FEDERAL TRADE COMMISSION

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WORKSHOP ON:	)
HORIZONTAL MERGER GUIDELINES	) Matter No.
REVIEW PROJECT	) P092900
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TUESDAY, JANUARY 26, 2010

Conference Center
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

The above-entitled hearing was held, pursuant to notice, at 9:00 a.m.

P R O C E E D I N G S

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MR. SHELANSKI: Good morning. Thank you very much for coming to this fifth of our Horizontal Guidelines Workshops. I have two tasks before we get started, one a chore and one a pleasure. The chore is to read you a security briefing, which we're required to read, and the pleasure is to introduce our opening speaker.

So here's the security briefing. Anyone that goes outside the building without an FTC badge will be required to go through the magnetometer and x-ray machine prior to re-entering into the conference center. In the event of a fire or evacuation of the building, please leave the building in an orderly fashion. That worries me with this crowd. Once outside of the building, you need to orient yourself to New Jersey Avenue.

Across from the FTC is the Georgetown Law Center. Look to the right front sidewalk. That is our rallying point. Everyone will rally by floors. That's not relevant to us. You need to check in with the person accounting for everyone in the conference center. That person will make themselves known to you.

In the event that it is safer to remain inside,

you will be told where to go inside the building, and if you spot suspicious activity, please alert security, and that does not refer to my colleague Phil Weiser's remarks.

Towards the end of each panel or during each panel, somebody will distribute these question cards. We ask you, please, to fill them out, and they will be brought up front. That has tended, we think, to be the most effective way to get questions. Given the size of the audience, however, we may opt to just take your questions. It might be simpler, given the number of people here.

Finally, there will be a lunch break from 12:30 to 2:00. The offerings are not enormous right around here, but there are a couple of cafes. If you just make a left out the front door, there are a couple of places to eat on that block, and then there's Union Station just a couple blocks away. Those are probably your closest bets.

Finally, I would like to introduce Assistant Attorney General Christine Varney, of course, she needs no introduction, who will give us some opening remarks today, and just so you all know, all remarks today will be on a transcript that will be posted online within a week or so. Thank you.

MS. VARNEY: Thanks, Howard. Good morning, everybody. Don't take any notes because my remarks are going to be posted on the DOJ website at greater length. I wanted this morning is talk about what we've learned from the workshops and the comments we've received so far and give you some preliminary views about what we've heard during the process and where I, and only me, believe consensus may be emerging.

As we complete the five workshops, we welcome additional comments, including comments on the topics that I'm going to outline this morning.

A consistent theme running through the panels is that there are indeed gaps between the guidelines and actual Agency practice, gaps in the sense of both omissions of important factors that help predict the competitive effects of mergers and statements in the guidelines that may now be inaccurate. These gaps are something that we are all aware of.

The guidelines need to inform practitioners and the business community of the Agencies' standards for evaluating mergers. Gaps between what we say we do and what we actually do run counter to our goal of being transparent. Transparency helps businesses make accurate predictions about our likely enforcement intentions adjust new behavior accordingly. Lack of

transparency creates uncertainty, and uncertainty results in unpleasant surprises. We want to avoid that.

Similarly, the agencies rely heavily on the merger guidelines in our competition advocacy efforts both here and abroad. To be effective as well as pervasive, the guidelines must reflect our best thinking about the competitive effects of mergers and appropriate merger enforcement policy.

Courts also rely on the guidelines, in the words of the Fifth Circuit, "to provide persuasive authority when deciding if a particular acquisition violates antitrust laws." When the guidelines either inaccurately reflect enforcement or omit crucial considerations, we do a disservice to the law as well as the business community.

At the same time, I do not want to overstate the magnitude of these gaps. The focus in the guidelines on whether a merger is likely to create or enhance market power, resulting in anti-competitive effects, remains the heart of merger analysis.

The guidelines articulation of possible unilateral and coordinated effects entry and efficiencies accurately reflects the key concerns of merger analysis. I said at the outset of this project that I did not envision radical review of the

guidelines. Nothing so far in the comments or the workshops has changed my assessment. Updating the guidelines, however, does appear to be worthwhile in a number of areas.

Turning to some specifics, there are a few areas where consensus appears to be emerging. To begin, many of our panelists have noted that the Agency's do not mechanically apply the five-step process set forth in the guidelines where markets and market shares are first assessed, followed by a sequential consideration of potentially adverse competitive effects, entry, efficiencies, and then failing firm defenses. None of our panelists advocated following that sequence as the best way to either assess every merger's likely competitive effects or to reach an enforcement decision.

To be sure, the guidelines themselves offer a note of caution regarding the potentially misleading results that can follow from mechanical application of the guidelines. Panelists have noted that far more flexibility is both the norm of actual Agency practice and appropriate given the diversity of considerations that are presented in the range of transactions viewed by the agencies.

Thus, as a matter of actual practice and sound theory, some adjustment of the description of the

analytical process used by the Agency seems appropriate. Implicit in deemphasizing the sequential nature of the guidelines inquiry is a recognition that defining markets and measuring market shares may not always be the most effective starting point.

Remember the purpose of defining a market and assessing shares is to assess the potential harm. When it is clear that either certain vulnerable customers are likely to be harmed by a merger or that certain customers have, in fact, been harmed by a consummated merger, the need to define a market to assess likely competitive effects is obviously diminished.

For instance, the consumer harm that followed from the consummated Evanston Hospital transaction lessened the importance of the Commission's market definition and market share analysis. Our panelists have largely confirmed the view that market definition should not be an end-all exercise. Rather, it is something to be incorporated in a more integrated, fact driven analysis directed at competitive effects.

Of course this is not news. The commentary on the Horizontal Merger Guidelines explains that the agencies apply the guidelines flexibly, and those practicing before the agencies have been aware for some time that market concentration is more important in some

cases than others. For instance, a merger involving a new, disruptive entrant may well impact competition far more than market shares might suggest.

Similarly, the Division's merger review process initiative has recognized the appropriateness of a tailored second request schedule designed to enable the division to take a quick look at potentially dispositive issues such as failing firm and entry at the outset of an investigation; thus precluding the need for full, sequential review outlined in the guidelines. Expressly acknowledging this flexibility in the guidelines themselves seems to me to be prudent.

The next area I would like to discuss is one where the guidelines appear to be inaccurately describing the Agencies' enforcement policy. It will come as no surprise to you, the merger challenges data that we collect confirms that it is rare for the agencies to challenge mergers that will lead to HHI concentration levels below 1,800. Yet the guidelines indicate that such mergers potentially raise significant competitive concerns.

Similarly, the guidelines suggest that a 100 point increase in HHI concentration level raises anticompetitive concerns. In actual practice, the agencies have only infrequently, indeed I say rarely,

challenged a merger unless they increased concentration several times that much.

More broadly, our panelists have generally confirmed that the guidelines overstate the importance of HHIs in merger analysis. Again, it will not surprise you that HHIs have not been the focus of any party presentation or any staff recommendation since I've been the Assistant Attorney General. That reality reflects the current state of merger analysis where HHI levels are given far less prominent place as a predictive tool for assessing competitive effects than suggested by the guidelines.

In that vein, I note that while many panelists have acknowledged their usefulness as a tool for assessing likely competitive effects, none has maintained that HHIs should be the key driver in an enforcement decision.

It is clear that the HHI threshold set forth in the guidelines no longer capture Agency practice or economic learning about the kinds of mergers that are most likely to lead to consumer harm. Revising the thresholds to express accurately how the agencies use them seems not just appropriate but also necessary to overcome what is at this point an affirmative misstatement.

A third area where the guidelines may be usefully updated is unilateral effects. This is an area where economic thinking and Agency practice have progressed significantly since 1992, when the concept of adverse unilateral effects was first explicitly introduced in the guidelines.

That introduction was a major step forward, but the treatment of unilateral effects was sparse, and several of our panelists and commentators have noted that significant advances in thinking have taken place since 1992.

Unlike the HHI threshold where gaps are more in the nature of misstatements, in unilateral effects, the gaps are more in the nature of omissions. There are important considerations that the agencies routinely employ when assessing unilateral effects that are not mentioned or even alluded to in the guidelines.

Our panelists identified a number of considerations routinely used to assess unilateral effects. Diversion ratios, price cost margins, win/loss reports, customer switching patterns, the views of competitors, customers and industry observers, for instance, are all tools we use to analyze mergers of firms selling differentiate products.

Yet the guidelines say little about how these

types of evidence are used to assess unilateral effects. In fact, when assessing pricing effects in markets with differentiated products, both agencies employ a variety of techniques to evaluate whether or not the merger is likely to lead to higher prices.

There is a growing body of evidence that measures of upward pricing pressure, which focus on diversion ratios and price cost margins, more accurately evaluate the likelihood of unilateral pricing effects where HHIs may be more productive in a coordinated effects analysis.

Unilateral effects can arise along many dimensions of competition, including pricing of differentiated products, negotiations between buyers and sellers, output and capacity for more homogeneous products, product variety and innovation. The agencies have accumulated a great deal of experience analyzing such effects, and that expertise is not reflected in the current guidelines.

Updated guidelines can enhance transparency by explaining how the agencies currently evaluate unilateral effects. I'll briefly mention five other areas where clarification of the guidelines appears to be worthwhile.

First, the discussion in the guidelines of

targeted customers and price discrimination could be clarified. Many of our cases involve price discrimination. Yet the guidelines treatment of price discrimination is quite abbreviated.

Second, the guidelines could more accurately convey actual Agency practice by indicating that market shares are normally assessed using recent or projected sales in the relevant market while explaining the conditions under which other measures, such as capacity, may be used.

Third, different parts of the guidelines employ closely related concepts of supply side responses by non-merging firms: Expansion by firms already selling in the relevant market, uncommitted entry, repositioning and committed entry. A number of panelists suggested a more unified approach to these concepts.

Fourth, the guidelines could clarify that coordinated effects can arise through accommodating behavior among a small number of rivals without the necessity of reaching the terms of coordination.

Lastly, several panelists have pointed out that the guidelines are virtually silent regarding innovation, despite wide spread recognition innovation generates enormous value for consumers over the long run.

A revision could move the guidelines into the 21st Century by explaining how the agencies account for market dynamics, the pro-competitive role of disruptive entrants and a merger's effect on innovation.

It's now time to turn to our expert panelists, but I would first like to reiterate several notes of thanks. To all our panelists and to those who either have submitted or will submit comments, thank you for volunteering your time and expertise.

I would also like to offer my warm thanks to the Federal Trade Commission staff and Antitrust Division staff who have worked very, very hard to organize these workshops, and I'm very appreciative for the very wonderful and cooperative relationship the FTC and the DOJ have enjoyed on this project, and I thank the FTC for their hospitality today.

So I'm going to turn it over to my deputy, Phil Weiser. Thanks, everyone.

(Applause.)

PANEL 1: MARKET CONCENTRATION AND THE STRUCTURAL PRESUMPTION.

MODERATOR: PHIL WEISER, Deputy Assistant Attorney General

PANELISTS:

MARK COOPER, Director of Research, Consumer Federation of America

ALBERT A. FOER, President, American Antitrust Institute

ANDREW I. GAVIL, Professor of Law, Howard University School of Law

CHARLES F. RULE, Partner, Cadwalader, Wickersham & Taft, LLP

MR. WEISER: So thank you, Christine. That was a terrific way to kick off our last session, and thank you so much for your engagement and support in this effort. If I could ask the panelists for the first panel to come up, hopefully sitting where your name card is, I will start the process of introducing you all.

The idea of this workshop in general was to get a variety of perspectives, and there are many people who said, Well, are there things you want us to say, and the answer was, No, we want you to have a thoughtful, engaging discussion, and with the folks we have here, I'm very confident we will.

Sitting to my left, Mark Cooper, who is one of the premier consumer advocates, probably by all accounts would be in the consumer advocate hall of fame. He's the research director at the Consumer Federation of America. I first met Mark in the '90s when he was there, and I was at the Antitrust Division, and he is an economist trained at Yale where he has a Ph.D. and is, among other things, a fellow at the University of Colorado's Silicon Flatirons Center.

Next to him, Bert Foer, who is what I guess you would have to call a policy entrepreneur. He founded the American Antitrust Institute and has turned that entity into a force. It is a unique enterprise. Those not familiar with AAI, it brings together a bunch of people on an advisory board as well as some resident fellows to advocate on antitrust policy, and we're so glad to have him here. Bert comes from a rich background in both private practice and also at the FTC and in the industry.

Next to him Andy Gavil, who is one of the leading lights in the academy, a law professor here at Howard University. He is also a coauthor of an antitrust case book with Bill Kovacic --

MR. GAVIL: And John Baker.

MR. WEISER: -- and John Baker. John is now

chief economist with the FCC formerly of the FTC, and Bill Kovacic, of course, is a Commissioner at the FTC.

Finally, Rick Rule, who is one of the former Assistant Attorney Generals, who has been so kind to be supportive and engaging on this project. Rick has sort of a long-standing place at the bar. He is now at Cadwalader where he is head of their antitrust group. He represents a number of major clients and was head of the Antitrust Division in the '80s.

The folks we have gathered here are going to talk about market concentration. The way we're going to do that is have a series of questions, have a give and take, and I want to start with what Christine teed up for us, which is we have these HHI figures, which many acknowledge are, as Christine put it, a misstatement of actual Agency practice, and also some would suggest out of sync with economic learning. I guess the broad question is: How do we think about this issue? What makes it appropriate, and possibly if you would want to supplement it, some have said maybe HHIs are not the right framework.

We could think instead of significant competitors or market shares of the merging firms, what have you. Rick, you've been around this for awhile. I think, were you there when the '82 guidelines were done

or the '84 guidelines?

MR. RULE: I came shortly after the '82 guidelines were done and was there and in theory, sort of the deputy, who was managing the process for rewriting the guidelines in '84.

MR. WEISER: What I heard is back then they were using four firm concentration ratios, and they tried to reverse engineer from that an HHI figure, and they came up with 1,800, which has been -- was 1,800 taking it back in the '80s and they kept the '92?

MR. RULE: Well, what happened was in the '68 guidelines, the original guidelines, they used four firm concentration ratios. I wasn't there in '82, but Mr. Werden, who is in the audience I think, is the source of my information on this. As I understand it, the big conversion in '82 was the introduction of what was viewed at that time as a relatively revolutionary tool, the HHI.

As I understand it, Bill Baxter decided that it made sense in making that change not to change the thresholds, to largely have something that was similar. Also the numbers, a thousand, 1,800, are nice round numbers and sort of equate to certain things that make sense, and so that's how that came about.

I should say it's also important to keep the

historical perspective in mind. In '68, the structure performance paradigm, so to speak, was alive and well, reflected in the courts, and in fact even, one might say, more extremely so, and that's where the four firm concentration ratios came from.

I can remember as a summer associate, in fact, in the late '70s writing a paper that sort of summarized the things other than structure that were relevant in antitrust analysis and doing that for Ed Zimmerman, who had also been an AAG, and he found that quite amazing, that there were things that were relevant other than structure.

In '82, I think it is fair to say that there was the new learning that had occurred. There was a recognition that structure might be less important, but there was still a strong sense within the Division, and I think in Bill Baxter's case, that structure still was the significant factor, and a lot of the analysis really took the form of market definition issues, and of course the focus in '82, in addition to the HHI, was the SSNIP test, which of course was the principal lasting innovation of the '82 guidelines.

In '84, there was a sense that -- and if you go back to the '84 guidelines, you will see that the HHI thresholds, even there, there's a line that sort of

indicates they are at the beginning of the analysis. There were some of us in the Division who thought we should be even more explicit, that they really were safe harbors as opposed to determinative guidelines, but there was the sense that politically, that would not be a fruitful exercise.

So instead of changing the numbers to reflect what was emerging as the reality in '84, there was that line. Now, I will say, if you go back, most of the analyses that have been done of mergers really are from 1990 forward, and if you go back into the 1980s and around that time, there actually were mergers that were getting scrutinized, and at times challenged, as I recall it where the HHI post merger was below 1,800.

