

FEDERAL TRADE COMMISSION

PUBLIC WORKSHOP:

POSSIBLE ANTICOMPETITIVE EFFECTS TO  
RESTRICT COMPETITION ON THE Internet

Wednesday, October 10, 2002

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FEDERAL TRADE COMMISSION

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25

Auctions -- Page 668

Real Estate/Mortgages/Financial Services -- Page 727

Retailing -- Page 796

Views from the States -- Page 867

**P R O C E E D I N G S**

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**FIRST SESSION -- AUCTIONS**

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4 MR. CRUZ: Good morning, everyone. Welcome to  
5 the third and final day of the FTC's public workshop on  
6 possible anticompetitive efforts to restrict competition  
7 over the Internet. My name is Ted Cruz. I am the  
8 Director of the Office of Policy Planning here at the  
9 FTC. I am very glad to see everyone who came out on this  
10 rainy, drizzly morning to join us as we discuss a number  
11 of important issues.

12 We are going to begin this morning with the  
13 Auctions Panel. We have a terrific and distinguished  
14 panel of experts to discuss possible barriers on the  
15 auction industry. And this panel will be moderated by  
16 John Delacourt, who is an attorney in the Office of  
17 Policy Planning. John?

18 MR. DELACOURT: Thanks, Ted. This is the panel  
19 on Internet auctions. This may seem like an odd topic  
20 for inclusion in a workshop like this, given that we have  
21 primarily been discussing restraints on e-commerce.  
22 After all, Internet auctions, by most accounts, have been  
23 one of the great e-commerce success stories. Given the  
24 newfound opportunity to sell seemingly worthless items on  
25 the Internet, America's basements are the cleanest that

1           they have been in years.

2                         In spite of the rapid growth of Internet  
3           auctions, however, concerns have been raised about the  
4           potential effect of both old and new state regulations.  
5           On the old side of the equation, the concern relates to  
6           laws that were enacted prior to the advent of the  
7           Internet. Some of these laws may, unintentionally,  
8           impose requirements that have a disproportionate impact  
9           on Internet auctioneers.

10                        On the new side of the equation, the concern  
11           relates to laws that are currently being debated and  
12           enacted to address two principal concerns. The first  
13           concern is a perception that there is a need to level the  
14           playing field between Internet auctioneers and their  
15           brick-and-mortar counterparts. Some state regulators, as  
16           well as industry participants, believe that Internet  
17           auctioneers are currently receiving a regulatory free  
18           pass. The second concern is a significant consumer  
19           protection interest in preventing Internet auction fraud.

20                        So, hopefully, this morning we can have a  
21           productive discussion about whether these very different  
22           sets of laws are, in fact, impeding the growth of  
23           Internet auctions, and, if so, whether there are less  
24           restrictive ways that we can go about achieving the  
25           important consumer protection objectives underlying them.

1           Before we begin, I have two additional notes.  
2           One is that we will be taking questions from the  
3           audience. If you have a question, please let an FTC  
4           staff person know. We will be passing out note cards on  
5           which you can write down your question and have it passed  
6           to the front. In addition, I will ask each of the  
7           panelists, before you begin your remarks, if you could  
8           just preface them by identifying yourself and stating  
9           your organizational affiliation, that would be helpful to  
10          all of us.

11                 I think it would be easiest to just go from  
12          right to left, so why don't we start with Bob Hamilton.

13                 MR. HAMILTON: Hi, my name is Bob Hamilton, I  
14          am the Executive Director of the North Carolina  
15          Auctioneer Licensing Board. I have been with the Board a  
16          little over three years. I am also the President of  
17          NALLOA, which is the National Auctioneers Licensing Law  
18          Officials Association, which is a group of staff and  
19          board members across the country that has a membership  
20          that oversees issues in auctions, auctioning law and  
21          things of that nature.

22                 The North Carolina Auctioneer Licensing Board  
23          is responsible for the administration and enforcement of  
24          the Auctioneer's Law, which establishes specific  
25          standards of conduct that serve to protect the public.

1 It affords a means of redress of grievances to any person  
2 suffering damage by reason of misconduct relating to  
3 sales at auction and provides a means of monetary  
4 restitution for loss suffered. Licensing auctioneers and  
5 auction businesses by the Board increases public  
6 confidence in the profession by providing a means of  
7 determining the ability, the general knowledge, integrity  
8 and good character of those permitted to practice and a  
9 means of deterring fraudulent or dishonest dealings and  
10 unethical conduct.

11 It is the responsibility of the Auctioneer  
12 Licensing Board in North Carolina to assure that the  
13 qualifications and the activities of those engaged in  
14 auctioneering are in accord with the law and in the best  
15 interest of the public to receive and act upon license  
16 applications; issue, suspend or revoke licenses; adopt  
17 rules and regulations; and take other such actions as may  
18 be necessary to enforce the provisions of the  
19 Auctioneer's Law.

20 Our Board believes that Internet auctions come  
21 under our law, which was written in 1973. And our law  
22 basically defines what an auction is and the  
23 interpretation by our Board is that Internet auctions  
24 come underneath that definition.

25 We had some notoriety in 1999 when it became

1 public -- more public, I should say -- what the Board's  
2 interpretation of the law was, and we received requests,  
3 both from the public and the legislature, to defer  
4 regulation of Internet auctions. And the Board agreed to  
5 do that. And that is where we stand at this time. That  
6 does not take away anything from the Board with respect  
7 to future regulation of Internet auctions, once they get  
8 more support from the legislature and from the public.  
9 Thank you.

10 MR. DELACOURT: Thanks, Bob. Next we will hear  
11 from Tod Cohen.

12 MR. COHEN: Good morning. My name is Tod  
13 Cohen. I am the Associate General Counsel for Global  
14 Public Policy at eBay. Thank you, again, for inviting  
15 eBay to participate in this workshop on the potential  
16 negative effects that state regulations can have on the  
17 Internet.

18 We believe that much of this regulation does  
19 far less to protect the public than to protect local  
20 companies. The net result of these regulations is not to  
21 protect consumers, but to penalize them. As a result, we  
22 applaud the fact that the Federal Trade Commission is  
23 holding this workshop to shine a light on this disturbing  
24 trend.

25 eBay is the world's first and largest on-line

1 trading community. Founded in September 1995, eBay has  
2 become the most popular shopping site on the Internet.  
3 EBay brings together more than 50 million buyers and  
4 sellers from around the world to facilitate these sales  
5 of goods and services. Last year alone, eBay users  
6 transacted over \$10 billion in sales. Whether selling  
7 through a quasi-bidding process or fixed price format,  
8 prices on eBay must be competitive, not just with other  
9 on-line sellers, but with off-line retailers as well.

10 Similarly, retailers in the traditional brick-  
11 and-mortar world can no longer base their prices merely  
12 on what the local market dictates. They must now  
13 consider the price the consumers will pay on eBay and at  
14 other Internet sites. Such price competition is great  
15 for consumers, but not for the entrenched middleman that  
16 came before them.

17 They justify these new state barriers and  
18 existing state barriers with spurious claims that e-  
19 commerce may harm consumers. Far too often, though,  
20 these claims simply seek to mask the fact that these  
21 merchants are trying to protect their own turf. State  
22 regulations of auctions is one of the areas that we have  
23 concerns about. We have been approached by numerous  
24 states to try to regulate us as an auctioneer or auction  
25 house. Well, eBay is neither. The listings on its sites



1 are often referred to as auctions because of the bidding  
2 process for which eBay offers an only on-line venue.

3 As a result, some state regulators, and the  
4 entrenched middlemen with whom they collaborate, want to  
5 interpret state auction laws as regulating eBay and other  
6 on-line market places that involve bidding. Recognizing  
7 that in most cases these laws cannot be interpreted that  
8 way, they are also pushing for new laws to hobble their  
9 new Internet competition. Any harm to eBay, our army of  
10 entrepreneurs and our millions of customers could be  
11 significant.

12 One of the most important areas that we are  
13 concerned about is licensing regimes. Current state  
14 auction laws generally require an auctioneer or an  
15 auction house to obtain a license to conduct auctions.  
16 Obtaining such a license in states with such auction laws  
17 would be cumbersome and very costly. eBay could comply,  
18 but our millions of individual and small business sellers  
19 certainly could not. Such licensing requirements could  
20 force every on-line seller to obtain state licenses  
21 before he or she can sell goods on eBay.

22 Furthermore, some state auction laws place  
23 remarkably onerous demands on potential auctioneers. For  
24 example, to obtain an auctioneer license in Indiana, you  
25 are required to pass an exam to prove your auctioneering

1 aptitude, but you cannot take the exam until you have  
2 completed a mandatory 80-hour course on auctioneering.  
3 The curriculum includes classes on bid calling, sale  
4 preparation and mathematics. These arcane requirements  
5 do not seem to make much sense for sellers trading goods  
6 and services over the Internet.

7 In addition, if you applied for a renewal of  
8 your license in Indiana, you must have taken 12 hours of  
9 continuing education, including six hours on subjects  
10 like Indiana's rules and statutes governing  
11 auctioneering, as well as six hours on topics like bid  
12 calling, and most important for Internet sales, public  
13 speaking.

14 Beyond these licensing requirements, more  
15 significant potential dangers arise because of  
16 substantive auction law provisions. The most onerous of  
17 these common requirements is the requirement that the  
18 auctioneer or auction house be responsible for the items  
19 being auctioned and thus liable for any  
20 misrepresentation. Such a requirement may make sense as  
21 applied to classic auctioneers or an auction house  
22 because they actually take possession of the goods that  
23 are being sold. They review the condition of the goods;  
24 they authenticate the origin of the goods; and they make  
25 sure the goods are what are being advertised.

1           Applying such a law to eBay does not make much  
2 sense. We do not take possession of the goods sold on  
3 our site; we do not attempt to authenticate them; and,  
4 more importantly, we charge four to five times less than  
5 what traditional auction houses would charge.

6           Overall, we have been working with our friends  
7 in Illinois to amend the Illinois Auction Licensing Act  
8 to apply to the business that we do. We are very happy  
9 that on August 15th of this year that the governor signed  
10 a bill that did not impose a strict licensing  
11 requirement, but that created a simple registration  
12 scheme that ensures that individuals will be able to  
13 contact businesses like eBay if problems arise, and did  
14 not require individual sellers to obtain licenses. Thank  
15 you.

16           MR. DELACOURT: Thanks, Tod. Our next speaker  
17 is Wynn Arnold.

18           MR. ARNOLD: Thank you, John. I am Wynn Arnold  
19 from the New Hampshire Attorney General's Office, and  
20 among 18 agencies I represent the Auctioneers Board. My  
21 presence here is on behalf of that Board and also the  
22 Attorney General's Office, which handles the consumer  
23 protection enforcement for the State of New Hampshire. I  
24 do not speak for the legislature, which has its own  
25 investigation of Internet commerce in play now.

1           New Hampshire currently has minimal regulation  
2 of Internet auctions, but it is monitoring the situation  
3 to see which direction may be appropriate to go. The  
4 "Live Free or Die" state is particularly sensitive to  
5 issues of anticompetitive regulation of business such as  
6 those Tod mentioned, whether the commerce is conducted  
7 out of brick-and-mortar facilities or via cyberspace.

8           The New Hampshire State Constitution provides  
9 in part that free and fair competition in the trades and  
10 industries is an inherent and essential right of the  
11 people and should be protected against all monopolies and  
12 conspiracies which tend to hinder or destroy it. Thus,  
13 regulation of any industry in our state has to be  
14 demonstrably necessary to protect the public interest  
15 rather than simply to protect an industry.

16           Eyebrows are being raised in New Hampshire,  
17 however, over the growing instances of consumer fraud in  
18 the Internet auction industry. In New Hampshire, with a  
19 population of only 1.2 million, complaints alleging  
20 unethical Internet auction practices have increased from  
21 a handful a year several years ago to over 20 per month  
22 this year and are increasing month by month.

23           These complaints generally allege that the  
24 product was never delivered or that the quality or  
25 characteristics of the product were not as represented.

1 Most of the complaints involve New Hampshire consumers  
2 who are aggrieved by sellers residing outside the state.  
3 A substantial number of the complaints allege misconduct  
4 by sellers who reside in New Hampshire.

5 Resource limitations, along with the relative  
6 complexity and expense of Internet-related  
7 investigations, have precluded active pursuit of many of  
8 these complaints. The Attorney General's Consumer  
9 Protection Bureau looks for repeat offenders or patterns  
10 that can be grouped for investigation, and these have  
11 primarily been pursued under the State's Consumer  
12 Protection Act.

13 The Consumer Protection Bureau also reviews  
14 auction web sites for misleading or otherwise actionable  
15 content and refers for criminal prosecution appropriate  
16 cases. There have been two instances so far.

17 Often it is not discernible from the complaint  
18 or the Web page whether the seller is selling her or his  
19 own property or the property of other persons or  
20 purchasing property for resale. Under New Hampshire law,  
21 an auctioneer is defined as someone who by auction sells  
22 the property of another person or buys for resale for  
23 compensation or commission. So, we have an initial  
24 problem of ascertaining whether sellers would be an  
25 auctioneer under our law.

1           The New Hampshire Auctioneers Board has taken  
2           action against at least two Internet auctioneers residing  
3           within the state who used auction web sites to sell the  
4           property of others. As a result, the Board has licensed  
5           those persons and several other Internet auctioneers.

6           The Auctioneers Board first became interested  
7           in regulating Internet auctions in 1999 when various  
8           licensed auctioneers in the state complained against eBay  
9           operating in the state without a license. In early 2000,  
10          the Board met with representatives of eBay to discuss  
11          their business practices and based on the information at  
12          that time concluded that eBay did not meet the state's  
13          definition of auctioneer.

14          At that time, there was insufficient evidence  
15          of public need to regulate to justify proceeding with  
16          additional legislation to restrict Internet auctions in  
17          New Hampshire. In the mean time, those few Internet  
18          auctioneers based in New Hampshire that have come to the  
19          attention of the Board have become licensed. Although  
20          new legislation is not currently being considered in New  
21          Hampshire, regulators are discussing how to best address  
22          the cascading consumer protection issues, whether it be  
23          through licensing, registration or more vigorous civil  
24          and criminal legislation and enforcement.

25          Some of these discussions include how to best

1 protect New Hampshire consumers from the unethical  
2 practices of out-of-state, as well as in-state,  
3 auctioneers and how best to allocate limited resources to  
4 such a task. The same professional conduct concerns that  
5 justify licensure of brick-and-mortar auctioneers are  
6 becoming more evident in the electronic auction house.  
7 And so far it appears to New Hampshire regulators that  
8 there still is a void in effective enforcement that  
9 together I think we should explore how to fill.

10 MR. DELACOURT: Thanks, Wynn. Our next speaker  
11 is Professor Lawrence Ausubel.

12 PROF. AUSUBEL: I am speaking today in two  
13 capacities. First, I am a Professor of Economics at the  
14 University of Maryland, specializing in game theory, and  
15 I have written extensively on the theory and practice of  
16 auctions, as well as holding three patents related to the  
17 auction technology. Second, I am Vice President and  
18 Treasurer of Market Design, Inc., and in that capacity, I  
19 have advised sellers in designing and implementing some  
20 of the Internet auctions to which I will refer, and I  
21 have advised bidders in numerous high-stakes  
22 telecommunications auctions.

23 There has recently been a vast increase in the  
24 volume of Internet auctions. While public attention has  
25 focused largely on the growth of Internet bazaars such as

1 eBay, there has been an equally tremendous rise of less  
2 visible auctions involving such areas as telecom  
3 spectrum, energy, the environment and business-to-  
4 business procurement.

5           Electronic bidding gives the auction designer  
6 greater flexibility and control in designing an efficient  
7 process. Electronic bidding vastly reduces the  
8 participation costs of bidders and electronic bidding  
9 greatly reduces the tangible expenses associated with  
10 running an auction. Consequently, the preferred medium  
11 for implementing new auctions today is on the Internet  
12 and, with due respect to auctioneers on the panel, it is  
13 easy to envision a day when on-line auctions will all but  
14 supercede traditional auctions in which buyers bid in  
15 person.

16           To give you a flavor of the less visible  
17 auctions, let me give three examples. Beginning in July  
18 1994 and through the present, the Federal Communications  
19 Commission has allocated scarce telecom spectrum using  
20 auctions with electronic bidding. In a typical FCC  
21 auction, the U.S. is divided into anywhere from six to  
22 734 regions, and licenses covering the respective regions  
23 are auctioned simultaneously in a single auction process.

24           Second, Electricity de France, EDF, the  
25 dominant power producer in France and the world's largest



1 electricity group, began the divestment of 6,000  
2 megawatts of generation capacity representing  
3 approximately 10 percent of France's electricity supply  
4 last year. This divestment of capacity is being  
5 accomplished by an Internet auction with which I am very  
6 familiar because I designed it.

7 Third, earlier this year, the U.K. government  
8 initiated a greenhouse gas emissions trading scheme  
9 intended to facilitate an efficient reduction in  
10 greenhouse gas emissions. As part of the introduction of  
11 this scheme, the government offered incentive payments to  
12 U.K. companies committing to greenhouse gas emission  
13 reductions and the U.K. allocated the incentive payments  
14 by an Internet auction.

15 Let me give a few of my views about Internet  
16 regulation. First, as regulators consider new  
17 requirements on Internet auctions, they should be  
18 cognizant that there are many less visible Internet  
19 auctions besides the Internet bazaars such as eBay. The  
20 less visible auctions have been operating largely without  
21 any complaints whatsoever; yet, they would be extremely  
22 adversely impacted by intrusive regulations. Many of the  
23 regulations that I have seen would cover those, as well.

24 Second, even if regulations are limited to  
25 Internet bazaars, regulators should be cognizant that

1 fraud is only one side of the story relevant to  
2 consumers. I am speaking as an economist now. Fee  
3 structures are another factor of equal relevance.  
4 Typically, buyer commissions and seller commissions are  
5 significantly lower at Internet auctions than at  
6 traditional auction houses and Internet auctioneers apply  
7 competitive pressure on the commission levels of  
8 traditional auction houses.

9 Thus, regulations requiring licensing of  
10 Internet auctioneers or otherwise limiting them should be  
11 viewed as quite possibly anticompetitive. The  
12 beneficiaries of such regulations are likely to be not  
13 consumers but incumbent traditional auctioneers.

14 Finally, to the extent that fraud is a problem  
15 on Internet bazaars, attention would be better directed  
16 toward enhancing escrow and related services, information  
17 disclosure, payment services and things along those lines  
18 that would enable consumers to better protect themselves.

19 MR. DELACOURT: Thank you, Professor Ausubel.  
20 Our next panelist is Larry Theurer.

21 MR. THEURER: Thank you, and I appreciate the  
22 opportunity to be here. As John mentioned, I am Larry  
23 Theurer, President of the National Auctioneers  
24 Association. I represent an association of 6,300 members  
25 located in the United States and Canada. As members of

1 our profession and our association, we abide by a strict  
2 code of ethics that governs our relationship to our  
3 sellers, bidders and the public.

4 We are not opposed to Internet auctions. In  
5 fact, many of us, including myself, regularly utilize the  
6 Internet for selling goods and services. We utilize the  
7 live Internet, right along with live bidding. Live  
8 auctions are time limited sales in which the auctioneer  
9 solicits bids from the public on a property and sells to  
10 the highest bidder.

11 Often this process may take as little as one  
12 minute for certain items, or it may be an hour for  
13 certain types of real estate. However, considerable  
14 preparation time is necessary prior to the auction to  
15 learn about what is being sold, and to properly and  
16 truthfully represent it to the public. We often have  
17 bidders on the telephone who bid by that method based on  
18 our description. Our credibility is on the line.

19 Auctions are conducted no differently on the  
20 Internet than they are by us, other than the medium being  
21 used. The only difference is that we are being  
22 regulated. The brick-and-mortar auctioneers abide, as I  
23 stated, by a strict code of ethics, or they abide by  
24 licenses in their respective states. The lack of  
25 regulations causes considerable fraud among online

1 auction companies and individuals, such as not delivering  
2 goods after receiving payment or failing to represent  
3 goods properly.

4 I have two items right here. One is a business  
5 journal containing a long article noting that online  
6 auctions top the FBI's Internet fraud list. And here is  
7 another article about tips to help prevent online auction  
8 fraud. The number one complaint on the Internet Fraud  
9 Complaint Center is the auction fraud.

10 As auctioneers that are licensed in various  
11 states, we must meet certain requirements. We must be at  
12 least 18 years of age and have a high school diploma or  
13 its equivalent. We must have attended a course of study  
14 approved by our state licensing board, passed  
15 examination, paid licensing fees and, of course,  
16 participated in continuing education. We must also  
17 follow standards for accurate and truthful advertising,  
18 which is not misleading to the public.

19 License laws do protect the consumer, seller  
20 and bidder. Failure to follow the license law may merely  
21 cause an auctioneer to have his license revoked or may  
22 subject him to fines or other disciplinary action. There  
23 is no regulation for online auctioneers.

24 It is our belief that online auctioneers should  
25 be licensed in the state in which they reside. This

1 would include individuals who conduct auctions on  
2 consignment, purchase property for resale, or offer  
3 merchandise through online auctions.

4 Congress passed the Fair Debt and Collections  
5 Practice Act in 1978 to protect consumers from  
6 unscrupulous debt collectors. Authority and enforcement  
7 powers were given to the Federal Trade Commission. NAA  
8 believes, and suggests, that the Federal Trade Commission  
9 should use all of its existing powers to regulate online  
10 auctions. If the agency feels it does not have authority  
11 to deal with such abuses, then it should seek legislation  
12 giving it sufficient power to do so.

13 MR. DELACOURT: Thank you, Larry. Our next and  
14 final panelist is Norm Willoughby.

15 MR. WILLOUGHBY: I am Norm Willoughby. I am an  
16 Assistant Deputy Commissioner with the Office of Banks  
17 and Real Estate in the State of Illinois. We license and  
18 regulate auctioneers. In the spring of 1999, in the  
19 Illinois General Assembly, House Bill 1805 was introduced  
20 to license and regulate the auction industry in Illinois  
21 for the first time. The Bill was originally written to  
22 regulate the conventional practice of auctioneering.

23 The Bill proceeded out of the House with little  
24 or no debate, and then during the debate in the Senate  
25 Licensed Activity Committee, some concern was brought

1       about whether or not it would apply to auctions conducted  
2       over the Internet. After the debate in the committee,  
3       the sponsor placed a floor amendment on the bill that  
4       included in the definition of auction as a licensed  
5       activity "to sell or lease property via mail,  
6       telecommunications or the Internet."

7               House Bill 1805 was then passed by the Senate  
8       with concurrence from the House and was signed into law  
9       effective January 1, 2000. As written, the Bill did not  
10      contemplate the regulation of Internet auctions. It was  
11      written with the intention of licensing and regulating a  
12      conventional auctioneer. A conventional auctioneer  
13      normally has the opportunity to see and examine the  
14      property, to develop advertising descriptions and lend  
15      advice to the seller and possibly the buyer, as to the  
16      condition and quality of the property being sold.

17              We do not believe this scenario is true with  
18      respect to most Internet auction listing services. Most  
19      Internet auction listing services simply provide a  
20      platform or a medium for a person to describe and post  
21      their property for sale or lease although, under the  
22      provisions of the Illinois statute, it was clear that  
23      other activities and services provided by Internet  
24      auction listing services would require their licensure  
25      under our statute. In addition, it was clear that the

1 legislative intent was to regulate this segment of the  
2 auction industry.

3 The Office of Banks and Real Estate, as the  
4 agency responsible for regulation of the auction  
5 industry, began discussions with auction industry groups,  
6 the State Attorney General's Office, the Internet auction  
7 industry and other affected groups concerning the  
8 implementation of this provision of the statute. The  
9 issues considered included: protection of consumers,  
10 jurisdiction issues, administrative issues and business  
11 interests.

12 During our discussion, it appeared that the  
13 most beneficial tool the state could provide to combat  
14 fraud was a mechanism to identify and locate the users of  
15 Internet auction listing services when alleged fraudulent  
16 activity had occurred. It became clear that the  
17 licensing and regulation provisions in the statute as  
18 written were at best cumbersome, and possibly burdensome,  
19 if they were to apply to Internet auction listing  
20 services.

21 OBRE began serious negotiations with members of  
22 the Internet auction industry and other groups to amend  
23 the statute to better meet the goals established in our  
24 earlier meetings. Language was drafted and introduced in  
25 the spring of 2002 as House Bill 5803. The Bill moved

1 through the legislature and was signed into law in  
2 August. We are currently drafting administrative rules  
3 to further clarify the provisions of that amendment.

4 The amendment provides for a separate and  
5 distinct regulatory structure for Internet auction  
6 listing services. The amendment provides that if the  
7 buyer, the seller or the property offered on the Internet  
8 site operated by an Internet auction listing service is  
9 located in Illinois, then the Internet auction listing  
10 service must register with OBRE.

11 The registration includes certification by the  
12 Internet auction listing service that: it is not an agent  
13 for the users, it will gather and retain information on  
14 the users and transactions for a period of two years, it  
15 has a mechanism to receive complaints and inquiries from  
16 users, it has adopted and implemented a policy to suspend  
17 users who defraud consumers and it will provide  
18 information to OBRE and law enforcement on users who may  
19 be subject to investigation for fraud.

20 The amendment also provides grounds for  
21 discipline of a registrant for violating provisions of  
22 the statute. OBRE has the authority to revoke, suspend,  
23 place on probation or administrative supervision any  
24 registrant for a violation, and may issue a civil penalty  
25 of up to \$10,000 per violation.



1           OBRE is currently drafting rules and we believe  
2 this regulatory structure to be a common-sense approach  
3 to a very complex issue. In addition, OBRE believes that  
4 this approach achieves the best balance between the  
5 competing interests of preventing fraud and limiting the  
6 regulatory burden for business.

7           MR. DELACOURT: Thanks, Norm. Now we will move  
8 to the question and answer segment. I would like to  
9 begin with a somewhat basic question. It seems that our  
10 principal concern is what sort of regulation, if any,  
11 should be applied to auctioneers. So, my first question  
12 is how should we define "auctioneer." Should that  
13 definition include Internet platforms? Should it include  
14 sellers who participate in auctions over the Internet?  
15 And, if it does, does it matter whether the seller is a  
16 professional or non-professional? Would anyone like to  
17 take a stab at that?

18           MR. HAMILTON: In our state, an auctioneer is a  
19 person who is in the business of selling goods for other  
20 people. We have exemptions in our law that allow for  
21 people to actually sell their own goods without a  
22 license. Again, our law does not dictate whether an  
23 auction is a brick-and-mortar auction or whether an  
24 auction is an Internet auction or whether an auction is a  
25 telephone auction or a catalog auction, which before the

1 Internet, telephone and catalog auctions were regulated  
2 by our state. This Internet issue has to be analyzed in  
3 the same way. What is an "auction?" What is an  
4 "auctioneer?" And, so, the answer is basically that a  
5 person who is in the business of buying and selling, or  
6 taking consignments from people, would need to have a  
7 license.

8 MR. ARNOLD: New Hampshire has analyzed the  
9 issue the same way. It does make a difference whether  
10 you are professional or non-professional. There has been  
11 no interest to date in New Hampshire in imposing  
12 additional restrictions on people who are just selling  
13 trinkets from their attic or their cellar. But many of  
14 the complaints that we are getting involve people who are  
15 in the profession. And it seems that people in the  
16 profession have a special obligation for fair dealing.  
17 They deal in higher volume and they are subject to the  
18 same public interest factors that justify the regulation  
19 of auctioneers in general.

20 And as far as the definition of "auctioneer" is  
21 concerned, as I mentioned before, we focus on those that  
22 sell the property of other people, or that buy for  
23 resale, and feel that the focus of any national  
24 regulation should be the same.

25 PROF. AUSUBEL: I guess my fear would be that I

1 haven't heard anything so far in this proceeding that  
2 would indicate any consumer benefit associated with  
3 requiring Internet auctioneers to register as  
4 auctioneers. I just haven't heard any argument as to why  
5 consumers would benefit. I mean, what would be the  
6 result if you required Internet auctioneers to register?  
7 You would have fewer of them. I mean, eBay, if it were  
8 an enforceable law, it would register. You'd have fewer  
9 smaller ones, so you'd have less competition for eBay.  
10 You'd also have less competition for conventional  
11 auctioneers, but it is not clear to me how any of the  
12 incidents of auction fraud would in any case be reduced.

13 And I think the burden is on people who are  
14 advocating more widespread registration to first of all  
15 give a tight argument that there is any benefit at all;  
16 and secondly to argue that whatever benefit there is  
17 would not be completely swamped by the social loss to  
18 consumers due to reduced competition.

19 MR. DELACOURT: Norm, as the advocate of  
20 registration, do you have any thought on that?

21 MR. WILLOUGHBY: Well, I think there is a  
22 distinct difference in what we have done in Illinois as  
23 far as what is being contemplated under existing law. I  
24 do not believe that the Internet auction listing service  
25 registration process is anywhere as cumbersome or

1           burdensome as the rest of our Act, as applied to  
2           conventional auctioneers.

3                       I will tell you this -- in Illinois, there was  
4           very little or no concern about whether conventional  
5           auctioneers wanted this in the bill. It was absolutely  
6           driven by the legislature in the committee process to  
7           combat fraud. And we believe that this mechanism will  
8           give OBRE and especially law enforcement the opportunity  
9           to at least get basic information on these users who may  
10          have committed fraud. And I think we have articulated a  
11          distinct difference between an auctioneer and an Internet  
12          auction listing service.

13                      Tod, maybe you can comment on that, because you  
14          were heavily involved in that.

15                      MR. COHEN: At eBay, we are not necessarily  
16          concerned about traditional live auctions. We would just  
17          point out the fact that there are currently 27 states  
18          that do not regulate auctions. So there are only 23  
19          states that we have identified that regulate auctions and  
20          require licensing. That suggests something about the  
21          scope of the underlying problem. I would guess that the  
22          auctioneers' association probably is not advocating that  
23          the non-regulating 27 states add regulation in those 27  
24          states. That is the first part.

25                      The second part is that you need to look at

1        what is going on. What we were happy about when working  
2        with our friends in Illinois was that they looked at what  
3        was occurring on the site. What is the functions that an  
4        eBay or any type of "online auction service" or "listing  
5        service" provides that make it different than a  
6        traditional live auction. And then there are  
7        distinctions between the two that are fairly significant.

8                Historically, auction regulations were in most  
9        instances intended to protect sellers from unscrupulous  
10       auctioneers who took the money of the sellers. So, in an  
11       enormous number of the complaints that we have looked at  
12       a seller is complaining about the auctioneer taking their  
13       money and not giving the money back to the person whose  
14       item was listed.

15               So, where the auctioneer takes possession of  
16       the goods -- where you are entrusting a third party -- it  
17       may make some sense to have some form of regulation. But  
18       an auction listing service, in most instances, is no  
19       different than a classified ad system in which you just  
20       put the item up for sale. It is a bulletin board in  
21       which there is a way to communicate with each other to  
22       post up the items. The item never transfers. There is  
23       no bailee/bailor relationship created between eBay and  
24       our sellers.

25               MR. ARNOLD: Could I just add that right now I

1 do not think anybody really has an answer about how to  
2 best combat fraud. I think everybody would acknowledge  
3 that there is an additional opportunity for fraud with  
4 Internet sales simply because of distance, jurisdictional  
5 issues, hiding behind e-mail, and the ability to change  
6 addresses. It is easy to commit fraud and it is easy to  
7 misrepresent, and it is very expensive, difficult and  
8 complex to enforce right now.

9 So, I think it is very important for different  
10 states and the Federal government to have experience.  
11 Different states and the Federal Government are acting as  
12 laboratories right now. All of us are participating in a  
13 thought process. And we can see over time where the most  
14 effective, and least restrictive, procedures are in  
15 place. It is important that the regulations be the least  
16 restrictive.

17 But New Hampshire is seeing an increase in  
18 fraud. Something has to be done about it. I simply  
19 think it is obvious that fraud itself diminishes free  
20 competition, hinders free competition, potentially more  
21 than effective regulation would.

22 MR. DELACOURT: Larry, you have a comment?

23 MR. THEURER: Thanks to eBay, the auction  
24 industry has been elevated to heights previously unknown.  
25 Through eBay and other things like that, people have

1 heard what auctions are all about. It has increased the  
2 attendance at our auction. So we are in no way trying to  
3 suppress eBay or any other online auction companies that  
4 are out there.

5 In fact, we have found that many, many more  
6 people are coming to our auctions today to buy things and  
7 turn around and put them on eBay. Thus it has increased  
8 the prices of a lot of things that we are selling. And  
9 thank goodness those people come and they buy the pots  
10 and pans. We call them precious metals.

11 You know, auctioneers go way back to the Roman  
12 Empire days, back to the Civil War days. That is how the  
13 word colonel came about. The colonel sold the spoils of  
14 war following the Civil War. Auctioneers have a high  
15 tradition of representing the goods -- whatever they are  
16 selling -- correctly.

17 And I think our whole concern is that the fraud  
18 that is going on out there is reflecting negatively on  
19 us, the brick-and-mortar auctioneer. You know, we love  
20 eBay. It has helped us tremendously. We just need to  
21 figure out a way that we can stop the fraud that is  
22 happening out there which negatively affects us.

23 MR. COHEN: Can I talk about the fraud for a  
24 moment? My favorite headline of any story that I have  
25 seen since I joined eBay two and a half years ago was a

1 report from -- I forget the newspaper -- but it says,  
2 "Millions of Successful, Safe Auctions Held Daily."

3 (Laughter).

4 MR. COHEN: Of course, it is very easy to find a  
5 headline that says, "Internet Auction Fraud  
6 Skyrocketing." Now, that is the equivalent of in the  
7 teens, or in the 1910s, a headline that car accidents are  
8 skyrocketing. Well, that is also because cars were being  
9 used much more than before. And, so, our concern is  
10 somewhat that the numbers, which sound relatively high,  
11 in reality are not.

12 And let me just give you two examples. In  
13 1999, there were 125 million listings on eBay alone. And  
14 the Federal Trade Commission said that there were 13,091  
15 incidences of fraud reported to the FTC, of which I will  
16 tell you a significant portion of them were us self-  
17 reporting incidences to the Federal Trade Commission.

18 In 2000, there were 265 million listings on  
19 eBay. So we more than doubled the number of listings on  
20 eBay, while at the same time there were only 10,872  
21 reported incidences of fraud to the Federal Trade  
22 Commission. So, it is a large number, but relatively the  
23 trends are going the right way. What you should see is  
24 that as the number of auctions increases or the number of  
25 listings increases, the number of fraud claims increases.



1 But we have not seen that. And part of that is just the  
2 pure visibility. It is not a particularly good place to  
3 commit fraud. I mean, when you are out in the open, you  
4 are out in the open. So, we just wanted to make sure  
5 that that number out there are viewed in the appropriate  
6 context.

7 MR. DELACOURT: Bob, I thought you had a  
8 comment?

9 MR. HAMILTON: Yes, I wanted to comment on a  
10 couple of the remarks that Tod just made. I agree -- and  
11 our Board agrees -- with him on the individual licensing  
12 of people on the Internet as auctioneers, and that the  
13 preliminary requirements -- covering taking consignment  
14 of goods, listing them and offering a facility -- might  
15 be a little bit over and above what a person would  
16 actually need.

17 Our board back in 1999 considered that. In our  
18 state, we have three different types of licenses. One is  
19 an apprentice license; the other is an auctioneer  
20 license; and a third is an auction firm licence. In the  
21 definition of an "auction firm," the Board provided an  
22 opportunity to get a license to conduct and manage  
23 auctions that does not require the applicant to go to  
24 school or to be able to talk at an enormous rate of  
25 speed.

1           And, so, the Board at the time issued a  
2           statement that, if people wanted to apply for an auction  
3           firm license, they would just have to meet the conditions  
4           for that license, which did not include the 80 hours of  
5           preliminary education in auctioneering. The Board did  
6           not require them to take the long auctioneer's exam, and  
7           the process was much simpler.

