1           were people on that group who said in effect, by golly, it's  
2           important to abolish the Federal Trade Commission. Now,  
3           they don't phrase it that way. They say, Shouldn't we have  
4           only a single antitrust agency. But the last time I checked  
5           there was not a big constituency for abolishing the  
6           Antitrust Division, and if you did get rid of the antitrust  
7           part of the FTC, it would not be the same agency, so talking  
8           about doing antitrust in any one agency is effectively  
9           saying abolishing the FTC as we know it. So also people in  
10          that group, talked with great vigor about how terrible it  
11          is that there are these massive delays in deciding which  
12          agency will investigate this or that merger and which agency  
13          will investigate this or that non merger matter. There were  
14          complaints about the different legal standards for getting a  
15          preliminary injunction. Why should my client in a merger  
16          have a different legal standard, depending upon which agency  
17          is out there? Shouldn't we do something to get rid of that?  
18          For that matter shouldn't we order the FTC to get out of the  
19          business of administrative adjudication of mergers, and  
20          then have to do all their litigating in court like the  
21          Justice Department does, and on and on.

22                 So you've got people, at a high watermark in the  
23          reputation of the agency, who are raising serious  
24          questions about it. Go back to Judge Posner's  
25          speech last night. Judge Posner said: Let's take a  
26          look at what's going on the in the agency -- how can one

1           justify it? Well, you can have substantive law -- not  
2           there. You can have procedural law -- not there. He  
3           glossed over the fact that in fact there is some part III  
4           adjudication going on -- I continue to think  
5           that it's essential to have part III adjudication going  
6           on -- but he said: Is there substantive advantage? No.  
7           Procedural advantage? No. Should we have competition  
8           between two agencies? No.

9                        So therefore, what should we do? He said that  
10           because it is going so well, we should continue it just  
11           because you don't tamper with success. Well, of course the  
12           flipside of that is that when the hard times come, and they  
13           will, and when the Agency is no longer held in as high  
14           respect as has ever been the case, then suddenly the  
15           pressure to abolish it will be much stronger than before,  
16           and if we face this kind of  
17           criticism now when we're doing so well, just think what  
18           it would be like when we're not doing so well.

19                        So, that's why I worry. Is there reason to  
20           hope? Yes, there's reason to hope. Let me give you  
21           very quickly four quick reasons to have hope.

22                        First, we've got this conference and a bunch of  
23           good people asking hard questions and sticking to the  
24           meeting and going back and trying to learn from the  
25           past, and that just is very important.

26                        Second, the agency really has had outstanding

1 leadership of late, and that makes a big difference, so  
2 it makes it easier to recruit more outstanding  
3 leadership in the future.

4 One important point came out that Bob did a great  
5 job (I'm biased) I think, but yet by all accounts Muris  
6 came in and emphatically said: We cannot rest on our  
7 laurels, we're only as good as our last game, and you  
8 have to get out there and do better tomorrow than you  
9 did before. You need that kind of an attitude for an  
10 agency like this, which is a vulnerable agency, in order  
11 to be able to thrive and indeed even to survive.

12 By all accounts now Debbie Majoras is doing a  
13 really fine job of taking advantage of this odd interim  
14 kind of period, and I'm especially glad that BCP is  
15 reaching out and making phone calls to a number of  
16 people out there in the community and asking nice  
17 pointed questions like: What are we doing right and what  
18 are we doing wrong, and trying to get the kind of  
19 criticism that lets an agency constantly be improving  
20 itself. That's a very important thing to do.

21 Third, the FTC career staff really has a lot of  
22 people with terrific talent and dedication. One  
23 thing that was great about this program was that so many  
24 of them were involved, and it wasn't just outsiders like  
25 myself. By my count there were 13 career Staff people  
26 who participated, and that really in the end is what's

1 going to make this agency work -- not the leadership but  
2 rather the career staff -- and so it's been very good to  
3 see that kind of role.

4           You've all you heard this one before (you've  
5 heard me give a farewell) but for the one or two of you  
6 that didn't, the career staff story that I like (it's true)  
7 was about the time when I was here and the Commission  
8 decided to bring the Joe Camel case -- massive case,  
9 controversial, politically difficult, all that sort of  
10 stuff against a very hard, hard-hitting kind of  
11 opponent (including frankly Tim Muris working for the  
12 defendants in the case), and the one slight problem -- and  
13 my memory faded a little bit, but I have a dim  
14 recollection that it was the night before the complaint  
15 was going to be issued and suddenly the Commissioners  
16 realized that they did not have a lead trial lawyer --  
17 forgotten that little part of the overall program -- and  
18 asked me if I could volunteer somebody from the General  
19 Counsel's office.

20           I proceeded to call David Shanka at home and  
21 said, David, it's ten o'clock at night, what's the  
22 chance you want to give up the next several years of  
23 your life to bitter, unpleasant litigation against the  
24 forces of Joe Camel, thereby ruining whatever family  
25 life you planned to be having -- think about it overnight  
26 and talk to me in the morning.

1           He came in the morning and said: Well, when you  
2           are a staff lawyer at an agency and your chairman says  
3           he needs you, there's really only one answer you can  
4           give.

5           And there are just a whole lot of people here who  
6           have that attitude, and that's going to help the  
7           Commission overcome the great threats that it faces.

8           Last, the FTC is very special. Jay Shaffer has  
9           been a great teacher to me about how different this is  
10          than the Justice Department, and in its own odd quirky  
11          way a place that is more loved, that has more loyal  
12          alums and more enthusiastic staff. The story there  
13          (which also I've told before), is Jay's story, but  
14          it's so wonderful I can't resist telling it one more  
15          time just to close.

16          There was a time when the Sunshine Rule, going  
17          back to that, came into effect, and the Commission  
18          decided it had to open up the Commission meetings to the  
19          public and to have microphones and let people listen,  
20          and they were concerned perhaps that the equipment would  
21          not work very well, and so they wanted to have someone  
22          in the back get ready to be able to do something if  
23          people could not hear, and it was too quiet. They printed  
24          up and the typist prepared a notice to put in the seats of  
25          the different people out there in the room that explained  
26          who was sitting where, and then just to make sure we can

1 deal with these problems of inaudibility, they put down a  
2 little notice, and the notice said -- thanks to a slight  
3 typo -- "Please be sure to raise your hand if the discussion  
4 becomes incredible."

5 Well, the Commission has been doing incredible  
6 things for 90 years, and it's doing incredible things  
7 today, and I am confident it will be doing incredible  
8 things for a long time to come. Thank you very much.  
9 See you at the 100th.

10 (Applause.)

11 MS. BAILEY: Thanks, Steve, and that's it. See  
12 you in ten years.

13 (Time noted: 4:51 p.m.)

14

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16

17

18 C E R T I F I C A T I O N O F R E P O R T E R S

19

20 TITLE: 90TH ANNIVERSARY SYMPOSIUM

21 SYMPOSIUM DATE: SEPTEMBER 23, 2004

22

23 WE HEREBY CERTIFY that the transcript contained  
24 herein is a full and accurate transcript of the tapes  
25 transcribed by us on the above matter before the FEDERAL  
26 TRADE COMMISSION to the best of our knowledge and

1 belief.

2

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DATED: OCTOBER 6, 2004

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SALLY J. BOWLING

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7

DEBRA L. MAHEUX

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9

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

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11

I HEREBY CERTIFY that I proofread the transcript

12

for accuracy in spelling, hyphenation, punctuation and

13

format.

14

15

DIANE QUADE

16