What I think was happening over that period of time, and you can see it in some of the speeches, you can actually see it in the international guidelines that came out at that time, there was a recognition in the Division that the notion that structure or market shares were really a beginning and that what you had to do, and the way I like to say it, is you have to tell a story.

Inevitably you have to focus on structure because what a merger does is changes the structure of the market, and what you have to decide is, as the agencies do, whether or not that change in structure

makes it likely, in light of all of the relevant circumstances, that prices may go up, and I think through the '80s there was a recognition that it was more complex than just structure. It was more complex than could just be handled in a SSNIP test.

Entry was the factor that everybody focused on in the '80s, but there were other factors that were developing. I think notwithstanding it wasn't until '92 that the unilateral effects analysis was specifically stated. It was something that, in various forms, was being looked at by the Division in the '80s.

So by the late '80s, by early '92, I think it was very clear to anybody inside the Division that those numbers were really only safe harbors and that they were just the starting point, and at that point, structure, market share was really only one part of the holistic effort to tell the story, to show what the linkage was and decide whether or not that linkage was a concern in light of all of the relevant factors.

So I think that the history is important. To me, I think that if you look at those numbers that were generated by the FTC and the DOJ in the early part of the last decade now, you will see that I think probably 2,000 is the cut off or 2,500, as it now turns out, and the few outliers where there's still cases that had been

brought below 1,800, I think there are kind political explanations for them, and if anything, those political explanations led the agencies to bring cases in those areas because the guidelines were there.

So as far as I'm concerned, they are, as Christine said, safe harbors. They ought to be raised because I think today they're inaccurate, but I think that the sort of trend away from just focusing on structure is again a 30 year or longer occurrence. It ought to continue and the guidelines ought to be very clear that structure really in and of itself can only be a starting point and really can only be part of a much larger effort of looking at a variety of factors.

MR. WEISER: Andy, how do you conceive of the HHIs and their proper role in the guidelines?

MR. GAVIL: I think what I would add to what Rick said is that this 30 year evolution is larger than just merger law. Antitrust law has changed in those 30 years. In you look back at cases in other carries, Section 1, Section 2, our thinking and our reliance on structure has changed generally in many ways in antitrust law.

So I think it's clear that we don't rely on structure to the same degree that we once did, but having said that, I worry about two things in throwing

the baby with the bath water out. Do we still think structure is of some utility? Do we think it's of some utility at certain very high levels?

One of the big challenges in antitrust generally is that there is a trade-off between reducing error costs, false positives, false negatives, and increasing the direct costs of deciding and litigating cases, so does the structural assumption have some utility? I think it still does.

The other thing I worry about is every sentence the agencies now add to the guidelines will be cited and held against them in court when they litigate as a constraint on their discretion, so to the degree you move away from the structural presumptions and you started adding, Well, we ought to look at this factor, look at that factor, when you get into court and litigate, people will say, Well, you didn't look at that factor in this case, and I think there's a long history under the guidelines since 1982 of courts holding the agencies to their own guidelines and it not always working out well for the agencies.

I completely agree, however, that moving away from the 1,800 makes sense. The assumption there was sort of a six to five was the threshold where we would start getting concerned, it looks more like where we are

today is five to four or four to three, but I get very concerned about the agencies saying that, creating the impression of safe harbor and actually constraining their own discretion, if a case based on other factors that happens to be six to five or happens to be five to four or gives them some concern, how you draft the guidelines could wind up making it more difficult to litigate and win that case if you had to.

So it makes sense to me to change it. I think the case for changing the increased thresholds, the 1,500, that stuff is clearly -- that's too small to be of some use, but I would just caution a little bit about balancing the value of increased guidance against constraints you can place on the Agency by adding additional factors that you want to look at, which will become de facto requirements when you litigate.

MR. WEISER: So you don't think the old lawyerly construct of including, but not limited to, or illustrative, but not necessarily required, is going to do the job because there's a tension between providing guidance and giving people transparency into what we do, and the other side is you worry about pinning yourself down?

MR. GAVIL: The guidelines currently say and even the announcement of this process said, this is just

how we make decision, not how we litigate, and then it proceeded to list all of the cases in which the courts had used the guidelines as a framework with shifting burdens of production and proof, and I think that's just a reality that you have to be aware of.

You can put the conditionality in there, but thinking back to Baker Hughes and the language of the guidelines on entry at the time, it didn't stop the court from saying, Well, the language you've used is not persuading us.

MR. WEISER: Bert, you at a conference last year in Colorado said something to the effect of there is I guess an indisputable gap between practice and the guidelines, let's say it's 1,800 and 2,500 as Rick suggested, and many people have said, as Rick noted, you can just raise it, and I think you said at the time, Well, you can start bringing more cases that are in the 1,800, 2,000 range. Is that still kind of your view? How do you approach that issue?

MR. FOER: My view is that we're moving in the wrong direction. We have a gap, but that the proper direction would be to conform practice to the guidelines. You've asked us to talk about what the metric is that we should look for, and it seems to me that the proper metric is Congressional intent. It's

not economic theory. And, the Congressional intent, as defined unfortunately perhaps long ago, by the Supreme Court is that this is an incipiency statute.

The whole purpose is to avoid high levels of concentration, and if you step back the way, for instance, the Antitrust Modernization Commission did not and you ask, Where are we, where have we come, how concentrated has industry become? What is this too big to fail issue that everybody is worried about today?

I think you have to say that we have not succeeded in fulfilling the Congressional mandate. Now, why else do we hear our marching orders if not from Congress and the Supreme Court? So the question I ask is whether the Incipiency Doctrine can be utilized more than it is in the guidelines. The guidelines mention it in one sentence and virtually ignore it.

It does not seem to me that this brings us back to Von's, which nobody wants, but I thought that the original guidelines, looking at basically a six to five, and basically saying, okay, five companies competing should be kind of a model, not inevitable, not irrebuttable, but when you get to five, you should be worried.

I think that the reality today is much more when you get to three, you're worried. Well, by then it's

awfully late to be worried. One thing antitrust is not good at is creating competition. It's much better at, in theory at least, preserving competition, and we know that by the time you get to three or four or five, collusion is much easier to accomplish. It can be accomplished in a more fragmented industry, but common sense tells us it's easier to accomplish.

Also, we don't really have a way of getting at parallel behavior, so since we can't get at parallel behavior very well, we should try to maintain a structure in which it's less likely to occur.

Therefore, I would shift the burden, when we get to high levels of concentration, and I would say instead of starting with the proposition that underlies our current policy: Mainly, that mergers by and large are good. They're efficient. They're likely to be useful to the overall welfare.

That's the golden proposition, and it works pretty well up until high levels of concentration, but then it no longer works, and when we look at the results of mergers, most of them don't work out very well. There's some that work out very well, and we've got to not preclude those, but generally speaking, they're not terribly successful, because the externalities of a merger are not calculated into the analysis. There are

real externalities, and I think we're coming out the wrong way. In other words, when we get to a very high level of concentration, there should be a strong presumption against it, and the burden of demonstrating that it's in the public interest should be on the parties that want to go forward.

MR. WEISER: So there are two ideas here. I'll take them both. One is the virtues and vices of a safe harbor and what should that be, and the second is the virtue and vices of a I think it's called a structural presumption, which is where Bert is going, and, Mark, I want to ask you to address the second one.

At what point, and Bert suggested six to five or five to four, others I think would suggest four to three or even three to two, should a structural presumption give some weight? As Rick noted, the focus on structure as a predictor of actual competitive effects has become more questioned, although the guidelines still today have a commitment to a structural presumption.

Is that something that should be retained, and how should the agencies look at it?

MR. COOPER: Well, I think the critical point is if you're going to set a threshold, it's important to know what the threshold means. Unless you really know what it's going to mean, where you set it is a shot in

the dark. I like to analogize and a couple people have heard this before, for the last 25 years, the merger guidelines have been sort of like the pirate's code in the Pirates of the Caribbean. Not too many people saw the movie, so now I get to tell the story.

It's a comedic device throughout the movie that actually really gives you some insight into life in pirate society, and essentially what happens is at each key point -- it's an older crowd, you don't have young kids here. At each key moment in the movie, when someone is about to do the morally incorrect thing, another character says, But wait a minute, what about the pirate's code, which of course tells you to do the opposite thing, don't abandon your friend, right, when you're about to jump ship?

The pirate's code will always tell you to do the opposite thing, and everyone violates it, except of course for the heroine, who is not a member of pirate society, and they play this routine throughout the movie. Every time some dastardly act is about to be committed, someone says, What about the pirate's code, and they go off and do the wrong thing anyway.

At the end of the movie, the chief villain is challenged, and they say, Well, what about the pirate's code, and he says, The pirate's code, they's only

guidelines, and he does the wrong thing.

The fascinating thing is in the beginning of the second movie, they introduce this very early, and someone is about to challenge him, and he just waves his hand and says, Don't give me that parlay stuff, he's not going to hear the pirate's code, and the pirate's code disappears from the last two movies.

The key here is that if the thresholds are going to be meaningful, they will be useful, but lax law enforcement is bad in antitrust, just like every place else in law enforcement, so if you're going to give me thresholds, they have to be meaningful, and I would say the following: I can live with four is few and six is many, I'm a ten guy, but that's okay, times have changed.

I can live with four is few and six is many if, when you get above 2,500, you pretty well know that you're going to end up in court. The threshold has to be meaningful, and you need to know that between six and four, there's going to be a parlay going on. That was the central theme in the pirate's code is whenever you're about to get off, you would say, wait, parlay, and in theory the pirates were supposed to negotiate.

If you come in with a six to five or a five to four, you should know that there's going to be a really

tough conversation about the harm to competition, so for me, I think the reality has moved there, and I agree with Bert. When we have this conversation, we say there's a gap between practice and the guidelines, we assume that the guidelines are wrong and the practice is right. Some of us actually think the guidelines were right, and that practice is wrong, but four to six is a number that I think we can begin to live with.

Let me say, the other question, non structural issues. I would take Andy's statement about that structures still have utility one step further. Given the current state of the economic discipline, the question is: Does neoclassical economics still have some utility?

Let's be clear. The fundamental assumptions that we've used to analyze the performance of markets has been shaken, sometimes I like to say buried, if not dead, beneath the financial rubble of Wall Street, and so we need to ask ourselves the question that transaction costs economics and behavioral economics teaches us things about economic performance that are directly contradictory to neoclassical assumptions and predictions, and the question we should ask ourselves: Does the teaching of these two disciplines make it more or less likely that market power will be abused?

I believe structure still has some importance, and I frankly believe that behavioral economics teaches us that once you have market power, given the role of inertia and social influence and things in human society, market power is liable to be more durable than you thought, not less, because the assumptions you make about human behavior are incorrect. They don't reflect reality.

Clearly a good clear statement of four is few, six is many, with a precise understanding that this stuff is going to meaningfully dictate future Agency behavior would, in fact, be a better place to live than where we've been for the last 25 years.

MR. WEISER: So we're going to come back to the following formulation as you put it. You said in some context, you need to be able to put on the spot, so we can tell the story. In some contexts you need maybe a safe harbor, and in other contexts, some argue there should be a structural presumption and maybe likely to challenge.

Mark has put on the table if you have a six to five or five to four merger, you have to have a good story. If you have a four to three merger, you should expect to be challenged, and the Agency should get a presumption. What's your take on that proposal? Is it

something you can live with?

MR. RULE: Well, let me start by saying, as I get older and mellower, I find it hard to resist propositions from Mark and Bert and others. It also probably has something to do with the fact that I tend to represent more plaintiffs these days.

MR. WEISER: There is a transcript of this.

MR. RULE: That's okay. I will give it to my plaintiff clients. No, what I would say is, look, to me the structural numbers are relevant frankly to the world at large, and I think all of us know, we run into clients who have heard this thing called HHIs, and so it becomes a big issue for them. It is relevant to them.

It's relevant to people who are planning, who don't want to necessarily go out and hire an antitrust lawyer when they're putting together two Kansas wheat farms to basically say, Look, if you're under this level, there is not a problem. That's why I say, and people maybe don't like this, that it ought to be a safe harbor, and that may tell you that you want to set these numbers a little lower, so maybe not 2,500. Maybe 2,000 is the right number, but again, you also have a thousand in the guidelines.

I think that's what gets communicated. The problem I have with what Mark says, as I say, even

though I find some attraction to it is I think the experience of the last 25 to 30 years has taught people who do this, both inside the government and outside the government, that there really are potentially a lot of relevant considerations so that in some cases, I will grant you that six might be too few.

I mean, I'm old enough I guess that I don't find 1,800 to be completely appalling, although I think if you go from six to five, maybe that's a better area or even five to four. I mean, I can understand the theory, and under some circumstances that might be a problem.

I think though what the agencies have found is there are a lot of other pieces of evidence. There are a lot of other facts that can inform one as to whether or not a merger that goes from six to five, five to four, four to three, three to two, in fact is a problem. If we can know the answer better than relying on something like a market definition, which is not perfect, and then some heuristics that don't necessarily have support empirically, that's what we pay the government to do, to try to get the answer right.

Unless they can tell a story that the merger may substantially lessen competition in some line of commerce, in some section of the country, then frankly the law doesn't allow them to challenge it, but to me, I

guess we do know more today than we did 25 years ago.

I think analysis has to take that into account, and one of the things we do know is that structure doesn't hold the same significance for determining the outcome of an effect of a merger as we thought it did 30 years ago, and I think given that reality, the guidelines ought to be changed to reflect it. Again, as much as on some days Mark's proposal might make sense, I think it ignores the fact that we may actually be able to get it right in a particular case more often than using what is a rather crude rule that Mark plays out.

MR. WEISER: So let me take that line of discussion, and I have several different ones that I want to follow but we'll follow this one: Different industries have what you might call different minimum efficient scale, meaning it's hard to sustain, let's say, five competitors in certain types of industries.

The DOJ filed comments recently in the Broadband Plan, noting in that broadband markets you're not going to see textbook competition. You may well not see six broadband providers for that matter.

What do you say if there are claims in an industry where it's moving from, let's say, four to three, and they're saying it's four and three merging, and we need to be stronger. On a pure structural case

you might not want to allow that, but as Rick says, there might be other reasons to believe that merger is benign and may be pro-competitive.

How does that square with a concern that Mark articulated about departing from what you're pre committing to as a particular code? Do you want to start with that one, Mark?

MR. COOPER: Well, yes, because I have the experience of working lots of industries, and so in the first year of this administration, I've had conversations with the antitrust authorities over airlines, railroads, newspapers, wireless companies, broadband service providers, all of which are industries where four would be heaven. We have this problem of a small number of competitors, and the antitrust authorities lose their primary weapon, which is lots of competitors, to ensuring an efficient economy.

So I have a series of principles, five quick principles, and I will file them. Basically, when I'm looking at a situation, first of all, you really do have to test the limits of minimum efficient scale. Everyone is going to come in and say: Hey, this market won't support more than two or three or four. You need to challenge that, but if it's true, you really have to make sure that you get the maximum number of competitors

you can, and that's going to be a fight about whether or not the weaker of the two merged parties is viable.

In the case when you conclude that there is going to be less than four, then you have to be really worried about market power because economics teaches us that the ability of the small number of players to extract rents and otherwise avoid the inconveniences of competition is great when there's that small number of competitors.

So we need to really worry about things like artificial barriers to entry, refusals to deal, efforts to monopolize neighboring markets. So, for me, there's a tremendous need to analyze small number of competitors from the Agencies' point of view, both eventually prophylactically setting out a policy by which you might bring other cases under other sections of the Act, but also as a framework for analyzing what we understand about the conditions we have to put on these mergers.

So if I'm confronted with a four to three and I conclude that it's a necessary outcome in terms of minimum efficient scale, then I have to really worry about the ways that the resulting market power would be abused.