8           MR. HAMILTON: Also, Mr. Ausubel suggested that  
9           the cost of a license is very high right now because the  
10          nature of the beast is that we have a relatively small  
11          number of brick-and-mortar auctioneers, but the idea was  
12          that once licensing was done for Internet auctions also,  
13          the cost of licensing would go down dramatically.

14          PROF. AUSUBEL: What is the price right now?

15          MR. HAMILTON: It is \$150 a year. Our Real  
16          Estate Commission charges \$35 a year for brokers. The  
17          reason it is so low is that because they have such a  
18          large number of brokers.

19          Tod mentioned the number of complaints that are  
20          reported, and I disagree in that respect, because he is  
21          talking about an individual complaint for an individual  
22          item. That is the basis, if I understand it, of eBay.  
23          You put up an individual item for auction. When you go  
24          to a traditional brick-and-mortar auction, the person  
25          might have 500 different lots that they intend to sell in

1 four or five hours.

2 And, so, the individual complaints could be for  
3 that many people, whereas our complaints, if you look at  
4 my figures that come from the National Fraud Information  
5 Center, in the State of North Carolina, just with rounded  
6 numbers, you are looking at eight times the number of  
7 complaints that are filed for Internet auctions compared  
8 to brick-and-mortar auctions. And I think you have to  
9 put everything in perspective when you start talking  
10 about the number of complaints. You need to determine  
11 the number of sales that are on eBay or any other type of  
12 auction service, the number of complaints, and how many  
13 of those are from one individual.

14 MR. DELACOURT: Actually, I have a follow-up  
15 question that relates to that issue. You mentioned that  
16 the statistics showed a greater degree of fraud in  
17 Internet auctions than in other contexts. My question  
18 is, given that the push for licensing is primarily  
19 motivated by this desire to prevent fraud, is there  
20 reason to believe that consumer fraud is more likely over  
21 the Internet than conventional channels? Tod mentioned,  
22 for example, classified ads. I will add to that a  
23 related question that was submitted from the audience,  
24 which asks, "Is is bid rigging more likely in the  
25 Internet auction context than in the brick-and-mortar

1 world?"

2 MR. ARNOLD: I would just like to very quickly  
3 add that clever descriptions of the property have become  
4 common. Some of the complaints that we have reviewed,  
5 that do not amount to necessarily be a violation of law,  
6 relate to very clever descriptions that seem intended to  
7 mislead. If consumers read the fine print, and read it  
8 carefully, then they will know what they are getting.  
9 But a lot of consumers do not get it, and do not receive  
10 what they think they are purchasing. They do not get to  
11 kick the tires like in a live auction. They do not get  
12 to view the produce. There usually is not an opportunity  
13 to return a product within 30 days if they do not like  
14 it. And, so, there is a lot of temptation to be clever,  
15 as a seller. And we have had quite a bit of feedback  
16 that consumers need to know how careful they should be.

17 And, also, as far as the number of complaints,  
18 I agree with Tod that the number of auction transactions  
19 has skyrocketed, and so it is logical that the number of  
20 complaints has gone up. But I query how many of those  
21 complaints, percentage-wise, are actually resolved  
22 satisfactorily, compared with equivalent complaints  
23 against auctioneers in state under regular licensing acts  
24 or under the Consumer Protection Act involving  
25 transactions within the state. And I venture to say that

1 a very small number of them are actually resolved. And,  
2 so, it is not whether or not the number of complaints is  
3 disproportionate or unreasonable, so much as the  
4 effectiveness of the enforcement in bringing resolution  
5 to those matters.

6 MR. DELACOURT: Professor Ausubel, I thought  
7 you had a comment?

8 PROF. AUSUBEL: Yes. On the question of  
9 whether fraud is inherently easier on the Internet, what  
10 I would say is that as far as the bidding process is  
11 concerned, fraud is probably harder. There are a couple  
12 of issues here. The first is that one of the ways that  
13 bidders at traditional auctions collude is by setting up  
14 bidding rings. They can see exactly who is there and can  
15 invite anyone who is there to be in on the bidding ring.  
16 Then the seller can be effectively defrauded with a very  
17 low price. In an online context, that is virtually  
18 impossible to do because somebody can still swoop in at  
19 the last moment and submit a bid, even if all the known  
20 bidders were colluding with each other.

21 Another thing to note is that people have left  
22 out the fact that some of the best known traditional  
23 auction houses themselves were colluding. Also, all I am  
24 hearing is the number of complaints. I am not hearing  
25 anything about the dollar volume of complaints and, in

1 particular, the dollar volume of complaints divided by  
2 the dollar volume of trade. I would guess that if you  
3 look at traditional auction houses, when you combine  
4 buyer collusion, seller collusion and auctioneer  
5 collusion, that calculation very likely comes out higher.

6 MR. THEURER: I have a comment on that. With  
7 due respect, Professor Ausubel, those of us that have  
8 been in the business a long time are not going to be in  
9 business if we allow bid rigging and collusion to go on.  
10 The public will soon quit coming to our auctions.  
11 Sellers will soon quit calling on us to do their  
12 auctions.

13 I can tell you, in 27 years, the number of  
14 times that bid rigging has happened at my auction. I can  
15 count it on one hand and have fingers left over. I feel  
16 I know the product well enough. I know its value. If I  
17 detect bid rigging, I am going to be the first one out  
18 there to talk to that person or group. You know, bid  
19 rigging is a Federal offense. We are going to put those  
20 people in the corner and tell them either to leave or to  
21 never come back. So, I do not believe that that is an  
22 issue here.

23 PROF. AUSUBEL: Oh, what you are saying is  
24 certainly true, but it applies equally to eBay or any  
25 other Internet service that if fraud gets out of hand

1 they are going to lose their customers and they have  
2 exactly the same incentives you are referring to.

3 MR. THEURER: But the bad actors can come back  
4 on very easily, can't they?

5 PROF. AUSUBEL: I do not understand. You  
6 boycott traditional auctioneers who allow rampant fraud  
7 and you boycott online services that allow rampant fraud.  
8 It would seem like they are exactly on a par with each  
9 other.

10 MR. COHEN: John, I just wanted to comment on  
11 something that Wynn said. We do not have any report,  
12 since the FTC does not compile a record of the number of  
13 incidences of fraud or claimed fraud, so there is no  
14 reporting mechanism to say if an incident has been  
15 resolved. But I would suggest that resolution rate is  
16 much higher for two very simple reasons. One, for eBay  
17 at least, we provide every buyer \$200 free insurance with  
18 a \$25 deductible. And that just requires you to fill out  
19 the form if you have not received the item. The cost of  
20 administering that program makes it much more likely for  
21 us to just refund the money, rather than to go through  
22 that process.

23 So, at least in that chunk of sales -- which is  
24 by far the largest chunk of sales that we are dealing  
25 with, since our average sales price is still below \$50 on

1 the site -- complaints are being resolved fairly quickly.  
2 The other thing is that we have been using a group called  
3 Square Trade for third party dispute resolution, and have  
4 worked very closely with the Federal Trade Commission in  
5 doing so. People use the program to resolve problems --  
6 wrong color, wrong size, or otherwise not exactly as  
7 promised. Our experience has been that simply filing the  
8 complaint with the Square Trade group generally resolves  
9 the issue. The disputes almost never go beyond the  
10 filing because 95 percent of the time the other side  
11 wants to fix it.

12 And we have left out one other thing, which is  
13 our feedback forum -- our ability to rate each  
14 transaction that occurs as positive, negative or neutral.  
15 That online reputation is remarkably important to our  
16 sellers. If they receive even one negative review, I can  
17 assure you that our sellers go out of their minds trying  
18 to make sure that it gets corrected.

19 I mean, to a certain extent, it is a bid  
20 rigging problem that would occur in which buyers take  
21 advantage of sellers in many instances, by threatening  
22 negative feedback, and threatening to ruin the seller's  
23 reputation. So when you say that complaints are not  
24 resolved, I just basically disagree with that.

25 MR. WILLOUGHBY: I have a question, too. Bob,



1           who exactly was your Board contemplating regulating? Was  
2           it eBay or was it the seller? I am a little confused.

3                   MR. HAMILTON: Actually, thank you, Norm.

4                   MR. WILLOUGHBY: I am confused, so --

5                   MR. HAMILTON: No, that is all right. With the  
6           law as it is written, the Board felt that it had  
7           legislative authority to regulate both the people who  
8           were selling on eBay and --

9                   MR. WILLOUGHBY: Even if it was their own  
10          property.

11                  MR. HAMILTON: Excuse me, I do not mean to  
12          specifically say eBay --

13                  MR. WILLOUGHBY: Right.

14                  MR. HAMILTON: -- but we keep talking about  
15          eBay and I am talking about auction listing services.  
16          Both the sellers on those auction listing services and  
17          the auction listing services themselves. In our specific  
18          law on the requirements for an "auction firm," one of the  
19          lines specifically says that "In the regular course of  
20          business uses or allows the use of its facilities for  
21          auctions."

22                  Basically, if a person in our state with a  
23          brick-and-mortar facility -- and we are not talking about  
24          the National Guard Armory whose sole purpose is for the  
25          National Guard to have functions there -- but if you had

1 a facility that you owned and you allowed several  
2 different auctioneers to come in and have separate  
3 auctions within that facility, you would be required in  
4 our state to get an auction firm license.

5 And with respect to an auction listing service,  
6 they are allowing the use of their facility, which is  
7 their software and their technology, to conduct what we  
8 felt were regulated auctions in our state.

9 MR. WILLOUGHBY: Okay.

10 MR. HAMILTON: We had submitted some questions  
11 to the Attorney General to look at and give us some  
12 information, although we later pulled them back, but we  
13 felt that if the Attorney General gave us information  
14 that said that our interpretations of the definition of  
15 "auction" and "auction firm" in our state were incorrect,  
16 then the question was is it illegal in our State to  
17 advertise these transactions as auctions, since they do  
18 not come under the definition of "auction." Basically,  
19 the answer to one of those questions has to be "yes."

20 And, so without changes to our law, that was  
21 the basis for the regulation. The intent was not to put  
22 Internet auctions, auctioneers, auction services, and  
23 listing companies, in a position that they could not  
24 compete with regular auctioneers, because, again, regular  
25 auctioneers love Internet auction services. I have

1 talked extensively across the State. I do continuing  
2 education at seven different sites across the state, and  
3 they want the Internet auctions to continue, because just  
4 like Larry said, this has become a very important part of  
5 the brick-and-mortar auction business.

6 And I disagree with Professor Ausubel. I do  
7 not know where he is getting his information on brick-  
8 and-mortar auctions someday going by the wayside, but if  
9 you look at brick-and-mortar auctions and you go to some  
10 brick-and-mortar auctions, those people are not always  
11 there just to get a great deal. They are going there for  
12 the fellowship and for other reasons, not just to get a  
13 \$10 item for 50 cents.

14 MR. DELACOURT: I have a question that refers  
15 back to one of Professor Ausubel's earlier comments and  
16 also incorporates a question posed by someone in the  
17 audience.

18 Professor Ausubel spoke about less visible  
19 auctions, and in particular he mentioned the business-to-  
20 business procurement exchanges. It seems to me that  
21 given the discussion of what type of auctioneer would be  
22 required to be licensed in North Carolina or New  
23 Hampshire or Illinois, that a business-to-business seller  
24 would potentially be required to be licensed. Is that  
25 correct, and is that sensible, in light of the fact that

1 the consumer protection motivations in that context might  
2 be significantly different?

3 MR. WILLOUGHBY: I can confirm that this issue  
4 was not contemplated. After I read Professor Ausubel's  
5 report, it brought some new issues to light. The  
6 legislative intent behind our statute was consumer  
7 protection, so it is something we are going to have to  
8 take a look at.

9 PROF. AUSUBEL: So, you are saying the intent  
10 was not there, but it may be there in the language?

11 MR. WILLOUGHBY: Right, and I cannot answer  
12 that without going back and actually looking at what you  
13 are talking about, Professor, and the way your business  
14 is conducted in some of those instances versus what we  
15 were thinking of, and I hate to keep picking on eBay, but  
16 what eBay does.

17 MR. DELACOURT: Wynn or Bob, do you have any  
18 response to that?

19 MR. ARNOLD: Just that I agree with Professor  
20 Ausubel that the policy has to be targeted effectively  
21 and efficiently. Obviously regulations and laws cannot  
22 always be targeted as precisely as we would like, but it  
23 is a good point that we have to keep in mind the consumer  
24 protection goals, the sophistication of the participants,  
25 and the nature of the process when assessing what kind of

1 auctions should be covered by what regulations.

2 MR. DELACOURT: Bob, no comment? Okay.

3 The next question relates to the way that  
4 regulations should be targeted. What we have been  
5 talking about until now is mostly the nature of the  
6 seller, and I have received a question from the audience  
7 that suggests that maybe regulation should be targeting  
8 the nature of the product. The specific example I am  
9 given is an automobile. And the question says, "Given  
10 the complexities which exist in a motor vehicle sale,  
11 such as titling, odometer statements and emissions  
12 compliance, as well as the economic and safety issues,  
13 should motor vehicles be treated differently than other  
14 goods?" And I would generalize that to say "should other  
15 complicated products be treated differently."

16 MR. THEURER: Let me touch on that. We that  
17 are the brick-and-mortar auctioneers that sell  
18 automobiles have to comply with the same regulations that  
19 any dealer does. We make sure the title is filled out  
20 correctly, make sure the title is clear, and we make sure  
21 that the buyer's going to get a good title that he can  
22 use to go get a tag.

23 MR. DELACOURT: I would be interested to hear,  
24 Tod, do you have any thought on that?

25 MR. COHEN: We have been fortunate to have sold

1 in the last year, and this was in 2001, more than a  
2 billion dollars worth of autos and auto parts on eBay.  
3 What is more remarkable than that is that it looks like  
4 we are on pace to hit \$3 billion in auto sales this year.  
5 And that includes not only what we would think of as  
6 classic cars, but literally every type of car is being  
7 auctioned across the site.

8 Most of those, from what we can tell, have not  
9 been test-driven by the buyer. And the incidents of  
10 fraud and problems with cars have been much less than on  
11 the rest of the site, mostly because the values are much  
12 higher, so the escrow services work. We do provide a  
13 specific warranty called "I Warranty" -- a one-month  
14 warranty on the car that can then be sold. You can also  
15 get a longer warranty.

16 And our experience has been that if it says it  
17 is a '75 Mercury, it is a '75 Mercury. No one's going to  
18 try to sell the '74 as the '75. So, the complexity has  
19 been in some ways more of a positive. There was a  
20 statement made yesterday during the auto panel that no  
21 one would buy a used car without test driving it. Over  
22 100,000 cars have been sold this year on eBay without a  
23 test drive.

24 So the fundamental question is should auto  
25 sales be regulated any differently? Our argument would

1 be no, that that would be a classic area in which there  
2 would be existing entrenched middlemen who do not want  
3 any type of additional competition.

4 MR. WILLOUGHBY: And I think the only place  
5 where we have made a distinction in our amendment is with  
6 respect to real property. Real estate is different and a  
7 real estate broker's license required if you provide that  
8 type of service over the Internet and the property is  
9 located in Illinois.

10 MR. DELACOURT: My next question refers back to  
11 my opening statement, when I talked about the distinction  
12 between old, legacy laws that did not account for the  
13 Internet and new regulations that are intended to address  
14 novel problems that will potentially arise with the  
15 expansion of Internet auctions. I will ask Professor  
16 Ausubel and, I guess, Tod, which of these do you think  
17 poses the greater problem and is potentially more likely  
18 to impede Internet auctions?

19 PROF. AUSUBEL: Why don't you go first.

20 MR. COHEN: Existing laws can be incredibly  
21 difficult to deal with. I would give the example of  
22 France. The French auction laws are remarkably  
23 restrictive. In 1546, Henry II granted concessions to  
24 the auctioneers that have not expired. There are 456  
25 licensed concessionaires in France. Each of the 456 to

1       become an auctioneer in France must have not only a  
2       degree in art history but a degree in law, so it is a  
3       positive for the lawyers out there.

4               A further restriction is that you could only be  
5       an auctioneer in the hometown you were born in, and there  
6       were other unbelievable restrictions. The EU has spent  
7       years trying to break that and succeeded last year.  
8       Sotheby's and Christie's have finally been able to open  
9       up auction houses in France.

10              What we have seen is that once they have lost  
11       the traditional auction law protection, they have gone  
12       and created new barriers to entry. There is a group  
13       called the Counsel de Vant, which would be the equivalent  
14       of the National Auctioneer Association, except that it  
15       has state power. They are proposing a rule that bans the  
16       sale of cultural goods online -- items of national  
17       patrimony. The concern is that the Mona Lisa would be  
18       sold, after leaving Italy and getting to France somehow,  
19       or the obelisk in Paris.

20              **(Laughter).**

21              MR. COHEN: What they've done is they've said  
22       well, that rule is not really items of national  
23       patrimony. It is really items that are more than 50  
24       years old. So, the opponents of online auctions are very  
25       clever in reaching out. And what we are concerned about



1 is not necessarily the auction laws, the domestic auction  
2 laws, but some of the other regulated areas. If they  
3 fail in obtaining protection, then they will go and do  
4 what they've done in the auto area, where we have got --  
5 I believe Hawaii's the last state left, and as they told  
6 us yesterday, the governor is about to sign the law there  
7 to prohibit online auto sales.

8 PROF. AUSUBEL: I will restrict my attention to  
9 the U.S. I think, in terms of selling general sorts of  
10 items, I haven't heard of old statutes on the books that  
11 are really causing major problems. The issue is more  
12 what new statutes do. And they have the potential of  
13 causing major problems. I mean, if when you consider  
14 that somebody may have to pay a registration fee in every  
15 state and hire an attorney in every state and so forth,  
16 the cost could well exceed the cost of the computer  
17 system and everything else combined.

18 Now, there are particular subject matters where  
19 existing laws could get in the way. I won't say much  
20 about this because this will come up in the next panel,  
21 but in particular, say, if you are talking about  
22 offerings of stock, then there are very broad SEC  
23 restrictions on what may be done and, in fact, private  
24 letters that have been issued in interpretation of the  
25 existing laws have sort of emasculated the auction

1 process.

2 One can imagine the same sort of thing comes up  
3 in real estate sales where, I believe, Norm mentioned  
4 that real estate is treated differently from other  
5 property. I think that was you who mentioned it.

6 MR. WILLOUGHBY: Just about five minutes ago,  
7 to refresh your memory.

8 PROF. AUSUBEL: Yes. And there are many people  
9 who are of the view that the prevalent 6 and 7 percent  
10 commissions on real estate have to do with barriers to  
11 entry, probably supplemented by state rules in support of  
12 them. And those would certainly be detrimental to, say,  
13 online auctions of real estate.

14 MR. Willoughby: Well, I do not believe our  
15 entry fee of \$100 would probably prevent too many people  
16 from getting a license in Illinois.

17 PROF. AUSUBEL: How much time is involved?

18 MR. WILLOUGHBY: Well, basically if a firm  
19 wanted to get a license, they just have to have an  
20 Illinois broker manage that firm. So that is simply what  
21 they would have to do. So, basically you have got two  
22 people involved. Or one person in a corporation, let's  
23 say, would be involved. And I can guarantee you there  
24 are 26,000 brokers in Illinois that would probably line  
25 up to be any Internet auction listing service's managing

1 auctioneer. So, I do not think that is restrictive at  
2 all. I think that is not a good argument.

3 And you are right, they could probably do it  
4 considerably cheaper and, in fact, there are brokers in  
5 Illinois right now that are doing that, providing that  
6 type of service, for consumers, at a 2 percent rate.  
7 They are listing properties on the web.

8 MR. THEURER: They are listing properties on a  
9 web site? They are not doing any newspaper advertising  
10 and not holding open houses?

11 MR. WILLOUGHBY: Right.

12 MR. THEURER: The seller ends up being the one  
13 to show all the properties. And so the commission is not  
14 an issue. You know, we as Americans will adapt. And the  
15 dollar still talks. I mean, it is that simple.

16 MR. WILLOUGHBY: I think it depends on what  
17 level of service the individual or consumer wants. Some  
18 people do not want to have anything to do with the sale  
19 of their property, and that is why they turned it over to  
20 a traditional broker.

21 PROF. AUSUBEL: Yes, but it is very hard to  
22 argue that a 6 or 7 percent commission is the result of a  
23 competitive market.

24 MR. WILLOUGHBY: We do not regulate commission  
25 rates in Illinois.

1           PROF. AUSUBEL: But the state typically does  
2 have a role supporting rules of the multiple listing  
3 service -- for example, fee splitting between a seller  
4 agent and a buyer agent. I do not know about Illinois  
5 and Illinois might be an exception, but typically there  
6 are state rules that support that. I am not referring to  
7 registration requirements to be a real estate auctioneer  
8 but other state requirements.

9           MR. THEURER: I am not aware of any states that  
10 tell real estate people what they can and cannot charge  
11 or how they have to split their fees. That is strictly  
12 between the companies.

13           PROF. AUSUBEL: Except that the multiple  
14 listing service is there and there are issues of exactly  
15 what the multiple listing service can require and cannot  
16 require. And I think Federal regulators have looked at  
17 the question at various times because it does appear on  
18 the face of it to be problematic.

19           MR. WILLOUGHBY: I do not believe the word  
20 multiple listing service is used in the Illinois real  
21 estate statute, anywhere.

22           MR. THEURER: I am not aware of it in Kansas  
23 either.

24           MR. DELACOURT: I think we'd better move on. We  
25 have had a question from the audience seeking

1 clarification of some of the terminology that we have  
2 been using in talking about who must be licensed as an  
3 auctioneer. In my initial question, I made the  
4 distinction between a "professional" and "non-  
5 professional." Others referred to an individual being,  
6 or not being, quote, "in the business." The question is,  
7 what exactly does that mean? Is that determined just by  
8 virtue of the fact that the auctioneer is reselling  
9 property? Does it mean that the person is selling a  
10 certain number of items per month? Does it mean that  
11 there is a certain dollar volume of sales being made per  
12 month? Could someone clarify that?

13 MR. HAMILTON: Yes. In the State of North  
14 Carolina, basically, if someone owns the goods and they  
15 did not purchase those goods with the intent to resell  
16 them at auction, they can auction without a license. If  
17 they do not own the goods, and are acting as an agent for  
18 the seller, then they do need to have a license. And if  
19 they did purchase the items with the intent for resale at  
20 auction, then they do need a license.

21 MR. COHEN: John, I want to correct something  
22 on the record. I said there were 23 states that  
23 regulated auctions. It is 29 states that regulate  
24 auctions and 21 that do not. So I want to make sure that  
25 the record is correct.

1           Our concern about whether a seller is a  
2 "professional" or a "non-professional" gets very complex  
3 very quickly in the 29 states that regulate. For  
4 example, some states permit unlicensed auctioneering if  
5 it is only your own property, but then we have the  
6 problem of the person that has their cousin or friend or  
7 son or nephew listing the item for them because they've  
8 never done it on eBay.

9           We have a program called Trading Assistance in  
10 which there are people around the country, and I think it  
11 is up to 50,000 of them, that help people list items on  
12 eBay. And they may charge a fee for the assistance.  
13 They may have the scanner. They may have the digital  
14 camera. They may know what works best on how to prepare  
15 a listing. So, our concern is that "in the business,"  
16 "professional," "non-professional," or "on behalf of  
17 someone else" -- the difficulty is how do you comply with  
18 all 29 different states?

19           PROF. AUSUBEL: There is one thing that I am  
20 slightly mystified about. Am I hearing right that if you  
21 simply are a seller and post your items on an Internet  
22 site for auction that you may have to be considered a  
23 licensed auctioneer?

24           MR. WILLOUGHBY: No. I do not believe that is  
25 true in Illinois.

1                   PROF. AUSUBEL: Are you saying that is the case  
2 in some states?

3                   MR. HAMILTON: No. I said in the State of  
4 North Carolina. if you own the goods, then you do not  
5 need a license. If you did not purchase those goods with  
6 the intent to resell. Now, I think the exemption itself  
7 is based on whether you are going into the business of  
8 auctioning or not, or whether you are basically  
9 liquidating your own goods.

10                  PROF. AUSUBEL: But I am not understanding. If  
11 you were to just walk into his auction house and say "I  
12 have these goods for resale, I would like them to be  
13 auctioned," you do not need a license to do that, do you?

14                  MR. HAMILTON: That is because you have signed  
15 the goods over to him and he is actually the person who  
16 is conducting the sale and is managing the sale.

17                  PROF. AUSUBEL: I understand why in the statute  
18 there is a difference, but economically, I mean, this  
19 sounds like something where you are actually attempting  
20 to regulate things offline more harshly than on the  
21 Internet.

22                  MR. HAMILTON: Actually, I think it is a mirror  
23 image of a brick-and-mortar auction in the sense that we  
24 apply the law the same way in both cases. Well,  
25 actually, let me back up. In North Carolina, we are

1 still are deferring any regulation of Internet auctions.

2 (Laughter.)

3 MR. HAMILTON: I did not mean to possibly  
4 mislead anybody, but the law speaks for itself. It is  
5 even across the board in both applications. In 1999, the  
6 board felt that was the case.

7 PROF. AUSUBEL: There is actually one other  
8 issue, if you do not mind my bringing it up.

9 MR. DELACOURT: Sure, go ahead.

10 PROF AUSUBEL: I thought generally the answer  
11 to "why would these rules reduce fraud?" -- I thought  
12 generally it wasn't answered. The answer I thought was  
13 most responsive was phrased in terms of tracing people  
14 who auction things. And on that point, nothing has been  
15 said so far about anything the FTC could do. So, here is  
16 something that the FTC could do.

17 Why is it so hard to trace sales on the  
18 Internet? Let's say you were putting something up.  
19 Would you use your regular e-mail address? Would you do  
20 anything that was easy to trace? No, because you would  
21 find yourself on 30 million spam lists and so forth. You  
22 might be at higher risk of identity theft if you gave  
23 personal information to an online auctioneer and so  
24 forth.

25 This is one of the reasons why online services



1 find it difficult to acquire the tracing information that  
2 they need. So, if more were done, so that people  
3 wouldn't feel threatened by giving out this information,  
4 then you'd have an easier time tracing. And that is  
5 actually, I think, an FTC job.

6 MR. HAMILTON: I agree with Professor Ausubel  
7 in that respect, but you have to understand that once you  
8 start licensing people, in our state, you have to  
9 advertise a certain way and you have to provide a license  
10 number and you have to use your name or a d/b/a and  
11 things of that nature. Before purchasing something from  
12 this individual, the consumer can check their  
13 qualifications and find out whether they are regulated or  
14 not.

15 Similar processes are in place in other fields.  
16 If you wanted somebody to operate on you, for example,  
17 you would most likely assure yourself that they had a  
18 medical degree and that they were licensed to do that  
19 particular procedure on you. There was a time when  
20 doctors were never licensed. Unfortunately, there are  
21 still some out there that are not licensed, and hopefully  
22 they get caught.

23 But you wouldn't actively look for a non-  
24 licensed doctor to operate on you. We are talking about  
25 three different publics here -- the buying public, the

1 selling public and the auctioneering public. Over time,  
2 the buying public will look for licensed individuals who  
3 are selling, because they have the confidence that they  
4 have met a minimum standard to get that license.

5 MR. WILLOUGHBY: I do not think that is his  
6 question, though, Bob.

7 MR. HAMILTON: Oh.

8 MR. WILLOUGHBY: I think his question is how do  
9 we track those users who may have committed fraud. Is  
10 that correct? And I think what we contemplated that when  
11 we drafted the amendment in Illinois based upon input  
12 from the Attorney General's Office, which had  
13 investigated these fraud issues. And you are right --  
14 people that commit fraud usually give you a fraudulent  
15 address and everything else. So the Attorney General's  
16 office said that focusing our efforts in that area would  
17 be the most beneficial. And that is what we have tried  
18 to do.

19 I can guarantee you, I do not see the Office of  
20 Banks and Real Estate trying to go out and arrest  
21 fraudulent users. We are going to turn that information  
22 over to law enforcement and let them handle it, assisted  
23 by our information. What we have tried to do with the  
24 amendment is to establish a mechanism that requires the  
25 Internet auction listing services to collect a minimum

1 amount of information on their users. We are looking at  
2 different things that could pin those people down even  
3 more accurately.

4 But we have got to look at Privacy Act issues  
5 and those kinds of things, and I am sure we are going to  
6 work those out with the Internet auction industry. I  
7 understand your question. But I think if we caught two  
8 or three more, that is better than where we were.

9 MR. HAMILTON: Does eBay have the technology to  
10 trace fraudulent sellers?

11 MR. COHEN: Our data is a whole new area of fun,  
12 especially when we get into spam and harvesting of  
13 information data. Identify theft of our users' IDs and  
14 the ability of people to come on and act as sellers are  
15 remarkably difficult problems. It is a trade-off that  
16 the people in this building understand better than most,  
17 and the people across the street understand, which is  
18 that every bit of information we gather from users then  
19 potentially becomes a privacy loss for them, and a reason  
20 for not wanting to engage in these transactions.

21 And, so, it is a never-ending balance between  
22 data retention, data collection, and data use by third  
23 parties. There is also the expense of checking credit  
24 card materials and lots of things. But I wanted to go  
25 back to a question, which is the fundamental to

1 regulation in the area, and I would ask Mr. Theurer, do  
2 you think the incidence of auction fraud is higher or  
3 lower in the states where there is no auction regulation?

4 MR. THEURER: Could you rephrase that? Higher  
5 in states that --

6 MR. COHEN: That do not require licensing. Do  
7 you think that members of the NAA that are in non-  
8 regulated states commit more incidences of fraud than  
9 those in --

10 MR. THEURER: Well, they are not members.

11 MR. COHEN: Okay -- they are not members. But  
12 the question is, in the states that choose not to  
13 regulate --

14 MR. THEURER: Well, let me answer that by  
15 saying in the state of Kansas, which I reside in and do  
16 business in, we are one of those non-licensed states.  
17 How much fraud do we have in our state? I cannot answer  
18 that. I do not know. Whether we have any higher or  
19 lower incidence than those that have licensing, I do not  
20 know.

21 MR. HAMILTON: Can I respond to that? In our  
22 state, we have probably one of the strictest standards  
23 for advertising. And if you look at the states that do  
24 not have either an auction law or the strict standards,  
25 if you go into their state and look at the advertisements

1       that are placed, in my experience, these are very  
2       fraudulent advertisements. They would constitute fraud  
3       in our state, but it is permitted because they do not  
4       have any requirements for advertising in those states.  
5       And, so, I would say -- though I do not have any figures  
6       or statistics on it -- that the incidence of fraudulent  
7       advertising is probably higher.

8                   MR. DELACOURT: Well, I think Bob's going to  
9       have to have the last word. We have come to the end of  
10      our time. I would like to thank everyone for  
11      participating. I think this has been a very useful and  
12      informative discussion, so thanks again. And I think now  
13      we are going to take a 15-minute break. We will be  
14      reconvening at quarter to 11:00, and the next panel will  
15      be on real estate, mortgages and financial services.

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1 group of people sometimes who do not get an opportunity  
2 to talk very often. One thing that I want to make clear  
3 is that we are to talk about problems and think about  
4 solutions.

5 You know, many states pass laws and regulations  
6 that address legitimate public policy concerns. While  
7 some of these laws may raise some competitive issues with  
8 us, because we may see them as having some harm to  
9 consumers, others acted because they thought they were  
10 conferring consumer benefit. What they may inadvertently  
11 do is cause consumers harm to the extent that  
12 inconsistencies in state laws and regulations may cause  
13 confusion for businesses and consumers alike.

14 I think this forum may provide us all with an  
15 opportunity to examine these areas of conflict and  
16 reflect on how government and businesses and consumers  
17 can work together to think about how we can come up with  
18 solutions that will benefit the public so that they can  
19 enjoy the potential of electronic commerce. Now, as many  
20 of you know, I especially do a lot of work  
21 internationally on the consumer protection front, and we  
22 are considering some of these same issues in the context  
23 of examining how we address consumer protection in  
24 electronic commerce and think about consumer confidence  
25 in a global context.

1           So, on that note, I am really interested in  
2 hearing what some of the panelists have to say today and  
3 hopefully we will also get some good questions from you.

4           Now, as we have done before, we are going to  
5 let the panelists give some of their own remarks and they  
6 introduce themselves, because they can do it better than  
7 I could. So, can we start on this side?

8           MR. CAPPER: My name is Russell Capper, and I  
9 am president and CEO of e-Realty, a Houston-based real  
10 estate company. I come here as a businessman who has  
11 spent almost 30 years in the technology space, and I have  
12 always been able to participate in that part of  
13 technology, right where it first starts working, where it  
14 increases productivity, where the user is really happy,  
15 and I feel blessed having spent my whole career there.

16           And I must admit and acknowledge that in the  
17 last three or four years the pace of the offering of  
18 technology has just been incredible, with the Internet  
19 and with e-commerce. And for that, I thank Ted Cruz and  
20 the FTC for holding this session and also specifically  
21 the Netchoice organization, of which I am a charter  
22 member, for really focusing on the issues here.

23           My business situation here, I think, is unique  
24 compared to all of the sessions that have been taking  
25 place this week, unique for two reasons. Neither of



1 those reasons have anything to do with the fact that the  
2 people on the other side of my situation in this case  
3 have selected not to be here, and that is National  
4 Association of Realtors. I think it is disrespectful and  
5 disingenuous that they could not be here to argue these  
6 issues. And I feel that very deeply.

7 The two unique things about my business  
8 situation are that, number one, the business that I am in  
9 is the mother of all consumer transactions. It is the  
10 biggest, and arguably the most important, consumer  
11 transaction that Americans make. They are selecting  
12 where they live, what the environment is like. It  
13 decides where their children are going to go to school.  
14 It decides whether they are going to be looking East or  
15 West when they walk out their front door. It decides how  
16 much energy they can conserve in their commute to work.  
17 It is just tremendously important.

18 And I was contrasting it to all the other  
19 sessions and, cost-wise, it is monumentally higher than  
20 any other. I was going to say that from a product life  
21 cycle it was longer than any other than, but then I  
22 noticed the casket guys had been here.

23 **(Laughter.)**

24 MR. CAPPER: Anyway, it is just enormously  
25 important. The second thing that I think is a little bit

1 unique is that the serious anticompetitive behavior that  
2 we are facing and several other very innovative companies  
3 in real estate, is not a problem necessarily with old  
4 legacy rules that did not anticipate e-commerce but  
5 rather a changing of the existing rules.

6 I was trying to explain to my children what I  
7 was coming up here to do, you know, we live in Houston  
8 and when Houston businessmen come to DC, people get a  
9 little bit concerned. I am not related to any of those  
10 guys, as a matter of fact.

11 PROF. AUSUBEL: And some of them should be  
12 concerned.

13 MR. CAPPER: I totally agree. But it was my  
14 wife who was trying to explain what I was going to do  
15 here, and it was my 10-year-old son that said oh, so  
16 after the game started, they changed the rules. And I  
17 said man, that is it, I wanted to bring him along,  
18 because that says it perfectly.

19 We do have some legacy problems, and I was  
20 talking to Professor Ausubel about it while ago. They  
21 fall in the category of state regulations. In 13 states  
22 in the United States, when you are a buyer's broker, you  
23 cannot rebate your commission back to the consumer. We  
24 had trouble understanding where that benefitted the  
25 consumer, but I guess giving them money might be harmful.

1 They might go buy drugs with it, who knows what they  
2 would do with it, so we cannot give that back. But I am  
3 not here specifically targeting that issue, although that  
4 issue is huge.

5 What I am targeting instead is the fact that  
6 the National Association of Realtors is the regulatory  
7 authority in our world. They were very progressive 50  
8 years ago when they set up one of the best, most  
9 effective exchanges in commerce that brought buyers and  
10 sellers together in a very productive manner that  
11 benefitted the industry and that benefitted the consumer.