You will notice I stopped at four to three. The concepts of a dynamic duopoly or a benign monopoly

simply don't exist in my vocabulary. I just don't think this Agency or the antitrust authorities in this country can, in fact, be comfortable with the theories that led us get down to those extremely low numbers.

MR. WEISER: Bert?

MR. FOER: I don't think I disagree with Mark. I don't have five points. I have kind of one encapsulating point, and that is the principle that as the level of concentration increases, the size and the certainty of the offsetting benefits have to increase. In other words, the higher the level of concentration, the more skeptical, the more intensive the investigation, the greater certainty that these efficiencies are going to be there, and that they will be passed on, in substantial part, to consumers.

It's a sliding scale. It's the Heinz Baby Food test where you had apparently very high level of efficiency demonstrated, but it wasn't high enough because the level of concentration was going to be so high. I think that's the right approach, and it gets very difficult to become more scientific about it because in part, we've created a pseudoscience.

Sorry all my economist friends, but I think that we've made it into more of a science than it really is or it can be, and that one of the prices we pay for that

is a lack of intelligibility to the public in our merger policies. It's so much easier to talk about a four to three than it is about HHIs. Maybe we can do it internally inside the Beltway, but we've also got an audience outside the Beltway that we've largely ignored, and I don't think they are very supportive of what we do.

MR. WEISER: Andy, you can jump in here. If not, I have another question for you.

MR. GAVIL: No.

MR. WEISER: The other question goes like this: We've talked now for the last half hour or more about concentration broadly speaking, not differentiated between coordinated effects and unilateral effects, and part of what happened I think is that the '82 guidelines and '84 guidelines largely were thinking about and governing the concern about coordinated effects, and since '92, most of the Agency's cases have been on the unilateral effects side, still also invoking the HHI structural presumption.

So let me start with coordinated effects. On coordinated effects, the question would be as follows, and this gets to something Rick said earlier: If you have a structural case, say a four to three merger or a three to two merger, is that enough based upon what we

know that we should be worried about, coordination which I believe Bert said or Mark said is something that if it's tacit coordination is not a problem under Sherman Section 1? You can have conscious parallelism, and that's not something Sherman 1 does anything about.

So is that enough of a reason to worry about it or might we want to say, as the guidelines do, that there are certain pre conditions we need to look at to understand whether or not collusion or coordination or even, as Christine said, accommodating behavior is likely, and the Agencies need to have some evidence of that in addition to the structural conditions? How do you think about that coordinated effects question?

MR. GAVIL: Two things. First, this is sort of a broader comment, and I'm glad we made that transition because in the revisions that are being talked about for the guidelines, we're trying to separate out what is a dilemma of the guidelines. The guidelines reflect multiple strands of intellectual history in merger and economic thinking. The structural paradigm was very strong because of the '68 guidelines, because of the influence of the structure conduct paradigm.

We then introduced oligopoly theory, game theory, and we've sort of layered different strands on, and I think the tension that's now being addressed

between the structural concepts and unilateral effects is a good example of it. What you really want to get away from, in all of our discussion to this moment this morning, is that all that structural stuff may not be as relevant in unilateral effects cases.

That's a reflection of there being these different strands, but the structural paradigm was very well established in the case law. It was very well established in the literature, so it got written into the '68 guidelines, carried over in '82 as not to appear to be a too radical departure.

So we have these competing strands of intellectual history, and I think part of the challenge in the rewrite is to explain that and separate that out and explain which models work under what circumstances.

Now, to get more directly to the question. The guidelines in essence already answered your question, made that decision, that structure alone was not enough, that there's a separate inquiry about anticompetitive effects. It's all in the same section of the guidelines, but again, as I said earlier, the agencies found they were being held to that when they went and litigated.

When you went out and said, Well, here's structure, well, the statistical case is pretty much no

longer going to be enough, except at maybe a very high level. You have to tell the coordination theory. What are the conditions for coordination in this market? How will this merger alter those conditions and facilitate better coordination?

That's become part of the analysis. It is clearly added to the burden of the agencies in challenging a coordinated effects case. Is that as it should be? Are there some levels beyond which we shouldn't have to do that?

Again, I think if you're going to write that into the guidelines, two to one, do you need to show it? Bert mentioned Heinz. Heinz is not very careful about delineating what theory of anticompetitive effects is there. It's just saying at some point the presumption is just fine with us, and the sliding scale approaches, and we're not going to really demand that, but you look at cases like Arch Coal, and the Court wants to know where your evidence is of coordinated effects.

The last point I would make is, yes, it is very important that we use the merger laws to stop structures from forming which could lead to coordination that we could not reach under Section 1. That has always been a traditional purpose of Section 7, because we recognize that oligopolistic coordination, which can't be reached

under Section 1, is still bad. It still results in higher price, and the only tool we really have in antitrust, because we've essentially walked away from the idea that Section 1 can reach interdependent pricing, is stopping the structure from forming that will make it easier.

So I think on that sense, Section 7 really does provide a very important -- it goes back to the incipiency idea to some degree. It is an important barrier that keeps us from getting to structures and problems that we can't reach under other parts of the antitrust laws.

So I think that role is still important. It does, I think, require us to tell a coordination story. How will this merger incrementally increase the ability of firms post merger to coordinate is an important question to answer, especially if we're talking about six to five, five to four. Like I said when you get to three to two and two to one, maybe the story doesn't matter as much. We're just too scared to go there.

MR. WEISER: Rick, to kind of capture Andy's point, if you have let's say a four to three or three to two merger where you have conditions that you would seem to facilitate coordination, let's say very difficult to enter, homogenous product and maybe some story you can

tell about how coordination happens, should that be enough for a Court to, under incipiency theory and under the structural presumption, be able to stop a merger?

Others have argued in comments that the whole idea of a structural presumption and this concern is not one the Agency should focus on. How do you come down on that question?

MR. RULE: Again maybe it's a reflection of my age, but I tend to agree with Andy on this one. To me, one of the issues, and I think a number of commentators have raised this, I think that currently the guidelines are a little confusing in the use of the term coordinated effects versus unilateral effects, and I think you should probably get away from that.

I think I heard Christine say that there should be a more detailed description of what an adverse price effect means, and I agree with that. But I also believe that, and I think the evidence is consistent with the fact that in some industries, for example, the characteristics that you laid out, a reduction in the number of competitors can raise a threat of a price increase.

Now, I would say that even in that circumstance, one ought to be willing to look at efficiencies and that sort of thing, and so I would say in appropriate

circumstances, that could be a basis for concluding that a merger violates the antitrust laws.

On the other hand, and this is I think part of experience, but it's also part of the change in the economy: Trying to apply that paradigm to a lot of modern industries just doesn't work very well, and so the notion that there's going to be some sort of coordinated interaction in some industries, for example, the information industry, is just, to me, not very credible.

I don't think there's a lot of empirical basis for that, so I think you've got to reach the conclusion first that this is an industry that is likely to witness tacit collusion, in the old term, before you reach that conclusion.

The other point I would make, and I think this is just an interesting observation, while I agree with everything Andy said and what I just said, it's also kind of interesting that the law actually, under Section 1, has moved in the direction of capturing more of what might be called tacit collusion, leaving Twombly aside and the difficulty of pursuing those cases, if you look at Posner's opinion in high fructose corn syrup, there are ways I think today that I would have been much more skeptical about 25 years ago of actually creating an

inference of a conspiracy using some of the analysis of Posner.

So that there's an argument today that maybe we can reach some of that conduct under Section 1, that 25 years ago when all this was developed, there was kind of the sense that you just couldn't find an agreement under those circumstances, even though there was tacit collusion going on, and so approaching it and trying to stop it structurally was more important. There's at least that argument.

MR. COOPER: I really agree with that, except I don't want to call it tacit collusion. I want to call it noncooperative games because I think we're talking about the same thing, and I think that analysis of noncooperative games is the bridge between coordination and unilateral action, and he did win a Nobel Prize for it, and we have spent 25 years, -- and it's almost exactly 25 years that the theory has received an immense amount of attention.

While I'm not a lawyer and haven't reviewed the cases very closely, I don't think the influence of noncooperative game theory has been fully felt, nor has the influence, as I said, of behavioral economics, and I think that that needs to get reflected, so I'm agreeing with that. I just don't want to call it tacit collusion

because that has that old style ring to it of, there's a collusion here; no, these are just people who, as the lion in the movie says at the second bar room scene, Adam Smith was wrong. It's a wonderful line because --

MR. WEISER: Which movie are you talking about now?

MR. COOPER: This is in A Beautiful Mind. I'm sorry, I'm a veracious consumer of popular culture, so in A Beautiful Mind, Nash is struggling with his theory, and in the second bar room scene, there are nine guys and nine gals, and one very pretty gal and other very intelligent women, and he looks at it. He says, what's going to happen here, right? He realizes that if they all compete for the one good looking woman, eight of them will be disappointed.

He then goes back and writes his theory of how the nine guys will learn very quickly to allocate who ought to chase whom, and the ability of a small number of people to capture the monopoly rents available without colluding is a really important observation to which the economics discipline has devoted a great deal of attention for exactly a quarter of a century since the guidelines were adopted.

MR. WEISER: I just want to point out for those who missed it, we have Mark Cooper and Rick Rule in

agreement, so the idea of an emerging consensus, we can stop right here.

We can stop right here and see if we have questions from the audience. I think, as Howard said, we have a small enough group of folks that rather than asking you to submit written ones, if there are people who have questions that they want to ask, we have time for a question or two, and as sort of a professor on leave, I'm not afraid to call on people either.

Any questions folks want to ask? I have more too, but if there were any questions? Is that Alden in the back, do you have a question?

MR. ABBOTT: Yes, thank you very much. The question would be directed at Rick. He pointed out Posner's opinion in high fructose corn syrup, but given recent case law, some might argue that it's becoming very, very hard to win a Section 1 case. Posner's view is viewed by many as a minority view.

I would say there are lots of other commentators who have challenged that, so if that is the case, how likely are you going to be able to pursue a Section 1 case, and does this get back to the notion that Section 7 is an incipiency statute, and because of the very difficulties in approving a quote, unquote agreement, despite Posner's views, Section 1 may be a less than

ideal vehicle?

MR. RULE: I mean, I don't disagree with that, Alden, and as I said, I agree that under the right circumstances where you believe that whether you want to call it tacit coordination or some sort of game theory tells you that there's going to be a likelihood that prices will increase, I think that's a basis for stopping a merger.

The only point I would make on Section 1, the fact that Posner's decision is out there, I think it lends credibility to an argument that frankly ten years ago would not have gotten you very far. I think the principal issue on Section 1, for what it's worth, in terms of being difficult to win is Twombly actually. Twombly is the one that creates the biggest obstacles, but that's a different panel.

I do think that that is one theory that could motivate a merger challenge. Again I think the point is that structure is not by itself determinative of whether or not an industry is going to exhibit that sort of conduct. You have to look at other factors. That's the experience of the last 30 years, and I think that's really what needs to be captured by the revision of the guidelines.

MR. WEISER: Do we have another question?

MR. CARY: George Cary. I guess I am finding this discussion really fascinating, especially some of Rick Rule's comments. I guess the question that I would have is: Is there room in the guidelines for a greater explication of the role of non price coordination in merger analysis?

The guidelines seem to focus on pricing. They don't seem to elaborate very much about how non price competition might be the subject of coordination. That tends to be relegated into the unilateral effects part of the guidelines, and I wonder whether there isn't room for some discussion about competitors channeling their competitive efforts into elements of competition where consumers could be harmed, where they still compete, for example, on marketing rather than on price or on some forms of innovation rather than other forms of innovation, or is that too big a project?

I guess the sub theme here is whether the unilateral effects analysis has ignored the role of coordination among firms producing differentiated products and whether that ought to be spelled out somewhere?

MR. WEISER: So, George, that's a great question. I was going to add, let me put my related point on the question, and then I'll let the panelists

answer.

More broadly: Should the structural presumption not only be tied to and motivated by a story about price, but other elements of competition, be it quality, product variety what have you? Mark?

MR. COOPER: Well, as the consumer advocate who is always accused about only caring about price, let me say we care about a lot more, and we always have. There are other two areas that are really important, one, is terms of service. We have got complaints about -- termination fees in cell phones, wireless, for instance is a really onerous condition on consumers, and there will be people who will disagree with that, but we look out at bundling in the cable industry as a term of service.

We look out at the competition of big fat bundles in the triple play, and these are key questions about everybody's offering me the same package, and it only serves a quarter of the market, so, yes, I think the terms of service is a second area that's really important in addition to the price, and then the big enchilada is innovation and long-term competition.

We have tried very hard not to go for the short-term, near term buck, so frequently people will come forward and argue that, hey, the prices will be

lower next week, and we say, yeah, but what about next year or ten years from now, so the second area is innovation and long-term competitive structure.

The guidelines have a footnote here and there, they need to be much more prominent because they are at least as important, and, in the case of the second one, innovation and long-term competition, probably more important than price and terms of service. I think the guidelines should be oriented around that, they should be forward looking.

It's interesting, Bert talks about the Congressional mandate, and I ask myself: What would the Congressional mandate look like if this Congress were working on it? Obviously they can't agree on much, but I think the most important thing they would talk about is long-term innovation and production, and that wouldn't be a bad thing. They would talk a lot less about price and a lot more about building an economy for the 21st Century, and I think that would be a useful thing for the guidelines to say.

MR. WEISER: Other comments? Bert?

MR. FOER: If I can challenge Joe Farrell for a speech he once gave: Price is usually a pretty good surrogate for the things that we want from competition, from the market. We want fair price. We want

innovation. We want choice for the consumer, but in some industries and in some circumstances, price is not a very good surrogate.

For instance, right now there's an investigation of a voting machine merger where the bottom line is not so much what the price for a voting machine is going to be as different aspects of the effects that can come, including some possibly very important innovation effects.

In information industries, we may not care as much about price as we do about choice, so there's got to be a loosening up that permits these other objectives to become part of the analysis.

Exactly how you do that, George, I'm not sure, but I am sure that your question is the right question. How do we make certain that what we're getting out of our policy are the outputs that we really want, and price alone is insufficient.

MR. RULE: I mean, here's another one where I will agree, this time with Bert. I've always kind of viewed price as an easier, sort of more quantitative variable to do things like understand how you define markets. And actually I think a number of different competitive parameters can be understood or reduced in some ways to price.

However, I agree that -- and it's contrary. It would frankly be inconsistent with my experience recently to say that the Agency should ignore other effects, other than price, because my sense is that if there is a reason to be concerned about sort of non price elements of competition, the agencies will look at it.

Conversely, again my experience has been that where one has an explanation, that even though there might appear to be some minimal price effect, if there is a countervailing non price benefit like a quality improvement or a technological innovation improvement, the agencies will consider that.

I think the only thing I would counsel the Department and the FTC as they go through the process of doing guidelines, I think it is incredibly difficult to generalize. I think that's one of those areas where, again if you explain the process, then that will help counsel. But, I can tell you as the person -- I don't think there's anybody else in this room who was involved in it -- who came up with the sort of structural presumption for R&D joint ventures. We just made it up, and no particular empirical reason for doing it, but we were trying to come up with something to put in legislative history in the old NCRA, and that's where we

came up with this notion that so long as it was possible to create I think we said three other joint ventures, equal capability, there shouldn't be a problem.

It sounded good. There was a logic to it, but I'm not sure that -- and again it had the benefit of sort of weeding out the things that probably aren't going to be very interesting, but I do think that when you start getting into non price areas, it's much harder to make generalizations, and I personally think it would be unwise to try.

MR. WEISER: Andy, you get the last word.

MR. GAVIL: I think it's hard to make generalizations, but there are industries where it's obvious that innovation, quality and service, those three things, can be very important and are vulnerable to being lost.

I realize we're out of time. Healthcare I think is an industry where you can see lots of examples where you have pressure from payers to reduce payments. We allow mergers. One thing that could get lost in the mix is service and quality and innovation as well.

I think there have been some examples of that, so you do, I think, have to go beyond price. Whether or not -- and I think George's narrow question is whether concentration has really been linked to losses of non

price competition. I don't know that there are studies to support that, but I think it is important for the agencies to not just function on price, and I think it's easy to identify industries where these other components of competition are especially important and are vulnerable to being lost.

MR. WEISER: I want to thank our panelists for a great discussion.

(Applause.)

PANEL 2: PRICE DISCRIMINATION/POWER BUYERS.

MODERATOR: HOWARD SHELANSKI, Deputy Director, Bureau of Economics

PANELISTS:

SUSAN CREIGHTON, Partner, Wilson, Sonsini, Goodrich & Rosati

MARC SCHILDKRAUT, Partner, Howrey, LLP

JOE SIMS, Partner, Jones Day

JOHN THORNE, Senior Vice President and Deputy General Counsel, Verizon Communications, Inc.

MR. SHELANSKI: Okay. Well, I would like to welcome you to our panel on price discrimination and powerful buyers, and we have a wonderful panel, as we do really throughout the day. Everybody here with the, exception of one member of our panel, has both serious private antitrust as well as government enforcement experience, and the one, John Thorne, who does not, has vast experience being pursued by public enforcement agencies, so this is really a very fit panel for this topic.

I would just like to briefly introduce the panel and then open up with a couple of questions. Seated immediately to my left is Susan Creighton, who is a partner at Wilson Sonsini, and a former Bureau of

Competition Director here at the Federal Trade Commission.

To the left of her is Marc Schildkraut, a partner at Howrey, who has had a very distinguished career in both private practice and public enforcement and is another FTC alum.

Joe Sims is well known to everyone as a leading antitrust partner at Jones Day, who spent a long part his career at the Department of Justice, Antitrust Division as a Deputy Assistant Attorney General, and then John Thorne, who is senior vice president and deputy general counsel of Verizon, who has been a contributor on many panels through his writing, and also as a litigant in many regulatory and antitrust matters.

I would like to start with a very broad question for our panel, which is how the Agency should judge a merger's effects on price discrimination? What evidence and criteria are relevant to judging a merger's effect on price discrimination? And, Susan, why don't we start with you?

MS. CREIGHTON: Sure. It seemed to me that really was sort of two questions. One was the criteria, and the other is: What kinds of evidence should be relevant?

In terms of the criteria, I should say by way of

preface that it's interesting how often, particularly in say high technology markets, price discrimination is almost always the first thing staff is looking for, so it comes up all the time, and because it comes up all the time, I think that the criteria that really should be used is whether you are able to identify the infra marginal customers, and can you engage in price discrimination? What's the mechanism for engaging in price discrimination, and third is: Is it profitable?

So those are the criteria. I think that's the easy part. The question is just how heavy should the burden of evidence be to go from sort of just presuming that, gee, you should be able to discriminate between the buyers and actually having to prove it?

It seems to me that the evidence should have to be relatively compelling that you actually would be able both to identify the customers, and that they would have no means of avoiding having sort of some recourse, whether arbitrage or something else. And also, some kind of econometric evidence that it would be profitable.

So just to use a high tech example, I would say that the ability to price discriminate is -- I don't know if John Baker is here, but I think he had used the great example in an article a long time ago, something

like a unicorn or a white tiger.

I guess I would say it's neither. It's probably just a regular tiger, that it can be found in some places in nature relatively frequently, but the things that you need to be looking for are, for example, how does the seller relate to the buyer? Is it through a reseller channel, or is it direct contact with the particular customers? Then, further, an example would be: Is it just sort of an infrequent dealing with the customer, or is it extensive hands on, deep knowledge of the individual customer?

In technology, for example, with heavy supply of services, you have people on the premises all the time, then all of a sudden it starts to become plausible that maybe you actually do have some ability to know the ability of the customer to have some kind of ability to avoid price discrimination or not.

So that would be the kind of evidence that I would be looking for. I think that kind of thing can bedevil agencies trying to figure out why one customer likes one thing and not the other, so I think, for example, the SunGuard case was probably a great example of that.

It wasn't possible to draw a circle around saying, well, it's the big customers that can self

supply, or it's sort of this type of customer versus that type of customer, but because of the nature of the customer relationships, I think if price discrimination had been better understood and better supported in the merger guidelines, that might have been an easier case to say just because we have 60 declarations and they have 80 declarations, that doesn't mean you just throw up your hands.

It may mean, in fact, that there are 60 customers that, in fact, the Agency knows don't have alternatives that self supply.

So bottom line, I guess what I would say is I think there needs to be not only plausible but demonstrable evidence that would tell a story about how it is that you actually would be able to engage in that kind of price discrimination, so it isn't just a story.

Of course it would be great if there's evidence that supports that where you can show through econometric evidence or otherwise that in fact that kind of price discrimination already has been going on. We can to it, but I thought, for example, that was the thrust of the econometric evidence in Oracle. I think was to show that there had already been that kind of price discrimination evidence.

MR. SHELANSKI: Thanks. Marc?

MR. SCHILDKRAUT: I think you need to go back one step and ask yourself something more about price discrimination, because price discrimination is basically pervasive. Just to give you examples, any time someone uses a coupon, that's price discrimination. Any time someone turns around and goes to a movie theater and has a child or a senior citizen with them, they'll probably all be at different prices.

Almost every airline discriminates left and right no matter whether they have market power or not, so this is a quite pervasive thing, price discrimination, and the problem in the guidelines with using price discrimination is you can make millions of markets. It all seems very arbitrary. It can seem very arbitrary, particularly to a Court more used to general criteria, to all of a sudden have a case where you say, we're going to identify this group of customers that can be targeted.

That becomes very, very difficult because you can slice and dice 500 different ways, and being able to do that suggests to me that you actually need to be more rigorous when you have a theory of price discrimination to define a market than when you have a general theory of a market definition, and that further means to me that Susan's last remark was very important, which is

ongoing evidence of price discrimination is important.

It's important to show that that ongoing evidence is not the kind of evidence that relates to simply the every day kind of price discriminations which I was talking about, which is pervasive, but there are industries where we're talking about something else, and those are usually multiple players.

There's systematic price discrimination ongoing, particularly if you're dealing with a fungible commodity, and then you need to ask yourself the question: What the heck is going on here? How is it possible that an industry like that can really price discriminate?

Typically, when I was back at the FTC and I would ask questions like that in depositions, I would say, Well, why are you doing this, I mean, wouldn't you be better off shaving the price to the people who are disfavored, and you can make more money? Usually the answer I got was, Well, if I did that, everybody would do that, and how would I ever be better off? That's when I knew that I had something I had to think about much harder because that was indicating to me that the propensity to price discriminate was actually meaningful.

If you have something that's that meaningful and

you can then turn around and prove something like that to a court, then you have a theory that's workable and something that you can do something with and something that doesn't seem arbitrary. I think the most important thing is to avoid this potential for arbitrariness, and that requires not only having something special, it requires being able to target. It means no arbitrage is possible.

All those different things need to come into play, and one more thing that needs to come into play: I think you have to think about your underlying theory when you're doing this. What I mean by that, is that if you're dealing in a case that is a coordinated interaction case, it is very possible that, unlike most cases, a small fringe firm that couldn't really increase its output is going to be able to undermine that collusion very, very easily because all it needs to do is to shift to the disfavored customers.

It doesn't have to produce another unit, so I think all these things need to come into play. I probably answered all of your questions at once in doing this, but I think all of those things need to come into play when you're thinking about defining markets in terms of price discrimination.

MR. SHELANSKI: We have a couple follow ups, but

I want to hold off on them until we hear from Joe on this.

MR. SIMS: Well, first I think I feel compelled to correct the historical record as laid out by Mr. Cooper. For those of you who are my age, you remember a movie called Ghost Busters, and there was a great scene in Ghost Busters where Sigourney Weaver, possessed by the demon, is pursuing Bill Murray throughout her apartment, and he's trying to resist her, and finally she tackles him on the bed in the bedroom, and he says, Wait a minute, wait a minute. He says, We have an absolute hard and fast result, no fraternizing with the customers, and then he looks directly at the camera and says, Well, actually it's more of a guideline. So I think that's the origin of the Pirates of the Caribbean remark.

A theme that will run through my comments today is practical versus theoretical. You asked: What's the criteria and evidence? I would start with: Are the parties doing it today? If it's not happening pre merger, then there needs to be a really compelling story about why it's going to happen post merger.

Even if it is happening pre merger, there should be some explanation of why the merger is going to make it worse or why the merger is going to make the effect

of that price discrimination worse.

This seems credible only in some pretty limited circumstances. If it doesn't happen pre merger, how is the merger going to change that fact? Indeed if there is a potential for this, will the merger cause some dynamic changes by customers to minimize that risk?

Buyer statements, declarations, having obtained declarations on both sides of this question from buyers in multiple matters, I'm not very enthusiastic about their probative value. It is I think pretty common that many customers don't really know what their options are until they're incentivised to think about them.

Inertia plays a very strong role in business behavior, and until they've actually been forced to examine the possibilities, a lot of people will automatically revert to the: There isn't really a realistic option available. There's a lot of laziness in preferring the status quo, so you ought to have some evidence that these concerns are real as opposed to just the statement of the concerns. Indeed, I would apply the same test to statements contained in documents or otherwise from the merging parties.

Anybody who is an experienced practitioner in this field knows how often they get deeply involved in looking at a merger and come to the conclusion that one

or both of the parties don't understand their business as well as you would expect them to.

The facts, as evaluated by somebody who knows how to look at it from an antitrust perspective, as opposed to a business perspective frequently lead you to different conclusions than the parties reached on their own without the advice and input of that training.

So sometimes companies don't know they have market power. I don't think the Antitrust Division or the FTC would accept that as a defense, and the other way ought to work too. The fact that they say or think that they have market power doesn't mean they have actually. So my general point here is you need to look for hard evidence as opposed to conclusionary assertions by either side.

MR. SHELANSKI: John, as one of these representatives of one of these high tech companies that Susan alluded to, have you now or have you ever engaged in price discrimination? I withdraw the question.

MR. THORNE: That's a great question. If you've seen any of the recent Verizon television commercials like during the NFL playoffs, you see the guy come out, and there's a big white sign, and it says $99 for this package of all the voice calls you want to make in a month, and he flips around the 9 to become a 6. On

national television in front of all the NFL viewers, our pricing went from $99 to $69.

When you have large economies of using national advertising, it's hard to target Albuquerque for a price increase that's different than that. In the real world, the transaction costs often overwhelm any desire on a tiny market basis to price discriminate, so in echo of what Joe said, the practical constraints make it more difficult to price discriminate than some of the theoreticians would anticipate.

MR. SHELANSKI: Let me ask a follow-up to that. Would a hypothetical telephone company that had merged seriatim with a number of other hypothetical telephone companies have found its ability to engage in this kind of price discrimination be affected by those transactions, and if so, in which direction?

MR. THORNE: Telecom is a hard industry to talk about as an example because some price discrimination increases output. It allows you to build a system. I don't think if you can fly an airplane today that didn't have differently priced seats and still fill up all the seats, so there's some industries where price discrimination may be output increasing, and in telecomm in some aspects may be that.

I think the general trend, if you look at

telecom mergers, for example, in wireless or wire line has been to unify, not to fragment the pricing structure.

MR. SHELANSKI: Right. That actually leads very nicely to a follow up question I would like to ask the whole panel. It gets exactly to this question of the different kinds of effects that price discrimination can have for consumers.

Certainly the fact that some people are willing to pay an enormous amount of money for business class may enable the airline to offer some very cheap fares in the back of the plane and fill seats that otherwise would not have been filled, so I guess the question I would like to follow-up with, we'll start with Susan again and just work down the line is: If a merger investigation does produce the kind of compelling evidence that you and Marc and Joe have talked about of price discrimination or of an increased ability to engage in price discrimination, how should the agencies balance harms to vulnerable groups of consumers against possible benefits to other consumers?

MS. CREIGHTON: I think that's a great question because I think that, maybe just to step back on the question of whether you call it sort of a localized effect within a larger market or a price discrimination

market or a sub market, you really are asking or potentially getting to the point where you're saying: For this group of six customers, there's the ability to price discriminate, but it could very well be that that's in the context of a merger where the other 94 customers really want to be able to have the integration that you're now going to be able to supply, these six don't need it.

So I guess it seems to me that as much as the agencies have resisted historically the notion of very narrowly defining efficiencies and sort of offsetting pro-competitive effects, that you can't say benefits in this market can't be offset by benefits or sort of detriments in that market, it has to be merger specific, sort of all this very narrow defining down of what kind of benefits will credit to the merger.

I think the concomitant of saying, Yes, we will look at -- and it may in fact be sufficient for us to challenge a merger if there are these localized competitive effects, that it's incumbent on the agencies simultaneously to step back and broaden their view with respect to the offsetting competitive benefits.

MR. SCHILDKRAUT: Yeah, I would agree with that, and I might want to go a step further than that. We have, in the efficiencies section of the guidelines now,

something that says we're not going to trade-off different markets, but if you have price discrimination markets, you can have millions of markets, and any individual consumer could be an individual market on that basis.

If a million consumers are going to benefit and one is going to be harmed, in theory under the guidelines, you have an anticompetitive effect, and the guidelines are telling us we must prevent that from happening. I think that that is not the way the agencies actually practice.

The agencies do make trade-offs under those circumstances. They don't announce them that way, but if the guidelines are going to be honest about this, we ought to look at these trade-offs and think about whether you want to bring a case where the pro-competitive effects to most consumers outweigh the anticompetitive effects to some.

MR. SHELANSKI: Would you envision doing this within the effects analysis, or would you envision the pro-competitive aspects as something that would come in under the efficiency analysis?

MR. SCHILDKRAUT: Well, it could come under the efficiencies analysis, but it doesn't have to be a traditional efficiency. It is standard analysis that it

is ambiguous whether price discrimination is going to lead to adverse welfare effects, so it could very well be, I suppose, that in a merger, you're going to get the better ability to price discriminate, but the better ability to price discriminate could lead, on average, to lower prices.

That's not what one would normally think of as a standard efficiency analysis, so my answer to that is it depends on what kind of effect you would have as to where you would balance it, but in either case, I don't think you should let the guidelines where tradeoffs are verboten unduly effect the analysis where we think there is going to be positive welfare effects from the acquisition.

MS. CREIGHTON: If I could just maybe interject something Marc says triggers, and this is a bit of a detour, but one of the issues that you have is the question of who your audience is for the guidelines, and I guess I would encourage you to be thinking about District Courts as your audience, over and above everybody else, and one of the benefits that the guidelines have had is a tremendous amount of buy in from the court system.

To preserve that, I think if you're going to have buy in on the notion of sort of more localized

competitive effects, you are going to have to sell this as reasonable. You're going to have to sort of respond to sort of the common sense kinds of reactions you're going to get from judges along the lines of what Marc was describing.

If you're trying to say: Under our guidelines we don't have to look at the fact that overall our prices are going to go down, you're just not going to get the kind of buy in that the '92 guidelines had.

So just at a very practical level, I think it's important to be taking cognizance of that, that this has to be a realistic and accord at some level with the intuitions of general stretches.

Sorry.

MR. SHELANSKI: Joe?

MR. SIMS: Let me just first follow-up on that point. I mean, your basic audiences for guidelines it seems to me are two: All those folks out there in the world who are trying to figure out how to look at mergers based on the way the government will look at mergers, number 1, counselors, internal and external counselors, and number 2, the courts.

I agree with Susan, the courts are a lot more important than the counselors. The counselors can figure it out over time. The courts will hold you to

what you say and what you layout as the standards. Not only will they but they should. Otherwise, what boundaries are there? The statute provides very little boundaries, so there is a tension.