12 As part of that exchange they shared their  
13 listings with each other, and they had to do it under a  
14 set of rules and regulations that made sense, and they  
15 did, and they did it very, very well. And one of those  
16 rules was that to participate in this effective trade  
17 association, everybody had to put all their listings into  
18 this database. Never did they say how a realtor has to  
19 deliver effective listings to bona fide buyers and  
20 sellers.

21 Today they are trying to say you cannot use the  
22 Internet. They are allowing brokers to retract their  
23 listings. I guess I am missing something, because I have  
24 never understood the "best kept secret" method of  
25 marketing homes. But that is what they are advocating

1 and it is harming significantly our business. They are  
2 on the verge of implementing this initiative in 30 days  
3 and I am here to ask the FTC for assistance. Thank you.

4 COMMISSIONER THOMPSON: Thank you. Now, I am  
5 reminded that something I did not do was to lay down the  
6 ground rules about time. This has nothing to do with  
7 you. Thank you for your presentation. You will not be  
8 permitted to talk for the rest of the day.

9 **(Laughter).**

10 COMMISSIONER THOMPSON: It is that I think we  
11 have allotted about three to five minutes for each of you  
12 to have an opening. This helpful gentleman there will  
13 have a little sign to let you know when you have hit one  
14 minute and a stop sign. Okay?

15 Now, that is better than a speech I gave in  
16 Singapore a year ago where they had a big cowbell.

17 **(Laughter).**

18 COMMISSIONER THOMPSON: You see, so you are  
19 getting off easy here. Thank you.

20 MR. CUNLIFFE: My name is Eric Cunliffe. I am  
21 the Senior Vice President of LendingTree and the general  
22 manager of LendingTree's Real Estate Services Program.  
23 And I thank the FTC for having this, what I think is a  
24 very, very, very needed workshop. I would like to just  
25 say I will be quite as impassioned about the National

1 Association as Russell, but Russell and I are both in  
2 totally different businesses. We are fierce competitors  
3 in some areas, but where it benefits the consumer we are  
4 also advocates and we also work together and join with  
5 our efforts.

6 I will give you an idea of my background, and  
7 unfortunately I do not think I was as lucky as Russell to  
8 enjoy 32 years in the mortgage business. It has been a  
9 true vocation at times. It has not been very enjoyable.  
10 And that is because I have been involved in mortgage  
11 licensing nationally with four companies. Two are not  
12 Internet-related but are now driving to the Internet. I  
13 spent 16 years with PHH Corporation, which is now  
14 Cendant, the 14th largest mortgage company in the United  
15 States, and licensing that nationally; two years with  
16 Norwest Corporation, now Wells Fargo, where we acquired  
17 Prudential and took that national; four years with  
18 Homespace, my own company, where unfortunately this time  
19 I paid for the cost of licensing and the attorneys' cost  
20 out of my own pocket, which was a definite shock to my  
21 system; and the last two years with LendingTree where we  
22 have had to go through the same thing all over again.

23 The last two have of course been purely  
24 Internet-related companies in realty-related service over  
25 the Internet. I have also served on many Mortgage

1 Bankers Association of America committees and spent six  
2 years on the New Jersey Board of Governors of the  
3 Mortgage Bankers of New Jersey.

4 LendingTree has basically two consumer  
5 offerings. One is mortgage and consumer financing  
6 exchange, and we are concerned about the mortgage piece  
7 at this time. The goal is truly to empower the consumer  
8 and to lower the cost of the transaction. We have over  
9 180 lenders on our exchange, and, when you apply for a  
10 transaction on our exchange, you will receive up to four  
11 bids from those lenders, competing bids, which drives the  
12 cost down.

13 On the real estate side, we also have a real  
14 estate exchange, and the goal's the same, to empower the  
15 consumers. We offer the consumer a choice of up to four  
16 realtors -- four real estate companies -- from our  
17 network of over 700 realtors, realtor companies, and  
18 7,000 certified agents. We act as an advocate in the  
19 process and help the customer feel very comfortable with  
20 this transaction of finding a realtor that they can trust  
21 and a source that they can go to and know that they can  
22 trust, now that they've received a reputable, local real  
23 estate broker and that somebody's out to look after them  
24 in the transaction.

25 We acquire customers using LendingTree's

1 marketing, and our slogan is fairly popular. It is,  
2 "When Banks Compete, You Win." We pull all of those  
3 consumers into -- not very popular with a lot of banks, I  
4 agree -- but we pull our customers in and then offer them  
5 this service, and those that choose to participate and  
6 opt into it receive a real estate commission -- receive a  
7 real estate rebate from us.

8 We achieve a real estate commission from the  
9 cooperating brokers for delivering the consumer to them;  
10 in turn we give back 55 to 75 percent of that rebate to  
11 the consumer, reducing the cost of the transaction  
12 significantly, averaging over \$1,000 per transaction back  
13 to our consumer. We are concerned that nationwide  
14 licensing is complex and it is inconsistent.

15 In-state office requirements and staffing  
16 mandates are a burden, an unnecessary burden, and as  
17 Russell says and we agree, and are popping up not as  
18 legacy legislation but as new legislation, which was  
19 extremely disturbing. The real estate brokerage  
20 regulations and interpretations by commissions on rebates  
21 in not allowing a consumer -- a principal in the  
22 transaction -- to receive cash back is just absolutely  
23 astounding to us.

24 Added to that, we have various state appraisal  
25 boards now who are now attempting -- starting to attempt

1 -- to impede the immediate valuation services which will  
2 deliver a valuation, a legal valuation, for purposes of  
3 valuing your home for financing at a cost of  
4 approximately a cost of \$35 versus \$350 if you were to go  
5 pay a full-price appraiser. And, absolutely, state  
6 appraisal boards do not like that. It is really  
7 basically going to harm their industry.

8 So, in conclusion, I am not going to offer any  
9 solutions at this point in time, but would be happy to  
10 answer some questions. We are all about, as Russell is,  
11 reducing the cost of the real estate transaction, at  
12 LendingTree specifically for home buyers, which is our  
13 primary consumer, and specifically for first-time home  
14 buyers, which is about 40 percent of our business.

15 Thank you.

16 COMMISSIONER THOMPSON: Thank you. Darren?

17 MR. ROSS: Good morning, and welcome. I am  
18 Darren Ross, Director of Electronic Commerce for Stewart  
19 Information Services Corporation, to you it is probably  
20 Stewart Title that you would recognize, also out of  
21 Houston, Texas. Russell and I are neighbors, just around  
22 the corner from each other, and also business partners  
23 and I can reflect many of the same issues that Russell  
24 mentioned.

25 We feel that a discounted real estate agent and



1 commission for the consumer is a benefit to the consumer;  
2 however, as title agents, our title agents out there  
3 offering our products are concerned that they are  
4 jeopardizing traditional realtor business by working with  
5 what is considered to be a discount broker, because  
6 typically 60 to 70 percent of title agent business comes  
7 from a real estate agent or broker in a non-refinance  
8 equity market. However, we feel it is a benefit to the  
9 consumer, and all of our initiatives around e-commerce  
10 are intended to enhance the real estate closing process  
11 for the consumer.

12 We feel it is a travesty that what we have done  
13 in the past is to bring a consumer in for closing and sit  
14 them down at the closing table and stick that big, thick  
15 folder in front of them and say read this, understand it  
16 and sign it right here, right now. We have got to be  
17 able to provide information prior to closing and try to  
18 alleviate many of those issues.

19 I will be brief, and if it looks like I am  
20 reading from a screen, I am. My printer in my hotel room  
21 was not working, so I apologize. The past year, the  
22 title industry has faced many attacks from industry  
23 media. The type of articles, remarks from Senator Phil  
24 Graham, Radian's Mortgage Impairment Product, to the most  
25 recent regulatory threat, HUD's proposed changes to

1           RESPA.

2                       As you are well aware, Mel Martinez of HUD,  
3           apparently displeased with his recent purchase in DC, is  
4           publicizing his latest efforts as the Homebuyer Bill of  
5           Rights. While the intentions and overall objectives  
6           initially are good or sound good for the consumer, it is  
7           contrarily likely to be detrimental to the title  
8           industry, the realtors, the real estate attorneys, small  
9           size lenders and, in purchase sale transactions, even to  
10          the consumers themselves, because they are offering  
11          substantially less information to the homebuyer; the  
12          lender is not required to disclose what services are  
13          being ordered or are not being ordered and/or what the  
14          cost for those services are. Additionally, they are  
15          removing the freedom of choice of service providers from  
16          the consumer.

17                      Additionally, since the guaranteed mortgage  
18          packaging agreement of HUD's proposal includes a loan at  
19          a guaranteed interest rate, it effectively precludes  
20          anyone else from being able to offer that package.  
21          Additionally, in 1999, we were provided with a revised  
22          UCC Article 9, which recognized electronic documents,  
23          electronic signatures. It provided also for legally  
24          enforceable electronic chattel paper, transferable  
25          records, and negotiable instruments. We then saw UETA

1       come along, become adopted in various states. We then  
2       had President Clinton's E-sign. All excellent attempts,  
3       but little has been done. They really haven't done that  
4       much for us.

5               There are still many state-specific regulatory  
6       statutes which effectively preempt whatever authorization  
7       is then provided through UETA and E-sign. E-sign does  
8       not apply to a contract to the extent that a Federal or  
9       state regulatory agency's right to require those records  
10      be kept in paper if there exists a compelling  
11      governmental interest in doing so.

12             In California, we have seen efforts around  
13      getting state data standards for electronic recording.  
14      They had those data standards developed when they were  
15      ready to move into a state-wide model for electronic  
16      recordation of public land records. That was stifled  
17      because the California Attorney General's Office pulled  
18      up existing state legislation that specifically stated  
19      that only Orange and San Bernadino counties were  
20      authorized to accept electronic documents with electronic  
21      signatures.

22             This is illustrative of many of the same types  
23      of issues associated with the acceptance and adoption of  
24      electronic mortgage transactions, electronic closings,  
25      and electronic filing throughout the United States. If

1 we cannot effectively establish constructive notice to  
2 third parties through the electronic recordation of  
3 public documents into the public records, then we have  
4 wasted a lot of time and a lot of money in conducting  
5 these electronic closings.

6 Additionally, we need the secondary market, the  
7 GSEs and investors, to step up to the plate and move more  
8 quickly on developing and providing the industry the  
9 investor delivery requirements, their guidelines and  
10 their acceptance of electronically produced mortgages, so  
11 that adoption will occur.

12 Thank you very much.

13 COMMISSIONER THOMPSON: Thank you very much.  
14 Larry, the Professor, enlighten us.

15 PROF. AUSUBEL: My name is Larry Ausubel. I am  
16 speaking in two capacities. First, I am Professor of  
17 Economics at University of Maryland, the same one I was  
18 at an hour and a half ago when I introduced myself. In  
19 addition to research on auctions, I have done research in  
20 some areas of the financial sector, including insider  
21 trading and the credit card market.

22 Second, I am Vice President and Treasurer of  
23 Market Design, Inc., and in that capacity I have designed  
24 auctions, advised sellers, advised buyers, in various  
25 sectors of the economy, telecom, energy, environment, but

1 actually not in financial services yet.

2 My comments today will focus on one of my pet  
3 peeves, the market for initial public offerings. Since  
4 IPO shares are typically held in accounts and never  
5 delivered, IPOs seem like subject matter ideally suited  
6 for an Internet dynamic auction system. Moreover, the  
7 current procedure for issuing equity securities appears  
8 to be fundamentally correct, and is now leading to a  
9 proliferation of enforcement actions by Federal  
10 regulators and state attorney generals.

11 The share price in IPOs often bears little  
12 connection to the equating of supply and demand, so that  
13 IPOs as done today are sometimes massively oversubscribed  
14 and the share price increases by as much as a factor of  
15 five from the offering price to the close of the first  
16 day of trading. Shares in these oversubscribed offers  
17 are rationed, not according to the willingness to pay,  
18 but to favored clients of the underwriting investment  
19 banks. Often there is at least the appearance that  
20 clients receive their allotments in exchange for  
21 returning value to the investment banks and other  
22 transactions.

23 For example, Worldcom Chief Executive Bernard  
24 Ebbers made more than \$11 million in four years on shares  
25 of 21 hot offerings that he received from Salomon Smith

1 Barney. During the same time, his employer, Worldcom,  
2 paid Salomon \$107 million in investment banking fees.  
3 Qwest executives made \$6 million in hot stocks while  
4 their employer paid \$37 million in fees. The New York  
5 State Attorney General recently filed suit against five  
6 telecom executives under essentially this theory.

7 So, my perspective is that a more radical  
8 overhaul of current IPO practice is necessary: a change  
9 to a modern dynamic auction system implemented on the  
10 Internet that provides an open, transparent mechanism for  
11 price discovery. That is the clearest way that the  
12 persistent scarcity and under-pricing of IPO shares and  
13 the accompanying incentives for abuse can be eliminated.

14 Now, the topic today is inhibitions to various  
15 forms of commerce, including financial e-commerce. Now,  
16 besides inertia, which is quite important here, there  
17 appear to be major inhibitions to IPO auctions in the  
18 U.S., some are regulatory restrictions and some are the  
19 considerable opportunities created by the current system  
20 for incumbents to protect their position.

21 So, first, the U.S. Securities and Exchange  
22 Commission, that is the SEC, not the FTC, heavily  
23 regulates the entire IPO process and so SEC approval  
24 would be necessary for any novel IPO procedure.  
25 Beginning in the late '90s, the SEC began to receive

1 inquiries concerning proposed online auction procedures.  
2 The SEC staff has responded by issuing letters indicating  
3 that the SEC would not take action against particular  
4 proposed procedures.

5 In the July 1999 no-action letter, the SEC  
6 allowed a firm to offer securities on the Internet  
7 subject to certain conditions. These included that  
8 investors provide traditional electronic offers to buy  
9 securities prior to effectiveness and that these offers  
10 to buy are reconfirmed and not binding. Anyone familiar  
11 with auctions knows that if bids are not binding, that  
12 can have a detrimental effect on the auction process, to  
13 say the least.

14 Second, incumbents are afforded considerable  
15 opportunities by the current IPO system to protect their  
16 position. Their discretion in the allocation of scarce  
17 underpriced shares provides a vehicle for rewarding  
18 managers who utilize the current system. So, more  
19 rigorous regulation of the excesses of the current IPO  
20 system may itself encourage firms going public to step  
21 outside the current system and to experiment with new  
22 procedures such as Internet IPO auctions.

23 COMMISSIONER THOMPSON: Thank you very much.

24 Laura?

25 MS. BINION: My name is Laura Binion, and I am

1 the Senior Vice President and General Counsel for  
2 CheckFree Corporation. I guess I may be the financial  
3 services part of the panel, if they are mortgage services  
4 over there. We are a leading provider of financial  
5 services over the Internet. Our largest division is our  
6 electronic commerce division, and it enables consumers to  
7 receive and pay their bills online. For the year ended  
8 June 30th, 2002, we had approximately 300 million  
9 electronic payments that we made on behalf of consumers,  
10 and we delivered about 4 million bills.

11 I am telling you that information to give you  
12 an idea of the size of the electronic billing and payment  
13 industry. For the most part, most consumers still pay  
14 their bills the old-fashioned way: they get the bill in  
15 the mail and they write a check. I think industry  
16 studies show that there were 17 billion paper bills  
17 produced last year, and of that 17 billion paper bills,  
18 74% were paid by check; 11 percent were paid  
19 electronically.

20 I am here today because it is our position that  
21 we are running into a lot of state and local laws that  
22 are increasing our cost, and this is a young industry,  
23 those costs do add up, and they become a barrier to  
24 entry. They also raise the price of electronic bills and  
25 they keep people from transitioning from paper bills to



1 electronic bills over the Internet.

2 We understand that there are a lot of  
3 legitimate consumer issues out there that are driving  
4 these laws. Our main problems with them are when you do  
5 business over the Internet the way we do, it is very  
6 difficult to keep up with the laws of the 50 states, and  
7 it can become prohibitively expensive to monitor those  
8 laws and to make sure that you are doing things exactly  
9 the way the states and sometimes the cities and the  
10 counties want you to do it.

11 We monitored, I think 560-something laws last  
12 year that were introduced in the various state  
13 legislatures and that could have changed the way we did  
14 business. Only one of them actually passed. It was  
15 Senate Bill 168 out in California. We tracked the cost  
16 of changing our system to comply with that law. It was a  
17 law that had to do with whether or not you could send out  
18 a consumer's social security number over the Internet.  
19 We had to reprogram our system, and because we cannot  
20 differentiate our California customers from any other  
21 customers, we had to reprogram it for all of the states.  
22 It was several hundred thousand dollars for that one law.

23 In a growing industry like ours, you can see  
24 that those kind of costs can add up. So, our concern  
25 really is the various patchwork nature of the laws and

1 the volume of them that we see, affecting growth in the  
2 industry.

3 COMMISSIONER THOMPSON: Thank you very much.  
4 Very interesting.

5 Jerry?

6 MR. BUCKLEY: I am Jerry Buckley, I am a  
7 partner in the law firm of Goodwin Procter, and I act as  
8 General Counsel of the Electronic Financial Services  
9 Counsel. On behalf of the EFSC, we appreciate the  
10 opportunity to participate in this workshop. The EFSC  
11 represents many leading companies offering financial  
12 services over the Internet, including LendingTree, and  
13 our testimony was jointly presented with Eric Cunliffe of  
14 LendingTree.

15 My remarks will focus on the burdens and  
16 inefficiencies which current state laws generally impose  
17 on companies offering financial services electronically  
18 and suggest two possible approaches to streamline the  
19 regulation of companies providing financial services  
20 electronically.

21 Mr. Cunliffe, of course, has already discussed  
22 the impact of state regulation on his company's efforts  
23 to offer mortgages and other financial services  
24 electronically. Other EFSC members have also experienced  
25 significant expense, delay and frustration in their

1 efforts to offer services to consumers by way of the  
2 Internet as a result of a variety of legacy laws and  
3 regulations designed to facilitate face-to-face paper-  
4 based transactions but which now stand as barriers to  
5 competition in the fulfillment of opportunities available  
6 through electronic commerce. As has been mentioned  
7 before, we are not only dealing with legacy laws, we are  
8 dealing with laws which are being enacted today with the  
9 apparent purpose of frustrating the offering of services  
10 electronically.

11 The Internet is a borderless medium. It is a  
12 paperless medium uniquely suited to facilitate commerce  
13 among the states and with other nations, and, of course,  
14 financial services, because they are denominated in  
15 numbers and words, are ideal services to be provided  
16 electronically. You do not have to send the physical  
17 goods so the entire transaction can ultimately be  
18 completed electronically.

19 While the EFSC supports an appropriate role for  
20 the states in the regulation of electronic commerce, we  
21 suggest that the Federal Government has a unique  
22 responsibility and indeed the Congress has a  
23 Constitutional obligation to reduce or eliminate those  
24 elements of state or local regulation that unduly burden  
25 interstate commerce. Congress should provide a sound

1 legal framework necessary to facilitate the free flow in  
2 interstate commerce through the Internet and through  
3 other channels of electronic commerce.

4 While the difficulties associated with 50 or  
5 more different licensing laws predate the existence of  
6 the Internet or the conduct of business by electronic  
7 means, the ease of access to the nationwide market made  
8 possible by the new technologies heightens the need for  
9 uniformity. The Gramm-Leach-Bliley Act of 1999 was an  
10 important step toward the elimination of unduly  
11 burdensome and unnecessary regulatory barriers for the  
12 banking sector of the financial services industry.

13 We believe similar progress needs to be  
14 achieved in mortgages and real estate and in other areas  
15 of financial services, as well. Regulations governing  
16 the brokering, making, and servicing of residential  
17 mortgage loans, home equity loans, and consumer loans  
18 vary significantly from state to state. Each state has  
19 at least one and in some states two or more licensing  
20 laws applicable to mortgage and consumer lending  
21 businesses.

22 There is no consistency of definition of the  
23 activities subject to the licensing or the categories of  
24 companies eligible for exemption from licensing. A  
25 company doing business on the Internet seeking to become

1 licensed to offer first and second mortgage loans in all  
2 50 states and in the District of Columbia may have to  
3 complete 50 to 75 separate license applications; obtain  
4 multiple surety bonds; provide similar corporate;  
5 personal and financial information on its officers,  
6 directors and investors, on separate forms for each  
7 state; and undergo expensive and repetitive background  
8 checks and investigations.

9 Although each state reviews roughly the same  
10 information when considering license applications, there  
11 is no uniformity with respect to how the information is  
12 gathered, processed, or analyzed. Nor is there any  
13 effective system by which states can access information  
14 obtained by other states to reduce the redundancies of  
15 the current system.

16 As a result of these inefficiencies in the  
17 multistate licensing process, a company seeking national  
18 lending authority may require up to a year or more to  
19 obtain its licenses, and the cost is in the range of a  
20 half a million dollars.

21 With one minute left, I will just give you the  
22 two concepts that we are advancing to try to address this  
23 problem. One is that we believe that the NARAB proposal  
24 that was in Gramm-Leach-Bliley, which called for a  
25 national licensing effort if the states could not get

1 their act together, made sense. We should encourage the  
2 states through national legislation, if necessary, to  
3 adopt a system which allows you to qualify in one state,  
4 have standards that are met across the states and be  
5 admitted in the other states on that basis.

6 Second, and if that does not work, we think  
7 that there ought to be a parallel effort to consider a  
8 Federal charter for people offering mortgage loans  
9 electronically, along the lines of the current charter  
10 offered by OTS to thrift institutions. What we have in  
11 mind is essentially a non-deposit charter, which would  
12 allow you to take advantage of the secondary market  
13 instead of trying to access deposits for your loans, but  
14 be able to have the benefit of the preemption that is  
15 available under the current OTS charter, operate across  
16 the 50 states, you would still have the benefit of  
17 excellent regulation at the Federal level, and you'd have  
18 the opportunity to operate without all the burdens that  
19 are imposed through the current system.

20 And we think this is applicable not only to  
21 lending, but might be extended to other functions that  
22 are essential to the real estate purchase process and to  
23 other financial services, as well. Thank you.

24 COMMISSIONER THOMPSON: Thank you. I would  
25 like to note that Professor Yezer may come in a little

1 late, so he may join us later. Now, we are going to take  
2 questions from the audience, but I get first dibs to ask  
3 a few questions of my own. But if you have questions,  
4 you can raise your hand and there will be note cards and  
5 someone will be collecting note cards. And the same  
6 thing down in 432 in the overflow room, correct?

7 MS. OHLHAUSEN: I think so.

8 COMMISSIONER THOMPSON: To the extent there is  
9 someone down there.

10 MS. OHLHAUSEN: If there is someone there, yes.

11 COMMISSIONER THOMPSON: If so they can bang on  
12 the ceiling and let us know.

13 MS. OHLHAUSEN: Right.

14 COMMISSIONER THOMPSON: I thought all of these  
15 presentations were very interesting. They are  
16 interesting in a couple of different senses. First,  
17 there is an observation that I make: traditionally, e-  
18 businesses have spent a lot of time and energy and money  
19 in this town fighting all forms of Federal regulation.  
20 Have things really changed?

21 MR. BUCKLEY: You'll find that e-businesses  
22 have been here in force, asking for the enactment of E-  
23 sign legislation, which ultimately passed. That was a  
24 form of Federal preemption of all state laws to  
25 facilitate the electronic delivery of financial services.

1           What we are talking about is industries which are  
2           regulated, and it is a question of relative burden. And  
3           the fact that we have a national market --

4                       COMMISSIONER THOMPSON: Now, most of my banking  
5           friends call that lesser evil.

6                       MR. BUCKLEY: That is right, well, they have  
7           lived with national bank charters and, in fact, the  
8           benefit of the proposal, the latter proposal that I made,  
9           is that it does not require Federal regulation, it offers  
10          it as an alternative. It allows the company that wants  
11          to offer financial services electronically to opt for a  
12          Federal charter and get the benefit of one regulator, a  
13          good regulator, and offer their products across the 50  
14          states, subject to state consumer protection laws, but  
15          not subject to examination, licensing and all the burdens  
16          that have been discussed at this table. It is not  
17          required if you choose to operate at the state level, you  
18          can still do that.

19                      So, we are not calling down Federal regulation.  
20          We are offering the opportunities that Federal regulation  
21          provides currently to national banks, thrift institutions  
22          and others.

23                      MR. CUNLIFFE: Can I maybe add a comment to  
24          that, Commissioner? From our perspective, we have  
25          already gone through all this. We are already living



1 with it; we spent the money. We are in an enviable  
2 position of having done it. Our concern is for the  
3 consumer side. And having lived through this, I cannot  
4 describe the various state regulations, commission  
5 rulings and laws as anything other than a total mess.  
6 And it is totally puzzling to the consumer. In three  
7 states we cannot, period, give a consumer any kind of  
8 rebate on the transaction at all, in West Virginia,  
9 Oklahoma and Alaska. That is not particularly onerous  
10 for us, because they are not large states for  
11 LendingTree, they are not large states that participate  
12 in the Internet form of financing, but it totally  
13 precludes them.

14 One state is a no-man's land, the popular state  
15 of New Jersey. And New Jersey has not made a decision,  
16 and the laws are conflicting and has not ruled in over a  
17 year to help the real estate brokers. The benefit of  
18 that to us is that typically in our transaction, the  
19 commission I receive is an average of \$2,150. I give  
20 between a \$1,000 and \$1,700 of that back to the consumer.  
21 In the state of New Jersey, I get to keep it all. I do  
22 not want it, but nobody's addressing this.

23 As Jerry said this morning, the laws are the  
24 equivalent of taking the Federal interstate highways and  
25 allowing the state of South Carolina to put up traffic

1 lights. It just does not work for the consumers and it  
2 does not work for us. And if the only way to get the  
3 consumer a consistent benefit is Federal legislation,  
4 then we are all for it.

5 COMMISSIONER THOMPSON: Now, in that case,  
6 would you agree with Jerry that it should be an optional  
7 choice on the part of businesses, or do you think  
8 something more is necessary?

9 MR. CUNLIFFE: Absolutely. I think if the lead  
10 comes from the Federal Government and the states have a  
11 period of time to step and cure their ways, then allowing  
12 them to retain control is adequate. But I think it has  
13 to be consistent across all 50 states and the District of  
14 Columbia, and it has to be clear to consumers that what  
15 is now puzzling them is somebody in one state can have  
16 one benefit, somebody in another state cannot.

17 So, yes, I am all in favor of something very  
18 similar to the appraisal legislation that was proposed to  
19 force appraisers to be licensed in the states. They very  
20 quickly came on board and licensed their own appraisers  
21 and took care of their own business, but they need to do  
22 it consistently and with reciprocity.

23 COMMISSIONER THOMPSON: I was wondering, Laura,  
24 how then do you go through a sifting process? There are  
25 some of these areas that you pointed out that have

1 legitimate state interest.

2 MS. BINION: There are legitimate consumer  
3 interests to be protected, whether it is the state that  
4 does it or the Federal Government that does it. I am  
5 sure there are volumes and volumes of state and Federal  
6 law that I do not know that govern that, but from an  
7 Internet provider's perspective, we can only do things  
8 one way. And by definition, any transaction we do  
9 probably crosses two or three state lines. So, would we  
10 prefer that no one regulate us, probably so, but what we  
11 have to have though --

12 COMMISSIONER THOMPSON: I think people in this  
13 building might have a different view.

14 **(Laughter).**

15 MS. BINION: But we have to have it be  
16 consistent or we cannot do business, and I think it is  
17 just a function -- it is almost like his example of the  
18 state highways, the Internet highways or whatever they  
19 are, you have to be able to go at the same speed.

20 PROF. AUSUBEL: One thing that I could add to  
21 that in terms of the subject matter in this panel, which  
22 is a little bit disparate, they vary a lot to the extent  
23 that there is something they think of as a state interest  
24 or not. Like if you take what I was just talking about  
25 on IPOs, that is clearly just a national market and one

1 would be very leary of the states being involved. For  
2 that matter, bill payment seems to be something which in  
3 major ways is just a national sort of thing.

4 On the other hand, you would think there is a  
5 greater role when you are talking specifically about real  
6 estate transactions because the states do have the  
7 traditional preeminence on real estate issues.

8 COMMISSIONER THOMPSON: Now, from your  
9 perspective, the people here represent the e-marketplace  
10 and they have an e-presence. But are a lot of the  
11 problems different for companies who are traditionally  
12 brick-and-mortar-based companies that are moving online,  
13 as well? Or do they see some of the same problems you  
14 do? I mean, because you talk about a range of what  
15 states do. Are they better equipped to live with that  
16 than perhaps you are?

17 MR. CAPPER: I've got a comment on that. Our  
18 situation, I think, is somewhat unique in that we do have  
19 a brick-and-mortar operation and that there are brick-  
20 and-mortar realtors that are migrating to models like  
21 ours. E-commerce, quite frankly, allows for a much  
22 better, faster, cheaper transaction in this all-important  
23 category. It's just much more efficient. The consumer  
24 feels much, much better about it.

25 In our case, because of the national regulatory

1 make-up of the National Association of Realtors, it  
2 genuinely feels like the large more successful brokerages  
3 have recognized that we have an advantage and that we've  
4 invested and we've developed it, and they want to stop  
5 us. And they're stopping us through the National  
6 Association of Realtors.

7 I cannot think of any other way to describe it,  
8 other than it's very anticompetitive. We discount fees,  
9 we rebate fees everywhere we can. Our consumers love us.  
10 It's just a better way to do the business. We weren't  
11 really on the radar, because we were real small, until  
12 suddenly one of the more major e-commerce players in the  
13 world, Yahoo, wanted to give their users a better real  
14 estate experience and looked nationwide for a realtor  
15 that was modern and that could handle e-commerce.

16 Ourselves and some people like us out in  
17 California called Zip Realty, are so far the only two  
18 that they found that could do this. It was suddenly when  
19 we were on that radar screen that the big guys said we  
20 need to change the rules. We need to say you can't do  
21 what those guys are doing.

22 COMMISSIONER THOMPSON: Well, you've alluded to  
23 the National Association of Realtors which has a rule  
24 that will affect you, something that's new. What is it  
25 specifically and how do you think it will specifically

1 impact the work that you're doing?

2 MR. CAPPER: The National Association was  
3 progressive in the very beginning when they set up this  
4 neat MLS exchange, and it has worked. It is a  
5 cooperative exchange that works very well.

6 When you bring together a bunch of competing  
7 and cooperating brokers, you have to have a set of clear  
8 rules and regulations or it just won't work. They have  
9 had really clear rules and regulations that work very  
10 well. When you go through them, you go through page  
11 after page after page of things you can't do with this  
12 valuable data. And they're legitimate things. You can't  
13 show it to the public, you can't sell it, all that kind  
14 of stuff. And then you get towards the end and it says  
15 however, none of these "do-not" rules preclude you from  
16 sharing a reasonable number of these listings with your  
17 own bona fide buyers and sellers. That's why we can all  
18 call up any Coldwell Banker guy in town and they'll just  
19 flood us with listings over the fax, or even e-mail.

20 That's what we built our business on, those  
21 rules and regulations, which we think are very, very  
22 reasonable. We just chose a new path to deliver  
23 listings, just to our bona fide buyers and sellers, not  
24 to the public. They're now taking it away. They're  
25 giving all the other brokers the ability to strip out

1 their listings from ours. They've rendered e-commerce  
2 impotent. It is what they will have done, if this  
3 happens.

4 COMMISSIONER THOMPSON: Well, I'll throw this  
5 open to everybody, but I was curious, though, aren't  
6 there some people who will say, who are in states, or for  
7 that matter I've heard it in the Federal Government, you  
8 guys just represent a certain kind of segment of people  
9 who are the buyers or the sellers, people who are engaged  
10 in transactions. We cannot make public policy based on  
11 that segment. We need to look at what everyone is and  
12 you're not in the center. How would you address that?

13 MR. CAPPER: I think that there is absolutely  
14 no question that the world will evolve to where we are in  
15 the center. The Internet is becoming the center of all  
16 commerce. The traditional guys are trying to get there.  
17 I would love to hear what the Professor has to say to  
18 that, too, though.

19 PROF. AUSUBEL: Let me give a completely  
20 different answer. I mean, first of all --

21 MR. CAPPER: Maybe I take that back. I don't  
22 want to hear what he has to say.

23 **(Laughter).**

24 PROF. AUSUBEL: You'll still like the message,  
25 I'm sure.

1                   COMMISSIONER THOMPSON: Ask the person who has  
2 absolutely nothing to lose by giving the answer.

3                   MR. CAPPER: That's correct.

4                   PROF. AUSUBEL: I mean, first of all, what do  
5 real estate and IPOs have in common? A prevalence of a 7  
6 percent commission, and furthermore, a prevalence of a  
7 very high and standardized commission well pre-dating the  
8 Internet. I mean, so, when you're talking about the  
9 barriers to entry in either of these markets, these are  
10 things that Federal regulators should have dealt with in  
11 an effective way 20 years ago.

12                   It's now reappearing in a new context because  
13 in particular in many of these types of things the  
14 Internet is now the most viable way to have new entry,  
15 and in some of these things, in particular, you'd expect  
16 transaction costs would be much lower when the technology  
17 is a lot more efficient. Many of these are old line  
18 regulatory issues and just because the e-commerce guys  
19 are raising it now does not mean these are things that  
20 the FTC and DOJ should have looked at a long time ago.

21                   COMMISSIONER THOMPSON: Well, I mean, Jerry  
22 alluded to this a little bit when he said there are some  
23 laws that are outdated, and there are some that may be  
24 hostile or protectionist, and there are some that might  
25 just be burdensome. And, so, the question is, does it



1 matter which is which? I mean, because the one thing --  
2 and I love economists -- but one of the things that they  
3 would say, many people who are involved in the policy  
4 arena, it's not always about price. So, that's why I  
5 said, how do you wind up sifting through the interest,  
6 when you look at those three categories of laws and  
7 regulations? How do you try to figure out what consumer  
8 benefit might be?

9 PROF. AUSUBEL: Yes. Well --

10 COMMISSIONER THOMPSON: When you talk about  
11 IPOs, there are some people who would legitimately say  
12 and that you may argue with -- that there is some  
13 legitimate shareholder, corporate interest in a company  
14 targeting where some of its shares go, in institutions,  
15 et cetera, and in order to provide shareholders with  
16 maximum value.

17 PROF. AUSUBEL: But the thing that I would  
18 emphasize is, take IPOs. It should be a red flag to  
19 regulators, and I forget the dollar range --

20 COMMISSIONER THOMPSON: Which is great because  
21 I work in the Federal Government, I can't afford any  
22 anymore.

23 PROF. AUSUBEL: There was a recent study which  
24 looked at IPOs in a certain range, it might have been 20  
25 million to 80 million range, it might have been somewhat

1 different, but it found that roughly 90 percent of them  
2 had exactly a 7 percent commission. I'm sure that the  
3 real estate people can cite very similar sorts of things  
4 in the real estate industry. That should immediately be  
5 raising a red flag that they are anticompetitive issues  
6 and it is not merely what you are saying that there are  
7 rules on the books because there are legitimate  
8 regulatory concerns to help consumers.

9 MR. CUNLIFFE: In fact, the Professor is  
10 correct, in three states we're not allowed to give  
11 rebates to buyers, but the state certainly says that the  
12 realtors can reduce their commission for the equivalent  
13 benefit. Well, of course they can, they can't do  
14 anything else but allow a realtor to charge whatever they  
15 want on the commission, otherwise that would be  
16 anticompetitive and price fixing.

17 MR. BUCKLEY: To try to answer your questions,  
18 I'm happy to say that the Electronic Financial Services  
19 Council members, some of whom, many of whom, are  
20 traditional players, Wells Fargo and --

21 COMMISSIONER THOMPSON: I know them, right, we  
22 all know them.

23 MR. BUCKLEY: They are supportive of the  
24 position taken here. Now, it's interesting, because in  
25 some ways you could point -- you could say, and I think

1 Eric's company, now fully licensed and operating, could  
2 say well, you know, we have a competitive advantage,  
3 there's a barrier to entry for others. But they  
4 recognize that this is not a good way to run the system.  
5 And they think that it is worthwhile to consider.