There's a tension between trying to write guidelines that are descriptive, in fact, of what the agencies do and descriptive enough so that people can actually figure out what the agencies do in some detail on the one hand and writing guidelines that will actually be followed and useful to courts when you're dealing with that.

Now, most mergers don't go to courts, and so a reasonable person could say: Well, why emphasize courts over counselors? The courts set the rules in the end. It's not the guidelines, and it's not the agencies. It's the courts, and those are, to me, the most important audience.

The other sort of side point to this, and I'll come back to your basic question, is: Economics is critically important in intelligent analysis of mergers, and for that matter almost anything else in antitrust, but courts deal in English. They don't deal in math, and so you can't really in my view assert economics, an economic analysis only or primarily as the basis for challenging a transaction.

Economic analysis has to be supportive of an intelligible and pervasive competitive effects story. You have to tell a story. There are damn few Posners sitting on the bench. More of the people on the bench are like me, who have to have economics interpreted to them by intelligent economists, and what happens in trials is we have our intelligent economists, and you have your intelligent economists, and the court sits up there and says, I don't have a clue which one of these is right and they wash, and you end up with a decision based on something else, so I apologize for the divergence.

On the question of how do you balance, I think this is actually the single most important question that's connected to price discrimination, and I think I agree with both Susan and Marc, if I understood them.

You really can't, as a practical matter, expect to be successful in challenging transactions which have apparent anticompetitive effects only on very small audiences and positive or neutral effects on much larger audiences.

A court is going to look at this not as an exercise in trying to find the group of consumers who might be injured, but they're likely to look at it as an exercise in figuring out whether this transaction is in

the public interest from an antitrust perspective? Is a net good or a net bad? To use Susan's example, 96 plus 94 does not come out to net bad.

Now, the commentary recognizes that the agencies will deal with this thing. That Guy Bakery case that's noted in the commentaries talks about maybe there was some anticompetitive effects on some institutional customers, but there were procompetitive effects on everybody else, and the institutional customers are only 20 percent of the customers, and the efficiencies were uniform across the board, and so we didn't challenge the transaction, even though there arguably was a basis for challenging it.

That is the kind of analysis that I think the agencies have to do, and more importantly, it's the kind of analysis that they have to be prepared to defeat, if they don't do that analysis and try to go to court to protect that 20 percent or in many cases, that 1 or 2 percent of the potential audience.

MR. SHELANSKI: Thanks. John, do you want to comment?

MR. THORNE: I thought you were about to switch to a new topic.

MR. SHELANSKI: I'm about to switch to a new topic. We may look back and follow-up on some of this,

but I would like to switch to our distinct but related topic of large buyers, and I would like to start with you on this, and I have a couple of different questions.

Why don't we start with this one, which is basically: How powerful buyers , and I actually want to use the term powerful buyers instead of large buyers.

MR. THORNE: I can tell you that's the wrong term, but go ahead.

MR. SHELANSKI: That can be part of your answer. I would like to hear your thoughts on that, but how should powerful buyers factor into the analysis of competitive effects, and specifically how should agencies determine whether powerful buyers will protect all buyers or just themselves? To what extent do they dictate the market price or just their own price?

MR. THORNE: That's a good question for me because most of my experience, most of Verizon's experience with the agencies is as a buyer. We're very frequently called by Agency staff about other people's mergers, and we do a little bit of merging ourselves, but most of our interactions is in the context of: You've been named as one of the 20 largest buyers of so and so's product, they're merging, can you put somebody on the phone that can explain the jargon of the industry because nobody knows what these products are or even

know who these various participants are.

Then usually the interview goes a bit deeper. They ask for the views of a customer, and I think the views sometimes matter. There's a paper by Ken Heyer and some papers by Joe Farrell on how often customer viewpoint is important, but the important question comes after that, and that's: Well, what if the merger goes through? What if we, the Agency, allow it to happen? What are you going to do to protect yourself? Can you do anything? Who would you turn to?

There we usually -- I don't think Verizon is unique in this, but usually we have something to say. Occasionally I get a guy on the phone that's being interviewed, and I don't know, I'm expecting you to block it, but often as a buyer, there's a strategy for dealing with a merger or with anything that might threaten the price increase or a change in terms of dealing.

I'm tempted to tell a story. Maybe I'll tell it quickly and then get away with it. Just on the visibility into this thing over the whole period, when the Bell System was broken up, you had the Baby Bell Companies freed from buying Western Electric Gear. They had always for -- not a whole hundred years, but for most of the century been buying their house product, and

all of a sudden, like being subject to a merger to monopoly, you're freed to try to do something else.

You've been buying Western Electric but now you're allowed to do something else. The Bell Companies immediately went to Canada and bought Nortel, the supplier there to the American market, so there were two.

Bell Atlantic, the precursor to Verizon, wasn't happy with just two suppliers, and went to Germany. Siemens, which was on a totally different standard than the North American telecom standards, agreed with some nudging and promises, to bring its gear to the North American market. Bell Atlantic helped to qualify the gear, get it tested, guaranteed enough purchasing to make it worth it as well.

Now, we had three suppliers. Lucent, the renaming of Western Electric, felt threatened and retreated to a strategy of: Well, I guess we have some locked in supply, let's milk it for all its worth, let's make it hard to or expensive to get increased capacity and new features on the locked in devices. Bell Atlantic again, with the help of Bellcore, the standards groups of the Bell Companies, set standards to break the points at which we were locked so we could add capacity in other people's gear that connected through a standard

interface, add features to get another box that was connected through another standard interface.

Lucent, again I'm just going to tell you what the allegations were because that case -- although the trial started but we didn't finish, Lucent tried to thwart the standards. I brought an antitrust case in East Texas. We settled.

Moral of the story was that the strategy of opening up what was at one point a total hundred percent self supply to multiple competitors and evading even the lock in on the residue, the strategy succeeded and Bell Atlantic, Verizon was not the only beneficiary, but tiny Seelex, the competitive local telephone companies under the '96 Act, entered the market getting all sorts of cheap product as a spillover from probably a group of sophisticated buyers doing the work of opening up that market, attracting supply, supporting and qualifying new entrants; then with standard setting and redefining the product, making it possible to have mix and match capability for the things you had to add to the locked in piece of it.

That's the long story I meant to make short, but let me just outline how I think buyers are important.

First, as a matter of fact, buyers often can self protect, and if you think in symmetry terms, this

is a problem with being a math major, the guidelines spend so much time on what other suppliers do. Can they enter to discipline a merger? Well, what can buyers do? The other half of the transaction, what can they do to self protect?

We submitted some comments that cite some of the relevant articles on the subject, but there's one thing we missed and I want to point out. Mary Lou Steptoe, the year after the '92 guidelines, in the '93 Antitrust Law Journal Winter Edition, has a wonderful little article canvasing the ways that buyers can defeat oligopoly pricing.

So the first point is the buyer's side of the market is important. The second point, and this is just my own experience, the agencies seem to be looking at whether buyers can self protect. If the buyers answer the interview phone call and say, yeah, we think we can take care of this, that helps an Agency decide not to challenge.

The third thing, recently courts have begun taking seriously the buyer's self protection. For example, Verizon supplied a witness for the DOJ case against Oracle PeopleSoft. The good Judge wrote that these witnesses seem like they can take care of themselves and disregarded their concern about the

merger.

So I think the merger guidelines, as presently written, insufficiently reflect what the courts are doing, what the Agency staff is doing and the importance of this. Now, that's not the end of the story, and we sort of come back to price discrimination.

The fact that some buyers can protect themselves doesn't mean that all buyers can protect themselves or the spillover is perfect. Not all buyers can always protect themselves. The same skepticism that applies on the supplier side: Will entry be timely, likely, sufficient, you can apply a similar skepticism to a story about buyer self protection, but it's still an important element of how the markets or some markets tend to work, and I think it deserves some attention in the guidelines, the way the supplier side entry stories get attention.

MR. SHELANSKI: Okay. I've got some follow ups, but I think before we go to those, I would like to hear from the rest of the our panelists. Joe, do you have some thoughts on this?

MR. SIMS: Yes. I guess the only thing I would add to what John said, all of which I agree with, is that the key question to me is not so much can some buyers protect themselves, but can most buyers protect

themselves? There are lots of different ways to protect yourself. I've done a lot of work for people who make consumer products, and when we're talking about the reaction of distributors like supermarkets or the Wal-Marts of the world, and they sell those distributors 30 or 40 different products, misbehaving with respect to one product creates serious dangers with respect to other products.

I know a lot of economists find that nonsense, but as a practical matter, it is real and business people believe it, so that constrains their behavior because these people are important buyers. I don't like the term large buyers because large really isn't the issue. It's how much bargaining power do they have in the competitive environment in which they operate?

Same thing can happen on geographical differences. You're selling to people in multiple geographies. You have the ability to exercise market power in one but not in the others. If you exercise it in one, does that cause them to change their behavior in another, or the fact that the buyer has some strategic importance to the seller? It's a validating buyer in some ways.

So there's lots of different ways that this can happen, but the critical question, as John says, is:

How far does that reach? We get back to price discrimination in the end. Can you, in fact, behave differently with respect to some meaningful group of consumers that don't have the same leverage, bargaining leverage that this one group has?

MR. SCHILDKRAUT: Often this issue is self correcting. What I mean by that is, let's say arbitrage is very difficult, and in fact you have a group of firms that can attempt to coordinate, to target some unfortunate, small buyers while they can't target the large buyers. Typically what's going to happen under those circumstances is some of our colluding firms are going to end up much better off than others, because unless they can perfectly allocate the customers, everybody is sharing equally, the seller who ends up selling more to the big buyers and less to the small guys who are at higher prices is going to turn around and say everybody else is doing better than I am, and that seller is going to start cheating.

And because he's just not doing as well, so coordination becomes very hard when you're dealing with big buyers versus small buyers, and so you have to watch out and make sure you're actually dealing with a stable situation, even if it looks like small firms can't protect themselves as well, because they may not be able

to, but the market may end up protecting them.

Go ahead.

MS. CREIGHTON: No. I thought you were done.

MR. SCHILDKRAUT: On the other hand, one other point I want to stay in the opposite direction, I'm not saying it's impossible that you could have a stable situation like that and you have to, under those circumstances if you're the Agency, watch out for what large buyers are saying to you because if the large buyers think they can do better off than the small buyers can, they may not want to say that because there may be benefits to them because the price will stay high downstream, and they're getting the benefit and they may think the merger is good simply because it's anticompetitive and they're going to be able to share in the anticompetitive effects.

Go ahead.

MS. CREIGHTON: I was going to mention on a more pedestrian level, I think it may be that power buyers are the issue most often raised by the parties about which the guidelines are completely silent, and I would certainly say that after entry, my guess is power buyers, you would have to poll the staff, is the defense invoked most often as a defense.

So although I had previously said I think the

principal audience for the guidelines is the courts, I said that because I think there are other ways of educating practitioners, as Joe was suggesting. The commentary was an effort at that. You can give speeches. There's a lot of other things you can do to educate practitioners, but it is my impression that powerful buyers get invoked way too often by the parties and rejected out of hand way too often by the staff, whereas entry I think staff really agrees is an issue.

I think their skepticism about power buyers is reflected in the commentary, and that that was an undue skepticism. The power buyers are going to be relatively infrequent solution if you otherwise have a competitive problem, but it happens with some frequency, and so sort of things like I think you were just mentioning, Howard. I would be curious why John thought power buyers was the wrong term, but certainly I think many practitioners tend to equate power buyers with large buyers.

You always see it when it's like state and local government, oh, well they're large, but they may be the perfect example of a customer who can't in fact on a particular kind of purchase defend themselves. I think it would behoove the agencies to follow the example in this respect of the European Commission, and specifically address power buyers.

Going back to my final argument about the courts being your ultimate audience here. If it's coming up this often before the agencies, eventually it's going to start showing up in litigation as well, and you will want to have staked out your ground for when it is that the power buyers are sufficient and hence, why in a particular case that condition hasn't been met.

MR. SHELANSKI: Before I get with John on what the right term is, let me just ask a question that follows very quickly from that. What I was hearing from John and Sue and Marc is a suggestion that there are certainly circumstances where buyers are, we call them powerful buyers, large buyers, who obviously can't protect themselves. We obviously don't want to make that too large of a presumption. Otherwise you swallow all of merger analysis, and then you brought in these buyers with the suggestion that the existence of a powerful buyers could be a defense.

Is your thought that powerful buyers should be elevated in the guidelines to the level of efficiency as sort of a defense, or more along the lines that I thought I was hearing from the others? It's a factor to take into account in the competitive effects analysis?

MS. CREIGHTON: Oh, I guess I'm not that sure that I have a view on that. I'm more getting at the

substantive point, that if you have buyers who can't have the same set of purchasing needs as other buyers in the market, so you can't say, Well, sort of segregate the products, they have an ability to find alternative sources of supply. They're substantially large enough in the market that they would render a price increase unprofitable. How you want to put those factors in I guess is really what I was going to answer.

MR. SIMS: Can I make one quick point? I recognize before I make it that this is a lot easier to suggest than to execute, but one of the problems in the current guidelines is that they're too mechanical on their face. Merger analysis is not mechanical. Merger analysis is, with all due respect to the economic input, art, not science. There is a certain amount of judgment involved because the facts are never really crystal clear.

There are always ambiguities. The guidelines, to the extent possible, should be written to recognize that this is a dynamic process, not a mechanical process, so asking the question: Should it be an efficiency or should it be an anticompetitive effect? I don't like the question.

MR. SIMS: I do like the question, and I really think it should remain in competitive effects. That's

what's really going on is we're looking at an effect of the merger. You make it a defense. All of a sudden you're shifting burdens of proof I think at the wrong time.

I don't think that's the way to go about that. I do think they need to be mentioned more in the guidelines. Just the first order effect of a large buyer is a large buyer can just go and negotiate with someone, and basically say: If you don't give me a lower price, I'm going to go to somebody else who I think will, and you really don't know in advance whether somebody's going to stick to some coordinated agreement or not under those circumstances, and you're nervous, and you end up giving someone a lower price, and that can then ripple throughout the industry.

MR. THORNE: Let me answer the question that I think you asked: Assuming you like this idea how do we draft it? As Susan mentioned, this is one of the rare places where the American guidelines are out of step with the European Commission and actually a little more severe on mergers.

The European Commission has a fairly nice formulation of how to consider offsetting buyer power or buyer self protection, but if you want to Americanize it, the Mary Lou Steptoe article has five scenarios for

buyers self-protecting that are pretty good, and one of those scenarios isn't about large buyers. It's about well informed customers, and so I've got one prop I want to share, and I didn't bring -- this is the January issue of Consumer Report. I didn't bring this because it shows that in every single American market Verizon has the best cell phone service, that's not why I brought it.

If you're a Consumer Report subscriber and you get their online version, you can find out what the car dealer paid the manufacturer including all the discounts and rebates -- paid for the car, and so as a well informed Consumer Report's subscriber, you can go to a car dealer and you start from his cost, and I know what you paid for the car, you want a margin of $250. That's my offer.

Just by being a stubborn and smart buyer, you can negotiate, well, thanks to being well informed, so my term wouldn't be large buyer. It would include sophisticated buyer, well informed buyers or buyers who enjoy the spillover effect of those who are sophisticated or stubborn.

MR. SHELANSKI: Your mission, John, if you choose to accept it, is to figure out how do we encapsulate that into one adjective that we can stick in

front of buyer in the guidelines and let me know when you come up with that.

MR. THORNE: Leave the adjective and talk about it as buyer's self protection, what can buyers do to protect themselves it.

MR. SHELANSKI: That's very helpful. With that last word, I would like to go to the floor with any questions or our panel? Phil Weiser?

MR. WEISER: So the discussion on self protected buyers has been very illuminating. One thing I will want to peel back a little bit is putting the two concepts of the panel together.

How often do you think that the dynamic John described as for his Seelex cases, Seelex benefitted from the sophistication of Verizon will be the rule as opposed to where you have certain buyers, say Walmart, who are able to be very savvy and protective but others won't necessarily have those capabilities, and thus you have the two concepts together?