6 Now, you're asking what is the gravamen, what's  
7 the test? You can look at the various states and say in  
8 those states where there is not a brick-and-mortar branch  
9 requirement, is anyone being injured there? Is anyone  
10 being hurt there? You really can look at these  
11 requirements and say which of these are surplusage?  
12 Which of these are not necessary? And then ask which  
13 ones are.

14 You can even look, as I have suggested, to the  
15 Federal charter, and say how do Federally chartered  
16 institutions doing business in those states today operate  
17 and what are they subjected to? If you use that  
18 standard, you can really make a judgment: there are  
19 legitimate interests to be protected. There are consumer  
20 protection laws at the state level that are needed, but  
21 accretions that are not needed and are duplicative can be  
22 eliminated without any damage to the consumer interests  
23 we're all trying to advance.

24 COMMISSIONER THOMPSON: Now, I think that's a  
25 very interesting idea. You know that it's a general

1 trend in the Federal Government, I think, that we take a  
2 very circumspect role in actually advocating things,  
3 ideas, that preempt state involvement. I don't think  
4 that's an unfair statement. Now, in that case, what is  
5 it that we say to states and also what do you foresee in  
6 an ideal world would happen? How long do you think it  
7 would take for us to have a degree of Federal involvement  
8 in the areas that you've just outlined? You can start,  
9 but I am each of you have a view.

10 MR. CAPPER: I am going to speak up every  
11 chance I get.

12 COMMISSIONER THOMPSON: I am sure each of you  
13 has a view.

14 **(Laughter).**

15 MR. CAPPER: I will tell you why, because I  
16 have a specific issue that's happening in November, that  
17 if it's not addressed, it will damage e-commerce  
18 significantly.

19 COMMISSIONER THOMPSON: I think there are a lot  
20 of issues up at that end of Pennsylvania Avenue that will  
21 happen around November.

22 **(Laughter).**

23 MR. CAPPER: Okay, I think you are probably  
24 right. I understand.

25 **(Laughter).**

1                   MR. CAPPER: The people on the anticompetitive  
2 side of this issue know I am here, they chose not to be  
3 here. I will tell you, if the FTC does not do something  
4 proactive on this, they will interpret it as meaning that  
5 it's okay to proceed. In my case, it's not all  
6 necessarily about price. It's about service. It's about  
7 allowing Century 21, Cendant Corporation, Caldwell  
8 Banker, to stay back in the 1970s and 1980s, and when  
9 you're ready to go buy a house, some guy my age will come  
10 and drive you around in a Cadillac all day long until you  
11 find something you want to buy, as opposed to our way of  
12 being able to do it. If they don't enact what they're  
13 trying to enact, we will show you every property, in  
14 detailed information, in the targeted area that you want  
15 to live in. We won't be calling you, we won't be  
16 bothering you, we won't take you in until you're ready to  
17 go.

18                   It is a better way. I am not the only guy  
19 doing it. But they are trying to keep us from doing what  
20 we do, both because we do it better and we do it cheaper.  
21 It's not a Federal or state issue primarily on the data  
22 thing as it is an association issue. And it's a real  
23 serious matter in our industry.

24                   COMMISSIONER THOMPSON: Well, Darren, you've  
25 been very quiet.

1 MR. ROSS: Just being a sponge.

2 COMMISSIONER THOMPSON: Hmm, that's a dangerous  
3 thing. What is your view?

4 MR. ROSS: Well, the issues we have been  
5 speaking to really have been around the real estate  
6 agent/consumer process and sort of around the commission.  
7 You know, speaking from the title industry's perspective,  
8 we don't have many issues, per se, with state or Federal  
9 regulatory restrictions around e-commerce. E-commerce  
10 has been around since the '70s with EDI. It works very  
11 well. We are entitled to do it. It is legal to do it.  
12 We can do B2B e-commerce just fine today.

13 The issues that we are facing today really  
14 revolve more around the electronic mortgage transaction,  
15 electronic closings, how we can improve the closing  
16 process for the consumer by facilitating an electronic  
17 closing package, allowing for electronic signatures to be  
18 used, really obtaining the benefits of a paperless  
19 transaction. It benefits everyone involved, lender,  
20 title company, consumer, investor, secondary, throughout  
21 the line.

22 Again, the issue on electronic recording, if we  
23 can't electronically record documents in electronic form,  
24 which have been executed electronically, UETA and E-sign  
25 does us nothing. We cannot close; we cannot establish

1 public land records; we cannot establish constructive  
2 notice to third parties. And, therefore, regardless of  
3 the technology that's available, it's obsolete.

4 MR. BUCKLEY: Commissioner, on that subject and  
5 on the subject of recording and on the general subject of  
6 preemption, I don't think that preemption is the first  
7 choice, but I think that things are stuck in the mud  
8 enough that we have to have some discussion of preemption  
9 at the Federal level so that we get things moving. I  
10 think that is possible to work with AARMR, the mortgage  
11 regulators, to work with the recorders associations, to  
12 work with others. I think they can be moved, but there  
13 has to be a counter balance to the local pressures to  
14 keep Internet commerce out. Unless you have that counter  
15 balance, the political pressures at the local level are  
16 so strong and the special interests are so strong that  
17 they are likely to prevail.

18 MR. ROSS: That's absolutely right, Jerry, and  
19 I am the co-chair of the standards committee on the  
20 Property Records Industry Association, once the Property  
21 Records Industry Joint Task Force, involving various  
22 entities such as Fannie Mae and Freddie Mac and the  
23 county recorders around the country, and we have  
24 developed a framework of industry data standards that is  
25 ready to be approved.

1           We have worked very closely with MISMO, the  
2 Mortgage Industry Standards Maintenance Organization, in  
3 constructing this data framework, which would facilitate  
4 a national model for electronic recording. If we could  
5 electronically record documents, we eliminate gap risk;  
6 we eliminate date-down types of searches from the time we  
7 get documents recorded back from the courthouse. We  
8 could secure ties in a day, and we could issue final  
9 policies immediately. The benefits are there, but we get  
10 into situations where restrictive legislation is either  
11 in place or it is not in place. We actually did two of  
12 these in Monroe County, New York, and we had the same  
13 issues that they could not effectively record those  
14 transactions legally, so we had to duplicate the process  
15 on paper.

16           Until we get some form of local enablement,  
17 either through various state technology offices or state  
18 library and archives commissions or something, as Jerry  
19 says, at a Federal level, adoption will be slow if  
20 nonexistent.

21           COMMISSIONER THOMPSON: Well, I think one of  
22 the things you've all outlined a little bit is there's  
23 always this interesting debate when you talk to e-  
24 commerce about e-commerce, who gets it and who doesn't,  
25 all right? I mean, one of the things that strikes me as



1       curious is that from the bottom up, do consumers get it?  
2       Do they understand it? Do they understand what they may  
3       not be getting? Is that the way to really initiate  
4       discussion here? Because, to a certain extent, you're  
5       talking about some pretty heady issues here that we can  
6       sit and talk about at this table. But, it is the bottom  
7       line and what happens at ground level that everybody  
8       seems to be concerned about, but we are not hearing very  
9       much about.

10               MR. BUCKLEY: I think your point is very well  
11       taken. In fact, I have often thought that at some point  
12       the power of the Internet to reach consumers through  
13       their business contact would allow you to message the  
14       consumers: you are missing out on something and you  
15       should contact your state representative and so forth.  
16       Maybe you could, through electronic media, ultimately  
17       create the grass roots that mobilizes the public. That's  
18       a major effort, but it's a possibility.

19               The problem is that in the meantime, the  
20       special interests are organized against and the public is  
21       not fully aware of what they are missing out on. Eric  
22       can give you an example from South Carolina where he has  
23       had communication with consumers.

24               MR. CUNLIFFE: We have considered putting up on  
25       our web site and through our e-mail sources information

1 to a consumer that says the reason we don't do business  
2 in South Carolina, which is less than five miles away  
3 from our corporate headquarters, is because of blank and  
4 turn the state regulators instantly on their heels and  
5 extremely annoyed with us. We can do that in multiple  
6 states. I can't do that because I don't know what the  
7 repercussions are going to be to my business.

8 But I would sort of like to introduce an  
9 example into the record, Commissioner, which is a  
10 consumer in South Carolina, which is for all intents and  
11 purposes, as an outsider, the same location, complained  
12 because he could not get a transaction done. He  
13 indicated that somebody from the South Carolina Senate  
14 Banking Committee contacted LendingTree to discuss that  
15 matter and said there's absolutely no reason that you  
16 can't get a loan from LendingTree, they should be giving  
17 you a loan.

18 Initially in South Carolina we had two issues.  
19 One was that to do business in South Carolina, we had to  
20 physically create all the disclosure documents, mail them  
21 to the consumer, get the consumer to sign the hard copies  
22 and return them to us and upon returning and verifying  
23 the signature we could then call the consumer and do  
24 business.

25 Now, the Federal E-sign legislation wiped that

1 out, a great example of how it took out a barrier to  
2 consumerism. But it left in place the one thing we  
3 couldn't address for this consumer, which was we're  
4 required to have a fully staffed 30-hours-a-week person  
5 located in South Carolina, with office facilities. We  
6 have to notify the state if we change our office hours,  
7 and that person would do nothing. The records must be  
8 maintained there, and that would do absolutely nothing  
9 for us; it's expensive for us. South Carolina isn't a  
10 large business opportunity for us, but the consumers in  
11 South Carolina are very puzzled. They want to know why  
12 they can't do business with LendingTree.

13 We transact, depending on the refinances, we  
14 get between 20,000 and sometimes as many as 50,000  
15 consumers a day requesting our services, every single  
16 day, saying we believe that the Internet is the way to  
17 go. Unfortunately, what a lot of them do is they get the  
18 pricing and the bids from our lenders, then they go to  
19 the local mortgage broker and say beat this.

20 We have provided a benefit and reaped  
21 absolutely no revenue from it, but it is still something  
22 that the consumers are smart enough to figure out, and  
23 they have figured out. On the real estate side, the  
24 National Association of Realtors itself says  
25 approximately 75 percent of consumers go online and look

1 at properties before they make a decision to buy. That  
2 is a huge number of consumers. It is the transactability  
3 that is missing, not the consumers' awareness that there  
4 is some kind of value there.

5 And I brought the letter from -- if you could  
6 pass it on to the Commissioner. Thank you.

7 COMMISSIONER THOMPSON: Well, I see that all of  
8 you have sort of ducked my question about timing, that,  
9 you see, in the end, you have to get a ball rolling in  
10 order to have a discussion and then to sort out what the  
11 possible options are for a solution, okay? What do you  
12 think -- I mean, each of you are involved in businesses  
13 where timing is very important. What is the ideal? I  
14 mean, all of you would love it to happen yesterday, but  
15 what do you think realistically is going to happen? Have  
16 you reached critical mass in your business relationship  
17 with states in a variety of areas? Is there enough  
18 interest on the Federal side to actually take up a  
19 debate? Easy question.

20 MR. CUNLIFFE: My answer to that question would  
21 be somewhat along the lines of the Professor's, that we  
22 are doing business and doing very well right now. We  
23 believe it is the consumer that is hurting. If we do not  
24 start to do something now, regardless of how long it  
25 takes, it is going to be 20 years downstream and we still

1 will not have done anything.

2 MR. BUCKLEY: I think that it would be helpful  
3 to have the FTC issue its report. You have raised this  
4 issue, you have done the first thing that has to be done,  
5 and you have the ability, you have the bully pulpit, you  
6 can raise this issue and you can write a report on it.  
7 That will be a first step. That will give confidence to  
8 some people in Congress to say, you know, there is an  
9 issue here, if you conclude that there is, I am hoping  
10 you will. There is an issue here. This is something  
11 that should be addressed.

12 You have people from the Progressive Policy  
13 Institute, which obviously supports a Democratic side of  
14 the aisle. I think you will have some people on the  
15 Republican side of the aisle, as well, concerned about  
16 it. You might get some legislation introduced. That  
17 might start a debate at the local level, maybe at the  
18 state level. Maybe the regulators will say well, maybe  
19 we ought to consider what we can do here. Maybe we do  
20 not want to have Federal regulation. Maybe we can solve  
21 some of these problems. And you get the process going.  
22 How long is it going to take, you know the regulatory and  
23 legislative process is a long process, but it can move  
24 forward and we cannot despair.

25 COMMISSIONER THOMPSON: The reason I think this

1 is very interesting, when I asked is there a tipping  
2 point on the part of industry and is the "e" part of this  
3 industry different than others is that there are many  
4 people in Washington who find that the financial services  
5 industry has not necessarily been receptive to discussion  
6 about public policy problems in the past, and Gramm-  
7 Leach-Bliley is an example of that, that the financial  
8 services industry wanted to talk about parts of  
9 streamlining that they wanted to talk about; they didn't  
10 want to necessarily talk about any broader sense of that.

11 Now where you're talking about an area where  
12 the Federal Government can actually be helpful in  
13 discussing some of these issues, do you think that that  
14 discussion can take place in a free-wheeling sort of way?  
15 To talk about all the problems but also whether the real  
16 concerns that consumers have and the benefits that they  
17 can achieve, including issues dealing with  
18 competitiveness and consumer protection? Those are areas  
19 that we are particularly concerned about.

20 As a person who has been involved in financial  
21 services before this for a long time, I represented a lot  
22 of people that felt that we know better, but now the  
23 question is is there a greater recognition in the  
24 financial services industry that they may have to work  
25 together with Federal Government and with consumers to

1 find a better public policy answer? You know, it is not  
2 us, it is not that we have a better answer, it is just  
3 everybody collectively has got to reach a better  
4 conclusion, and that discussion's going to take a long  
5 time. Is this very distressing to you?

6 PROF. AUSUBEL: One thing that is bothering me  
7 is, I mean, if you look at the political economy of the  
8 whole situation, in each one of these situations, you  
9 have a collection of incumbent firms who basically feel  
10 threatened by changes, in particular, ones that would  
11 open up the process, and they typically have well  
12 organized trade associations, they are well plugged into  
13 representation and so forth. Then you have a lot of  
14 isolated consumers who are aware that the current system  
15 is not working well for them. I mean, people are  
16 outraged when they have to pay a 6 or 7 percent  
17 commission to a real estate broker --

18 COMMISSIONER THOMPSON: Unless you're related  
19 to one.

20 **(Laughter).**

21 MR. BUCKLEY: Is your wife a real estate --

22 COMMISSIONER THOMPSON: No, no.

23 PROF. AUSUBEL: People are quite well aware  
24 that there have been all kinds of abuses going on over  
25 the last few years involving IPOs and it has been harmful

1 to them. But people do not have the individual interest  
2 to just go out and organize. I mean, what you're seeing  
3 here, people who are trying to break into these various  
4 industries is what you're going to see. People are not  
5 just going to come to you on their own.

6 I at least think that part of the institutional  
7 role of the Federal Trade Commission ought to be to look  
8 around and see where are there industries that really are  
9 suffering from lack of competition and where there are  
10 ways of opening it up and take the lead. I mean, draft  
11 model legislation, not really saying it is going to get  
12 approved, but push the discussion yourselves.

13 COMMISSIONER THOMPSON: Thank you, Professor.

14 **(Laughter).**

15 COMMISSIONER THOMPSON: Okay, I wanted to do  
16 something here. I am going to give each of you a couple  
17 of minutes, and if you had a wish list from us, what  
18 would you want us to do, and be very specific.

19 MR. CAPPER: I go first?

20 COMMISSIONER THOMPSON: Yes.

21 MR. CAPPER: Well, I did --

22 COMMISSIONER THOMPSON: Wait a minute, maybe  
23 that's not fair. You went first last time.

24 **(Laughter).**

25 COMMISSIONER THOMPSON: Maybe you should go



1 first this time.

2 MR. BUCKLEY: I defer, I think he has a more  
3 immediate need.

4 MR. CAPPER: I thank you very much, and I do.  
5 When you asked the timing question, I said man, the time  
6 is now for my part of the world and the competition. I  
7 love what the Professor said just then about you guys  
8 sort of taking an initiative. I would even underscore  
9 what he said about the consumers. Our consumers get it  
10 and they love it. But --

11 COMMISSIONER THOMPSON: I thought we had taken  
12 initiative already, but, you know --

13 MR. CAPPER: Well, we are going to the next  
14 step. The first step was to get here, and we are here,  
15 so we are going to the next step. But the consumers, my  
16 consumers, are not going to become advocates for my  
17 cause. I mean, they will to a degree, but we have had  
18 consumers come to us and tell us look, these realtors are  
19 behaving in an anticompetitive way, would you like us to  
20 issue a press release and tell them that they are saying  
21 they are not going to cooperate. And we go, well, that's  
22 cool, but we don't want to tell the whole marketplace  
23 that we got problems. And, so we have to be careful.

24 But, Commissioner, what I would really like the  
25 FTC to do is to look into this very specific initiative

1 that is a proposal that is in front of the National  
2 Association of Realtors right now, scheduled to be voted  
3 on in November, in New Orleans, and it is critical to e-  
4 commerce, it is critical to the consumer and it is  
5 critical to stop anticompetitive behavior. And it's now.

6 COMMISSIONER THOMPSON: Thank you.

7 MR. CUNLIFFE: I think Jerry was absolutely  
8 right, Commissioner. I think the issues of a white  
9 paper, should you feel opposition is valid, would go a  
10 long way. I think it would go a long way to address the  
11 facts. You could take the most restrictive licensing  
12 state in the United States right now for real estate  
13 purposes or mortgage purposes and replicate it and say  
14 that addresses all consumer issues across the board.

15 State legislation, there is a legislator that  
16 is going to say well, that doesn't address my consumer  
17 issues in South Carolina or my consumer issues in  
18 Tennessee. But it has to be done for us to be able to  
19 operate on a consistent basis. Although we are licensed  
20 already, we are obviously subject to the fact that any of  
21 these states at any one time can start to change their  
22 licensing laws and we are going to go through that  
23 expense of monitoring them, reapplying every year, to say  
24 nothing of the personal inconvenience. I immigrated  
25 fortunately to this country in 1968 and before doing so

1 went through extensive background checks and the FBI took  
2 my fingerprints and they still have them on file. I have  
3 since given --

4 COMMISSIONER THOMPSON: I know where you live.

5 MR. CUNLIFFE: I have since given 35 states  
6 five sets of my fingerprints, and nobody has benefitted  
7 from that except for the fact that I probably could  
8 commit a crime now because I don't think I have any  
9 ridges left.

10 **(Laughter).**

11 MR. CUNLIFFE: It is absolutely ludicrous to me  
12 that there is not a central repository for that kind of  
13 information, to say nothing, as Jerry said, of  
14 shareholders, boards of directors having to report  
15 personal information to every single state. So, from a  
16 state positioning, take the most restrictive state or the  
17 most consumer-oriented state that you wish, but make it  
18 consistent and demand that the states do that or the  
19 Federal Government will do it for them.

20 On the financial mortgage side, there are  
21 states like Tennessee that has no law mandating that we  
22 have an office in state, but a regulator has determined  
23 that he is not going to let anybody from out of state  
24 operate in his state without an office. There is no  
25 legal background for it. We can't go and sue the

1 legislatures in every state that produces something like  
2 this, but that is a pure instance of somebody saying this  
3 will keep the competition out.

4 My personal bandwagon of the rebates to  
5 consumers, I think states would see something in this  
6 paper that says how in the world could the legislation  
7 that the states put in place, which was absolutely valid,  
8 saying nobody but a licensed person can get a piece of a  
9 real estate commission. Obviously a great purpose to  
10 prevent fraud on the consumer; but never intended to  
11 apply to giving the consumer his own money back.

12 The State of Washington and every other state  
13 has such a law. Realtors in the State of Washington  
14 challenged us, went to the Attorney General informally.  
15 He read the law and said you've got to be kidding. The  
16 legislature never intended that a principal in the  
17 transaction should not be able to get some of their own  
18 money back. Put us on a firm footing in the State of  
19 Washington, something from the Federal Government that  
20 indicated in a white paper that you ought to look at that  
21 and examine your own principles on why you are enforcing  
22 this thing would help.

23 And to Russell's purpose, 75 percent of  
24 consumers looking at the MLS. Dealing with realtors who  
25 earn, and I believe, a good commission, I think a lot of

1       them are entitled to 6 and 7 percent for the work they  
2       do, but they are obligated to the seller of the property  
3       to market that property in every possible way, and to  
4       restrict that marketing just doesn't make sense and just  
5       smacks of total protectionism to me.

6                COMMISSIONER THOMPSON: Thank you.

7                MR. CUNLIFFE: I'm sorry I get so impassioned  
8       on this.

9                MR. BUCKLEY: If I could yield part of time to  
10       just ask that you address one question for the record, so  
11       that it's there. As we talked at breakfast, you talked  
12       about the savings that you believe consumers realize  
13       through this system, and I think it might be useful to  
14       just briefly document it, because it is not an  
15       insignificant amount of money we're talking about for  
16       consumers. And that is the constituency that  
17       Commissioner Mozelle is most concerned about.

18               MR. CUNLIFFE: It absolutely doesn't. We offer  
19       a reduction in the cost of home ownership in various  
20       ways. As you may know, I mentioned we have an airline  
21       program with U.S. Airways, United Airlines, Continental,  
22       Delta, where you can buy a house and if you buy and sell  
23       a \$200,000 house and finance it with us, you get 162 --  
24       170,000 frequent flyer miles, which is enough to take  
25       your family on a nice vacation. That's not reducing the

1 cost of home ownership, but it's a choice to the consumer  
2 that we offer.

3 The primary one that we offer is reduction in  
4 closing costs, cash back to the consumer, or something in  
5 the form of gift certificates that they can use in home  
6 supply stores, and every consumer has the right to take  
7 it in cash if they choose. The average on our real  
8 estate rebate, on just one side of the transaction, just  
9 the buying side of the transaction, is \$1,000. In some  
10 instances it is much more; in some instances it's as low  
11 as \$500, depending on the sales price and the realtor's  
12 commission. So, we've got \$1,000 on there.

13 We figure that, and this is purely internal,  
14 LendingTree has researched how interest rates looked, the  
15 effect of the competitiveness of the exchange in four  
16 lenders bidding, over the last three months, on the  
17 average rates that a consumer receives, using Freddie Mac  
18 as the baseline, and it is about 25 basis points, or on  
19 our average loan of \$180,000 another \$450. And if the  
20 appraisal groups are successful in banning the use of  
21 AVMs, the difference in price is around \$300 to \$350.

22 So, we are talking almost \$2,000 in cost to the  
23 average consumer, which is certainly significant. You  
24 are right, the consumers do not know that it exists  
25 unless we tell them, and we do our best to tell them with

1           our advertising. But even so, we are facing this  
2           anticompetitive environment out there.

3                       MR. CAPPER: I might use a little bit more of  
4           my time to further underscore what these guys just  
5           pointed out.

6                       COMMISSIONER THOMPSON: You will have no time.

7                       **(Laughter).**

8                       MR. CAPPER: I assume everybody has gotten a  
9           copy of the Netchoice State of E-commerce 2002. They  
10          specifically went into the category that Eric was just  
11          referring to, and probably do not take into consideration  
12          all the savings but point out \$7.2 billion savings  
13          projected in the real estate world in this year, if there  
14          were really free enterprise in real estate transactions.

15                      MR. CUNLIFFE: Taking into account the  
16          recording fees and everything else.

17                      COMMISSIONER THOMPSON: This is your shot.

18                      MR. ROSS: My wish list, huh? Okay, I'll hit  
19          on a couple of points. Going back to the question of who  
20          gets it, clearly I think the consumer gets it. I do not  
21          think that the apprehension that was once there around  
22          electronic signatures is still to the level that it once  
23          was. We have consumers e-signing today at Home Depots,  
24          WalMarts, at various places, signing on pads. They can  
25          do the same thing at a closing table. I do not think the

1 consumer has issues with that.

2 What they want is faster, better, cheaper. If  
3 they can find a listing through an Internet site, if they  
4 can apply for a loan, if they can have an electronic  
5 closing package, if they can view their documents before  
6 closing and we take the process down from two months to  
7 two weeks, clearly there are benefits for everyone. The  
8 consumer gets it.

9 The lender, the servicers get it. There is a  
10 \$600 to \$700 per file on every single transaction that we  
11 conducted electronically, just on the servicing and back  
12 end side of the operations. The investors and GSEs also  
13 realize this.

14 Quick question, who in this room has ever e-  
15 signed something? Good. Because anyone who has ever  
16 clicked an "I agree" or put your name on the bottom of an  
17 e-mail has e-signed. So, congratulations.

18 Secondly, I think it could be argued that part  
19 of the reason for the hesitation and the slow delivery of  
20 investor delivery requirements that we have seen is  
21 perhaps because there is some vested interest in who  
22 controls the closing table. Many of these standards and  
23 these investor delivery requirements have been in the  
24 works for over two and a half years now since we began  
25 sitting down to work on these things. I think some



1 questions and some arguments might be made as to why it  
2 has taken so long to get formal public announcements and  
3 approval of these standards released to the public.

4 Secondly, I would ask that -- or thirdly, I  
5 would ask that the Federal Trade Commission do a little  
6 R&D or due diligence in what we can do to authorize and  
7 provide the ability for states and counties to accept  
8 electronic documents and electronic signatures. How can  
9 we tackle that problem? I know I don't have time for it.  
10 Every single county I go into is a unique situation.

11 COMMISSIONER THOMPSON: It usually involves  
12 transfer payments.

13 **(Laughter).**

14 MR. ROSS: That's my wish list.

15 COMMISSIONER THOMPSON: Larry?

16 PROF. AUSUBEL: Okay, so I guess my wish list  
17 would be that this process not end at just having panels  
18 and not just end at having a report, but rather that the  
19 FTC would actively pursue proposing legislation that has  
20 as a general objective promoting open, transparent  
21 processes in areas of the economy where transactions are  
22 currently being done in arcane ways.

23 A good way to identify specific sectors for  
24 attention is to look for uncompetitively high prices, and  
25 that is certainly consistent with the historic mission of

1 the FTC. Then, in areas that are identified, for staff  
2 to look for specific practices which seem to have no  
3 rationale to them and which could be changed via  
4 legislation. In terms of things that we have discussed,  
5 I think the real estate industry definitely would satisfy  
6 that test.

7 What I have been calling my pet peeve, which is  
8 the market for new issues and stocks, even though that is  
9 not certainly in the FTC's primary regulatory area, it  
10 would not hurt to propose legislation. You cannot do any  
11 regulations there, but proposing rules that others could  
12 act on would not hurt.

13 COMMISSIONER THOMPSON: I could see you would  
14 be really popular here.

15 **(Laughter).**

16 COMMISSIONER THOMPSON: Yes, Laura.

17 MS. BINION: I don't know that I have a  
18 specific wish list.

19 COMMISSIONER THOMPSON: Mistake. No one comes  
20 to Washington without a wish list. More importantly,  
21 when they say that they don't have one, there is a secret  
22 one.

23 **(Laughter).**

24 MS. BINION: Well, if I think of it, I will let  
25 you know. We do not have a specific law we want passed.

1 We do not have a specific industry issue that we need  
2 cured right this minute. We just have a growing concern  
3 and we are watching it develop. I guess we are here  
4 because we were pleased that someone was willing to  
5 acknowledge that the patchwork of laws that we see can be  
6 a financial barrier and can hurt consumers.

7 Do I have a specific thing I want you to do  
8 because of that today, no. I am just glad that there is  
9 a forum in which it can be brought out and that we can  
10 continue to monitor and look at it. Maybe next year if  
11 we have ten more California laws passed that cost us  
12 several hundred thousand dollars, I will have a different  
13 answer. But I think right now we are just thrilled to  
14 have the forum to get someone to look at it.

15 COMMISSIONER THOMPSON: Thank you.

16 You have 30 seconds.

17 **(Laughter).**

18 MR. BUCKLEY: I just want to say thank you.  
19 And I want to say also that I think you and Chairman  
20 Muris perform an extraordinarily valuable function in  
21 bringing this type of subject to the fore. It is true  
22 that preemption is a delicate issue and the interplay  
23 between the states and the Federal Government has been  
24 one of the most important parts of our history, including  
25 150 years ago we had a very strong discussion about that.

1                   COMMISSIONER THOMPSON: In fact, I was talking  
2 to some of my European Union colleagues last week, and  
3 they said we don't understand, how do you get along with  
4 your states? How do they recognize Federal authority?  
5 And I said, well, we had a little war.

6                   **(Laughter).**

7                   COMMISSIONER THOMPSON: And a lot of people  
8 died.

9                   MR. BUCKLEY: 500,000 died.

10                  COMMISSIONER THOMPSON: I wouldn't suggest that  
11 was an ideal model.

12                  **(Laughter).**

13                  MR. BUCKLEY: But we have a president who is a  
14 former governor, who is obviously respectful of states'  
15 rights, the fact that his appointed chairman of the FTC  
16 raises these issues and says there is something to be  
17 discussed here is very important. And I think that the  
18 fact that you are willing to do this, the fact that you  
19 have done it is going to be a major first step in getting  
20 a dialogue going. And, you know, I think that if you  
21 were to go back to that history and look at the history  
22 of the Republican party, with its Whig antecedents and  
23 its Lincoln antecedents, the idea that there should be --  
24 it should promote interstate commerce is a tradition in  
25 the party, as well.

1           So, I think that there ought to be some  
2           discussion with the administration about these problems  
3           that cost consumers and how we might initiate a dialogue  
4           with state regulators that is a real dialogue, where  
5           there is a real possibility of something happening so  
6           they are motivated to discuss these issues and come up  
7           with solutions that may not require Federal legislation.

8           COMMISSIONER THOMPSON: Thank you. Now, there  
9           are a couple of questions here that I do want to get to  
10          because I think they are important to raise. I will read  
11          them. One is, how do you address the political issue of  
12          job losses to the real estate and mortgage service  
13          brokers with the advent of e-technology and displacing  
14          markets?

15          MR. CAPPER: Well, I think I can just sort of  
16          answer it in the realtor world. The realtor world is  
17          very unique in that there are approximately 750,000  
18          independent contractor real estate agents in the United  
19          States. A great many of them do one to two transactions  
20          per year. A great many of them are part-time, yet they  
21          still call themselves real estate agents. I don't know,  
22          maybe with the high commissions they can probably come  
23          out okay.

24          We implemented a model that we think is what  
25          the rest of the sectors of the economy always does, and

1 we focused on quality and productivity, and our agents  
2 close 50 or 60 per year. I think the real estate  
3 industry and its structure with independent contractors  
4 was headed toward a major change, whether or not e-  
5 commerce came along or not.

6 COMMISSIONER THOMPSON: One other question is  
7 -- I think this is the "aren't you really begging the  
8 point" question. How can you comply with multiple state  
9 laws and even local laws, i.e., California privacy  
10 ordinances, without Federal preemption? And what about  
11 the threat of litigation with inconsistent state laws and  
12 litigation authority?

13 MR. BUCKLEY: The answer is that we are seeing  
14 a proliferation of state privacy laws. I work in a law  
15 firm where we produce studies that are extensive, because  
16 we have to respond to clients' needs to comply. And the  
17 proliferation of state laws in the consumer protection  
18 area and particularly privacy laws is a matter of  
19 concern.

20 Next year we will have an expiration of the  
21 Federal preemption in the Fair Credit Reporting Act area.  
22 We are going to have to deal with these issues. Next  
23 year is going to be a crucial year in terms of deciding  
24 where are we going to go on privacy legislation. And I  
25 think that debate, again, is one where the FTC could

1 provide some help in saying we have to recognize that  
2 there is a national market here. We are going to be  
3 competing -- the Europeans are driving toward developing  
4 a market of their own -- which is where they are driving  
5 not as fast as they would like, I guess, but they are  
6 driving it. We cannot have a balkanized patchwork  
7 arrangement and expect to be appreciably viable in the  
8 long run.

9 COMMISSIONER THOMPSON: Okay.

10 MR. ROSS: Yes, I would like to contribute to  
11 that, as well. I think Laura mentioned it earlier when  
12 she was referring to her social security number example,  
13 and we have seen that same thing in the State of Florida,  
14 where they had a mandate to have their public record  
15 indexes up on the Internet by 2001. It was a state  
16 mandate. Additionally, they were required to get their  
17 documents up on the Internet, another year later. They  
18 did that, met their deadlines.

19 Well, then, along comes privacy. Well, now  
20 we've got images out here, how in the world are we going  
21 to go back and try to resend different elected officials  
22 or social security numbers, names, all these bits of  
23 information from images is a very complex type of  
24 situation to be in.

25 And I would just close with a comment that I

1 had here, as I was thinking last night, referring to  
2 legislation that we must be sure to distinguish between  
3 regulatory legislation, which often dictates restrictive  
4 standards and conditions, and enabling or facilitating  
5 legislation, which can be used to support freedom of  
6 contract and increase predictability and certainty in our  
7 online transactions without inhibiting the development of  
8 new business models or technology.

9 COMMISSIONER THOMPSON: Thank you. I am just  
10 going to hit one more question, because it is addressed  
11 to me. And the person who writes with purple ink is not  
12 going to be permitted to leave.

13 **(Laughter).**

14 COMMISSIONER THOMPSON: It is the basic  
15 question, what is the FTC willing to do and when is it  
16 willing to do it. And the answer is I don't know. I  
17 think part of it will be taking what we've learned here  
18 over the past several days and analyzing what it means  
19 and also thinking about what our statutory role is and  
20 what we're permitted to do, but also to talk about the  
21 range of activities that we could be involved in. That's  
22 not just in the enforcement area, bringing cases for  
23 anticompetitive behavior, but also to the extent that we  
24 enlighten -- that we provide insight to states and other  
25 groups about areas where we see problems, but also



1 bringing constituency groups together to talk about what  
2 the issues are. Because, especially in the e-space -- as  
3 you all know, I've been involved in e-issues for a long  
4 time -- I think we've moved to a different kind of public  
5 policy model, one where businesses and consumers and  
6 government together develop what the right answers may be  
7 and recognizing that that has to be an organic process,  
8 one not necessarily fixed in stone.

9 It's especially important in a fast-moving  
10 marketplace, but it also begins to build what I call a  
11 constituency base that we always have a challenge with  
12 when we're dealing with issues dealing with consumer  
13 confidence and competition, which is it is very hard to  
14 build a constituency for issues where people lose things  
15 and they don't know that they have lost them. They don't  
16 know when they don't have choice and they don't know when  
17 they don't have better prices. They don't necessarily  
18 see the effect right away.

19 And, so, that's a challenge for all of us. I  
20 appreciate you all coming. I thought this was  
21 fascinating, and it raises some of the hard issues that  
22 I've talked about for a long time. It's what we need to  
23 think about, from a public policy sense, and not just in  
24 the Federal Government, but in the states as well and  
25 everywhere else, is that the Internet and the electronic

1 marketplace can provide great benefits to consumers. But  
2 as long as it is still regarded as the place for only  
3 those people who are most willing to accept risk, are  
4 most willing to be technologically savvy, then we'll  
5 never get there. So, we have to look at what's at the  
6 middle of the bell curve and not what's at the end.

7 Consumer confidence is an issue that lies  
8 there. Privacy and data protection lie there.  
9 Competitiveness is a thing that lies there. Disclosure.  
10 All of those issues are going to be very important so  
11 that we don't restrict your businesses, and for that  
12 matter consumer benefit to those tails in the bell curve.

13 So, I appreciate you all being here, and thank  
14 you very much for coming.

15 Now, one other word for the rest of the  
16 audience is that you get five minutes early from me, that  
17 we will reconvene at 2:00 and start with remarks from  
18 Commissioner Anthony. So thank you very much for coming,  
19 as well.

20 **(Whereupon, a luncheon recess was taken.)**

21  
22  
23  
24  
25



1       some of the other panels that have focused on state  
2       regulatory efforts, I understand that this panel's focus  
3       is to be more on private activities that may raise  
4       barriers to e-commerce by using hardball commercial  
5       tactics.