Large buyers wouldn't benefit from that effect but for the fact there can be price discrimination as to the large buyers? Any thoughts on how to evaluate that, and is that just all part of that effects analysis or is it just not as big of a concern? I don't know if anyone has thoughts on that.

MR. SCHILDKRAUT: I think again it's part of the effects analysis, and it's all the different things we have been talking about here. Is arbitrage possible? Is coordinated effects going to be undermined under these circumstances? How persuasive is it? How systematic is it?

All these different kinds of things are going to give you hints as to whether a merger is going to have an anti-competitive effect against a small insular group of buyers who just doesn't have the wherewithal of Walmart.

MR. SIMS: Ever since Derrick Bok's article 30 years ago, there's been this angst about the demise of presumptions and the rise of unique fact- situations. I am going to borrow a Marion Barry quote here, which I don't use too often but this one seems appropriate, which is: Get over it.

I mean, the world has left presumptions. It's not going back to presumptions. Every case is unique. Every case depends upon its facts. It's going to be impossible I think to write guidelines that are going to be credible and accepted in the courts that tend to try to create or rest on presumptions as opposed to explanations of the analysis that you use.

MR. NAIL: Hi. John Nail from FERC although

this is about healthcare. I was just reading about United States healthcare and a couple hospitals in New York City, and in those markets you have localized healthcare markets, localized healthcare networks being assembled by private insurers and public insurers and various other entities.

So how would these revised guidelines deal with the situation where two or three local insurers were merging in order to sort of where -- maybe these key hospitals where there aren't good substitutes? What's happening in this case are the hospitals are denying the increases in United Healthcare and threatening them not to be in the network.

So how would you deal with those situations where a merger between the private insurers may be seen as beneficial in terms of thwarting the power of certain key healthcare providers that aren't well substitutable? You can't necessarily go out of New York City to Phoenix to get your open heart surgery if there's certain kinds of very key elements and how would the offices on the ground deal with those kind of product market definitions? That's broad.

MR. SHELANSKI: If I can just generalize the question. To what extent should the existence of powerful buyers or monopsony power on one side effect

our view of the benefits of a merger?

MR. SCHILDKRAUT: Well, I think you first have to figure out whether we're really dealing with monopsony power or whether they're taking away the rents from the hospital, and the second thing we have to deal with is the fact that United in this case is pushing down the price, some of which may be passed along to the consumer.

After you take all that into account, I don't -- gee, I don't think the agencies are going to turn around and going to want to okay a deal which is going to prevent that from happening, but I think that is too particularized to end up in the guidelines. At least I hope it is.

MR. SIMS: I don't have anything to offer on that point, but I do have one hard and fast rule that I would recommend to the agencies in dealing with price discrimination, market definition based on price discrimination, and that is you can't have a market definition that requires more than six words.

MR. SCHILDKRAUT: I thought it was six syllables. Now it's got up to six words?

MR. SHELANSKI: We'll work on that. We have time for a final question from the floor for our panel? Okay. Then I would like to --

MS. CREIGHTON: Just on that though, we had given an example of SunGard and Oracle earlier, one of the things that had precipitated the move to do the commentary at the time that I was still at the Commission was this tension between sort of having direct evidence of competitive effects and market definition. When you end up with doing market definition first, instead of using competitive effects, as I think George did well to prove what the market definition was in Office Depot Staples, that you end up with the competitive effects, actually even undermining your market definition argument.

So you end up in this weird world where you're litigating a case completely different from the one you investigate or you're trying it in a way that's completely different from the one you investigated.

So I actually, maybe to beg to differ a little bit with Joe, price discrimination is the hardest case of that where you do end up with these multi word, seemingly market definitions or localized competitive effects within a larger market.

I would commend to everybody Mark Schildkraut's article from 2005 on the Oracle case and how you might have tried that case differently if you had started with competitive effects and used that to prove market

definition, but I do think it's important for judges to understand that you're not just making it up out of whole cloth because otherwise the multi adjectives really consume you.

MR. SHELANSKI: No. I mean that's an extremely helpful point, and it relates to some of what we were talking about in the earlier panel about the extent to which you free yourself from the sort of wooden algorithmic formula that is contained in the guidelines now and allows for this more flexible analysis, but taking Joe's advice seriously, that you have to really make it credible. You can't sound jerry rig it.

MR. SCHILDKRAUT: I just want to make a final point on that wooden analyses. I actually think if you're going to have guidelines, there has to be some wood in them. Everything can't be vague. You really have to tell people what you want to do and to have guidelines and commentaries, and then on top of that, well, that's not really what we do.

MR. SHELANSKI: Right.

MR. SCHILDKRAUT: Then having to take that to court where everything is very vague, and everything is very vague, that sort of gives the prosecutor the ability to say: Things mean things they were never intended to mean, so I'm not as opposed to wood as I

think Joe may be.

MR. SIMS: Just to put a fine point on that, I would strongly advise against guidelines that have rules in them. The guidelines ought to describe the analytical process and the relevant factors that the agencies take into account. You shouldn't try to layout in the guidelines what the result of that analysis is going to be because that result is going to be unique to the facts of a particular case.

As soon as you start laying out rules, you will set up a situation where some case that those unique facts drove you to a perfectly intelligent decision to challenge it is not consistent with that rule, and you will have to eat this in court, and those are the cases that you lose.

MR. SCHILDKRAUT: I think maybe sometimes you should lose some of those cases, that if we really need rules that give us guidance, that give courts guidance, and we have a universal vocabulary. We can talk about all those things.

MS. CREIGHTON: Can I try a reconciliation?

MR. SHELANSKI: Yes, terrific.

MS. CREIGHTON: 15 seconds because I think really going back to the point about that the District Courts that are the standard. I think it can't seem to

the Judge like you're just making stuff up, so as long as there's enough constraint in there, that it doesn't look like you're just pulling things out of the thin air, I think you could find a medium ground between them.

MR. SHELANSKI: I think with those two policies as parameters, I think there is some middle ground when you talk about specifying your analytic framework, but maybe not locking in presumptions or rules too tightly. There is middle ground there.

With that, I would like to thank there excellent panel for their remarks this morning, and we will have a shortened break. Given the wonderful luxuries provided to you out there, that shouldn't be too painful but let's come back in about five minutes and start with our entry panel.

(Whereupon, a brief recess was taken.)

PANEL 3: ENTRY.

Moderator: HOWARD SHELANSKI, Deputy Director, Bureau of economics

PANELISTS:

GEORGE S. CARY, Partner, Cleary, Gottlieb, Steen & Hamilton, LLP

MARGARET GUERIN-CALVERT, Vice Chairman and Senior Managing Director, Compass Lexicon

JOHN E. KWOKA, JR., Neal F. Finnegan Distinguished Professor of Economics, Northeastern University

JOSHUA D. WRIGHT, Associate Professor of Law, George Mason University School of Law

MR. SHELANSKI: Welcome back to our final panel for the morning, and we'll then have a lunch break. This is the panel on market entry, and again we are fortunate to have a really distinguished panel. Immediately to my left is Josh Wright, another FTC veteran. Josh is a lawyer and an economist and is a professor at George Mason University and has been a valuable contributor, and he is also the prime mover behind the truth on the market blog, and a prime mover in some antitrust topics. Thank you.

Immediately to the left of Josh is John Kwoka. John is a veteran of both the FTC and the DOJ, if I have

that right, and he's currently the Neal Finnegan Distinguished Professor of Economics at Northeastern University. For a long time before that, he was a professor at George Washington University here, and also over the years, along with Larry White, has produced our periodic volumes of the Antitrust Revolution. We're very glad John could come down from Boston.

To John's left is Meg Guerin-Calvert, a well known economist to most of us, and Meg is currently president of Compass Lexicon, one of the leading economic consultancies in the world.

Finally to her left, Josh Wright's uncle, but we won't presume any collusion in your remarks, is George Cary, long time and distinguished antitrust partner at Cleary Gottlieb, and also an alum, we're glad to say, of the Federal Trade Commission.

So thank you all for coming here and giving us your thoughts, and I would like to jump in I think with a difficult and broad question, and I'm going to direct this first to Meg because I know this is something she's thought about.

How should the Horizontal Merger Guidelines take into account the several ways that entry might factor into merger review? The current guidelines address the role of uncommitted entrants as market participants in

Section 1, but then defer the supply side consideration of committed entrants until Section 3. Does this distinction make sense and is there a better way to address entry comprehensively in merger review and in the guidelines?

MS. GUERIN-CALVERT: Thanks, Howard. I think just as an overall comment, I think one of the things that is of interest on this panel is the idea that the overall approach to the entry question is something that does belong in the guidelines, and that should be fully incorporated and unified as best as possible to take into consideration the competitive effects of the merger going forward and taken into account the analytical principles that are embodied in the current guidelines.

I think your question raises something more than organizational issues as to whether or not certain concepts should stay at Section 1 and others at Section 3, but really whether we want to affirm or reaffirm the concepts of uncommitted and committed entry and what it is that we could best do to have a unified theory. I have a couple of thoughts.

First, I think that the concepts underlying -- whether one agrees with the words or not, the concepts do remain very relevant and deserve continuance in the guidelines, probably albeit in a little built different

organization form. I think what the uncommitted entry concept provides is a means to consider the evaluation of entry, in particular where there are low or no sunk costs through either repositioning or expansion or other modes of entry.

I think it has a great deal of empirical relevance for a broad range of industries in which you have competitive constraints, both pre and post merger, that may arise largely from either nearby firms or nearby products.

I also think that the concept of committed entry, which really is the embodiment of the timely, likely, sufficient test, in its emphasis on evaluation of the importance of scale and sunk costs relative to the market are the cornerstone of modern economic theory on entry as is uncommitted and deserves a space.

I want to just mention one particular thing that I think as currently configured particularly makes the evaluation of uncommitted entry very difficult. I think where it is right now in the market definition section and the market participation section, it essentially says if you have a set of circumstances where you're able to identify firms or products that could move in, they are, as they said, hypothesized to be in the market, and then implicit in that is some notion that

the consequence of that entry and expansion should be incorporated in HHIs and shares or some measure of elasticities.

I think as we all know, that is extremely difficult to do, and I think empirically, it has tended perhaps to be given less weight or done less frequently. I think in particular, historical loss data, diversion analyses, share analyses have a very difficult time capturing that fully. I think in some cases it has been captured fully, and it is embodied there. In other cases it's more difficult.

I think a lot of the models that we have in many industries make it very difficult to take into consideration the full effect of repositioning and uncommitted entry.

So given that, what might we do? What I would tee up for discussion is it would be useful to have a unified theory of entry that is fully part of the competitive effects analysis that takes into consideration uncommitted and committed entry in some form of a synthesized entry section, and that particularly looks at what I think embodied in the guidelines is a two part test now: Where it is that you have relatively low sunk costs, there's less importance perhaps in looking at the economies of scale part, and

easier perhaps to identify that the constraints exist post merger.

One can look at repositioning and expansion and I think evaluate that, and that way it will, I think, appropriately give a lot of weight in the entry analysis in the application to looking at those cases where you have either high sunk costs or very large economies of scale that are required relative to the market.

So that's where I think a unified approach that would give perhaps more weight and more analytic support for how to embody the uncommitted entry concept would improve the guidance provided by the guidelines.

MR. SHELANSKI: Thank you for those very helpful remark. George, would you like to follow-up on that?

MR. CARY: Yeah. I generally agree with the concept of a unified exploration of entry in the competitive effects analysis. I guess I would make two starting points. First I, think that from a demand side point of view, defining a product market from the demand side as the guidelines currently do is the right choice. Not including the supply side elements and market definition I think makes sense.

To move the supply side consideration into product market definition I think will create a little bit of confusion and also could potentially lead to some

ad hoc decision making at the agencies which may not be particularly helpful. So, I think maintaining the current division between demand and supply is a good general framework.

Secondly, I think that the current merger guidelines explication of timely, likely and sufficient on entry is a good format. It's a good structure. I think it's worked well, and at least I'm not familiar with any economic literature that would undermine that, so I think maintaining that makes an awful lot of sense.

The one place where I would differ slightly I think with Meg is that ultimately the question of product market definition feeds into the question of concentration: What are the market shares? So in looking at whether you consider uncommitted entry as part of the market participation, the question to me becomes whether there's a metric that allows you to feed that in rationally and sensibly into the market concentration numbers.

So, for example, if the issue where defining market shares is current sales in the market, if that's the relevant metric, then it doesn't seem to me to make a lot of sense to try to cobble on top of that uncommitted entry, which currently has zero market share and try to factor that in.

On the other hand, if we are talking about truly uncommitted entry, and if you're talking about a market where capacity is the relevant measure of concentration because people can move in and out of products very easily, say a chemical factory that's got a particular set of facilities, and what they're doing is they're shifting the ratio of one input chemical to another input chemical. If capacity is the metric, then that kind of uncommitted entry ought to be considered part of the market. It ought to be calculated in the market share and fed into the competitive analysis that way.

So in short, I guess, if there's a way to quantify consistent with how you're quantifying the participation of existing market participants, those who are uncommitted entrants in a real sense, I would include them in the calculation. If there is not, I would wait and look at the impact when you're looking at the competitive effects.

MR. SHELANSKI: John, do you have some thoughts to follow on that?

MR. KWOKA: Yes, I agree in large measure with both Meg and George on this. I think that the instances where we need to be concerned about uncommitted entry are sufficiently few that it's quite possible to address them in the market definition section with a notation

that where there is swing capacity freely, quickly, flexibly adaptable to the product in question, that that should be taken into account.

That would be as far as I think that section on market definition really needs to go in addressing that. I think the remainder of the concern about entry ought to be integrated into the later section where committed entry is now discussed in much greater measure.

I think that the present placement of the discussion of uncommitted entry invites seemingly the agencies and outside counsel and consultants to sort of scour around for possibly flexible capacity to determine market shares and to do calculations of concentration on that basis, and I think that's really not, as a practical matter, either necessary nor is it administratively a good use of resources at that very early juncture in the process.

So I think postponing that discussion until the entire matter of entry arises more naturally is both for practical purposes as well as on the economics a good idea.

I also would offer the suggestion, I think you may have asked two questions, Howard, or at least I heard two questions in your initial commentary. One part of this is: How should the guidelines take into

account the various ways that entry might factor into merger review? I think that integrating the discussion of entry into a later section is appropriate, but I would broaden that section to be sure that it encompasses supply response more generally.

I think that there are grounds for an integrative analysis of all of the ways that supply response may thwart or undermine a perspective price increase from a merger, and in particular what I have in mind is the fact that while the '92 guidelines performed a useful service in focusing attention on entry issues, elevated entry to an important place in the analysis, the '92 guidelines also downgraded something which I think is equally important, and that is the role of potential competition. Not so much potential competition or entry as a defense to an otherwise problematic merger, that's in many ways the thrust of many commentary, but I think the issue that I have in mind is where an incumbent firm actually acquires a firm deciding to enter, a constraining outside firm.

While potential competition had been part of the 1982 and '84 guidelines, and certainly it continues to play an important part in the UK, EU, Canadian, Japanese guidelines, that has really vanished, as has our elimination here in the '92 guidelines. I think that

the considerations of these issues has not ended, the Google Double Click merger, the Hopsira pharmaceutical arrangements, mergers in the airline industry dating back ten years to United USAir and more recently Delta Northwest, and even as of 18 hours ago, the DOJ consent in Ticketmaster LiveNation, all raise these issues of the role of potential entry.

There is no longer any explicit mention of it in the guidelines, and I would be happy to discuss -- I don't want to take too much time right now, but I would be happy to discuss I think the further reasons why that deserves to be re-introduced as an explicit part of any guidelines revision, and I also have some suggestions as to how that might be done.