6                 For example, I've read reports that  
7       manufacturers as diverse as Levi Strauss and Compaq  
8       computers have faced backlashes from their brick and  
9       mortar retailers when they've attempted to pursue e-  
10      commerce options. Sony Electronics has, likewise, faced  
11      tremendous resistance and resentment from its retailers.

12                Competition among distributors for a given  
13      manufacturer's favor is almost certainly healthy. But  
14      problems may arise where distributors in one channel  
15      exercise their market power to disadvantage distributors  
16      in another channel.

17                One of the cases I encountered early in my  
18      career here at the Commission was the Toys-R-Us case.  
19      There, Toys-R-Us, a powerful retail chain store, used its  
20      market power to force toy manufacturers to deal on  
21      unfavorable terms with the discount chains like Wal\*Mart  
22      and Price Club.

23                Around the same time that the Commission was  
24      dealing with the Toys-R-Us matter, it ran into a similar  
25      issue in the e-commerce context. This was a group

1       boycott case called *Fair Allocation Systems*. There, a  
2       group of Chrysler dealers in the Northwest got together  
3       to form a group that threatened their supplier, Chrysler,  
4       in various ways in order to force Chrysler to stop  
5       supplying cars to a dealer who was selling over the  
6       Internet at a discount. This horizontal agreement to  
7       boycott their supplier in order to restrict competition  
8       was plainly an illegal restraint of trade.

9               The Commission also found there was no  
10       plausible business justification such as the prevention  
11       of free riding for the concerted action by the dealers.  
12       This was a case that involved blatant misconduct.

13              I'm curious to know what forms of less blatant  
14       conduct are being used today and whether those activities  
15       might potentially run afoul of the antitrust laws.

16              Here's a question worth pondering. Is the  
17       Internet simply another distribution option where tried  
18       and true antitrust concepts will suffice or does it  
19       present some truly novel antitrust issues?

20              Absent anticompetitive pressures, like those we  
21       saw in Toys-R-Us and with the Chrysler dealers,  
22       manufacturers considering their e-commerce distribution  
23       options will likely make rational decisions that are in  
24       the best interests of their customers. I say this  
25       because manufacturers and consumers share an interest in

1       having the product distributed as efficiently as possible  
2       and at the lowest possible price. Thus, a self-  
3       interested manufacturer is likely to do its level best to  
4       deal with free riding issues and the like, and ultimately  
5       strike an appropriate balance between the lowest possible  
6       price and efficient distribution.

7               On the other hand, can Internet distribution  
8       ever gain a strong foothold in some product areas where  
9       the entrenched distribution channel, members who  
10      manufacturers cannot do without, at least until e-  
11      commerce matures, use hardball tactics to make sure that  
12      the transition period never begins?

13              As I said at the outset, however, I stand ready  
14      to be educated. So, without further ado, let's get this  
15      panel started. Thank you.

16              MR. AGARWAL: Thank you, Commissioner Anthony.  
17      As Commissioner Anthony mentioned, this will be the first  
18      panel whose focus will be principally on private attempts  
19      to regulate e-commerce rather than regulatory attempts to  
20      regulate e-commerce, and we look forward to the panel's  
21      views.

22              A few ground rules. Panelists will have an  
23      opportunity to give us an opening statement of up to five  
24      minutes and we have a timekeeper there who will let you  
25      know when you have a minute left. Audience members are

1 welcome to ask questions. An FTC staff person will have  
2 notecards, and if an audience member will indicate to the  
3 staff person that you have a question, he'll come give  
4 you a notecard and bring it up here.

5 With that, we'll start on this side of the  
6 table with Fran Smith.

7 MS. SMITH: Thank you. I'm very pleased to be  
8 here and I want to commend the FTC and its staff for  
9 intervening in a lot of the state activities to restrict  
10 e-commerce, and I also would like to commend them for  
11 convening this workshop. I think it's bringing together  
12 academicians, people in the industry on both sides of  
13 many of the issues, some consumer groups, public policy  
14 groups, I think, brings to bear on these critical issues.

15 What I am prepared to address today is to focus  
16 on what a consumer group thinks of these developments.  
17 Consumer Alert is a pro-market consumer group. We  
18 promote the consumer value of a market economy in  
19 increasing choice and competition, which leads to lower  
20 prices and leads to advances in technology that really  
21 improve consumer welfare, health, safety, convenience and  
22 so on down the line.

23 This workshop over the last three days has been  
24 dealing with the basic and critical issues in any  
25 marketplace, even what is a market, how buyers and

1 sellers get together, how competition can be encouraged  
2 or restricted, and how regulators should approach complex  
3 issues in a dynamic marketplace. So, during the last  
4 three days, you've heard from all points of view in a  
5 range of industries about possible anticompetitive  
6 efforts to restrict e-commerce, whether those are real  
7 restrictions, and why, if they are, they are occurring.  
8 We've also learned about the cost to consumers of some of  
9 the regulatory efforts at the state level, not just in  
10 terms of dollars, but in terms of limitations on consumer  
11 choices and restrictions possibly on increased  
12 inefficiency and inconvenience to consumers.

13 As you know, some common themes have been  
14 raised. One is the enormous benefits that consumers get  
15 from e-commerce in the areas of competition, choice and  
16 convenience. Yet, we've learned that there are some  
17 areas where those three Cs are being undermined, where  
18 consumers are paying the cost and they're not getting  
19 many, if any, of the benefits.

20 A second theme we've heard is  
21 disintermediation, the disintermediation that has  
22 occurred and efforts of those affected to ward off those  
23 threats to the middleman. Speakers have detailed lots of  
24 state regulations that were brought up ostensibly to  
25 promote the public good, but in reality, advance the



1 special interests of distributors or retailers or agents.

2 At this workshop, middlemen have been on the  
3 defensive, the traditional middlemen, and they really  
4 shouldn't have to be. The traditional intermediaries see  
5 their role as being diminished by direct-to-consumer  
6 sales. I would offer that I think it's a period when e-  
7 commerce is at the cusp of revolutionary changes, we're  
8 seeing disintermediation, we're seeing reintermediation,  
9 we're seeing new forms of intermediation, and nobody  
10 knows where it's going. Nobody knows who are going to be  
11 the primary interfaces between buyers and sellers, who  
12 the lead groups are going to be at this stage. So, in  
13 this dynamic marketplace, this area of significant  
14 changes, we have some recommendations that relate.

15 I'm going to skip over some more of my rhetoric  
16 and get to some of the recommendations that Consumer  
17 Alert would have for the regulators in this dynamic  
18 marketplace that I think has served consumers very well  
19 and which holds great promise of serving them more.

20 We would suggest that the FTC continue their  
21 excellent work in weighing in at the state level on  
22 anticompetitive laws and regulations that provide no  
23 public good and where the costs to consumers greatly  
24 exceed the purported benefits.

25 For regulations affecting interstate commerce,

1 we ask that the FTC block efforts to restrict free trade  
2 among citizens. For intrastate regulatory policy, we  
3 suggest that the FTC do comparative studies of specific  
4 policies and their consumer impact, for instance, rate  
5 regulation of the auto industry, licensing of such things  
6 as beauty salons.

7           Again, another recommendation is to examine how  
8 some of these new channels of distribution offer new  
9 gains for consumers. In the area of antitrust, we would  
10 say be cautious, indeed skeptical, in applying static  
11 views of antitrust to new entities and new combinations,  
12 and instead, focus on the consumer value of these new  
13 arrangements.

14           Much of the value of the new intermediaries  
15 will be providing aggregated information for consumers.  
16 Now, competitors may charge, and I think some have  
17 charged, that this is tying and this is bundling and this  
18 is steering and this is collusion. These are all  
19 horrible words, aren't they, and they're in, obviously,  
20 the antitrust lexicon. Instead of tying, why don't we  
21 talk about packaging, referring, linking, cooperating.  
22 So, again, I would offer to the FTC, review some of the  
23 trends in antitrust that may work against consumers'  
24 interests in the e-commerce marketplace, such as too  
25 narrowly defining markets.

1 I think the key is to ensure that the past  
2 doesn't restrict the promise of the future for consumers,  
3 and that's what I hope some of the thoughts of this  
4 workshop will lead to.

5 MR. AGARWAL: Thank you. Irv?

6 MR. SCHER: In my view, virtually all antitrust  
7 issues relating to e-commerce, distribution of goods and  
8 services involve the application of settled principles to  
9 a new channel of distribution. However, I've also  
10 noticed that business people, from time to time, don't  
11 even recognize the antitrust issues in this area.  
12 Accordingly, I thought it might be helpful at the outset,  
13 briefly, to summarize some fundamental antitrust issues  
14 involved in private restraints on the distribution of  
15 goods and services and e-commerce.

16 I've provided an outline which I believe is  
17 outside which has some of the leading cases in it that  
18 I'm going to survey, starting with the basic issue of  
19 whether conduct restraining the ability of either a  
20 supplier or a middleman to offer goods or services from a  
21 web site constitutes an agreement subject to antitrust  
22 challenge or unilateral conduct that's permissible for a  
23 nonmonopolist.

24 We start with the basic premise that a supplier  
25 acting alone generally has the right to refuse to deal

1 with an e-commerce retailer or distributor, and it's  
2 clear from the Supreme Court's Monsanto decision that  
3 such a refusal to deal is lawful even if responsive to  
4 complaints or recommendations by existing customers. And  
5 this works both ways. A retailer acting alone can tell a  
6 supplier that it might not deal with the supplier if the  
7 supplier opens its own retail web site and becomes the  
8 retailer's competitor. After all, nobody likes to do  
9 business with his or her competitors.

10 But what about agreements? Let's go past the  
11 unilateral issue. I believe that a supplier's agreement  
12 with individual dealers, that it won't supply e-commerce  
13 distributors or dealers, is subject to the rule of reason  
14 and generally will be upheld. The situation is different  
15 if a group of dealers, as Commissioner Anthony noted,  
16 obtained such an agreement from a supplier, and there's a  
17 danger of per se illegality under such circumstances.

18 Now, turn it around. An agreement by an  
19 individual dealer with a supplier under which the dealer  
20 agrees not to do business on web site or purchase  
21 products from the supplier for resale over a web site  
22 should also be subject to the rule of reason and should  
23 also generally be upheld.

24 Now, what about an agreement between a supplier  
25 and a dealer or a group of dealers under which the

1 supplier agrees not to open a retail web site? Now,  
2 since the supplier is agreeing not to compete with its  
3 dealers, is that a horizontal agreement not to compete,  
4 possibly subject to per se treatment or a vertical non-  
5 price agreement subject to the rule of reason? There's  
6 little law on this to date. I believe the Supreme Court  
7 hinted in the *GTE/Sylvania* case that such an agreement  
8 with individual dealers would be subject to the rule of  
9 reason and the Court of Appeals to date seemed to agree.  
10 Now, what we call a hub and spoke arrangement of that  
11 nature with a group of dealers and the supplier is  
12 another question entirely, and it's likely to be quite  
13 risky.

14 Another area of antitrust of interest to date  
15 with respect to e-commerce distribution involves  
16 exclusives. We heard a little of that so far in the  
17 first couple of days. For example, a supplier's  
18 agreement only to direct inquiring consumers to one e-  
19 commerce dealer raises interesting restraint of trade  
20 issues, generally again under the rule of reason, as well  
21 as issues under the Robinson-Patman Act, which can be  
22 addressed during our session if anybody is interested.

23 Finally, a topic that has been discussed in  
24 some detail during the workshop is the impact of state  
25 dealer laws on an e-commerce dealer's offer of products

1 into a jurisdiction in which dealer exclusivity has been  
2 granted. That has been addressed by the First Circuit in  
3 connection with Puerto Rico, Act 75, a dealer protection  
4 statute in Puerto Rico. We may want to discuss that  
5 later.

6 Now, my outline addresses some additional  
7 issues and ends with a series of questions that might  
8 also be of some interest this afternoon, but we'll save  
9 that for the panel discussion. Thank you.

10 MR. AGARWAL: Thank you. Paul?

11 MR. MISENER: In a panel session held in this  
12 workshop on Tuesday, I suggested that the state of  
13 competition on the Internet is best evaluated by  
14 considering, on one hand, online activities that are  
15 substitutes for or naturally competitive with offline  
16 activities, and on the other hand, those online  
17 activities that are truly unique to the Internet.  
18 Although online retailing relies on commercial activities  
19 that are truly unique to the Internet, for example,  
20 Internet access service, online retailing itself is a  
21 substitute for offline retailing, including retailing  
22 through traditional brick and mortar stores, mail order  
23 catalogs and home shopping channels on cable television.  
24 And I said on Tuesday, I believe the principal threats to  
25 competition in these two categories are, respectively,

1 from the governments and industry.

2 Retail competition already was robust before  
3 Internet-based retailing began, and since then, it has  
4 become even more vibrant and effective. It is vibrant  
5 through its sheer numbers. There are roughly two million  
6 offline retail establishments in the U.S. and thousands  
7 more on the Internet, and competition is particularly  
8 effective on the Internet, where it is effortless to move  
9 among competing retailers. Instead of having to walk  
10 across the street or drive across town to another store,  
11 consumers can simply and easily move across thousands of  
12 retail stores with the click of a mouse.

13 This is especially true for rural America, of  
14 course, where consumers are no longer beholden to a  
15 single store, or if they were lucky, to a mall of stores.  
16 Now they have thousands of stores.

17 In short, the online activities of commercial  
18 firms do not present a barrier to retail competition.  
19 Indeed, they actually enhance the already robust retail  
20 competition that predated Internet shopping.  
21 Unfortunately, however, some government policies restrict  
22 retail competition. Over the past few days, we've heard  
23 a lot about that. This workshop has revealed several  
24 specific cases, for example, the regulation of the sale  
25 of caskets and wine. But let me now describe for you the

1 general case in which governments are considering  
2 measures that would impair retail competition across the  
3 board by unfairly regulating online activities that, for  
4 all practical purposes, are identical to less regulated  
5 or unregulated offline activities.

6 In my view, any proposed law or regulation that  
7 treats substitute activities online differently than  
8 offline is anticompetitive, unless the proposal is  
9 limited to real differences between the Internet-based  
10 activities and those conducted offline. In other words,  
11 where there are true and relevant differences, different  
12 treatment may be warranted, but where there are no  
13 relevant differences, online and offline must, for  
14 competition's sake, if not for fundamental fairness, be  
15 treated the same.

16 To restate a concrete example, many state  
17 legislatures and even some members of our Congress have  
18 considered well-meaning, but ill-conceived, laws  
19 addressing consumer information privacy that despite the  
20 pervasive nature of the issue address only online  
21 activities. To the extent there are true differences  
22 between online and offline privacy, they are not  
23 addressed in the proposed laws. Rather, essentially the  
24 same activities would, to the detriment of competition,  
25 be treated differently.



1           As I suggested Tuesday, the only surefire  
2 solution, it appears, is for the Federal Government to  
3 preempt state action either as a matter of education and  
4 policy or as a last resort, as a matter of law. It is no  
5 longer sufficient for Federal policymakers to merely do  
6 no harm. They must be vigilant against the potential  
7 anticompetitive harms caused by non-Federal government  
8 actions.

9           As for the online activities that are truly  
10 unique to the Internet, it is important to recognize that  
11 consumers rely on some, if not all, of these activities  
12 to reach online shopping sites. Fortunately, government  
13 policies have tended to foster and not restrict  
14 competition within these Internet-unique activities. If  
15 anything, governments haven't done enough.

16           This leads me to my final point, which is for  
17 the Internet-unique commercial activities on which  
18 consumers rely for online shopping, government needs to  
19 ensure that private actions do not impair competition for  
20 such impairments ultimately would harm retail  
21 competition. The best current example I have is the one  
22 that I quickly mentioned on Tuesday, and that is  
23 broadband consumer Internet access. Although competition  
24 is robust in the current narrowband home Internet access  
25 environment, the broadband home Internet access

1 environment may not be nearly so competitive. If  
2 bottlenecked broadband Internet platform service  
3 providers in any way degrade or interfere with access to  
4 web sites, the character and the usefulness of the  
5 Internet will be seriously damaged. More specifically,  
6 impairing consumer access to retail web sites will  
7 restrict retail competition.

8 An appropriate approach here is Federal  
9 regulation. The FCC could adopt rules to prescribe this  
10 type of anticompetitive behavior or ensure competition  
11 among broadband Internet service providers, and the FTC  
12 could informally indicate that such behavior would be  
13 considered anticompetitive.

14 Either way, competition authorities should  
15 remain vigilant to ensure the continued competitiveness  
16 of consumer Internet access and indeed of all Internet-  
17 unique online activities.

18 In sum, retail competition is robust and all  
19 the more so because of Internet-based retailing. The  
20 direct threats to retail competition come from government  
21 policies in some specific areas and generally through  
22 "online only" policies that unjustifiably discriminate  
23 among modes of commerce. On the other hand, government  
24 policies generally have supported competition among  
25 commercial activities that are truly unique to the

1 Internet. Some private actions, however, threaten  
2 competition in such Internet unique activities, including  
3 broadband access, and thereby indirectly threaten retail  
4 competition.

5 Federal policymakers can address these threats  
6 to competition by respectively, one, eschewing or  
7 blocking discriminatory policies; and two, ensuring  
8 competition either through regulation or competition  
9 enforcement among Internet-unique commercial activities.

10 Thanks.

11 MR. AGARWAL: Thanks. Janet?

12 MS. McDAVID: Thank you. I was particularly  
13 delighted that Commissioner Anthony started with the *Fair*  
14 *Allocation* case because I think the Commission made real  
15 important contributions to this issue. It followed black  
16 letter law that had been developed in the courts with  
17 respect to brick and mortar retailers in connection with  
18 the first opportunity to try to preclude competition  
19 using Internet sites.

20 Her description of the case saves me from  
21 wasting my time describing it. But it was the last in a  
22 long line of such cases involving dealers who are trying  
23 to prevent competition from discounters. This kind of  
24 conduct raises risks both for the dealers, who are acting  
25 collectively, and for the manufacturer who may find

1           itself unwittingly sucked into a horizontal conspiracy  
2           among its dealers.

3                       My recollection of the *Fair Allocation* case is  
4           that it was, in fact, brought to the Commission by the  
5           manufacturer who was very concerned about its potential  
6           exposure in the event that it was sucked into a boycott of  
7           a discounting dealer using the Internet by dealers who  
8           were operating brick and mortar car dealerships, and who  
9           did not want to face price competition.

10                      There's a long line of cases, some of them --  
11           many of them actually, in the automobile industry, for  
12           example, *Lovett vs. General Motors*. One of my particular  
13           favorites is the *RWM Enterprises* case where a group of  
14           automobile dealers hired the same lawyer and sent  
15           identical letters to each of their manufacturers to  
16           prevent a discounter from opening a multi-dealership  
17           outlet, a single company mall.

18                      But there have been a whole range of these  
19           cases, and the case law is well settled and the  
20           Commission was to be applauded for jumping on this  
21           problem at a very early stage. It's very significant  
22           that we're seeing this kind of conduct developing on the  
23           Internet as we have seen it developing in the brick and  
24           mortar context. And it's not limited to automobile  
25           dealers. We've had wallpaper cases, we've had boat

1 cases, we've had book cases, we've had juvenile furniture  
2 cases. All dealers who face price competition from a  
3 lower price outlet are concerned about the opportunities  
4 that that lower-priced outlet may have to profit at their  
5 expense.

6 One of the areas in which I would particularly  
7 commend the Commission for taking a look is the area of  
8 automobile dealerships, and I know you spent some time  
9 with that earlier in these sessions. I want to echo some  
10 of the comments that Commissioner Leary made in a speech  
11 that he gave in May 2001 about the opportunities for  
12 consumers and the threats to consumers posed by state  
13 laws which are the product of dealer organizations to  
14 restrict competition on the Internet.

15 I have worked with the major automobile  
16 companies in attempting to set up web sites that would be  
17 accessible to consumers, that would allow each of you to  
18 try to figure out what the car you want to buy,  
19 configured in the way you want it, is going to cost. You  
20 could do your shopping online. And the fact is that  
21 state dealers, as the result of lobbying by dealer  
22 organizations, preclude that from happening in any  
23 meaningful way because an automobile manufacturer may not  
24 consummate a sale direct to a consumer. That is,  
25 obviously, restricting access to information by consumers

1 and it is also, perhaps, raising costs to consumers.

2 It's an example of lawful action by dealer  
3 organizations, because their conduct in seeking these  
4 laws is certainly covered by the Noerr-Pennington  
5 Doctrine, but it has, nonetheless, anticompetitive  
6 consequences and should be, I think, a subject of inquiry  
7 for the Commission.

8 MR. AGARWAL: Thank you. Professor Chevalier?

9 DR. CHEVALIER: Thanks. I am Judith Chevalier  
10 and I'm from the Yale School of Management. It's not my  
11 area of expertise to talk about the legality or  
12 illegality of certain conduct under the prevailing  
13 antitrust laws. So, I'm going to just confine my  
14 comments to some documentation of empirical  
15 irregularities from my research and some statements about  
16 economic efficiency.

17 So, as my starting point, I think, take as  
18 given that manufacturers do have some legitimate  
19 interests in using vertical restrictions to control the  
20 sale of their products online. So, manufacturers have an  
21 interest in ensuring that retailers have an incentive to  
22 provide sales and service effort and for some products  
23 that sale and service effort may be necessarily physical  
24 and may, most efficiently, be done at the retail level.

25 Now, there certainly may be -- and this

1 complicates the issue, that there may be anticompetitive  
2 rationales for vertical restrictions. Commissioner  
3 Anthony and the other panelists have alluded to those.  
4 But I want to argue that it's important that free rider  
5 issues shouldn't be completely ignored here.

6 Now, when we're thinking about the Internet,  
7 it's important to recognize that free rider problems can  
8 exist in both directions, so that it is possible for  
9 brick and mortar retailers to free ride off of the sales  
10 and service effort of Internet retailers, and it is  
11 possible for Internet retailers to free ride off of the  
12 sales and service effort of brick and mortar retailers.  
13 So, for example, if I were to go into a department store  
14 and try on a perfume and see if I like it and then order  
15 it online, the online retailer is effectively free riding  
16 off of the service effort provided by the brick and  
17 mortar retailer.

18 If I read customer reviews on a book-selling  
19 web site and then go buy the book at the local bookstore,  
20 effectively the local bookstore is free riding off of the  
21 sales and service effort provided by the Internet  
22 retailer.

23 So, free riding can happen in both directions,  
24 though it's usually emphasized in the direction of  
25 Internet retailers free riding off of brick and mortar

1           retailers.

2                         In part, I think that emphasis on one direction  
3 of the free rider problem is a mistake. On the other  
4 hand, I think there might be a good reason we tend to  
5 focus more on free riding by Internet retailers off of  
6 the sales and service effort of brick and mortar  
7 retailers. And one reason for that is because the sales  
8 and service effort of brick and mortar retailers tends to  
9 be physical, it tends to be hard to verify on the part of  
10 the manufacturer. Did I describe how the vacuum cleaner  
11 works or did I not really take time with the customer and  
12 show how the vacuum cleaner works? It's hard to verify  
13 and it can tend to take the form of a marginal cost.

14                         It can be attractive for the manufacturer to  
15 use margins as a way of compensating the retailer for  
16 providing that sales and service effort. In  
17 circumstances like that, whereas in the case of the  
18 Internet retailer, it might be easy for a manufacturer to  
19 verify that sales and service effort is taking place and  
20 the manufacturer may be able to compensate the retailer  
21 directly for undertaking that effort. So, the  
22 distinction between brick and mortar retailers and  
23 Internet retailers, I think, is important.

24                         I have some empirical work with Dennis Carlton  
25 where we look at online sales of DVD players, online and



1 brick and mortar sales of fragrances and online sales of  
2 appliances. We selected these products because these are  
3 all products in which we can contemplate an important  
4 role for physical sales effort. What we document in our  
5 paper is distribution arrangements that suggest that  
6 manufacturers do think about issues of what kind of  
7 retailers they would like to be selling their product on  
8 the Internet.

9 So, for example, we document manufacturer  
10 policies that have the effect of restricting the amount  
11 of discounting online. I'm not suggesting that these  
12 manufacturers are involved in retail price maintenance,  
13 but we see situations in which there are products which  
14 are commonly discounted in brick and mortar stores but  
15 which we only find for sale at the manufacturer's  
16 suggested retail price online.

17 This happens in circumstances in which  
18 manufacturers only deal with web sites that have a  
19 reputation for not discounting the products, so  
20 independent retailers, and also circumstances in which  
21 the manufacturers have eliminated online retailers  
22 entirely and have chosen to sell their products  
23 exclusively through their own manufacturer web site.

24 One thing that we know is that in every  
25 circumstance that we are able to document, we find that

1 manufacturer web sites, when a manufacturer sells its own  
2 product directly to consumers and in a circumstance in  
3 which that manufacturer uses independent retailers in the  
4 brick and mortar world, those manufacturer web sites tend  
5 to be expensive relative to the retail sites in the brick  
6 and mortar world. Thanks.

7 MR. AGARWAL: Thank you. David?

8 MR. BALTO: Thank you. Thank you for inviting  
9 me to speak today. By the way, I have two papers on the  
10 outside table which address some of these issues. I'm  
11 going to try to focus more on the vertical restraint type  
12 of issues.

13 But what I think is at issue here, as all the  
14 speakers have identified, is that certainly private  
15 parties can go and lobby the government to create  
16 artificial barriers to Internet commerce, but they can  
17 create some of the same effects simply by pressuring  
18 their manufacturers to diminish competition over the  
19 Internet by imposing distribution restraints.

20 It's noted in Rob Atkinson's paper that a  
21 survey of major consumer manufacturers showed that  
22 channel conflicts was one of the biggest issues they  
23 faced in promoting online sales, and the ability of the  
24 Federal Trade Commission not only to bring horizontal  
25 restraint enforcement actions, such as Jan suggested, but

1 also vertical restraint enforcement actions, is essential  
2 to make sure that Internet commerce really flourishes and  
3 it doesn't become the high-priced alternative.

4 I wanted to say a few words about the Toys-R-Us  
5 and the CDs cases that the Commission brought during the  
6 past several years, because I think both of them suggest  
7 the type of situations in which the Commission should be  
8 vigilant. Let me say at the outset that I was at the  
9 Commission when both of these cases were investigated and  
10 it's important to distinguish the difference between  
11 vertical and horizontal restraints, and restraints that  
12 initially may appear that they're vertical in nature,  
13 once you do enough digging, you find sort of horizontal  
14 elements to them.

15 In both of these cases, there were efforts by  
16 individual firms to deter the emergence of a new form of  
17 competition. In *Toys-R-Us*, Toys-R-Us, facing new  
18 competition from warehouse stores in the sale of toys,  
19 facilitated a horizontal cartel and also entered into  
20 illegal vertical relationships with manufacturers to deny  
21 the more popular toys to these warehouse clubs or force  
22 them to be sold on less favorable terms. The real irony  
23 here is that but for the antitrust laws and the  
24 enforcement of those laws, Toys-R-Us probably couldn't  
25 have emerged as a successful category killer itself.

1           In the CD manufacturing case, the Commission  
2 looked at the cooperative advertising practices of the  
3 major CD manufacturers, which seemed to be implemented in  
4 parallel fashion. What the Commission found, although  
5 these agreements may have initially looked vertical in  
6 nature, was that the retailers worked hand-in-glove with  
7 the record distributors to stifle the ability of category  
8 killer stores, such as Circuit City and Best Buy, to  
9 effectively sell CDs at extremely low prices. They also  
10 found evidence that these practices were used as a  
11 facilitating device to protect the margins of the CD  
12 manufacturers.

13           I want to talk about the issue of free riding  
14 which Professor Chevalier has so aptly presented, and I  
15 commend to you her paper with Dennis Carlton. My message  
16 on free riding is that the issue shouldn't be ignored,  
17 but theory shouldn't triumph over empiricism.

18           In both *Toys-R-Us* and the CD investigation, the  
19 Commission looked searchingly at what looked like black  
20 letter free riding arguments and found them wanting.  
21 First of all, I agree with the Professor that free riding  
22 can work both ways and it's important for the Commission  
23 to recognize that frequently, free riding may be on the  
24 Internet retailers. But as the Commission found in the  
25 *Toys-R-Us* investigation, the critical issue is whether

1 the dealers can be compensated for the services they  
2 provide. And if that's true, then there is no free  
3 riding.

4 I commend to you the Commission's opinion in  
5 *Toys-R-Us*, which proposed three different, less  
6 restrictive alternatives that could be used to compensate  
7 *Toys-R-Us* for the services they provided.

8 Carlton and Chevalier's article focuses on high  
9 service products and, of course, those are different.  
10 But for the vast majority of products, intelligent  
11 consumers may not be really free riding on the services  
12 of full service retailers.

13 Hopefully, somewhere later on in the  
14 discussion, I can present some specific recommendations  
15 for the Commission to address on some of these vertical  
16 restraint issues.

17 MR. NANCE: Thank you. We'll have an  
18 opportunity to receive audience questions via notecards,  
19 but first we'd like to open up with a few questions from  
20 the moderators. The first question is, are there any  
21 manufacturers currently who refuse to deal at all with  
22 Internet retailers? If so, are these manufacturers  
23 clustered in any particular industry or in any particular  
24 industry segment? I address that question to all  
25 panelists.

1 MS. McDAVID: My recollection is that Professor  
2 Chevalier's paper identified a toy manufacturer who sells  
3 only through its own web site and online sales are not  
4 otherwise available, but I don't remember which toy  
5 manufacturer it was.

6 DR. CHEVALIER: Yes. The example was Playmobil  
7 USA. At the time that Professor Carlton and I wrote our  
8 paper -- I hate to comment on anything I saw even  
9 yesterday on the Internet and claim that it still holds  
10 true today -- there were several major fragrance and  
11 cosmetic manufacturers who refused to sell online except  
12 through their own manufacturer web sites. So, I believe  
13 there are several examples in existence.

14 I should say that these tend to be  
15 manufacturers who, while not selling exclusively through  
16 a manufacturers outlet offline, these tend to be  
17 manufacturers who are using methods of restricted  
18 distribution offline.

19 So, for example, Playmobil USA is a  
20 manufacturer -- you would not find those products, I  
21 believe, at Toys-R-Us or at Price Club because that  
22 manufacturer only wants to deal with more high service  
23 retailers. Whether there's a link between that policy  
24 and their policy of selling exclusively through their own  
25 web site, you know, I cannot say.

1 MR. AGARWAL: Is there a way to determine  
2 whether those manufacturers' refusals to sell online are  
3 a result of their unilateral business decisions or maybe  
4 a result of some group pressure from their dealers?

5 MS. McDAVID: Absent a searching investigation,  
6 I'd be astonished if you can find it, and if you look, I  
7 think, as several of the panelists have commented, on the  
8 face, it will appear appropriate. You're going to have  
9 to dig hard.

10 MR. AGARWAL: Irv?

11 MR. SCHER: Well, let me say that most of the  
12 manufacturers that you will find are not selling to  
13 Internet retailers, haven't adopted that policy  
14 specifically for the Internet. For example, Playmobil,  
15 which was mentioned, didn't sell to Toys-R-Us, that  
16 market power retailer, didn't sell to mass merchants  
17 either. So, that was a policy of Playmobil before the  
18 Internet came into play.

19 The same thing with many -- there aren't that  
20 many, but I'll say some furniture manufacturers who  
21 previously wouldn't sell to mail order or telephone  
22 retailers and continued that into the Internet.

23 I believe Dell didn't sell to any retailers. I  
24 think now it sells to one or two. Apple wouldn't sell to  
25 mail order or telephone retailers. So, it extends out

1 into the Internet. So, these are not policies that are  
2 adopted strictly for Internet, these are policies of  
3 companies who want restricted or limited distribution of  
4 their goods. And this happens, in particular, in  
5 consumer product categories where pre-sale and post-sale  
6 service is very important, which I know Apple considered  
7 with its no mail order policy, and we've seen that in  
8 other areas as well.

9 If I'm selling musical instruments and I have a  
10 client who sells mass product as well as musical  
11 instruments. On its mass electronic products, it doesn't  
12 have these restrictions. But on its musical instrument  
13 product category, it does not sell to Internet retailers  
14 or to mail order retailers or to telephone retailers.

15 MS. SMITH: Isn't part of that to maintain the  
16 brand image, to say to the consumer that here is a  
17 quality product where the brand is important? So, to  
18 maintain that, not to have it sold at Wal\*Mart or some  
19 places that would, perhaps, create, in the consumer's  
20 mind, that it's an equivalent product to something that  
21 just came out.

22 MR. SCHER: You're going to see that with  
23 designer goods, high fashion products. You'll see that  
24 in fragrances, which has been mentioned already. But  
25 there's also the product categories that do, in fact,



1       require pre-sale and post-sale service. But I have  
2       another client that has a very limited fragrance line  
3       that goes to department stores and high-end specialty  
4       stores only, and then another mass line that goes  
5       elsewhere. Indeed, the antitrust agencies approved their  
6       acquisition of the mass toiletry manufacturer for that  
7       reason. It really was a product extension merger.

8               MR. NANCE: Stopping short of an outright  
9       refusal to sell on the Internet, are there manufacturers  
10      who may disadvantage Internet retailers by warranty  
11      policies or things of that nature?

12             MR. MISENER: I'd be happy to talk a little bit  
13      here. Just to quickly answer that question. We've  
14      experienced some instances of reluctance to sell through  
15      our channel. But that has faded dramatically with the  
16      success of Internet-based commerce. I guess one of the  
17      things that strikes me about this whole conversation over  
18      the past 15, 20 minutes or so, is that it's focused on  
19      whether it is done as a factual matter and perhaps  
20      whether it is legal. But no one's raised the real issue.  
21      Is this a viable business strategy?

22             It reminds me a lot of a computer manufacturer  
23      who famously had some wonderfully designed equipment and  
24      software and who chose not to license it to other  
25      manufacturers and still remains sort of a third-rate

1 manufacturer today as a result. You know, was it done?  
2 Yes. Was it legal? Yes. Was it a viable business  
3 strategy? No. I think what we have seen dramatically  
4 over the past five years is how the power over the sale  
5 really has been pushed out to consumers as a result of  
6 Internet-based commerce -- they really have authority  
7 over this.

8 I can cite just a couple of small examples and  
9 the most obvious of which perhaps is that on our web  
10 site, we have available some 28 million different  
11 products you can get through the site, and a very large  
12 number of them have some sort of review associated with  
13 them, and consumers can place reviews on any of them.  
14 And guess what? A lot of those reviews are really bad  
15 and really trash the products. They say, it's horrible,  
16 don't buy it, whatever. Not many retailers have done  
17 that in the past, have sold things and then had on there  
18 at their storefront, this is a bad product, you don't  
19 want to buy it.

20 That is an example of how the power has shifted  
21 from the retailer to the consumer. The consumer is going  
22 to decide, ultimately, what he or she is going to buy.  
23 So, I just question aloud whether these folks who have  
24 chosen to either be reluctant or to actually refuse to  
25 sell things through Internet-based channels, whether

1 that's going to survive long term as a strategy. It's  
2 not just an esoteric question, it's one that goes to the  
3 Commission's limited resources. If this is not going to  
4 work, maybe the Commission doesn't need to go after it.

5 MR. AGARWAL: Let me ask Paul and then the  
6 other panelists. Paul, are you folks at Amazon unfairly  
7 free riding off of brick and mortar retailers? And then  
8 for all the panelists, how should antitrust law deal with  
9 some of the free riding issues raised by Professor  
10 Chevalier and others?

11 MR. MISENER: A fun fact here, predictions  
12 notwithstanding, we are about one, one and a half percent  
13 of retail in this country. We're small. We're very  
14 small. And the fact of the matter is the physical world  
15 will always coexist with the online-based retail world.  
16 It's not going to be a replacement at all, as had been  
17 predicted foolishly. I mean, we are all carbon-based  
18 human beings and we live in the physical world.

19 It is true that some people will see products  
20 in stores and buy them from us. It is also true that we  
21 provide the best recommendation service anywhere, and so,  
22 people will look for recommendations and go buy them at  
23 the corner store. That's fine. That all goes to what  
24 customers want. If we really do focus on not the sort of  
25 selfish what is best for the retailer, but what is best

1 for the customer, it's best for the customer to have that  
2 choice.

3 DR. CHEVALIER: I think it's not surprising  
4 that when we look at the short history of what products  
5 have sold very successfully on the Internet -- you know,  
6 there was a time when people thought we would be buying  
7 furniture on the Internet, and I think we now think that  
8 that's mostly not true. I think that the products that  
9 have sold very successfully on the Internet tend to be  
10 those products for which the sales and service factor is  
11 not necessarily or kind of importantly physical.

12 And when you think about things like, would you  
13 ever drive a car without test driving it, the answer is  
14 probably -- for most people, the answer is, without test  
15 driving at least a car of that make and model, the answer  
16 is probably no. So, while it may be the case that  
17 manufacturers are going to want to sell cars over the  
18 Internet, it's also true that they're going to need to  
19 think of a mechanism to provide -- they're going to need  
20 to think of an alternative mechanism for providing that  
21 test drive service to the current mechanism in which the  
22 test drive service is only paid for via the purchase of  
23 the product.

24 MR. BALTO: The Commission's opinion in *Toys-R-*  
25 *Us*, is instructive. There are a variety of means that

1 manufacturers can use if they think free riding is  
2 occurring to either compensate the retailer who's being  
3 free ridden on or to have some payment go from the  
4 Internet retailer to the local retailer. For example, in  
5 territorial restraints, for years, antitrust has  
6 permitted profit pass over payments to compensate the  
7 local retailer when there's a transaction from one  
8 territory to another territory.

9 MR. SCHER: That's an interesting point.  
10 David's never been a retailer. I doubt that he's ever  
11 represented a retailer. But a retailer is not in  
12 business to advertise and promote for some other  
13 retailer's sales. It's not a zero sum game. So, if the  
14 retailer gets reimbursed for all the services that it's  
15 providing but doesn't sell the product, somebody else is  
16 making the profit.

17 MS. SMITH: David, I just want to ask you, why  
18 do you think the government should have to intervene in  
19 those matters? Don't you think that the manufacturers  
20 will realize that dealers have to get compensated in some  
21 way or another, that market forces are going to work if  
22 there, indeed, is a free rider problem that means that  
23 the dealers are going to be up and revolt, that the  
24 manufacturers are already doing some things to try to  
25 keep that channel vibrant and open knowing that it brings

1 enormous value to have the maintenance, the service and  
2 so forth and so on?

3 MR. BALTO: I generally agree with you. But I  
4 guess the experience of working on investigations at the  
5 FTC has taught me that manufacturers' and consumers'  
6 interests normally should be coincident, but sometimes  
7 traditional retailers can interfere with those interests.  
8 A manufacturer's interest is basically just to expand  
9 output, but sometimes retailers have coercive power that  
10 can prevent a manufacturer from recognizing that its  
11 interests are really the same as consumers.

12 And, also, this is just a threshold inquiry.  
13 I'm only questioning whether or not you decide not to  
14 investigate something based on a free rider defense.

15 MS. McDAVID: I think Fran is exactly right.  
16 Most manufacturers will try to find ways to address this  
17 issue within their own distribution system.

18 I'm going to date myself a bit here, but 20  
19 years ago, people in this part of the world ordered our  
20 furniture from North Carolina retailers by using 800  
21 numbers and mail order, and we all did our free riding at  
22 the local furniture outlets where we went around with  
23 pads of paper and wrote down numbers of each unit and  
24 maybe even ordered catalogs from the furniture  
25 manufacturers. Well, the effect of this has been, number

1 one, that many of those North Carolina outlets have been  
2 cut off from their supplies. But the second is that  
3 those retailers are not there any longer.

4 MR. NANCE: On the topic of retailing and also  
5 on the topic of complicated goods for sale, technologies  
6 are constantly emerging that may lend themselves to  
7 selling some of these higher inspection cost type goods  
8 online. We've all seen the reports of golf clubs, in  
9 particular -- the argument that a golf pro is necessary  
10 to properly fit the club. How much of this perhaps could  
11 be considered pretextual? How likely is it that there  
12 are technologies that are present but may be hindered  
13 right now from being fully implemented to sell some of  
14 the more complicated goods online?

15 MR. MISENER: I think a lot is made of sales  
16 and service or rather the service aspect of sales in  
17 brick and mortar stores that may be more fictional than  
18 anything else. I really challenge you to go into a  
19 traditional brick and mortar retailer and get more  
20 information about a product than you would off of  
21 Amazon.com.

22 So, it may be the case for things that are  
23 physically -- the physical size of an individual matters.  
24 Golf clubs is a huge thing. Clothing is more difficult.  
25 Certainly, custom clothing would be extraordinarily

1           difficult to do online. That's not to say it's  
2           impossible. But I think, frankly, the vaunt of service  
3           that we're led to believe exists in the offline does not,  
4           and that the teenager that you go up to in the store  
5           knows far less about the product than the product reviews  
6           offered on web sites such as our own.

7                       MR. NANCE: Which, if I might make a comment,  
8           sounds similar to some of the testimony we heard  
9           regarding automobile dealers yesterday on the sales and  
10          service side.

11                      MS. McDAVID: Well, the manufacturer sites for  
12          automobiles will provide you with all the specifications.  
13          You can find sites that will do comparisons between  
14          particular kinds of models. How big is the trunk, what's  
15          the fuel capacity? But to touch it and feel it, you  
16          ultimately have to go to the brick and mortar retailers  
17          because, frankly, you can't consummate the sale in any  
18          other way.

19                      MS. SMITH: Well, there are other options, too.  
20          Renting a car, which a lot of people do now, to try it  
21          out over the weekend, get a really low deal on a car  
22          they're thinking of. So, people don't necessarily always  
23          free ride on that. Plus recommendations from friends,  
24          driving a friend's car. So, that sort of thing, I think,  
25          operates more than people give it credit for.



1 MS. McDAVID: The manufacturer sites for the  
2 automobile industry are providing this as a service to  
3 the dealers in addition to being a service to the  
4 consumer. They are trying to facilitate the sales of  
5 their vehicles through the only outlets through which  
6 they can be sold, which are commercial automobile  
7 dealers.

8 MR. AGARWAL: Let me ask a question for the  
9 panel. Under what circumstances, if any, are exclusive  
10 dealer arrangements a problem?

11 MR. SCHER: Why don't you start that one,  
12 David?

13 DR. CHEVALIER: Which type of exclusive dealer  
14 arrangements do you mean?

15 MS. McDAVID: Exclusive territories or  
16 exclusive dealing arrangements? What is it you have in  
17 mind?

18 MR. AGARWAL: Both.

19 MS. McDAVID: Both, okay.

20 MR. SCHER: Well, you know, I thought you meant  
21 something else, Jan. Exclusives where the retailer gets  
22 an exclusive and the manufacturer doesn't deal with any  
23 other retailers, or in that channel with any other  
24 retailers is one type and, of course, the other type is  
25 where the retailer is not permitted to purchase from

1 other vendors. Do you want both, also?

2 MS. McDAVID: Requirements, contracts and  
3 exclusives.

4 MR. AGARWAL: Yes, please.

5 MS. McDAVID: David, take it away.

6 MR. BALTO: I think exclusive arrangements  
7 would be in problematic in rare instances where, you  
8 really could show some evidence that prices would be able  
9 to increase substantially. It's perfectly fine for a  
10 manufacturer to enter into exclusive territorial  
11 arrangements. That may be the most efficient means of  
12 distributing their product.

13 DR. CHEVALIER: I mean, remember that perhaps  
14 there would be some scrutiny over an exclusive contract  
15 between a manufacturer and a dealer. However, the  
16 situation in which the manufacturer just vertically  
17 integrates into retailing and decides to do the retailing  
18 itself is almost never -- there's almost never any  
19 scrutiny of that. And that seems a little bit of an odd  
20 asymmetric treatment.

21 We might ask the question, why is Tommy  
22 Hilfiger selling its clothes to this retail Internet  
23 outlet and not that one? But nobody says, gosh, why  
24 doesn't the Gap sell its Gap-labeled clothes to Macy's  
25 instead of selling it exclusively through the Gap retail

1 outlets? Well, that's because the Gap chose to  
2 vertically integrate. And it seems kind of odd that  
3 vertical integration would be okay with almost no  
4 scrutiny and yet we are very concerned about vertical  
5 contracting between manufacturers and retailers. That  
6 seems kind of an asymmetric treatment of two things that  
7 are somewhat similar in result.

8 MR. SCHER: Vertical integration has been open  
9 to scrutiny where the claim was that the first level of  
10 producer or manufacturer was a monopolist. The Kansas  
11 City Star case involved vertical integration under  
12 Section 2 of the Sherman Act. But absent Section 2  
13 Sherman Act issues, there's just nothing wrong with  
14 vertical integration.

15 MS. McDAVID: There have been a whole series of  
16 newspaper dealer cases with a vertically integrated  
17 network. But Irv is right, all of those cases have  
18 failed. But that doesn't matter in many ways. One  
19 important point, I think, that we need to think about --  
20 especially those of us in the private sector who counsel  
21 clients on these issues every day -- is that there's a  
22 big difference between having something be upheld  
23 ultimately after either a trial on the merits or even a  
24 motion for summary judgment and having it be not subject  
25 to challenge. A lawsuit, even one that is ultimately

1 disposed of on a motion for summary judgment or following  
2 trial on the merits or, God forbid, on appeal is  
3 nonetheless a disaster for the company that was involved  
4 in the lawsuit. So, the fact that there may not be a  
5 good basis for the lawsuit shouldn't necessarily be  
6 interpreted as a lay down win for the manufacturer who's  
7 subject to extraordinary litigation costs and diversion  
8 of attention from the business it's got to run.

9 MR. NANCE: Mr. Misener mentioned the broadband  
10 issue. I was curious whether there were any other  
11 external technological or other factors that served as  
12 impediments and that were within private control and  
13 which could be changed to facilitate e-commerce.

14 MR. MISENER: Yes, I think I would look at the  
15 entire distribution chain and communication link between  
16 consumers and the retailers online. So, you have not  
17 only, of course, the potential for a bottleneck by a  
18 broadband service provider, a broadband platform  
19 provider, but also, you can think in terms, if you're  
20 creative, of going towards software, hardware, both at  
21 the consumer level and at the backbone, and then look at  
22 the distribution subsequent to the retailer, from the  
23 retailer to the consumer.

24 You might want to look at interesting things  
25 having to do with shipping. Is the shipping environment

1 in this country truly competitive or not? How does the  
2 faltering U.S. Postal Service affect that level of  
3 competition? It's a huge concern for us. If the Postal  
4 Service goes under, query who can deliver the products  
5 besides maybe one or two names, and in that environment,  
6 prices could certainly go up for consumers and make it  
7 very difficult to find alternatives.

8 MS. SMITH: I think that's an interesting  
9 question you brought up that it's not just the selling of  
10 the products and services, but the Internet, the  
11 distribution problems, the payment problems, the payment  
12 systems, I think, are going to be critical to the  
13 Internet in the future. Certain sites provide certain  
14 levels of security, but still many consumers aren't going  
15 to e-commerce because they don't feel willing and ready  
16 to put their credit card number even in unsecured sites.

17 I think in the payment system, we probably  
18 should think about also micro-payments and how micro-  
19 payments are made in the real world for telephone calls  
20 and so forth and so on. You have very small payments.  
21 We don't have ways to do that very readily on the  
22 Internet. So, I think that could be a constraint from  
23 that standpoint as well. A market constraint if we don't  
24 get developments in that area.

25 MR. AGARWAL: I'd like to pick up on a point

1 made by Janet a moment ago, which was the sense of legal  
2 uncertainty about certain issues. For all the panelists,  
3 and particularly those in the private sector, what are  
4 some of the areas of real legal uncertainty out there and  
5 what can be done about it?

6 MS. McDAVID: Well, Irv's very excellent  
7 overview distinguished between per se and rule of reason.  
8 But even in a rule of reason case, you're not without  
9 risk. Ultimately, you are left with the risk tolerance  
10 of the individual company involved. Are they going to  
11 perhaps avoid conduct that might be procompetitive and  
12 reduce costs to consumers and their distribution network  
13 because it is not without risk? I'm confident, from my  
14 own practice, that such conduct happens today.

15 Manufacturers do not do things because of the  
16 risks of litigation that I described, even though they  
17 believe they would prevail in the end. I'm confident  
18 that David and Irv see exactly the same thing in their  
19 practices.

20 MR. SCHER: Yes.

21 MR. BALTO: Yes.

22 MR. SCHER: Both *Toys-R-Us*, which David  
23 mentioned, and the compact disc cases were rule of reason  
24 cases. The Commission tried the *Toys-R-Us* case under the  
25 rule of reason, and the Commission, which didn't try or

1 have any findings in the compact disc case, issued a  
2 consent order and stated that they considered the  
3 practice to be subject to the Rule of Reason. Yet, both  
4 Toys-R-Us and the compact disc companies were sued  
5 immediately after the Commission announcements in private  
6 suits, numerous consumer class actions, as well as many,  
7 many State Attorneys General as *parens patriae*. So,  
8 there's tremendous risk even in a Rule of Reason case.

9 MR. BALTO: Let me just touch on two issues.  
10 One of my papers talks about the cooperative advertising  
11 area, and as in other areas, manufacturers provide  
12 funding to Internet retailers to advertise on their web  
13 sites. It's unclear, from my perspective, to what extent  
14 a manufacturer can restrict pricing on that Internet web  
15 site because of those cooperative payments. Is it just  
16 simply on the part of the web site that is paid for by  
17 the manufacturer or can the price restriction go further?  
18 The second area, I think, that the Commission will  
19 provide guidance on is the area of functional discounts  
20 under the Robinson-Patman Act, and I notice I've made  
21 everybody in the room cringe. So, I'll stop it there.

22 DR. CHEVALIER: I also think another issue  
23 about legal uncertainty is that we can, in certain  
24 circumstances, describe situations in which conduct  
25 that's historically raised a lot of red flags from an

1 antitrust perspective in a particular circumstance may be  
2 less anticompetitive than other conduct that tends to go  
3 without scrutiny. So, for example, I raised the issue of  
4 vertically integrating versus signing a vertical  
5 contract. That would be a circumstance in which legal  
6 ambiguity might actually lead someone to use a mechanism  
7 that actually has more anticompetitive effect than an  
8 action which --

9 MS. McDAVID: But lower risk.

10 DR. CHEVALIER: But lower risk for antitrust  
11 scrutiny.

12 MS. SMITH: And I think, also, in the antitrust  
13 areas, it's going to become incumbent to look at the  
14 public benefit, how the public is affected when antitrust  
15 law gets more and more applied to e-commerce. I think  
16 that's often overlooked in the real world because many of  
17 the most prominent antitrust suits are a competitor  
18 bringing a suit against a competitor -- looking to  
19 perhaps have their business plan advanced by taking that  
20 antitrust action, as opposed to consumers in the  
21 marketplace being unhappy.

22 So, I think antitrust, historically, has never  
23 -- I don't think it can look at how consumers are  
24 affected by, for instance, an antitrust suit. So, on the  
25 Internet, competition's going to be -- because of the



1 numbers of people using it, because of the information  
2 out there, where consumers can find out ratings, can find  
3 out quality, can see the bad, can see the good, can look  
4 at disclosures on sites that have ads, they know that  
5 they're paid for.

6 So, there's an enormous amount of information  
7 there that I think should mean that antitrust should be -  
8 - as I said earlier, there should be some skepticism  
9 about applying antitrust policies that have been used in  
10 a somewhat static world to some of these very, very new  
11 types of dynamic -- the dynamic marketplace.

12 MS. McDAVID: But although the Commission has  
13 had a number of very important enforcement actions in  
14 this area that we've talked about and the Commission can  
15 use its bully pulpit to advocate, in too many of these  
16 cases the decision is going to be ultimately made by a  
17 Federal District Judge whose knowledge of the antitrust  
18 laws may be rudimentary at best, and 12 people from the  
19 local community. If you've ever watched the  
20 deliberations of a jury in even a model antitrust case,  
21 it's a frightening prospect, and very frightening to  
22 manufacturers. And that is part of the *in terrorem*  
23 effect of the risk of litigation in this area.

24 MR. AGARWAL: Well, you've all raised some  
25 interesting issues about cooperative advertising,

1 functional discounts and other issues. What should be  
2 the right rule? Let me start with David.

3 MR. BALTO: The right rule on cooperative  
4 advertising?

5 MR. AGARWAL: And functional discounts since  
6 you raised it.

7 MR. BALTO: I'm not going to answer Robinson-  
8 Patman questions sitting at the same table as Irv Scher.  
9 So, I'm going to leave that one to Irv. I've suggested  
10 in an article I've written that the logic of the  
11 Commission's enforcement action in the CD case, in which  
12 they said that it was okay to restrict the advertising in  
13 newspaper circulars, but it was not okay to restrict the  
14 actual price signs in the store, would suggest that in a  
15 cooperative advertising policy on the Internet, you could  
16 restrict pricing on the portion of the Internet site you  
17 were paying for, but not further.

18 So, I guess you could have a web site that said  
19 -- on the part of the site that's being compensated by  
20 the manufacturer, you could have an ad that says, we have  
21 a special good price without disclosing it, and then as  
22 you went through the web site, you could eventually find  
23 out what that price was at another part that wasn't being  
24 compensated.

25 MS. McDAVID: Well, it's remarkably confusing

1 to consumers, too, David. Part of the concern we've got  
2 to have here is that the Internet has brought information  
3 to consumers that was never available to them before. If  
4 the information that's available to them on the web is  
5 ultimately going to be confusing in terms of what price  
6 is or isn't available, have we done them a service?

7 MR. SCHER: The key issue here on advertising  
8 and the Internet is, what is the ad. A manufacturer  
9 offers coop advertising to all "competing customers." We  
10 have two decisions now, both in the book industry in  
11 which -- in dictum, the district courts have said that  
12 Amazon.com, in particular, competes with every bookstore  
13 in the United States. Therefore, whatever is being  
14 offered in the form of advertising to Amazon.com, under  
15 Section 2D of the Robinson-Patman Act, should also be  
16 offered to every retailer in the United States and vice  
17 versa. For example, if I, as a manufacturer -- let's go  
18 to grocery products, which isn't an Amazon.com thing, but  
19 it's where this kind of action is. A grocery  
20 manufacturer often limits a promotion to a regional area.  
21 With the chains, we'll say to the chain store, look, I  
22 don't want you trans-shipping this product into another  
23 market, it's only for the Denver area. And that's  
24 lawful. The manufacturer has to offer it to all  
25 retailers competing with that chain in Denver.

1           Now, what do you do if an Internet retailer is  
2           selling that product? Do you say to the Internet  
3           retailer, we're only going to apply this to sales you  
4           make in the Denver area? I don't think anybody's faced  
5           that issue yet. So, that's one issue.

6           Another issue, and I actually started with that  
7           one, let me go back to it, is what is the ad -- and I'll  
8           use Amazon.com hypothetically. What is the ad on  
9           Amazon.com? It seems -- there's been no cases on this.  
10          It seems to me that it's listing of the books -- let's  
11          use books. It's listing of the books is not an ad.  
12          Similarly, if I go to that page for Catcher In The Rye,  
13          and now I'm essentially seeing the inside of the jacket,  
14          maybe some reviews for it and what the book is about,  
15          that isn't an ad either because manufacturers don't pay  
16          the bookstores for that service. So, I don't believe  
17          they have to pay Amazon.com for that service. On the  
18          other hand, if, when I go to Amazon.com, I get a  
19          starburst and it says, Catcher In The Rye special this  
20          week, that's an ad, and all of the ramifications of the  
21          Robinson-Patman Act come into play. But there's no law  
22          yet on that, as far as I know.

23                 MS. McDAVID: Well, could the practical effect  
24                 of the case law that Irv has just described be to  
25                 discourage manufacturers from offering services and

1 discounts to local retailers?

2 MR. SCHER: It could.

3 MS. McDAVID: But because of the risk, that  
4 they're going to have to make it available to Amazon.com.

5 MR. SCHER: Well, it could. But now, of  
6 course, the Federal Trade Commission hasn't brought a  
7 case under Section 2D of the Robinson-Patman Act since  
8 1988 and that one was ultimately dismissed. I don't  
9 think we have much of a concern, from a practical  
10 counseling standpoint, that the Federal Trade Commission  
11 --

12 MS. McDAVID: I'm thinking in the public good  
13 terms rather than litigation risk terms.

14 MR. SCHER: I don't think there's much  
15 litigation risk unless -- but, you know, I've been wrong  
16 on that. I don't think there's much litigation risk  
17 unless it becomes an epidemic situation. The case that  
18 was brought under the Robinson-Patman Act against Barnes  
19 and Noble and Borders was brought by an entire  
20 association of retailers who put together a treasure  
21 chest. But something like this, I don't see it.

22 I've seen, in the last week, a new Elvis  
23 compact disc, Elvis I, which was offered at \$8.89 at  
24 Wal\*Mart last week and \$14.99 virtually everywhere else.  
25 Now, from what I've read, Wal\*Mart got a special track or

1 a special disc. Now, that could be looked at as a  
2 facility, under Section 2E of the Robinson-Patman Act,  
3 that wasn't offered to anybody else. On the other hand,  
4 it could be looked at as a different product, so the  
5 Robinson-Patman Act doesn't apply at all. But it does  
6 create interesting issues. But who would bring a case  
7 over one record?

8 MR. NANCE: We have a question from the  
9 audience. Would someone discuss the issue of whether  
10 displaying prices on web sites violates manufacturer's  
11 minimum advertised price policies where a brick and  
12 mortar seller would not violate its policy by putting the  
13 sale price of the same item in print?

14 MR. SCHER: Would you repeat the question? I  
15 don't know if I understood it.

16 MR. NANCE: The question deals with a  
17 manufacturer having a different policy for advertising a  
18 price on the Internet versus within printed material.

19 MR. SCHER: Well, on behalf of the consumer  
20 product manufacturers of the United States, I think they  
21 should have the right to tailor their own advertising  
22 dollars to where they think it will do the best in  
23 reselling the product. So, if I'm dealing with my  
24 neighbor here on Amazon.com, there's forms of advertising  
25 I don't want to offer to them because I don't think it

1 does me any good. I want to tailor my advertising  
2 dollars to them to advertising that I think is going to  
3 help them sell the product and me get more sales as well.  
4 So, I think tailoring it should be in the realm of the  
5 manufacturer's discretion.

6 MS. McDAVID: And I think the point you made  
7 earlier, Irv, is that perhaps the price listed on  
8 Amazon.com is not an advertisement.

9 MR. SCHER: That's what I think.

10 MR. AGARWAL: On Tuesday, in one of our panels,  
11 Senator Metzenbaum raised an issue which I'll ask here,  
12 which is, does the Internet facilitate collusion among  
13 manufacturers or retailers?

14 MR. BALTO: I think it's great that all the  
15 antitrust officials gave speeches about that topic back  
16 when e-commerce got going in the late nineties, but I  
17 think it's highly unlikely. Information is rich out  
18 there. I think all that the Internet provides is that  
19 instead of having to buy some consultant who counted box  
20 cars going into a factory, that you hire a consultant who  
21 goes on to the web and surfs a lot.

22 MR. SCHER: Of course, there is an Internet  
23 retailing price fixing case. It was brought in 1993 by  
24 the Department of Justice against the airlines, who are  
25 retailers of services, for using the Internet allegedly,

1 because this wasn't litigated either, to fix prices.

2 MS. McDAVID: Now, it's a very important, and  
3 often little known portion of that case that the line  
4 that the airlines were using to communicate with one  
5 another was not a line that was available either to the  
6 public or to the retail travel agent. It was a line on  
7 the screen that was only visible to the other airlines.  
8 And I think that is a very important element of that  
9 case.

10 I spent about six months with this agency  
11 discussing these issues in the Covisint investigation at  
12 considerable pain to my clients. But I can assure you  
13 that in all of the Internet arrangements that we've been  
14 looking at, the business realities that are facing the  
15 companies involved in those B2B sites or B2C sites and  
16 the antitrust laws tend to dovetail. They don't actually  
17 want anyone to see their data. The customers don't want  
18 their data being seen by anyone other than the  
19 manufacturer with whom they're dealing, and as a result,  
20 the kinds of firewalls and protections that we've built  
21 into these arrangements are both required by the  
22 antitrust laws and by prudent business practices.

23 MR. NANCE: What has the effect of the Internet  
24 distribution channel been on retail margins both on the  
25 brick and mortar and on the Internet side, and is there



1 any empirical evidence related to that? And does the  
2 effect on margins, if the effect does, in fact, exist,  
3 create a marketplace where it might be impossible to  
4 maintain business with its sole distribution channel  
5 being the Internet?

6 MS. SMITH: Can I just respond to the first  
7 part of the question? I think if you look at profit  
8 margins in the real world versus the virtual world, I  
9 think you have to look at it as a progression. Look at  
10 how food was sold, for instance, first. We had mom and  
11 pop stores. Then came the supermarkets, which undercut  
12 the mom and pops. So, the mom and pops raised their  
13 prices and stressed other things. The supermarkets came  
14 along. Now we have the electronic supermarkets. So,  
15 when you're talking about evolutions and rather than  
16 completely new revolutionary things, I think it's an  
17 evolution from a mom and pop to this broad array. So,  
18 you're going to find that profit margins are going to  
19 change as they have in the real world.

20 When a Wal\*Mart comes to town, that makes a  
21 difference to some of the other retailers there. As you  
22 know, many local communities, the business people have  
23 tried to stop Wal\*Marts opening up.

24 So, you're thinking of e-commerce and some of  
25 the sites that are going to take over the world isn't

1 necessarily what's going to happen. Today in the food  
2 world, we have mom and pop stores, we have boutique  
3 stores, we have organic stores, we have supermarkets, we  
4 have super-supermarkets, we have food sold on the  
5 Internet, and we have farmer's markets. So, you have  
6 vast panoplies, and I think we're going to continue to  
7 have many of those vast panoplies. You might pay a  
8 premium for some of the selections.

9 MR. MISENER: You know, Mark, I feel uniquely  
10 qualified to talk about profits. If you look at the top  
11 50 retailers in this country, I think all but three or  
12 four were profitable in 2001. One of them happens to be  
13 the largest company in the world, right? It's Wal\*Mart  
14 operating at \$220 billion worth of revenue, the largest  
15 company in the world. Its profits are on the order of  
16 \$6.8 billion. This is compared to Amazon's revenues of  
17 about three and a half billion.

18 So, I think it's fair to say that, as Frances  
19 has indicated with much more colorful language, the brick  
20 and mortar retailing world is doing just fine. The  
21 effect of the Internet on it so far has been one of, I  
22 think, quality because people are not going to put up  
23 with shoddy service anymore. There is absolutely no  
24 reason to go to a brick and mortar store if you're going  
25 to be mistreated.

1           Now, the reason to go there, of course, is to  
2 get something else. The experience of touching things,  
3 opening books, it's a big thing. I mean, there is a real  
4 purpose and I fully admit that I go to brick and mortar  
5 bookstores on occasion because there is an interaction,  
6 there is a service there. But if it's bad, if it's a bad  
7 experience, they will fail. But there's been no  
8 indication so far that profit margins have suffered as a  
9 result of Internet commerce.

10           MR. SCHER: Well, you know, it may be because  
11 people go to Barnes and Noble now to drink coffee and  
12 read the newspaper rather than buy books that they've  
13 joined the Internet world with BN.com, and indeed, as a  
14 "frequent reader," I got a better discount by buying from  
15 Barnes and Noble online than I do from buying in the  
16 store. So, they've joined it rather than fought it.

17           I've seen that in adjacent markets. I mean,  
18 we've seen it in books, music and video where major brick  
19 and mortar retailers have created online sites as well as  
20 their brick and mortar sites. You know, you're seeing it  
21 in hit product type of interests, hit product, low ticket  
22 mainly categories. Best Buy and Circuit City have online  
23 sites. Wal\*Mart has, what I've heard, a successful  
24 online site. Certainly, in these areas, which were the  
25 traditional Amazon.com area, they've joined Amazon.com to

1 compete with Amazon.com online.

2 DR. CHEVALIER: I don't think there's much  
3 empirical research. I mean, I think it would be  
4 something you would have to do category by category,  
5 documenting the effect of Internet commerce on margins  
6 offline. But it's important to realize that, in theory,  
7 it can go either way, and that we usually think of this  
8 issue of there's more competition, therefore we're going  
9 to be forced to have lower margins.

10 But, of course, it's also the case that the set  
11 of customers who showed up at the Barnes and Noble used  
12 to be a mix of the price shopping savvy types and the  
13 coffee drinking, here for the convenience and ambiance  
14 types, and it's now the case probably that those markets  
15 are more segmented, and theoretically it's possible that  
16 the right answer for a brick and mortar retailer is to  
17 raise prices a lot because the set of customers who  
18 arrive at the store is very different in the post-  
19 Internet world than in the pre-Internet world.

20 I also think that it's important, at this  
21 moment, when we think about the effect of the Internet on  
22 brick and mortar commerce, you know, I think Paul keeps  
23 emphasizing that Amazon is small and I think he's right.  
24 Internet commerce is actually probably competition from  
25 retailers selling stuff over the Internet is the small

1 story. But I think the large story is the effect of  
2 consumers who now walk into a store armed with  
3 information that they hadn't been armed with before. So,  
4 I think there's huge effects on probably things a little  
5 bit outside the scope of what you would call retailing.

6 I think that the business of selling term life  
7 insurance to consumers is never going to be the same now  
8 that people come in armed with the material that they  
9 read on the Internet before.

10 So, I think there's two aspects to it. There's  
11 the easy availability of research, which affects people  
12 when they come in the door, and I think at this moment  
13 that's more important than the actual competition being  
14 provided by Internet retailers.

15 MR. AGARWAL: We have a question from the  
16 audience which is, do Internet retailers face  
17 difficulties in gaining a foothold and momentum in  
18 certain manufacturing areas because the manufacturer's  
19 management looks first to a stock price and the next  
20 quarter's profits? Let me also add to that, do they face  
21 difficulties because any manufacturer's concerns over  
22 channel conflict?

23 MR. MISENER: Whose stock price? I wasn't  
24 following whose stock price?

25 MS. McDAVID: I think the manufacturer's stock

1 price is the implication I had.

2 MR. AGARWAL: Yes, because of the  
3 manufacturer's stock price.

4 MR. MISENER: So, the question sort of devolves  
5 to is it a short term or a long term strategy. Is that  
6 right?

7 MR. AGARWAL: That's right.

8 MR. MISENER: Well, I think I've indicated  
9 before earlier today that it is not a viable long term  
10 strategy to avoid this channel of commerce.

11 MR. AGARWAL: Are there concerns about channel  
12 conflict that you've experienced or seen?

13 MR. MISENER: I think I termed it before as  
14 reluctance and I think that that is what it was and  
15 they've gotten over it largely. They've seen that Amazon  
16 is good for manufacturers. We sell a lot of their  
17 product. So, the early reluctance and concern, the fear  
18 of the unknown, I think has dissipated greatly over the  
19 past, say, three years.

20 DR. CHEVALIER: I'm not sure that Amazon is  
21 typical in this regard in the sense that Amazon is  
22 probably the biggest, highest reputation retailer on the  
23 Internet, and so, it might be the case that Amazon's  
24 experiences in this particular regard may not be  
25 completely typical of other pure play Internet retailers.

1 MS. McDAVID: And I wonder what the fall-out of  
2 the dot-com failures has been about the perceptions of  
3 manufacturers and Internet retailing. The failure of the  
4 eToys and others may have set this back on a short term  
5 basis. I don't know because, frankly, I'm not a business  
6 person, that's not something I've seen, but perhaps you  
7 have.

8 DR. CHEVALIER: I think it would be hard to  
9 generalize about that.

10 MR. NANCE: What we'd like to do now is go  
11 around the table, starting with David, asking the  
12 question, what is it that the FTC could do now to best  
13 facilitate and promote the growth of competition via e-  
14 commerce?

15 MR. AGARWAL: And if it's bringing an  
16 enforcement action, what type of enforcement action?

17 MR. BALTO: Against who? That's great. I  
18 appreciate that. I think, first of all, you know, going  
19 after state regulation is an unabashed good just like  
20 having somebody else in the World Series other than the  
21 New York Yankees is an unabashed good. Sorry about that,  
22 Irv.

23 I think the Commission should apply hard  
24 empiricism to looking at Internet relationships,  
25 especially vertical restraints. I think that that

1 certainly has been sort of the code word of their recent  
2 merger analysis where they haven't stopped at the kind of  
3 presumptions that might suggest that there are  
4 competitive problems, but really dug deep into the facts.

5 I think one of the real benefits of antitrust  
6 enforcement during the prior administration was to look  
7 at certain types of vertical restraints and through  
8 searching inquiry, recognized the potential impact of  
9 those restraints in protecting traditional retailers from  
10 new innovative forces that offered low prices.

11 So, I think the kinds of investigations that  
12 the prior administration conducted certainly should be  
13 conducted in e-space and that means using compulsory  
14 process to really dig down as to whether there are  
15 illegal vertical restraints. Remember that the Toys-R-Us  
16 case found illegal vertical restraints. It wasn't just a  
17 horizontal case. But then, you know, doing the kind of  
18 searching inquiry to see if there is also an illegal  
19 horizontal agreement.

20 DR. CHEVALIER: So, I guess I would -- while I  
21 agree that there may be instances in which we would be  
22 very concerned about some vertical restraints we see, I  
23 would encourage the FTC to have some forbearance in the  
24 area of vertical restraints and that I think that --  
25 especially as I've emphasized before, I think that there



1 is -- we hold vertical contracts to a somewhat high  
2 standard and yet some unilateral actions that a  
3 manufacturer can take tend to be held to a somewhat lower  
4 standard. I think that there is a danger in creating  
5 distortions in a manufacturer's behavior, where they  
6 favor one vertical action over another because they think  
7 that one will meet less scrutiny than another.

8 So, you know, I'm probably not going to get you  
9 to do anything about resale price maintenance, but I  
10 think that -- you know, I would, nonetheless, encourage  
11 the FTC to take a broad view of this issue of free riding  
12 and think about and perhaps error on the side of  
13 forbearance in the case of vertical restrictions.

14 MS. McDAVID: I would like to commend the  
15 Commission for holding these hearings, and the kind of  
16 reports that have resulted from these hearings starting  
17 with the Pitofsky hearings, "Anticipating the 21st  
18 Century", which led to a really quite remarkable document  
19 that has taken us all very far in our analytical  
20 thinking. This also was true of the IP hearings, the B2B  
21 hearings. The Commission uses its bully pulpit to  
22 educate the business community and the bar about the  
23 risks and rewards involved in these kinds of issues.

24 In doing that, it helps us counsel our clients,  
25 it helps the business people try to grapple with the

1 risks they face. Over a much longer term, it may move  
2 the outcome of litigated cases in the right direction,  
3 although that's like water torture in terms of the amount  
4 of time that it will take to actually move the law.

5 But the Commission, using its bully pulpit and  
6 its unique mission, its statutory mission to study these  
7 problems and to advise the public on the issues, I think,  
8 is one of the biggest things you can do.

9 MR. MISENER: Most of the discussion this  
10 afternoon has focused on what I had sort of tried to  
11 characterize as a substitution activity. This is the  
12 Internet operating as a substitute for other channels of  
13 commerce, and it really seems to me that the principal  
14 problems in that area have to do with government  
15 regulation, particularly at the state and local level.  
16 So, to the extent the Commission can, through its  
17 policies or education, get at that kind of problem, that  
18 would be terrific.