MR. SHELANSKI: Josh, do you want to pick up either on the initial discussion that George and Meg sparked or also addresses John's point for a broader supply side analysis of an accomplished's repositioning and potential competition?

MR. WRIGHT: I will try to do a little bit of both, with a lower degree of difficulty now that the lights are back on.

So one of the things I hear emerging from the first three comments is something that I agree with wholeheartedly, which is whatever we're going to say

about entry, a unified theory I think was the term that was used, a unified theory that talks about supply side responses generally, that talks about I think retaining this distinction between committed and uncommitted entry as a conceptual matter is fine.

I mean, they're obviously important economic differences for how we think about entry with respect to its ability to constrain prices between uncommitted and committed entries, so I think conceptually, it's perfectly fine to retain that discussion, and whatever unified theory on entry that we might have might include in the guidelines.

Repositioning I think is also something that could be included in that sort of section to make it a little bit more clear how the agencies are evaluating issues of repositioning. I think that that's an issue that will become increasingly important.

I think such a unified approach to entry that is a little bit more clear on how the agencies are approaching the ultimate question of how the supply side responses are either counteracting competitive effects or constraining the ability to raise prices will I think ameliorate some of the problems that would arise if there are some who support moving supply side into market definition.

I agree with George that I think this probably produces a little bit more confusion than it's worth, but that's conditional on having a little bit more of a comprehensive unified section on entry that reflects Agency practice.

My last comment, along those lines, while I do think it's valuable to think about this distinction between committed and uncommitted entry, and as a conceptual matter, to the extent that this reflects Agency thinking is valuable to include in the guidelines.

As currently written, I think it would be desirable to deemphasize that distinction. The bright line distinction now I think, to my knowledge, doesn't reflect Agency practice. I don't think, and others may disagree, that the Agency thinking about these issues is consistent with that bright line distinction.

There's a spectrum of sunk costs for entrants, and we really don't know things like how much sunk costs are enough to hang our hat on that sort of bright line distinction, so I think something more reflective of economic thinking and Agency practice would be to write up that conceptual distinction in a way that's consistent with the idea that this is a spectrum and that we think about these different types of entry in

different ways.

MR. SHELANSKI: Meg, did you want to follow-up on that?

MS. GUERIN-CALVERT: I was going to emphasize one clarification maybe that I thought of as George was speaking. I think that where uncommitted entry is right now is, in a way, conceptually where it belongs because in essence, you are saying that it is feasible with the hypothetical price increase that you would draw in the appropriate capacity, to use John's phrase, and the appropriate constraint.

I think where the difficulty is is really more so in execution, which is how is it, to go to George's point, that you actually try to measure what that supply response is and what its influence is, and I think the importance of really trying to keep that concept, even if you move it into a unified theory, is not to all of a sudden raise the threshold such that you are putting a greater burden on having to evaluate that, but maybe just figuring out how better to take it into consideration.

The reason why I think it's important is I would differ some with John in that I think where the economic literature supports is that there is, in a great of industry, a very large amount of repositioning of nearby

firms and nearby products, and so the concept of uncommitted entry is one that resonates in a lot of industries. In airlines, for example, I think a lot of research has shown that if you are positioned at one or other end points, you do have an influence on pricing, which is consistent with uncommitted entry, and also with potential entry theories.

So I do think it's important to try to figure out how best to articulate both the economics as well as what the principles are as to how the tests are going to be applied.

MR. SHELANSKI: George?

MR. CARY: Yeah, I think the point that Meg just made and following up on Josh's point of the continuum, the reality is that most of the deals that come through agencies these days are differentiated product deals, and many of the deals, when they're reviewed, go back to this question: Will there be unilateral effect in a relatively narrow space? And the question becomes: How long will it take for other firms to reposition?

That's a continuing question. It's not a question of: Is there or is there not a sunk cost? It is a question of: What are the sunk costs for example to reposition a consumer product based on advertising money?

That can be large. It can be small. It can be zero. It can be positive. It's very unlikely to be a binary kind of decision, which to me suggests again that you move it back into the competitive effects entry analysis and evaluate it as part of the competitive dynamic rather than treating it upfront, especially when you're using unilateral effects analysis in the narrower market focus there.

MR. SHELANSKI: I would like to --

MR. KWOKA: May I just add something?

MR. SHELANSKI: Sure.

MR. KWOKA: I don't so much disagree I think in principle with what Meg says, but the problem here, of course, as in so many places in the guidelines is that there is a continuum, and the guidelines seek to draw cutoffs and make arbitrary distinctions.

It certainly is true that there is both capacity and repositioning that can be brought online and becomes relevant in a short period of time. The pure term of course of uncommitted entry doesn't allow for time at all. It does mean that it's virtually instantaneously available.

The minute you move away from that polar extreme, then you're into the continuum, the question becomes a practical one it seems to me of whether it's

more administratively feasible bringing the matter to a resolution more quickly to deal with it upfront or to postpone it later.

My own view is that unless the capacity is virtually instantaneously available, and I submit that that is -- it's clear when that's true and it doesn't happen all that often, then I would argue for postponing the issue of repositioning and capacity availability where the latter requires some time and effort, to the later point where supply responses are more fully accommodated.

I certainly agree with Meg, however, fully that in the airline case where one end point of a route is served by another firm represents a potential entrant, that it is precisely that case, which as Meg knows, she and I have talked about this, that I have investigated and others in some research which look at the USAir Piedmont merger, it's now 20 years ago, but it was a very good example of where two carriers merge where in some very minute routes they represented two incumbents.

There we know what's supposed to happen, and indeed it did. Prices rose by maybe 10 or 12 percent, but the more interesting empirical exercise was to look at routes where one of the two was an incumbent and the other served an end point but not the route itself.

So there's no change in concentration measured among incumbents, and if one looked only at markets where concentration changed as a result of the merger, one would ignore all those routes. They would turn out to be quite numerous because these are network carriers, and they intersect and overlap in lots of different ways. There was indeed a price increase, a statistically significant price increase of about 60 percent as great as where the two firms were incumbents.

It seems to me that where two firms meet each other in that fashion, whether they happen to be both incumbents in other markets or not, a pure and potential competition merger is simply the case where there is no change in concentration measured by incumbents, but someone positioned to enter quickly and readily is eliminated.

As I noted in my opening comments, those are the kind of mergers that were explicitly identified in the earlier guidelines and now are addressed really largely as sort of secondary matters and in most merger proceedings partly because there is no explicit provision in the guidelines as to how those should be treated but those are really quite important.

I would say however that even in the case of airlines where we believe entry is easy, and where after

all contestability was first applied or at least one of the first couple cases where it was applied, it remains true that the existence of a potential competitor is not the equivalent of an incumbent. It's 60 percent of an incumbent, and therein lies a reason why we see airfares as we do, and why mergers need to be evaluated with attention to both incumbency and the positioning of potential competitors.

MR. SHELANSKI: Thank you very much. I would like to turn to a different but related question. Maybe we'll start with George and work our way across the panel.

In many markets, in many cases, entry is presented on its face as being easy. We're told that entry barriers are low, that there's lots of firms with the capability and the capacity to enter. Yet entry has not in fact happened much or at all in the pre merger environment, and we're being told that don't worry, in the post merger environment, if there's any problem, entry's quite easy.

So I guess the question I would ask is: What factors should the guidelines establish or use as relevant to the likelihood of actual entry, and what weight should give to pre merger market experience with entry?

MR. CARY: I think as with most of the merger analysis, the question has to come down to an empirical assessment of why there has been no recent entry, if there has been no recent entry. I don't think the retrospective look at what has happened in the marketplace and the conclusion that there hasn't been entry, therefore there's not likely to be entry in the future, is going to be very fruitful.

Ultimately I think it's incumbent upon the agencies to establish what the conditions of entry are. If there hasn't been entry, can we find places where there have been elevated prices and yet the entry hasn't occurred? If people say they will not enter, can we get to the bottom of what the economic motivations for not entering would be? Why is it that entry would not be profitable in the face of an elevated price?

Details about what kind of economies of scale are in effect, details as to what the impediments of competitive entry would be; actually looking at the underlying economics of the firms that are purported to be potential entrants, and exploring what has caused them not to enter previously and whether those conditions would significantly change in the face of the merger.

I think it's often too easy to either assume

that entry is easy because objectively it doesn't appear to require much without delving into the dynamics of the economics. It's also relatively easy to say it's never occurred in the past, therefore it won't occur in the future, and it is incumbent upon the agencies to build that factual record.

So technological barriers, economies of scale, the kinds of things that are identified in the current guidelines I think are relevant and fruitful, natural experiments: Where have there been elevated prices and what has been the response of firms judged to be likely potential entrants in those circumstances, and a full some evaluation of what the underlying economics of entry are?

MR. SHELANSKI: Thank you. Meg?

MS. GUERIN-CALVERT: I would say, it's probably just to echo what George asked, is it worth it to look at two kinds of circumstances? One is that where you have what are thought to be relative to the size of the market very substantial sunk costs, and the need for very substantial economies of scale in order to be able to enter and the absence of entry circumstances seems to fit one fact pattern where I would agree with George, really looking at and evaluating the specific circumstances.

I think where the other area is is where you have, in terms of going down to the checklist and an evaluation that you have a relatively low sunk cost and where you may believe that there are smaller or lower economies of scale or it's less important, and you've ruled out obviously technological IP or other barriers so you're looking at the economic factors.

I think one of the things to really spend some time looking at is making sure that relative to the product that you have under evaluation that you're really looking at entry at the right level as to whether or not -- because I think in a very substantial number of studies of industries, entry has actually come from expansion of incumbents or expansion from nearby industries.

I think this is true even though, for example, divestiture studies as to where it is that firms have been successful, so I think it's to identify what the type of entry is that one is considering, but I think that the most -- why it is that you've seen more limited actual entry, but I think an important part of the literature that has been coming to the floor more so, and this is Bullberg and Woodberry have written an article recently, as has Gandhi, Chance, Werden and Froeb looking at the implications of what actions occur

in response to the merger, both if the merging firm is likely to reposition. Does that provide more openings for rivals to come in, and what the dynamics are with the hypothetical price increase as to whether or not there are more profitable circumstances for rivals, particularly in areas where there are lower sunk costs?

So I think trying to maybe draw those analytical principles a little more sharply in the guidelines might help.

MR. SHELANSKI: Okay. I may have some follow-up to that. That's very helpful. John, do you have some thoughts on that?

MR. KWOKA: Of course. I'm interested in talking about your question about why it is that in markets, we so often are told that entry should be easy, but we don't observe it, and I think there are really a couple reasons.

One is that Agency's ability to analyze the prospects for entry I think suffer from some disadvantages, even in contrast to the Agency's ability to understand decisions that are made by the parties in question. After all, the entry decision is made by someone else, not the parties in question, and I think that if that discrepancy could be remedied through improvements in the Agency's ability to investigate

prospects for entry by more directly examining the decisions and prospects for outside parties, that might help alleviate part of the information asymmetry that arises.

The other reason I think is it's probably fair to say that if one is not satisfied with our understanding of the rule of concentration based on empirical economics, there's no reason to be satisfied with our understanding about the decision to enter or not on the basis of empirical economics.

I think that the empirical realities that we understand are not well reflected in the guidelines. The guidelines have spent a great deal of time, not surprisingly, focusing on the perspective profitability of entrants, but a good deal of empirical research, just as one example, tells us that more important than -- perspective profits in the way we can measure them, more important than that is market growth, for example, and growth is mentioned as one of the considerations for sales opportunities by perspective entrants, but it doesn't receive the same kind of attention as I think would be warranted by looking at the actual evidence about what guides the entry decision.

I think it's not very hard to understand why it is that growth may be important or at least as important

as profits, but that too is not really I think reflected fully in Agency practice or the guidelines, so I think that those are the two reasons I think why it is we are oftentimes surprised when entry is said to be easy and then it doesn't happen, and I think that these are issues that might deserve further attention in guidelines revision or in Agency practice.

MR. SHELANSKI: Josh?

MR. WRIGHT: I think it's right that the entry has to be conceptualized from a guidelines perspective as an inquiry that's going to be largely fact intensive and empirical. There's no getting away from that, and I think the more that the guidelines embrace an approach that is one that suggests this is fact intensive or fact intensive inquiry rather than presumptions and the like or bright line categories about easy and hard entry and uncommitted and committed being attached to particular outcomes in terms of entry analysis, I think the better the guidelines will serve their ultimate purpose.

I do think Agency practice, the guidelines took us largely on the right general set of conditions to think about with respect to entry. I think the guidelines certainly don't necessitate that the agencies play into claims that we don't observe entry, so entry must be hard, or we don't observe entry, so we must not

have any competitive pricing. The guidelines don't necessitate falling into either of those traps, and I think lay out the right sort of the empirical conditions to evaluate.

What I would not do is, if I had to depend on Section 3, that other than laying out the conceptual approach and the types of facts that matter and the types of conditions that one wants to look at, I probably wouldn't go too far in committing myself to what types of analyses of those facts, and I think that that's fairly important because sometimes these are just qualitative evidence. Sometimes it's quantitative evidence. These methodologies develop over time.

I think the right thing to do and I think the thing sort of least restraining on the Agency and in terms of accurately reflecting agency practice is to lay out those concepts and the types of facts that matter, and I think on that score, Section 3 does fairly well.

MR. SHELANSKI: So let me follow-up because your remarks raise a question that I would like to hear your thoughts on and the thoughts of the other panelists as well.

So once there's evidence that entry to some degree is likely, how can the Agency go about deciding whether that entry is sufficient or not, so in other

words, suppose there's strong price increases from a merger, and we think that the effects analysis shows something to be quite concerned about? What kind of entry is needed to countervail that effect?

You say that the agencies don't need to go so far as to say that entry must eliminate any super competitive pricing, but why not or how far should the Agency go?

MR. WRIGHT: Let me back up for a clarifying comment. What I meant with the comment about super competitive pricing is you often hear arguments to when it is observed in this world, where there's no pre merger entry, and the claim is, well, there's no pre merger entry because there's no super competitive pricing, this is my explanation for why I can explain away the lack of entry, so there is actually easy entry, no super competitive pricing.

This may not be true, and that's for other tests, and we should investigate them and see if that's the right explanation.

Now, with respect to sufficiency, again this is an area where I think in terms of what types of evidence, I think obviously the best we can do where conditions allow us is to have evidence with natural experiment type evidence, and sometimes that's available

and sometimes that's not.

I think that's one of the dangers of the guidelines documents themselves committing themselves to particular methodologies. I don't know if you end up cases where you can't do reliable natural experiment analysis, you don't want to be in a position where we have the guidelines favoring this over other sorts of facts that might be relevant.

I think conceptually the guidelines again get the question right, and I think that's the important thing in terms of a guideline document that's meant to tell folks what the agencies are doing, what questions are they looking at, and there are other ways for the agencies to tell the antitrust community what types of specific methods they are using to address the sufficiency question, where there are particularly valuable natural experiments, and we do this in speeches.

People write papers. I don't think that there's any real problem in getting that information out and about into the antitrust community so folks know what's going on.

With respect to what I take to be a different question, not what should be the guidelines on this score but how the Agency should position of sufficiency,

I think clearly natural experiment evidence and that sort of evidence is the gold standard where available, but we're not going to know in advance when that is.

MR. SHELANSKI: John?

MR. KWOKA: Let me answer the question about sufficiency slightly differently. The issue of sufficiency arises with force when there is I think a substantial price increase and quantity reduction, and then the question becomes: What confidence does the Agency have that some outside firm will enter at sufficient scale with a sufficient degree of certainty, with a sufficient persistence in the market to defeat the price increase?

The guidelines as written focus a lot of course on the question of size and scale as crucial to the sufficiency. One of the features I think in my view that is not adequately reflected in the guidelines is the degree of certainty and persistence on the part of a potential entrant, of an entrant even of sufficient size.