19 But also listening to this discussion, I have  
20 to say I've heard the Robinson-Patman Act said today more  
21 than I have in 15 years in antitrust law. But it sounds  
22 to me that the activities that we've discussed today  
23 aren't all that prevalent. It's not as if we're  
24 reporting lots of cases. Your clients aren't saying that  
25 we're getting hit with this all the time. As Irv said

1 earlier, it's not unique to the Internet. In fact, as I  
2 tried to characterize it, it's specifically a substitute  
3 for what was going on before. There's this uncertain  
4 balance of free riding that the Professor pointed out,  
5 that it's not clear whether or not it's biased one way or  
6 another.

7 Frances has the skepticism of applying  
8 antitrust law in this area and I share that, frankly.  
9 And, frankly, from a business perspective, I would just  
10 question again whether any of these feared  
11 anticompetitive behaviors that have been discussed today  
12 really would work.

13 So, given all that, I wonder aloud whether or  
14 not the Commission's resources ought to be more focused  
15 on the anticompetitive effects and behaviors in the  
16 activities that are truly unique to the Internet, as  
17 opposed to these substitute ones, those truly unique ones  
18 having to do with consumer access to retailers on the web  
19 with delivery of goods to consumers. Those areas, it  
20 seems to me, that there's far less competition, far more  
21 opportunities for mischief than the sort of more esoteric  
22 supply side issues.

23 MR. SCHER: I'm going to second what David  
24 said. I think that the key issue for the Commission is  
25 the issue that took up the vast majority of the time

1 during these three days and that's state regulation. I  
2 really don't like doing these 50 state surveys all the  
3 time to find out how my clients are impacted by this  
4 hodge-podge of regulation, and it was there before the  
5 Internet. As Paul just said, it's not Internet specific.  
6 It was there before the Internet. Most of it is to  
7 protect the entrenched, the professionals, and it's just  
8 not good for this country.

9 I don't know why we limited it to contact  
10 lenses. Optometry is an area where if you go into a big  
11 box store, let's say, Target or Wal\*Mart or Kmart, they  
12 have to have a separate entrance. You can't walk into  
13 the main door to go to the optometry department because  
14 of state regulations. Now, what do we gain to have the  
15 cost of a separate entrance? They have to have an  
16 optician in addition to the optometrist in some states.  
17 So, it goes well beyond contact lenses.

18 There are cosmetology regulations where they're  
19 not allowed to have a -- I shouldn't call it a beauty  
20 parlor anymore, right -- a salon, so I'll call it that.  
21 There's all kinds of. There are 23 states that have  
22 sales below cost statutes that don't have a requirement  
23 of dangerous probability of monopolization. And indeed,  
24 when you look for costs under most of these statutes,  
25 it's invoice plus 6 percent. If it's below invoice plus

1       6 percent, it's below cost and it's a violation of the  
2       statute, and hereto the 23 states all over the place in  
3       terms of their statutes.

4               There are statutes out there that are  
5       specifically designed to keep the big box retailers out  
6       by putting limits on the size of a grocery aspect, the  
7       portion of a store that sells groceries. As a result,  
8       Wal\*Mart can't come into that town and open what they  
9       call a superstore with a grocery department there.

10              There's price advertising regulations all over  
11       the country. To the Commission's credit, it hasn't  
12       brought a price advertising case in years, and Bob  
13       Pitofsky, when he wrote that Harvard article, said that  
14       most of that kind of regulation is ridiculous, but  
15       there's price advertising regulations that differ from  
16       state to state and it's such a major problem of anybody  
17       who sells directly to the consumer.

18              Now, what can be done about this kind of  
19       regulation? I'm not talking about safety and prevention  
20       of crimes. I'm talking about this kind of regulation.  
21       What can the Commission do? I think, as it's already  
22       doing it. The Commission can be an advocate to limit  
23       these statutes either at the legislatures or in  
24       litigation, limit the scope of these states. The  
25       Commission can go for uniformity to the extent that it

1 can obtain uniformity if the states must regulate. And  
2 let's not forget that after Section 18 of the Federal  
3 Trade Commission Act was passed, I think in '76 or around  
4 then, in the mid-seventies, the Commission took the  
5 position that it could preempt state action through trade  
6 regulation rules. I believe there was a case that  
7 affirmed their ability to do that. So, the Commission  
8 should take a look at that to see if it's an area where  
9 there's a way to stop this anti-consumer, anti-price  
10 competition regulation.

11 MR. AGARWAL: Frances?

12 MS. SMITH: I, again, want to commend the FTC  
13 for serving as advocate to look carefully at state laws  
14 and regulations that dramatically restrict consumer's  
15 choices or raise cost and such.

16 What I think I would just like to comment on  
17 now briefly, however, is the fact that the states,  
18 though, still serve as competitive federalism, and we  
19 don't want to harmonize everything at the national level.  
20 Bad things happen at the state level. Some good things  
21 happen at the state level. I think the FTC and other  
22 regulators should get involved when something a state  
23 does affects people in other states, and that's where I  
24 think we should have questions. In many of these cases,  
25 that's what's happening.

1           However, competitive federalism -- I'll just  
2           use that term over and over again -- Michael Griva at the  
3           American Enterprise Institute has done some tremendous  
4           work in that area -- versus national federal  
5           harmonization which can take a bad idea and make it many,  
6           many, many times worse, exponentially worse. So, I would  
7           caution -- I've heard some people say, well, if we want  
8           licensing of this, licensing of that, and we have 50  
9           different state laws, let's have one Federal law to set  
10          up one super license.

11           Licensing, I think what Irv said, at the state  
12          level, in many cases, is protectionism, is keeping out  
13          new entries into the market, is keeping prices up for  
14          those people, that should be looked at as restrictions on  
15          e-commerce as well as in the real world. I think just  
16          focusing on how some of these state laws and regulations  
17          hurt consumers shopping on the Internet, that is an  
18          important point, but it also hurts consumers shopping in  
19          the real world by catalog or all sorts of other ways, by  
20          telephone and across state lines.

21           So, I'll just sum up. Again, keep up the good  
22          work in looking carefully at where restrictions hurt  
23          consumers, and I hope any antitrust action does not just  
24          look at how competitors are affected, but how consumers  
25          are affected. If consumers aren't being hurt by some

1 action of advertising or information being posted that  
2 some competitor thinks shouldn't be posted -- I'm going  
3 to end not with -- I'll end with Wright Patman. I don't  
4 know if many of you knew that in the thirties there was  
5 an anti-chain store movement, and I think almost every  
6 state in the country during the thirties had anti-chain  
7 store restrictions, legislation that was introduced, much  
8 of it was passed.

9 Wright Patman introduced, in 1939, I think it  
10 was, what was called the Death to Chain Stores Act. That  
11 was popularly known as that. I don't think it was in the  
12 Congressional record as such. It did not pass, luckily.  
13 But that shows you what happens when innovations are  
14 occurring when we have these fairly dramatic changes  
15 taking place and all the traditional players get very  
16 nervous. I won't give my example again, but we didn't  
17 have to worry about the Great Atlantic and Pacific Tea  
18 Company, which was the giant ogre that was going to take  
19 over the food markets of the world. A&P is but a tiny  
20 player today, and yet, that was the ostensible reason for  
21 Wright Patman's legislation. So, I'll just leave that in  
22 your minds.

23 MR. NANCE: Thank you, Fran. And with that,  
24 I'd like to thank all of our panelists. We've certainly  
25 been given a lot of information and much to consider.



1 This will conclude our panel. The next panel will begin  
2 at 4:00, 15 minutes from now, and that panel will be  
3 views from the states. Thank you.

4 (Whereupon, at 3:45 p.m., the third session was  
5 concluded.)

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**FOURTH SESSION -- VIEWS FROM THE STATES**

1  
2 MR. CRUZ: Thank you, everyone. We're going  
3 to get the final panel started of the FTC's Public  
4 Workshop on Possible Anticompetitive Efforts to Restrict  
5 Competition on the Internet. I appreciate everyone who  
6 has been here for these three days of hearings, and  
7 particularly for the stalwarts who have been through all  
8 10 industries that we have looked at. I think we've had  
9 some terrific discussions. This final panel promises to  
10 continue that trend we've had throughout.

11 We have a terrific panel today of views from  
12 the states, and we have represented, a number of  
13 different perspectives of state leaders. We have with us  
14 Governor Gilmore, bringing both the perspective of a  
15 Governor and also the perspective of an Attorney General.  
16 We have with us Attorney General Charlie Condon, who's  
17 joining us by telephone, bringing, again, the perspective  
18 of an Attorney General.

19 We have with us Senator Hagedorn from Colorado,  
20 and we have with us Bob Hamilton from the North Carolina  
21 of Auctioneers Licensing Board. So, we've got  
22 perspectives from the legislature, from the executive and  
23 from state board agencies that are actually implementing  
24 regulations dealing with industries in question.

25 We're going to continue this panel much as we

1 have the previous ones. Each of the speakers will have  
2 five to ten minutes to give introductory remarks. We  
3 have a timekeeper seated in the front who will hold up  
4 signs at one minute and at the time.

5 Following the statements, we will have a  
6 discussion among the panelists and we'll allow questions  
7 from the audience. If you have a question in the  
8 audience, please indicate to an FTC staff member who will  
9 hand you a notecard and you can submit a written question  
10 to be asked.

11 With that, let's go ahead and get started. And  
12 if we can begin, General Condon, if you want to perhaps  
13 start us off and we'll begin right to left, and take my  
14 word for it, you're seated on the far right.

15 MR. CONDON: Well, someone has accused me of  
16 being there, so it's very appropriate. Ted, I want to  
17 thank you for helping with this conference. I'm really  
18 sorry I couldn't be there because I really think that the  
19 issues that you are discussing -- and I certainly want to  
20 thank your chairman, Chairman Muris, for putting this  
21 together because the whole aspect -- I certainly won't  
22 take my five minutes because I know you've heard this  
23 before -- but this whole new e-commerce that's just  
24 blossomed in the last couple of years is such a wonderful  
25 tool. And yet, the problems that you've identified are

1 very real.

2 I know in my state there are a lot of wonderful  
3 folks who naturally feel very threatened by this new  
4 technology or concerned about the investments that  
5 they've made. I'm sure you've already talked about the  
6 car dealers. And I can see from their perspective their  
7 concerns. We've had farm equipment manufacturers that  
8 are also concerned about sales over the Internet. A  
9 customer will come in and compare what they've got and  
10 look at what they've got, kick their tires, they pay the  
11 overhead, and they're able, the dealers feel, unfairly to  
12 go on the Internet and get a cheaper price. But at the  
13 end of the day, that's what we want to have happen.  
14 We've got the greatest economic system in the world, and  
15 the reason it works so well is because we do foster and  
16 want fierce free, fair competition out there.

17 So, the concerns that I have as the State  
18 Attorney General -- I know Governor Gilmore will speak  
19 about this, also, and I suspect the official from North  
20 Carolina will have the same concerns -- we do want to  
21 have this competition. It's good for our citizens. But  
22 yet, at the same time, they're legitimate concerns that  
23 often are raised by our homegrown, so to speak, citizens  
24 on the ground who have to pay for brick and mortar and  
25 pay the taxes that we impose at the state level. So, how

1       you balance this, I think, is a wonderful, wonderful  
2       opportunity here for the FTC and for others to be  
3       involved, to look at this, to make sure that all these  
4       interests are fairly looked at.

5               But at the end of the day, at the end of the  
6       day, the key has to be looking at our citizens, what's  
7       best for them in terms of having the lowest price  
8       possible and the widest selection of goods.

9               I do want to commend the FTC for your interest  
10       in this area. I think it's just critical and it shows  
11       real leadership to address the issues that are very  
12       sensitive, but yet very real, and they do have to be  
13       addressed as this Internet blossoms even further. So,  
14       thank you.

15              MR. CRUZ: Thank you, General. For the next  
16       comments, Governor Gilmore.

17              MR. GILMORE: Well, thank you. First of all,  
18       I'm delighted to be here to be on this panel,  
19       particularly with Charlie Condon, the good Senator, and  
20       Mr. Hamilton. I'm kind of looking forward to hearing  
21       some of this myself. Charlie Condon and I are old pals,  
22       so it's good to be able to participate even if you're  
23       sort of a phantom person there, Charlie, over the  
24       telephone.

25              MR. CONDON: Thanks, Jim.

1 MR. GILMORE: I had done a handout which I  
2 believe is either out or is going to get out to all of  
3 you all. We're going to put it on the Internet, I  
4 believe, also, aren't we, Ted? So, that will give you  
5 sort of a feel for this. I'm going to work exactly from  
6 that document and get a feel for it.

7 Are we going to do some Q&A?

8 MR. CRUZ: Yes, we are.

9 MR. GILMORE: Okay. I'm kind of looking  
10 forward to that. I want you to know that I have suffered  
11 through Q&A on this subject for a year as Chairman of the  
12 National Advisory Commission on Electronic Commerce. So,  
13 I think it will be a lot of fun to talk these issues over  
14 and see where we're going.

15 Let me just begin by saying that I think that  
16 it's good for the FTC to take up an issue like this and  
17 to address an issue like this. I think I know where the  
18 FTC's going based on the materials that I've seen and the  
19 feel that they have. But I think they're trying to  
20 explore the facts and to be able to make sure that the  
21 policy directions that they're talking about are the  
22 correct one.

23 I think that the point I want to make to the  
24 audience and to the listeners or people who are going to  
25 be, at a later time, reading the transcript is this:

1 After a year of fighting over this issue on the E-  
2 commerce Commission, I conclude that you really just have  
3 to make a decision about what you think is the best  
4 policy for people.

5 I want to emphasize the word "policy." There  
6 is a tendency to think that if you get into these kinds  
7 of issues with the Internet and you learn enough facts,  
8 that the answer will emerge. I want to be a little more  
9 temperate than maybe I once was on this topic and just  
10 share with you all that I think it is largely a judgment  
11 call. It is a decision that policymakers have to make  
12 based upon their values and what they think is right and  
13 what they think is important so long as there is not an  
14 obvious answer that you can reach by just simple study.

15 I have noted in my remarks that I think the  
16 debate is, at bottom, a policy debate. It's not really  
17 such, much of an absolute truce, but instead, what is the  
18 policy that's going to be selected by all the actors  
19 that's in this process and who are they? They're the  
20 Federal Government, they're the state governments, and  
21 their business is engaged in the Internet, or businesses  
22 in competition with businesses on the Internet. These  
23 are all the players that are involved and they have to  
24 make a decision about what direction they want to go.

25 As I made reference to, I was Chairman of the

1 Internet Tax Freedom Act. The Internet Tax Freedom Act  
2 established the Advisory Commission on Electronic  
3 Commerce. It was established back in March of 1997 and  
4 the Act was passed. The Commission then got up and  
5 running and we issued a report on April 12th of the year  
6 2000, and it was a raging debate. I presently chair the  
7 National Congressional Advisory Commission on Terrorism  
8 and Weapons of Mass Destruction, and I want everybody to  
9 know that it is a peach compared to trying to chair the  
10 Commission on Internet Commerce. It was a very violent  
11 and raging discussion through the entire year. There are  
12 policy choices. And the question, fundamentally, that  
13 the players have to answer is: How is the public best  
14 served?

15 Let me just run through a couple of choices.  
16 Is it maybe one, by maximum competition, by lower  
17 barriers to entry, more choice for consumers for lower  
18 prices? Is that the policy decision that you wish to  
19 make? Is that the greatest and highest good for the  
20 public? Or is the public better served by ensuring a  
21 "level playing field" so that auctions online are the  
22 same as auctioneers in a state, or any of the other types  
23 of issues? Should people be taxed the same on the  
24 Internet as conduct that they're taxed on in the state?  
25 If you build a building and have brick and mortar and you



1 suffer one taxation, should the people on the Internet  
2 suffer the same taxation? Should there be a level  
3 playing field? A very powerful moral argument, if you  
4 will, that is often made towards restrictions in taxation  
5 on the Internet.

6 Is the policy better for equality of all  
7 actors, as I have just described? Is it preservation of  
8 existing industry? A case could be made that that's in  
9 the best interest of the common good. Preserving those  
10 jobs and preserving those methods of doing business and  
11 protectionism really, is that the question?

12 So, the point is that whichever policy you  
13 choose, I am absolutely confident that the government  
14 players can craft a management policy that will  
15 effectuate that. So, the first thing that the listeners  
16 have to recognize, I think, is you've got to just make a  
17 decision based on your values, what you think is best for  
18 the public.

19 The states often assert very legitimate policy  
20 goals that they seek through regulation. What are some  
21 of them? Well, you regulate alcohol as you probably have  
22 heard in some of yours because of an assertion that you  
23 want to make sure that the values of temperance are  
24 maintained and so on. Protection from unscrupulous  
25 Internet businesses that really aren't subject to the

1 physical location of control within the state.  
2 Preservation of the state sales tax base. I can assure  
3 you that state governors and state organizations and  
4 state legislatures are very largely just desperate to  
5 maintain that tax base. And there are, of course, a  
6 number of other reasons, policy reasons as well.

7 Others believe that -- and I believe -- that a  
8 state is best served, and the people within it, by  
9 unfettered growth on the Internet. If you have a tax  
10 regime in place, it is not, in my view, automatic that  
11 you would then take that same tax regime and put it in a  
12 whole new place, which is e-commerce. That's a policy  
13 decision that you have to make. You might justify it on  
14 the basis of level playing field, but you don't have to.  
15 You can make a decision to apply an entirely different  
16 set of rules because this is a new industry.

17 Already established companies will often fear  
18 this kind of competition, and I must point out that --  
19 and I'm very sensitive to this as I think we all should  
20 be -- that established business communities and  
21 industries within states, they think they're not being  
22 treated fair because they have the investment of brick  
23 and mortars and they pay taxes on that and they think  
24 that the Internet's getting a free ride, and they're very  
25 strong about it and they feel very adamant about it.

1 Believe me, they make political contributions to public  
2 officials' campaigns. So, public officials want to be  
3 very careful about crossing those established industries  
4 already in the state on behalf of some Internet company  
5 that may not even exist within their state. So, these  
6 are the forces that are at work.

7 The result is that really the argument is  
8 coming down to whether or not we're going to just simply  
9 preserve the status quo within states because people are  
10 invested in it, or whether or not there might be a better  
11 way or an additional way to do business.

12 Now, I think that you can make these things  
13 work together. I think that they can harmonize with each  
14 other. But I want to suggest that we should not just  
15 assume that all the same rules, regulations, taxes,  
16 policies ought to be applied to the Internet just because  
17 it's applied to existing industry. The truth is, the  
18 Internet just isn't exactly the same thing. It's not  
19 exactly the same method of retail, not exactly the same  
20 method of doing consumer to business sales. For example,  
21 e-commerce has some advantages. The consumer can get to  
22 it on his computer, he can wander all over the Internet,  
23 he can check prices, he can look at different kinds of  
24 things that are being offered from different types of  
25 approaches, and that's an advantage to the plugged-in

1 generation that we're seeing today.

2 But on the other hand, there are some down  
3 sides to e-commerce, that e-commerce can't really compete  
4 with brick and mortar companies in many ways. What are  
5 they? Well, you have to first of all think about -- and  
6 I think history is proving this out -- that human beings  
7 really don't want to do all their shopping on the  
8 Internet. It's dull. They really want to go out and go  
9 to the store. They want to wander through the Hecht's,  
10 they want to wander through the Nordstrom's, they want to  
11 look at things, they want to check out the color in a way  
12 and see if they really like it aesthetically. They want  
13 to know how it feels. If they buy it, they want to put  
14 it in a bag and take it home and wear it that night or  
15 the next morning. You can't do that with e-commerce.  
16 You can do it quickly with e-commerce, but you just can't  
17 beam products out there. It takes some time for  
18 delivery.

19 What if you get it home and it's got a flaw or  
20 what if you decide you just don't like it and you want to  
21 give it back? Then the advantages all rest with the  
22 brick and mortar people and not with e-commerce.

23 I want to point out one point. I know that I'm  
24 down to a minute and I think that I can actually finish  
25 in about a minute. Ted, in one of his FTC presentations,

1 pointed out that we had to be concerned a little bit  
2 about this because e-commerce is growing so very, very  
3 rapidly, and he quoted 24.2 percent over this quarter of  
4 this year over the same quarter of last year. When that  
5 was quoted to me, within my law firm, I said, yeah, but  
6 what percent of all retail sales is e-commerce, what kind  
7 of problem are we dealing with here. Because the  
8 argument that I've heard over and over again is that e-  
9 commerce is so powerful, it's going to overcome all  
10 commerce and all retail everywhere and destroy the tax  
11 base. I've heard it over and over again.

12 So, we did a little research and I want to make  
13 sure that you all are aware of what the reality of this  
14 so-called threat is. Today, in the second quarter of  
15 2002, e-commerce sales represent 1.2 percent of all  
16 retail. That's all. And by the way, that's a lowering  
17 of the percent from the previous quarter, which was 1.3  
18 percent.

19 So, you know, the question really is, do we  
20 have a system here that in the end is going to grow so  
21 rapidly, so fast, and just continue this upward growth  
22 pattern that it's going to destroy all retail and destroy  
23 all the tax base. I don't think that's been demonstrated  
24 yet. It's too complicated a system and it's entirely too  
25 new.

1           So, the final point I'll make is this: The  
2           economy of the United States and the world evolves.  
3           Things change. Methods that work are going to persist  
4           and things that don't work very well are going to  
5           disappear. And that's the way that American commerce  
6           works. The flexibility of the free market is what sparks  
7           innovation and best benefits consumers. The buggy whip  
8           industry died and the auto industry emerged. Bad luck  
9           for the buggy whip industry, but it's just the way these  
10          things go. If this Internet and e-commerce proves to be  
11          a true competitive advantage, then maybe it's time for  
12          the economy to evolve again. Now, I believe that the  
13          best result is going to be something that actually ends  
14          up harmonizing together, not pure plays either way. I  
15          think the best model is proving out to be a hybrid of  
16          clicks and mortars, the best method of commerce, a blend  
17          of Internet sales that supplements brick and mortar  
18          stores.

19                 So, that is, Mr. Chairman, my oral  
20          presentation. I'm looking forward to the Q&A. But I  
21          believe that maximum freedom of opportunity to try new  
22          things without barriers and regulations is the best way  
23          to have commercial innovation and that leads to the best  
24          result for the American consumer and the American people  
25          and their families.

1 MR. CRUZ: Thank you, Governor. Senator?

2 MR. HAGEDORN: Thank you. Firstly, I'd like to  
3 thank the FTC for hosting this conference and for my  
4 opportunity to express views from, not only from, I think  
5 I can say, the majority in Colorado's legislature, but  
6 also on behalf of the American Legislative Exchange  
7 Council, ALEC, which I'm the Chair of the Tax Fiscal  
8 Policy Task Force. ALEC is the largest bipartisan,  
9 individual membership organization of state legislatures.  
10 ALEC's mission is to advance the Jeffersonian principles  
11 of free markets, limited government, federalism and  
12 individual liberty among America's state legislatures.  
13 I'm proud of the work ALEC has done and continues to do  
14 to protect the Internet from unnecessary and harmful  
15 regulation.

16 I think all of us probably have heard the  
17 statement, the Internet has forever changed the way we  
18 conduct business and communicate. We've heard it so many  
19 times now that it's almost become a cliché'. But what is  
20 so special about the Internet? Is it the rapid exchange  
21 of information, the infinite supply of information or its  
22 remarkable ease to use?

23 While all these attributes to the Internet are  
24 revolutionary, it is the freedom of choice that makes the  
25 Internet special. The Internet provides an open and free

1 market able to rapidly respond to consumers' needs and  
2 desires. It is the great equalizer, enabling small  
3 businesses to compete with large. It is also the great  
4 consumer advocate, saving consumers money, time and  
5 hassle.

6 Electronic commerce is the ultimate environment  
7 for trade. Yet, despite all of the applause for the  
8 Internet, there are many people who stand in fear of this  
9 technical revolution. Rent seekers and regulations are  
10 desperate to break the speed at which the Internet and  
11 all of its wonders are making life better for individuals  
12 in the global marketplace. What is it about the medium  
13 for commerce and communication that incites such a need  
14 to regulate?

15 The new economy has developed a wonderful and  
16 sometimes staggering degree of inter-connectedness. It  
17 enables us to exchange goods while increasing market  
18 power at an astonishing pace. Its impact has been so  
19 revolutionary, it's often been coined or called the basis  
20 for the new economy.

21 Despite all of its promise, the new economy  
22 faces daily struggles with old economy regulation. The  
23 process of fitting the new economy with the laws of the  
24 old economy can be similar to trying to put a square peg  
25 in a round hole. Applying old economy regulations, such



1 as sales and use tax administration to new economy  
2 commerce is the largest barrier to consumer freedom that  
3 the Internet faces.

4 In the face of a rising e-commerce tide, states  
5 and localities find themselves with a tax structure that  
6 is based on the real world and not cyberspace. The  
7 problem between traditional in-person sales and online  
8 shopping lies with use tax administration. The use tax  
9 is basically the equivalent of the sales tax, but it's  
10 only due on those sales that occur across state borders.

11 While consumers who buy furniture in Ohio and  
12 drive it to their home in Illinois are supposed to remit  
13 use tax, the furniture maker is not. The furniture maker  
14 and other retailers are protected by the Supreme Court,  
15 which ruled that a state cannot force a business to  
16 collect use tax if the business is not located within the  
17 taxing state's jurisdiction, what we affectionately call  
18 nexus.

19 Many states attempt to increase use tax  
20 compliance by providing a line on state income tax forms.  
21 But unless taxpayers recognize and acknowledge the line  
22 on their income tax return and honestly report how much  
23 money they spent on out-of-state purchases, the state  
24 cannot collect the use tax in this manner.

25 If this all sounds terribly unfair, that's

1       because it is. Common sense tells us the states can only  
2       tax those activities that occur within their borders.  
3       The legal concept is known as jurisdiction. If states  
4       were free to tax activities outside the borders in an  
5       extrajurisdictional manner, the very existence of the  
6       states would be threatened. In fact, the interstate  
7       Commerce Clause of the Constitution designed to prevent  
8       extrajurisdictional taxation providing for a free trade  
9       agreement among the states.

10                 What does this all have to do with the Internet  
11       and the new economy? Big government advocates predict  
12       that online shopping will significantly erode the state  
13       sales tax base. Fiscal conservatives are getting in the  
14       act, too, claiming the need to protect Main Street  
15       retailers from unfair competition over the Internet,  
16       since the former have to collect sales tax and the latter  
17       do not. But this unholy alliance between right and left  
18       now wants to petition Congress to allow them to force  
19       out-of-state vendors to collect sales and use tax under  
20       the auspices of the Streamline Sales Tax Project, SSTP.

21                 SSTP's mission is to "develop measures to  
22       design, test and implement a sales and use tax system  
23       that radically simplifies sales and use taxes." The SSTP  
24       movement is inherently flawed because it seeks to apply  
25       the old tax rules designed for an early 20th century tax

1 system to the new economy of the 21st century. Such old  
2 rule application to e-commerce is one of the most serious  
3 threats to the vitality of the rich medium of exchange in  
4 economic growth that the Internet provides all of us.

5 Another area where regulation is being sought  
6 is in SPAM and privacy. Many people have a similar  
7 morning routine. They get up in the morning, sip their  
8 coffee and delete the dozens of unsolicited bulk e-mails,  
9 SPAM, from their computer's inbox, the online version of  
10 junk mail.

11 In truth, a lot of people really hate SPAM.  
12 However, not everyone deletes the same SPAM. Some keep  
13 sales announcements from their favorite retailer while  
14 others keep notices of community events. Despite the  
15 challenge to find what is bad SPAM, legislators have  
16 faced increasing pressure to address their constituents'  
17 crowded mailboxes. Now, public policy leaders are  
18 beginning to tie online privacy with similar regulatory  
19 ropes of SPAM, constructing additional barriers to e-  
20 commerce.

21 Since the 2000 legislative cycle, SPAM  
22 legislation has swept the nation. Unfortunately, many  
23 pieces of legislation do not appropriately address the  
24 issues at hand. Rather, such legislation hurts  
25 electronic commerce with little benefit to consumers.

1 Utah's SPAM law enacted in May 2002 is just one example  
2 of reputable companies being brought to court.  
3 Alternatively, Virginia passed SPAM legislation that  
4 constructively addresses SPAM and those who illegally  
5 infiltrate Internet service providers, ISP systems and  
6 disseminate fraudulent e-mail. Unlike the Utah  
7 legislation, the Virginia law protects e-commerce while  
8 allowing civil action against unlawful hacking and e-mail  
9 practices.

10 Following a similar legislative pattern,  
11 harmful online privacy legislation has gained public  
12 policy attention as well. This spring, Minnesota was the  
13 first state to enact online privacy legislation.  
14 California, Michigan and Pennsylvania have also  
15 introduced legislation this year. This type of  
16 legislation leaves industry and consumers in precarious  
17 positions, opening ISPs to massive class action lawsuits  
18 and inhibiting consumer choice from enriched goods and  
19 services.

20 A more constructive approach has already taken  
21 root in commercial practices through market-based  
22 initiatives to ensure the safety of private information.  
23 Leave the market alone and e-commerce will prosper in  
24 direct relation to the consumers' demands.

25 As in the case of so much political debate, the

1 market can, should and will take care of the growing  
2 concerns over unsolicited e-mail messages and privacy  
3 protections. In the case of SPAM, the market has  
4 responded to the public outcry. The Direct Marketing  
5 Association, DMA, has issued guidelines for sending  
6 commercial e-mail and businesses are already providing  
7 opt-in and opt-out choices for consumers.

8 ISPs curb fraudulent SPAM through their own  
9 SPAM filters, blocking seemingly illegitimate bulk e-mail  
10 from their systems. Providing additional tools to block  
11 unwanted SPAM, the software industry has armed computer  
12 users with message filter programs enabling users to  
13 filter their own messages.

14 Industry has taken similar self-led regulation  
15 measures to protect consumer privacy. The Progress and  
16 Freedom Foundation has recently studied the privacy  
17 practices of commercial sites on the Internet. Its  
18 findings: The online market has responded favorably and  
19 swiftly to consumer concerns regarding the collection and  
20 use of personal information. Among other privacy  
21 improvements, the study found that web sites are  
22 collecting less information and privacy notices are more  
23 prevalent, prominent and complete.

24 Market forces have encouraged commercial web  
25 sites to reduce the use of third party cookies to track

1 Internet surfing behavior and third party sharing of  
2 information. What the study demonstrates is that the  
3 market is responding to consumer concerns without  
4 burdensome government regulation.

5           Regardless of the positive impact the Internet  
6 has had on expanding markets to the consumer's benefit,  
7 industry specific rent seekers have been urging the  
8 regulation to smother their online competitors. As the  
9 FTC has outlined, states such as Connecticut, North  
10 Carolina, Rhode Island, Oklahoma are facing brick and  
11 mortar providers demanding that similar online services  
12 be prohibited.

13           Often, these retail rent seekers will claim  
14 that buying certain goods or services online leaves the  
15 consumer at risk, claiming that the consumer will be  
16 unable to determine whether or not an online version is  
17 safe or practical. Protectionist policies such as  
18 banning online provisions of contact lenses, mortgages or  
19 even casket sales, denies the opportunity for people to  
20 choose which goods and services best meet their  
21 individual needs. Policymakers should be hesitant to  
22 favorably consider discriminatory regulations that  
23 protect a market for one provider while simultaneously  
24 barring another.

25           Despite taxation pleas, unwarranted privacy

1       cries and rent-seeking demands, policy leaders should not  
2       rush to regulate e-commerce. Public policy leaders  
3       should resist the trends to smother e-commerce through  
4       Internet taxation, excessive privacy and soliciting  
5       regulation and other provider picking policies, and allow  
6       consumers and market forces to continue to shape the  
7       future of e-commerce. In other words, please hurry up  
8       and let's do nothing.

9               MR. CRUZ: Thank you, Senator. I would now  
10       like to hear from Bob Hamilton, the Executive Director of  
11       the North Carolina Auctioneer Licensing Board.

12              MR. HAMILTON: Thank you. I appreciate the  
13       invitation to be a part of this workshop and I'm  
14       especially honored to be able to sit on a panel with the  
15       fellows that I am here with today. I feel that it would  
16       be inappropriate for me to speak for the views of the  
17       State of North Carolina, first of all. I am not prepared  
18       to do that today. I do represent an agency of the state  
19       and I can speak on, I guess, my personal views on our  
20       state and I do believe that our governor and our  
21       legislature are very interested in e-commerce as it  
22       relates to our state laws and I'm sure that they'll be of  
23       great interest to the topic of the possible  
24       anticompetitive efforts to restrict competition on the  
25       Internet.

1           To speak a little bit about our board and the  
2 basis for us getting involved with Internet auctions, our  
3 board is responsible for the administration and  
4 enforcement of the Auctioneers Law, which establishes  
5 specific standards of conduct that serve to protect the  
6 public, affords a means of redress of grievances of any  
7 personal suffering damage by reason of misconduct  
8 relating to sales at auction, and provides a means of  
9 monetary restitution for a loss suffered.

10           Licensing auctioneers and auction businesses by  
11 the Board increases public confidence in the profession  
12 by providing a means of determining the ability, general  
13 knowledge, integrity and good character of those  
14 permitted to practice, and a means of deterring  
15 fraudulent or dishonest dealings and unethical conduct.  
16 It is the responsibility of the Auctioneer Licensing  
17 Board to ensure that the qualifications and activities of  
18 those engaged in auctioneering are in accord with the law  
19 and in the best interest of the public, to receive and  
20 act upon license applications, to issue, suspend, revoke  
21 licenses, adopt rules and regulations, and take other  
22 actions as may be necessary to enforce the provisions of  
23 the Auctioneer Law.

24           Speaking off of my sheet and basically putting  
25 in a nutshell the paper that I provided, we became



1 involved with Internet issues in an extreme fashion in  
2 1999 when I was hired by the Board and basically asked  
3 what their position was on Internet auctions, and through  
4 our legal counsel, through the Board's discussions and my  
5 discussions, we felt that our law, even though it was  
6 written in 1973, applied to Internet auctions. Our law  
7 does not have any provisions for brick and mortar  
8 auctions per se, it does not have provisions for  
9 telephone auctions, it doesn't have provisions for  
10 catalog auctions, and in the same respect, it didn't have  
11 provisions for the Internet auctions.

12 Our law is governed by what an auction is and  
13 how it's defined. So, through the definition and the  
14 interpretation of the definition, our Board felt that, by  
15 law, that we should be protecting the public by making  
16 sure that people that participated in auctions met the  
17 minimum requirements that were needed.

18 Through some information that got out before we  
19 were prepared to present it in a logical fashion, there  
20 was a large public outcry by both the general public and  
21 by Internet auction services, both to our office, to the  
22 legislature and to the governor's office. Through that,  
23 our Board reviewed the decision that they had made  
24 previously, and through a request from different people,  
25 decided to defer any regulation of Internet auctions

1           until it could be reviewed by the Joint Select Committee  
2           on Information Technology.

3                       At this time, they have not put it on their  
4           agenda, and I don't, at this particular time, think that  
5           unless we were to go back and ask them to put it on their  
6           agenda, are going to be looking at it any time soon. But  
7           the issue is still there. Our Board's interpretation is  
8           still the same, but we are not regulating Internet  
9           auctions. Until there is either legislative changes or  
10          it has been reviewed by the Select Committee on  
11          Information Technology, we will continue to continue with  
12          our policy.

13                      Now, this is just with timed auctions. Our  
14          interpretation for realtime auctions is standing and we  
15          do regulate those with a live auctioneer who is merely  
16          using the Internet to pass his image over telephone  
17          lines. Thank you.

18                      MR. CRUZ: Thank you, Bob. The first question  
19          I wanted to address to the panel is, in the past three  
20          days, we have heard panelists discussing possible  
21          restrictions in ten different industries. We've heard  
22          panelists talking about possible private anticompetitive  
23          conduct and we've heard panelists talking about possible  
24          restrictions in industries ranging from auto sales to  
25          contact lens sales to casket sales, real estate,

1 financial services, a wide range of industries.

2 And the question I would ask the panel is, how  
3 significant, in your judgment, are these sets of possible  
4 restrictions to e-commerce? Governor Gilmore talked  
5 about how, even with all of its growth, e-commerce is  
6 still a relatively small part of the pie of commerce  
7 altogether. And what I would ask is to what extent, in  
8 your judgment, are possible restrictions like that  
9 responsible for not allowing as much growth in e-commerce  
10 as there might otherwise be?

11 MR. CONDON: I would say that's a great  
12 question. One issue -- I'm sure you probably have  
13 discussed this -- is I have found that many citizens  
14 don't know of these restrictions. I suspect that your  
15 conference may be changing that with some. For example,  
16 car dealers -- and I hate to pick on car dealers because  
17 they're great corporate citizens of South Carolina -- but  
18 they advertise routinely that here's our Internet site  
19 and here's our web address and you can select our cars.  
20 I don't think our citizens know that they can't do that  
21 directly with the factory. They're under misapprehension  
22 or misinformed by those sorts of advertisements. I think  
23 that if they knew that there was a state law that  
24 apparently now has passed in every state in the union  
25 that prohibits them from buying directly from the

1 factory. I know that Saturn has had to close up their  
2 dealerships in South Carolina because that was the model  
3 they were going to use.

4 And so, I wonder if a lot of this is the fact  
5 that our citizens don't know about it because of the  
6 relatively new nature of this technology and the fact  
7 that a lot of this information, this anticompetitiveness  
8 that is out there, I think, wine or caskets or contact  
9 lenses or cars, they just simply don't know about it.

10 MR. GILMORE: I wish I could have been in the  
11 ten meetings. I don't know how many of you all had a  
12 chance to go to these additional meetings. I would have  
13 liked to have gone to the casket one. I have a hard time  
14 imagining people ordering caskets over the Internet. It  
15 absolutely has to be there the next day, right? Is that  
16 the way it is?

17 But you asked a direct question, I'm going to  
18 give a direct answer. Instead of speculating, I think  
19 that the FTC probably has to go out and get that  
20 information. I think they probably have to go out and  
21 conduct a survey, spend some of the taxpayers' money in  
22 order to make policy and actually do some consumer  
23 surveys and find out what it is that is discouraging  
24 people from using the Internet in a wholesale way.

25 Once again, the assertions have been that a lot

1 of bad things are going to happen to industry, to the tax  
2 base and to everybody else because this voracious machine  
3 is so superior to every other form of commerce that it's  
4 going to eat up everything else. So far, that has not  
5 proven to be the case. And, Ted, you've asked the  
6 question, why not? It may be that there are some  
7 restraints, and as an aggregate all of these restraints  
8 are bringing down the total aggregate purchasing and  
9 buying and selling over the Internet.

10 I theorize that it just -- people have a hard  
11 time adjusting themselves to doing massive purchases over  
12 the Internet. I think that there are some things that  
13 they do, but most things they don't. They're used to  
14 going out into the marketplace and looking at things and  
15 taking advantage of the elements that I talked about  
16 earlier that are available to them in the open physical  
17 marketplace as opposed to cyberspace.

18 However, a standard item, a standard item, a  
19 DVD, for example, of a movie, a standard item that  
20 doesn't really vary so much in quality might very well  
21 become something that is used more in e-commerce, and I  
22 think you have to find that out. It may be the  
23 percentage is considerably higher on standard items. But  
24 on items where you really need to see the color of the  
25 car, you really need to know whether that car is

1 comfortable to sit in, you really need to get behind the  
2 wheel and feel how it does. And one might say this is  
3 enough of a standard item that you could take a free  
4 ride. You could go over to the dealer, ride along on his  
5 investment that he's made in all of his brick and mortar  
6 and then go home and order it over the Internet.

7 I proposed earlier that there can be some  
8 solutions to that. The threat was that there might be a  
9 kiosk approach, for example. You put a kiosk in the  
10 showroom of the dealer and he says, now, find your car  
11 and then run over here to the kiosk and order it over the  
12 Internet and you don't have to pay any sales tax because  
13 the sales tax doesn't apply to the Internet. Well, of  
14 course, if there's a physical presence within that state,  
15 then that no-tax rule doesn't apply anymore. So, I would  
16 think that you could simply add a rule that says, if you  
17 can order over the Internet, that the tax-free zone is  
18 anyplace beyond the borders of your state, for example.

19 But why am I even talking about this? Because  
20 the goal here, it seems to me, is to give consumers  
21 another opportunity to conduct commerce without  
22 necessarily having to pay taxes, at the same time,  
23 unless, of course, you see the utter destruction of the  
24 tax base within a state. And so far, I just don't think  
25 we've seen that because I just don't think that

1 culturally it has not gone on to become a dominant form  
2 of retail. Frankly, I think this is findable through  
3 surveys and objective studies, and with your staff, I'm  
4 confident that you'll find it.

5 MR. HAGEDORN: The Internet is evolving. It's  
6 a new way to do business, it's a new way to purchase  
7 goods. There is always resistance to newness.

8 One of the things that I have been involved in  
9 for the last several years now in tracking the  
10 development of e-commerce is that state and local  
11 governments, in particular, were having nightmares about  
12 losing their sales tax base and it became Chicken Little  
13 saying, the sky is falling, the sky is falling. I think  
14 what we're seeing is that the Internet is evolving.  
15 Evolving is not necessarily rapid growth.

16 But we are seeing growth. I think if you  
17 track, certainly, the use of the Internet, certainly the  
18 online purchases, we are seeing an increase. It's  
19 rising. But what has happened, I believe, is that there  
20 were so many expectations, so many fears, so much  
21 paranoia about what the Internet, and especially e-  
22 commerce was going to do, and so, as my colleagues at  
23 ALEC and I, we have said that -- there were actually some  
24 reports that were published but were kind of ignored,  
25 that this huge rise in purchasing over the Internet was

1 not happening as they feared it would.

2 But it's exactly what those of us who have an  
3 interest in this area understand that it is a slow,  
4 steady growth, and understanding that we must not put  
5 barriers that will block the progress and the development  
6 of the Internet and the consumers' ability to purchase  
7 online.

8 MR. CRUZ: Here's a question from the audience.  
9 This one is addressed to Governor Gilmore and General  
10 Condon. The other panelists should feel free to express  
11 their views as well.

12 The question is, each of you is or once was an  
13 Attorney General, and as such, you provided legal advice  
14 and guidance for your Chief Executive. Please put  
15 yourself in the shoes of a corporate general counsel for  
16 a company doing business online. How can you possibly  
17 comply and protect your company from frivolous litigation  
18 if states adopt inconsistent regulation?

19 MR. GILMORE: You can't, and that's one of the  
20 key burdens and on e-commerce, that you, in fact, might  
21 see. That's why I think that you have to do everything  
22 you can to keep these kinds of regulations off the  
23 Internet.

24 Now, let me say this, and I know Charlie would  
25 feel this way, too, that everybody from the conservative



1 side understands that the states can provide a bulwark  
2 against total power and control by the national  
3 government. That's why the federal system was set up the  
4 way that it was and the way the Constitution was  
5 established. So, the state power can provide a check on  
6 that within the federal system. But there are some  
7 things that, without any doubt, have been delegated to  
8 the national government, and one of those is control and  
9 regulation of commerce, and there's a reason for it.

10 It's because the founders understood that if  
11 you had total control of commerce in each of the states,  
12 as they were admitted to the union, that you could create  
13 a balkanized America when the goal was to create a  
14 unified America. So, to the greatest extent possible,  
15 there needs to be some consistency of regulation. But,  
16 also, I would argue to the greatest extent possible that  
17 we ought to have as little as possible in terms of  
18 burdens and over-regulation of the Internet.

19 MR. CONDON: If I could jump in, I think that's  
20 a great question. Without telling too many war stories,  
21 I can remember a great conversation that I had with one  
22 of the lawyers, the general counsel for eBay, who, as I  
23 recall, he had experience being a prosecutor in one of  
24 the Federal Districts in Virginia, moved out to  
25 California, and that's exactly his point. He really had

1 a -- he was in a growth industry, like the lawyer's  
2 relief act, because he was dealing with 50 separate  
3 jurisdictions on just the criminal side of things, what  
4 can go wrong with auctions and things.

5 But I think at the end of the day, though -- I  
6 want to echo Jim's remarks. We don't want to throw the  
7 baby out with the bath water. We do want to make  
8 commerce easy. But I do think it's important to allow  
9 the states to innovate and to have the states out there.  
10 But I do think there's a balancing act here and I think  
11 it's a very good question. I think to the extent that we  
12 do take away the authority of the states in this area, I  
13 would like to say just on behalf of the states, that  
14 should be done very, very slowly because the states do  
15 have very important interests in protecting the health  
16 and safety of their citizens in ways that maybe other  
17 states don't care about.

18 MR. CRUZ: Let's use that last comment as a  
19 jumping off point for a second question, which is, in  
20 your judgment, what are the principal interests that are  
21 behind the regulatory efforts in these various  
22 industries? Are they consumer protection interests? And  
23 this actually segues with a question from the audience,  
24 so let's combine them both.

25 The question from the audience is, is ensuring

1 a level playing field consistent with maximizing  
2 competition and consumer choice and protecting consumers?

3 MR. HAMILTON: I'll comment it on the basis of  
4 our Board in the discussions that we had in reviewing our  
5 law. Our Board, at that particular time -- and this is a  
6 misconception that was spread afterwards that the Board  
7 was looking at keeping the competition down, and the  
8 Board actually had not even given a thought to the  
9 competition as it related to the Internet. Our Board's  
10 largest concern and why they even extended the time to  
11 look at the interpretation was for the consumer  
12 protection issue, and also, again, the level playing  
13 field issues in our state of taking two groups that are  
14 like bodies and treating them differently, and the fear  
15 that there might be a lawsuit against our Board for not  
16 using the same law and making it consistent with like  
17 bodies.

18 So, they came up with their interpretation and  
19 whether they liked it or not, they felt that they had to  
20 go by what the law said.

21 MR. CONDON: Ted, if I could jump in, just  
22 again, maybe the different experiences, different places.  
23 But there's no question that a large part of the  
24 motivation is, yes, consumer protection, but a large part  
25 of the motivation would have to be economic. People just

1 do not want the competition that's out there, and that's  
2 natural. But I think it's important to recognize that  
3 that has to be, I would think, if we're honest with  
4 ourselves, a large motivation that's out there.

5 MR. GILMORE: I think that's right based on  
6 what I've seen. I think it's a normal aspect of business  
7 that you don't want competition at all if you can work it  
8 out so that you're into something either a patent or  
9 something of that nature. If you can get in there with  
10 no competition, that's the best possible business model.  
11 So, you would expect a normal approach. And, surely, if  
12 you know you're going to have competition, you want to  
13 make darn sure you don't have a competitor that has an  
14 advantage, either legally or otherwise. And that, I  
15 think, is what motivates some of the emotion that goes  
16 along with the assertion that it's not a level playing  
17 field.

18 Let me point out that we, as a matter of  
19 policy, treat different types of economic activity  
20 different all the time. States, all the time, go in and  
21 subsidize industries in order to get them started and get  
22 them up so that they'll create jobs and there's a public  
23 policy about economic development. As a result, we  
24 subsidize people all the time. We do tax breaks on  
25 people all the time. We favor people in the Federal tax

1 code and all the state tax codes are thick with  
2 preferential treatment tax-wise because of a policy  
3 reason to try to enhance or to create a better  
4 opportunity for one industry or another.

5 So, we treat people differently all the time.  
6 There is no fundamental rule that says everybody has to  
7 be on a level playing field.

8 Then the second point I guess I would make is  
9 that a level playing field is something I really listened  
10 to for years. It's a very emotional argument that people  
11 say. But I believe, the more I have examined it, that  
12 maybe you have -- you can get a level playing field, but  
13 the problem is that one group is playing football on it  
14 and the other is playing baseball on it, even though it's  
15 a level playing field.

16 And that's because things don't work the same  
17 way. E-commerce has advantages that they can do. They  
18 have the ability -- for example, if you're looking for an  
19 out-of-print book and you go down to your local  
20 bookstore, it just probably isn't there. But on the  
21 other hand, you can probably find it on the Internet.  
22 But on the other hand, how many of you go to bookstores  
23 and browse around? Do you go? I go. I don't buy all my  
24 books on the Internet, although I have bought before.

25 But, you know, you like to go to the bookstore.

1 In fact, the book you probably went down there to get,  
2 you look at the back cover and open up and read a little  
3 bit of it and you decide, I don't think I want that, and  
4 instead you go over to the display and you see something  
5 else. Bookstores are doing pretty well and they,  
6 frankly, are using the Internet.

7 The Internet has advantages, but there are some  
8 competitive advantages that brick and mortar people have  
9 that cannot be matched by the Internet. So, it's not a  
10 level playing field either in subsidies, or in tax  
11 policy, or in preferential subsidies that we do for  
12 industries, or even in the method of commerce. It's  
13 really different types of vehicles and we make  
14 differences all the time.

15 MR. HAGEDORN: There's two points that I would  
16 like to make. The first is, I just would like folks to  
17 stop whining about unfair competition and lack of a  
18 playing field with the Internet and figure out how to  
19 take advantage of the Internet for your specific  
20 business. Instead of going after someone who is  
21 competing with you who may be out of state or whatever  
22 the excuse is, who doesn't have the investment in brick  
23 and mortar and police/fire protection and all the other  
24 things, just say, okay, fine, stop complaining about it  
25 and whining about it and figure out a way to use the

1 Internet to your advantage. I mean, some of these big  
2 companies that are whining about -- you know, who want  
3 protectionist legislation, why don't you direct your  
4 energies into finding creative solutions and how to  
5 expand your market share using the Internet.

6 The second comment that I would like to make is  
7 I'm completing my tenth year now in the Colorado  
8 Legislature, and I can't tell you how many times I've had  
9 someone come up to me and try to present this issue as  
10 we've got to protect the consumer. I said, really,  
11 what's happening with the consumer. And so, I hear all  
12 this and you know how these consumers are being ripped  
13 off, taken advantage of, whatever. I said, now, wait a  
14 minute, aren't we just kind of looking at the consumer,  
15 who also happens to be your employer, who's paying your  
16 lobbying bills, that you want that kind of consumer  
17 protection because the consumer is not being hurt by  
18 this, that we have laws in the State of Colorado  
19 regarding consumer protection as it is, and maybe there  
20 might be some tweaking of the wording of our consumer  
21 protection statute, which our AG and former AG and  
22 Governor may be familiar with. They seem to be very  
23 large sections of the state statute, at least Colorado is  
24 with all the consumer protection stuff that we have made  
25 as unfair practices and whatever.

1                   But I get a little tired, I guess, hearing  
2 people who want to protect their little niche of the  
3 market, and using the guise of consumer protection as  
4 their excuse to get legislatures to pass protectionist  
5 legislation.

6                   MR. CRUZ: All right, let me ask another hybrid  
7 question of a question here joined with a question from  
8 the audience. All of you on this panel have been in the  
9 midst of and seen firsthand the give and take of the  
10 political process and some critics of these restrictions  
11 have charged that they are an effective form of  
12 protectionism. In the economics literature, there's a  
13 school of examining political processes known as public  
14 choice theory that postulates when a benefit of a  
15 particular regulation is concentrated on a small group  
16 that feels it intensely and the harm from that regulation  
17 is disbursed among many consumers who really don't feel  
18 the harm all that much, that often the political  
19 processes will be far more responsive to that  
20 concentrated benefit than to diffuse harm, even if the  
21 harm is ultimately greater.

22                   So, the question I would ask is, to what extent  
23 are these restrictions or possible restrictions the  
24 process and the product of the political process and  
25 really what about the political process is producing



1       them? And Part B of the question, just to complicate  
2 matters slightly, is the part from the audience which  
3 asks, how much of this has to do with protecting in-state  
4 producers versus out-of-state producers? I think that's  
5 probably worth thinking about both from the perspective  
6 of your own state, but also to the extent that producers  
7 in your state may be being harmed by regulations in other  
8 states. I mean, how real is that as a dynamic in this  
9 situation?

10               MR. CONDON: Ted, I can jump in. At the risk  
11 of being stupid, I guess, but I'll give you experience.  
12 Again, I've put the white flag up on this, but I was  
13 first contacted, I guess it's been two years ago -- I  
14 thought to myself, this will never pass the General  
15 Assembly of South Carolina. They wanted a law that would  
16 prohibit our citizens from buying cars over the Internet  
17 from car manufacturers. Now, I couldn't think of a more  
18 anticompetitive -- I mean, that shows you how dumb I am -  
19 - law. I thought, there's no chance. That thing sailed  
20 through the General Assembly of South Carolina.

21               I learned the hard way -- and I have a lot of  
22 friends in the car-dealing business, they give \$1,000  
23 when they can to the local legislator and it had a very  
24 powerful steamroll effect, and it just sailed right  
25 through. I see from your literature that it's now passed

1 all 50 states. Again, the argument that you heard  
2 officially was, well, this was done to protect our  
3 consumers. You dummy, you might go there and you might  
4 buy a car directly from Ford and you need to buy it from  
5 the local car dealer because they can protect you.

6 Of course, my response was, couldn't the  
7 citizen make their own choice up. I was then told, no,  
8 no, no, really here, I've got to have this political  
9 support and we need the campaign money, and besides, it  
10 is true that maybe it's unfair to local people who put in  
11 \$2 or \$3 million buying the local dealership here that  
12 we've got to watch out for them.

13 So, I've given the white flag up on this. I  
14 quickly have now come to the point now where if it means  
15 that much to them, that's what they're saying, and people  
16 in this state and around the country don't seem to mind  
17 that they can't buy directly.

18 As you know, you cannot go now over to the  
19 Internet and buy directly from any car manufacturer in  
20 the United States of America. I think that's very  
21 anticompetitive. It's against our free market system,  
22 but I think I'm the lone voice out there, and I'm sure  
23 there's a lobbyist there from the automobile  
24 manufacturers -- I mean, the car dealers that's going to  
25 quickly e-mail their memberships in South Carolina,

1       they're picking on you again. But please put in your e-  
2       mail, I'm not. I'm not going to fight that again. I've  
3       lost. I'm a gracious loser. But I am a loser. I do  
4       think the consumers in our state don't benefit from that  
5       law, and I am a lone, lone voice in the United States of  
6       America on that point.

7               MR. GILMORE: I just think FTC has got to  
8       simply go forward and examine whether or not there are  
9       anticompetitive effects and whether the authority of the  
10      FTC to stop potential antitrust violations would allow  
11      you to intervene on behalf of the public.

12             Again, I want to be very generous here. You  
13      can have arguments on both sides. Everybody's got their  
14      own stake in this. It's a value judgment, it's a policy  
15      judgment, it's a pocketbook issue. The decision has to  
16      be made as to what, at the end of the day, benefits the  
17      public. The public is not organized. There's no union  
18      for the public. So, as a result, the FTC simply has a  
19      responsibility to see whether or not the antitrust laws,  
20      in fact, are being violated and to push forward with it.  
21      Otherwise, you know, there certainly is a case to be made  
22      for people who make brick and mortar investments and  
23      invest their capital, and they don't want to see an  
24      advantaged competitor.

25             Now, I don't think that's probably much of a

1 policy reason for the complete exclusion of Internet  
2 capacity. It's burden on the Internet that they would  
3 place. And they see that as being something that, once  
4 again, is leveling the playing field. The question is,  
5 is it really, and I think that the FTC has to examine  
6 that.

7 MR. HAGEDORN: In the previous panel, a comment  
8 was made about in the thirties, the big push against the  
9 chain stores as they were developing. That is very  
10 similar to moving from the Industrial Age to the  
11 Information Age, and as Governor Gilmore pointed out, the  
12 horse and buggy whip industry kind of took it in the  
13 shorts as more and more people started buying  
14 automobiles.

15 Hey, this is the Information Age, this is the  
16 21st century. The way we do business is going to change,  
17 and either you'll be part of that change or you're going  
18 to be left behind in the dust. There is, as I alluded to  
19 before, it's amazing how many consumer protection crises  
20 arise that no one's ever heard about, but certainly one  
21 industry's representatives will come down to the capital  
22 and say, my god, we've got to protect the consumers  
23 against this. And, again, it's a guise for protectionist  
24 legislation.

25 Just an example of something I read a couple of

1 months back now that -- I'm trying to remember what the  
2 name of this thing is, but the little two-wheel It  
3 Machine or whatever it is, you know, how you kind of move  
4 along, your body weight, all the gyroscopes and  
5 everything and quite remarkable and, of course, it was  
6 well-marketed with this, you know, what is It.

7 Well, this past -- so far I think there's been  
8 something like 20 states that have passed legislation  
9 legalizing these things to use on sidewalks, streets,  
10 whatever. Now, it didn't come before Colorado's  
11 legislature, but here's something that was done very  
12 cleverly by the individual involved and whoever his  
13 backers are in trying to market this thing, that they  
14 came into the legislature and said, hey, you know, we  
15 need to have this legislation, and da, da, da, da, da,  
16 and probably a lot of folks didn't even know -- the  
17 citizens, the consumers were not aware of what was  
18 introduced, not that I'm for or against this thing, but  
19 it's just the way that things happen is that a bill comes  
20 in, someone tells you that it's a good thing, it protects  
21 consumers, and so, you know, there's no opposition to it.  
22 Then it must be something that is good that we should  
23 pass because no one is speaking against it.

24 Well, the simple fact is, the citizens do not  
25 know that this bill's there. It's just that it's not

1 something that may have hit the media's attention, and  
2 they've written about it or broadcast about it, but it's  
3 just the fact that folks don't know that this came  
4 through. So, yeah, we can pass stuff that benefits a  
5 small number of people, but then has an effect that no  
6 one predicted that's going to hurt more people. But it's  
7 the manipulation of the legislative process.

8 Particularily, when you have so many states,  
9 like Colorado, the vast majority of them, I would say,  
10 have what I would call citizen legislatures, that we're  
11 not full-time. And you have most people that are very  
12 apathetic, unless it's an issue that directly impacts  
13 them or if they have a special interest and they have a  
14 lobbyist hired.

15 MR. GILMORE: I guess I might point out that  
16 there is an advantage to enhancing the Internet industry.  
17 Whatever states they're located in, they are creating  
18 jobs, they are creating economic activity, there are  
19 benefits particularly in states that house this type of  
20 activity, and certainly UPS and others and Fed Ex are  
21 doing very well with the deliveries. So, there are very  
22 -- and not to mention the software industry, the hardware  
23 industry, the switching and all the other aspects that  
24 were driving this economy and now aren't driving it so  
25 much anymore. I think the whole country, I think,

1 indisputably, is worse off because we're in a recession.  
2 It would be nice if we could get this technology industry  
3 back up again so that it could help lead us out of this  
4 recession.

5 MR. CRUZ: Let me just ask one final question  
6 and after this question, I'll give each panelist one  
7 minute to give a final closing statement.

8 The last question is, what would your counsel  
9 and advice to the FTC be? The Commission has a long and  
10 very positive history of working closely and  
11 cooperatively with the states, working closely with the  
12 states on law enforcement matters and working closely  
13 with the states in competition advocacy, helping work  
14 with state policymakers to think through complicated  
15 issues of competition and consumer protection. So, the  
16 question I would ask the panel is, what would your advice  
17 be in terms of where we should go from here?

18 MR. CONDON: Ted, I guess I'll jump in first.  
19 I think what you're doing is what you should continue  
20 doing. It's really refreshing. I want to commend you  
21 all for taking the time to ask those in the states what  
22 you think, because what you do does impact us and it  
23 impacts our citizens, and so I would continue gathering  
24 information and hearing from people around the country.

25 I do think, though, that there is a bit of a

1 void of leadership on this, and so, to the extent that  
2 you feel comfortable, I think that your willingness to  
3 lead on this issue, I would certainly encourage.

4 MR. GILMORE: Let me step in and say one thing,  
5 and that is, nobody in this room ought to misunderstand  
6 the general consensus at the state level. The consensus  
7 at the state level is that you must burden the Internet  
8 and you must certainly tax the Internet. That is the  
9 state view. The National Governors Association has been  
10 very strong on this issue and I just want everybody to be  
11 -- the localities are, the shopping center owners are,  
12 retail people across the country are, there is a very  
13 strong opposition to the development and growth of this  
14 industry as a competitor, at least as it is seen to have  
15 advantages.

16 The Senator talked about the State Streamline  
17 Tax Project, that was the one concession that the pro-tax  
18 lobby sort of took away from the Internet Advisory  
19 Commission, and that was that they were going to put  
20 together a State Streamline Tax Project, make it easy to  
21 impose a tax nationwide, and therefore, get the court to  
22 overturn the opinions and let them do it.

23 Our view was, on the Commission, that you  
24 probably couldn't achieve this physically. You just  
25 can't do it. The Internet is too free, it's too open,



1       it's probably not really controllable. You don't know  
2       really who you're talking to or where they are or whether  
3       they're in this country or some other country. You've  
4       almost got to intercept the delivery of the product in  
5       order to be able to impose a tax. That's very difficult  
6       in a free society.

7               So, you know, I guess that -- where do we go  
8       from here? Well, I think that the FTC leadership is  
9       going to be very key on this and you have to simply look  
10      at the authorities that you have available in order to  
11      make sure that you can ask these questions and get the  
12      facts and lead on the proper issues to create maximum  
13      competition.

14             MR. HAGEDORN: First, protect the intent of the  
15      Interstate Commerce Clause of the U.S. Constitution, and  
16      second, don't do anything to hinder the development and  
17      the evolution of the Internet.

18             MR. HAMILTON: We would be interested in  
19      assisting you in any way with any type of information  
20      gathering as it relates to the auction profession or  
21      Internet auction information that we could provide in our  
22      state, and keep this discussion open and find a solution  
23      that could assist the general public, both the buying  
24      public, the selling public and auctioneers, whether you  
25      want to call an Internet auctioneer an auctioneer or

1 brick and mortar person an auctioneer.

2 MR. CRUZ: Bob, you want to give a closing  
3 statement?

4 MR. HAMILTON: I think one thing that needs to  
5 be stated -- and Larry Theurer from the National  
6 Auctioneers Association made this comment today, and I  
7 would like to also make the same comment from what I've  
8 seen in our state. There are a lot of brick and mortar  
9 auctioneers in our state whose businesses have increased  
10 and they will tell you they have increased because of  
11 Internet auctions and not because they've gotten a web  
12 site or put items on auction listing services.

13 There are a lot of licensed auctioneers that  
14 have rolled over part of their business into doing  
15 Internet auctions, but for the most part, as a whole, in  
16 general sales, a lot of auctioneers, brick and mortar  
17 auctioneers are finding that a lot of their clientele are  
18 the people that are taking the items after they've been  
19 bought and are putting them on Internet auction services.  
20 That is why I don't think a brick and mortar auctioneer  
21 in our state is interested in putting an Internet  
22 auctioneer out of business in our state because they have  
23 a lot to lose because it's a great process. Everybody  
24 knows it's a great process. Thank you.

25 MR. CRUZ: Senator?

1 MR. HAGEDORN: I've used the expression a  
2 number of times about the Internet being something that's  
3 evolving, a technology that's evolving, the use of it is  
4 evolving.

5 I just want to follow up with using the word  
6 "evolution." The concept of evolution, one might say  
7 that our species has done well through evolution. The  
8 dinosaur was actually doing fairly well when you look at  
9 all the new finds they have made. When I was a little  
10 kid, there was the Tyrannosaurus Rex, and now I found out  
11 we know that there's a dozen variations of the big-  
12 headed, big-teeth creature that thundered across this  
13 planet millions of years ago. Well, but then a big old  
14 rock, apparently from outer space came and hit the planet  
15 and the dinosaur disappeared.

16 And we're at this juncture now as the Internet  
17 is evolving. We have to be sure that we're not hit by a  
18 big meteor, and that meteor is government regulation.

19 MR. CRUZ: Governor?

20 MR. GILMORE: I think that what we all should  
21 be striving for is to try to build some opportunity for  
22 consensus, not necessarily my reputation. But I think in  
23 this instance, it might be achievable.

24 What would happen if the FTC were to issue some  
25 type of rule that said, okay, if you want to burden the

1 Internet, then you can't use it? Now, what would brick  
2 and mortar people across the country do with a rule like  
3 that? They would scream, absolutely scream. If you  
4 said, okay, we're going to let the pure play guys do what  
5 they can do, you put burdens on it, you can't use it, I  
6 think the brick and mortar people would just complain  
7 bitterly about something like that because it, in fact,  
8 has become a tool.

9 I think we're beginning, with some exceptions,  
10 rare exceptions -- it's more typical that these pure  
11 plays have failed than that they've worked. I believe,  
12 with some exceptions, we are seeing a convergence of the  
13 Internet retail and brick and mortar traditional retail.  
14 I think we're seeing it more and more that people are  
15 finding the ability to use those tools.

16 You're seeing it from the point of view of  
17 brick and mortar people. If you look at your paper  
18 today, you will see all the retail stores. They are in  
19 the ads, and you can go online and you can view their  
20 products and you can even order their products online,  
21 and that is a very smart use of the Internet for the  
22 traditional people. They have web pages all over the  
23 place. They're using the Internet. At the same time,  
24 people are being encouraged to come on down and take a  
25 look at their local branch and to see, touch and feel the

1 product and take it home that night and pay for it under  
2 their revolving credit system.

3 Look on the other side. I was really amazed  
4 when I saw a development a couple of years ago, and I was  
5 at Tyson's Corner last night and saw this, L.L. Bean, a  
6 pure play catalog industry that has been using more and  
7 more of the Internet, has started to open a brick and  
8 mortar store at Tyson's Corner. Why would they do that  
9 and subject themselves to the taxation that that implies  
10 because of an immediate nexus under the law? Because  
11 they think that there is value in the brick and mortar  
12 system of retail that isn't going to go away.

13 So, I think there is an opportunity here to  
14 lead towards a consensus type of model where you can have  
15 a typical model of clicks and mortar, a less typical  
16 model of just an old style retail store and an old style  
17 e-commerce, but through all of this, I think you can find  
18 a way, a model, that lets all the flowers bloom and let  
19 the consumers have an opportunity to shop in all of these  
20 different models, and I think you're going to see the  
21 country and the consumer better off.

22 MR. CRUZ: General?

23 MR. CONDON: Thanks so much for the chance to  
24 be on this panel. I tell you, I've learned a lot. What  
25 makes me feel so good about this, I can remember being in

1 the White House with then President Bill Clinton, and he  
2 talked about the fact that we had this new Internet. I  
3 think he said at the time there were 50,000 new pages  
4 being added and who knows where this might go, and it  
5 just makes me really proud to be an American to hear this  
6 panel speak about the opportunities. This, after all, is  
7 an American invention, and that we are really changing  
8 the world. We need to continue to lead.

9 I want to echo my friend, Jim Gilmore's  
10 comments, that I do think that it is such a blessing for  
11 us to live in this country and to be able to have such a  
12 wonderful invention as the Internet, that I do think in  
13 talking with everyone and talking to different leaders,  
14 Federal, state and local, that the consensus, I think,  
15 can be developed and is out there that we need to do all  
16 that we can to allow our system and our free enterprise  
17 system to flourish with this new invention that is now  
18 becoming even somewhat old to some. I know to my kids  
19 it's old. I think we have great things ahead if we can  
20 all work together.

21 MR. CRUZ: Thank you. I'd like to thank all of  
22 our panelists for what I think was a really terrific and  
23 illuminating discussion, and also just make a few  
24 concluding observations.

25 I'd like to thank, in addition to our panelists

1 here today, the staff at the FTC who worked very hard to  
2 pull this three-day workshop together. Asheesh Agarwal,  
3 in the Office of Policy Planning, and Maureen Ohlhausen,  
4 John Delacourt, Jerry Ellig and Millie Taylor, all of  
5 whom have put in many, many long, long hours bringing  
6 this conference together.

7 I also want to thank Mark Nance who has joined  
8 us recently and dived into the fire, and also Debra Holt,  
9 in the Bureau of Economics, who's worked very hard, as  
10 well, bringing this together.

11 Over the past three days we've had over 70  
12 panelists and I think we've had a terrific array of  
13 panelists come before us. We have had all five  
14 Commissioners here at the FTC actively take part in this  
15 workshop. We have Governor Gilmore, General Condon,  
16 Senator Hagedorn, Bob Hamilton. We have had numerous  
17 state Assistant Attorneys General, numerous state  
18 regulators. We've had a sitting member of Congress,  
19 we've had a former Senator, we've had a member of the  
20 Council of Economic Advisors. We've had numerous  
21 economists, including a Nobel Laureate, and we've also  
22 had numerous CEOs and industry leaders directly involved  
23 in these industries.

24 Over three days we've examined 10 different  
25 industries, 10 different industries that many might think

1 are discrete and involved in utterly separate endeavors.  
2 One of the truly fascinating observations I found sitting  
3 and listening to panel after panel is that industries,  
4 you've got wine, you've got casket sales, you've got  
5 financial services, and most folks would never imagine  
6 that they have little, if anything, in common. And what  
7 has been fascinating over and over again is listening to  
8 the discussions of each industry panel and watching the  
9 same patterns of challenges and issues confronting each  
10 other over and over again. And it really was quite  
11 phenomenal because in each panel, you would typically get  
12 an observation from a member of the panel that, boy, I  
13 looked at these other industries and they've got some  
14 crazy things going on in those industries, but our  
15 industry is really very different.

16 And it was very interesting over and over again  
17 to hear that. But what the very different was that was  
18 expressed over and over again is, I think, a difficult  
19 problem that industry leaders and policymakers at the  
20 state and Federal level are going to have to wrestle  
21 with, which is that there are strong and legitimate  
22 desires for consumer protection, for ensuring that when  
23 citizens of each state go to buy a good or service that  
24 they are treated fairly and are not subject to fraud or  
25 deception.



1           And yet, many of the regulatory systems that we  
2           have established for doing that are dealing with the  
3           change of the Internet, that aside from the freedom and  
4           all the dot-com lingo that has entered our lexicon, it  
5           has also brought an ability for a small local producer to  
6           hit the national market instantaneously. And that  
7           change, I think, is for some time going to leave  
8           policymakers struggling as to how to adapt systems that  
9           were designed in an era when a local provider provided to  
10          the guy down the street, and now with the technological  
11          revolution, that same local provider in his garage can be  
12          providing to someone 3,000 miles away or even across the  
13          oceans in foreign nations.

14           Another very strong observation I'd note is  
15          that I thought it was very interesting the wide breadth  
16          of agreement, the bipartisan agreement, and the agreement  
17          just across ideological lines, across interest lines,  
18          about the need in the aggregate to reduce and minimize  
19          barriers to e-commerce. In particular industries to be  
20          sure, the established players are very concerned about  
21          the issues in each of those industries. But the overall  
22          aggregate sense is also that e-commerce has tremendous  
23          potential for the future, and I think there's widespread  
24          agreement that protecting the future of e-commerce is an  
25          important policy goal.

1           The principal purpose of this workshop was to  
2 learn and I think we've learned a tremendous amount.  
3 We've had a wonderful array of panelists. Let me  
4 encourage all of the panelists and also members  
5 of the public, we will be keeping the record open for  
6 30 days following the conclusion of this workshop and  
7 we would encourage every panelist and also members  
8 of the public to submit more extensive written  
9 statements, because really the core purpose of this is  
10 to understand what are the changing dynamics in these  
11 industries and how are these changing dynamics impacting  
12 consumers.

13           One thing I think there's a real thirst  
14 for at the FTC is hard empirical data. Governor  
15 Gilmore referred to that in this last discussion here.  
16 The need to not just hypothesize about what might be  
17 happening, but have some real concrete data to get in and  
18 delve and understand how are these new trends and  
19 dynamics affecting, for good and for bad, individual  
20 consumers?

21           So, with that, I think we all have our work cut  
22 out for us. The Commission certainly has its work cut  
23 out for it, and as well, I look forward, and I know the  
24 Commission looks forward to continuing to work closely  
25 with the states and with other policymakers to deal with

1           these new and exciting challenges.

2                           Thank you very much and take care.

3                           **(Whereupon, at 5:35 p.m., the workshop was**  
4 **concluded.)**

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