The best example of something like that I would say would be, for example, if there's a merger between two domestic companies where a foreign company represents a potential competitor, perhaps indisputably sizeable enough to replace whatever lost output there is

in the domestic market. However, foreign competition is inherently subject to exchange rates fluctuations and can disappear overnight in terms of as an effective force, just as well of course on the other side as it can double in force overnight, but the agencies are in that case and others where certainty becomes important I think hard pressed to know whether to treat such an outside firm, and the capacity it can devote to the domestic market, treat it as a full entrant, full potential entrant for purposes of determining sufficiency or how to discount it, if discounting is appropriate, or whether it should be ignored because again we are confronted routinely with instances where such a constraint goes away.

I think that is an issue too is of course not new to the agencies. There are many instances where those have been resolved, but it would be helpful I think if there was some method of articulating how it is to think about that problem.

MR. SHELANSKI: Thank you. Meg, have you thoughts about the sufficiency question?

MS. GUERIN-CALVERT: I would say maybe as a first principle to go to the premise of your question is the concept that there is likely to very strong price effects. I think probably the starting point for the

entry analysis, even as it is in the guidelines, is to identify what is the source of the prediction.

If, for example, it were to be based on some modeling that estimates that the two competitors are closer competitors, using various margin and other data and from that predicts a relatively high price effect, I think it's important to then evaluate -- looking and seeing whether or not those kinds of predictions do take into account issues of uncommitted entrants and so on, and what the source of the price prediction is, and is it implicitly saying that in order to discipline, you need somehow very, very large scale of entry to occur and occur in the near term in order to be sufficient.

I think there's two particular points. One is in a number of industries, to harken back to airlines, there is evidence where even a relatively small share of flights and frequency by a low cost carrier is enough to bring prices down. That may not work at all in other industries where that small scale of entry may not be sufficient.

I think the principles that are embodied in minimum viable scale and the concept of a sufficient amount not necessarily to replicate even the smaller of the two firms, much less the combined firms, is still something that I think works well as an analytical

principle, to look at whether or not one would expect there to be some on the order of a five percent share that could be acquired and then to evaluate whether or not in the particular context more is required.

MR. SHELANSKI: George, would you like the last word before we go to the floor?

MR. CARY: Sure. Going back to the basic premise here, which is that you need empirical benchmarks, you need to look at exactly what it is that the impediments to entry are and the agencies should be required, to go through those in a systematic way, not so much saying there hasn't been entry or there won't be entry as a result of the prior experience.

I think once you go through that analysis, laying out each of those elements in a systematic way, using accounting evidence if it's available, what is the investment, what is the payback period. If you can put into a hierarchy what those impediments to entry are and if you can tick them off, I think as you move down that scale, you can get some sense of the sufficiency.

If there will be entry of some sort by virtue of overcoming the largest barrier to the marketplace, going to the next step and asking: Will that entry eliminate substantial sunk costs to the point where the new entrant can then expand, reposition, move into the

market, map competitively is one way to measure the sufficiency element?

I think it's also very important to look at the opportunity costs facing firms that have crossed that first threshold or when you're look at repositioning, what exactly will the firm have to give up and tie that back into the competitive effect analysis? If the firm does choose to give that up, what kind of responses can it expect in whatever niche it's carved out?

So all of those things in an integrated analysis of the competitive effects plus the hurdles that have to be overcome to move from one space to the next have to be looked at.

MR. SHELANSKI: Thank you very, very much for that thoughtful last comment. That was very helpful. Are there any questions from the floor for our market entry panel?

MR. LEE: Yes. Eugene Lee from FERC. Some economists have some comments about the entry. They say that the antitrust analysis or the regulation should allow to really heavily depend on the new entrant because the empirical study shows for the new entrant company, it will take years to establish themselves and the series, they're changing the dominating players in the markets, how do you think?

MR. SHELANSKI: John?

MR. KWOKA: That observation I think is consistent with my reading of the empirical evidence too, and as I said before, I think there's a discrepancy between the way the guidelines advise looking at entry and the empirical reality.

Most entrants do not get in at full scale. They get in at something less than full scale and ramp up. That leaves us -- there's obviously good business and economic reasons for that, but it's worth thinking about what that exposes them to in the way of retaliation during that period.

So entrants grow after entry. Most entrants fail in most markets. Markets even, if competitive, don't lack entry. They lack -- they have lots of entry and lots of exit. We know all of these things about the entry process, and I think that the guidelines, the guidelines methodology on entry at best is a test of the possibility that entry, if of a certain size and configuration, can defeat a price rise, but I think its comparative static nature ignores a lot of what happens in between, and that's not really irrelevant to the viability or the outcome at the end of the day for exactly the reasons you say.

That said, I don't believe the empirical

evidence shows that potential entry is unimportant. It surely is, but again I think some greater melding of both the theory and the empirical evidence might help inform readers of the guidelines.

I know for awhile that these issues were part of the silent antitrust process of evaluation that goes on not following the guidelines line by line, but I do think the guidelines do have a tendency here to diverge from the way entry actually occurs and to give a somewhat false impression of the objectivity and quantifiable of the process.

MS. GUERIN-CALVERT: I would just add I think one thing. One of the things I think the literature on studies of entry and exit across industry do also show is that there's remarkable heterogeneity in the relative size of firms and industries, and I think we tend to talk about industries or mergers among particularly large firms, and that is not always the case.

I think we also tend to focus on those cases on where markets are somewhat more static or declining as opposed to dynamic, and where we do see, particularly in consumer products but also others, a lot of multi product firms. So, I think there it's a little bit more complicated. I think you also do have the circumstances where the nature of the competitive process between and

amongst firms is one of introducing new products or moving into new spaces.

So I think that is again the beauty of the concept of the uncommitted entrant is that you pick up some of that analytical framework in that regardless of where you put it, but I think appropriately it does focus you on the really significant cases where you do have very high sunk costs, large economies of scale and the framework that is there in the committed entrant.

MR. SHELANSKI: Another question. Yes, Andy?

MR. GAVIL: I have a question about how the guidelines on entry will translate into the world of litigation. I find appealing the idea of having a unified discussion of supply response, but in the merger area right now, entry is generally viewed when you get to litigation as a defense, and the merging parties show that entry is easy.

There's some monopolization law that takes a different view that views entry as part of the plaintiff's case to show entry is hard in order to establish monopoly power.

If there was an integrated single discussion of supply responses, where it gets located in the guidelines I'm afraid could influence how the court approaches it, and I wonder if any of the panelists have

strong feelings about whether entry really belongs as part of what the government must show to demonstrate anticompetitive effect or whether entry belongs as part of what we perceive the defendants would show to dissipate any likely anticompetitive effect.

MS. GUERIN-CALVERT: I would choose the former. I think analytically the framework is the same principle as you espouse with regard to monopolization, is that the whole merger analytic process, and I think well set out in the guidelines, is will or will not this merger, with some real likelihood, have an anticompetitive effect, and I think you can't disentangle the entry analysis and the supply response from that conclusion or that assessment, but others may have different views.

MR. CARY: I guess I agree with that, and maybe I disagree a little bit with Andy about how important that distinction it. At least in the last 20 years the government has felt it necessary to put in a case on entry.

Now, at that point there might be a burden shifting of coming forward, but I think the courts have treated entry as part of the government's case, and the defendant's obligation is to rebut it with evidence that entry could undermine any anticompetitive effect leaving the burden with the plaintiff, so I don't think that

that is a material change if you move away from a segregated analysis to a unified analysis.

I think the place where moving to a more economically oriented analysis might impact litigation is getting rid of the rules of thumb. If you get rid of the two-year threshold for what counts as competitive entry, which does tend to be something in my experience that the Agency lawyers will grab on to, well, that entry doesn't count, it's going to be two years and five months from now, if you get rid of the one year requirement on uncommitted entry, I think that could change the litigation dynamic, but I don't think going to an integrated analysis will have much of an effect.

MR. SHELANSKI: Final question. Bert Foer?

MR. FOER: One topic, I can't change the light bulb either, so don't worry about it, I'll talk loud. One topic that we have not discussed at all is strategic response. That is a merger often, not always, triggers other things in the industry. Maybe a trend of concentration, maybe not.

Let's put that into the context of entry for a minute. How do we think in terms of analyzing potential entry about other responses that may be occurring or may be likely to occur or might occur within the industry that perhaps might further concentrate the industry or

might otherwise change the dynamics?

MR. SHELANSKI: Does someone want to take a swing at that?

MR. CARY: You stumped the panel.

MR. KWOKA: That's too hard a question, Bert, but our models of strategic behavior don't really provide us with clear guidance as to how to evaluate things. That said, ripple effects more broadly speaking from a firm merger or threat of potential entry I think are routinely considered, repositioning the issues, retaliation issues, things of that sort.

So I think there is some consideration to those, but I think a lot of this is very merger specific, and is very hard to articulate broad themes either from experience or certainly from the economics here.

MR. CARY: The one place where the guidelines kind of internally create a little bit of tension here is with respect to the efficiencies because one of the major reasons that somebody that might have otherwise entered will not enter in the face of the merger is because the mergers have created such economies of scale that they reassess their opportunities in that marketplace.

So in that sense, making a decision as to which way you want to go is going to be important in terms of

the efficiencies part of the guidelines and the barriers part of the guidelines, but I think that ship has long sailed. You're going to have to do that same holistic analysis. You're going to have to look over the long run and make an assessment as to whether the economies are going to be large enough and passed on enough to mitigate any dampening of entry effect.

MR. SHELANSKI: That brings us to the close of this morning's session. Before we thank our panelists, I just want to say we'll reconvene promptly at two o'clock. We have two really excellent panels this afternoon, so I hope you will come back, and with that I would like to thank our entry panelists for a very helpful discussion. Thank you.

(Applause.)

(Whereupon, at 12:40 p.m., a lunch recess was taken.)

AFTERNOON SESSION

(2:00 p.m.)

PANEL 4: EFFICIENCIES AND MERGER REMEDIES

MODERATOR: PHIL WEISER, Deputy Assistant Attorney General

PANELISTS:

JIM LOWE, Partner, Wilmer, Cutler, Pickering, Hall and Dorr, LLP

JOHN M. NANNES, Partner, Skadden, Arps, Slate, Meagher & Flom, LLP

CONSTANCE ROBINSON, Partner, Kilpatrick Stockton, LLP

ALVIN VELAZQUEZ, Assistant General Counsel, Service Employees International Union

MR. WEISER: I would like to thank you for joining us for the second half of today. We have a panel now that's going to take on two topics, remedies and efficiencies, and then we will go to our closing panel, and we will try to pull it all together from the first five workshops.

The folks joining us here today that include two people who I served with in my last tour of duty , John Nannes, who was a Deputy Assistant Attorney General, and now is at Skadden Arps, and Connie Robinson, who was a

steward as the director of operations and has now moved on to private practice, Kilpatrick and Stockton.

We also have with us Jim Lowe, who is a staple of the antitrust bar and helped out with the ABA antitrust section comments, and someone who is not a familiar face around these circles, but we really appreciate his engagement, Alvin Velazquez comes to us from the labor world.

He is the Assistant General Counsel at the SEIU, and he filed comments. It's worth noting that we only got 45 comments for the merger guidelines workshop as compared to, I'm going to get the number wrong, but something over 1,500 comments or more for our agriculture workshops.

Mergers are a little more of I guess we might call it an inside game where agriculture is something where people are more inclined to be interested in, outside game as it were. Noting our merger effort, we did go outside the Beltway for three of our workshops and had even fewer people coming to the workshops than we have here today.

It was still worth it to get the engagement there, and one of the folks who filed comments that we wouldn't have known, and we really appreciate it, was Alvin on behalf of his group, so thanks for joining us,

Alvin.

The issue of remedies is one that lurks around the corners, if you will, of the guidelines. There's no discussion in the guidelines of remedies. That's not true in Europe where there is a discussion of remedies in their guidelines, and there is a policy guide at DOJ as well as some guidance document that the FTC uses.

I guess the first question, I'm going to turn this first to Connie, because by all accounts, she was the person to get on this panel. Patty Brinke, who is in the audience, I think is exempted from that because we're not having internal people on panels.

But the question goes to you, Connie: Is it a good idea to put remedies in the guidelines, and how do you think about framing a level of generality for any type of guidelines discussion on remedies?

MS. ROBINSON: Phil, I think the answer to that is yes and no. I think it would be a good idea to put certain fundamental principles of remedies in the guidelines. Things like the goal of a remedy after having found a competitive harm is to ensure a long-term viable competitor who replaces the competition that's lost.

Things like the goal is to replace competition, not to pick and choose somebody perceived as the best

competitor; and that the idea is to cure the harm, not to improve the competitive situation. I think that if you had the fundamental principles that underlie most remedies, and I think there's general agreement between both agencies on what they are, I don't think there's a lot of difference, that that would instruct.

I don't think the guidelines, however, are a place to put out the kinds of things that you do have in the remedy papers, where you go through in a lot of detail on how you look at various provisions that might be in a decree and what should or should not be there.

I think that would be too complicated. That's not what I think the guidelines are about. I do think that it would be a wonderful thing if both agencies could sit down and hammer out a single set instead of having two set of commentaries on remedies. I think that would serve the businesses who are looking for advice, and it would serve the agencies as well, and I think that would be a very useful thing to do.

MR. WEISER: Let me play with the high level, Connie, and just to see if I can get the right level of generality. One is address the harm created by the merger, not try to improve overall competition.

Second, I would ask this question: Is there room for, on your level of generality, discussion of the

nature of structural relief versus behavioral relief? Is that another principle that again is high enough level?

MS. ROBINSON: Yes, I think the principle that you generally prefer structural remedies over behavioral remedies would be a high level principle to put on that list, yes.

MR. WEISER: The third question I would ask is: You mentioned something to ensure a viable ongoing concern. Would you want to get much more detailed than that when you talk about a divested entity?

MS. ROBINSON: I think that that's the right level, and I think then in commentaries you can talk in great detail about how you do that analysis and what kind of evidence is persuasive to the agencies, but I don't think I would put that in the guidelines.

MR. WEISER: So, John, let me turn to you now. It's the same basic question, and let me put a hypothesis some have mentioned, that the problem with remedies is they're too often an afterthought, and they're sort of marginalized, and thus don't get the attention they deserve.

A, do you agree with that; and B, does putting it in the guidelines, let's say along the lines Connie says, somewhat corrective, appropriate, inappropriate?

MR. NANNES: Let me take it, if you don't mind, in the reverse order. I mean, if Connie's answer to your question was yes and no, I think my answer would be no and yes, and the reason I say that is I think there's a risk in trying to do too much in the guidelines

The guidelines can serve important purposes if they're transparent. They tell the agencies what applicable framework the leaders of the agencies expect them to undertake. It also tells the business community and the legal community what to anticipate, but I think when you get in the area of remedies, you're dealing with areas that are historically committed to some degree to prosecutorial discretion, whether it's Justice as an executive agency or even the FTC as an independent agency.

Thus, as courts have looked to the guidelines and use them to cite back to the government in cases they litigate, I think there's a also bit of a risk that if you start putting too much about remedies in the guidelines, you invite the courts to try to make their own application of those remedial principles.

I do think, as Connie said, that there's a lot of guidance that's already been provided through the FTC's best practices statements and the DOJ's guide to merger remedies, so what may really be going on here is

that those people who think we're going to try to import some of that into the guidelines are really hoping that through that process, you could force greater convergence between the agencies respective approaches to merger remedies that I do think can be quite different.

To go to your first question, which was: Are these afterthoughts? It's not my sense that they're afterthoughts as much as it is that I think that, institutionally, the agencies have structured themselves over the years rather differently to address remedy issues.

The FTC has a dedicated compliance group that is involved in every major negotiated decree, and thus brings to bear continuity of principles, but also an extraordinary level of detail that goes into the remedial process.

On the Justice side, I think Bernie Hollander is still upset that the old judgment enforcement section was decommissioned some 25 years ago, so it is the case I think that you tend to get a little more attention to remedies on a consistently applied basis at the FTC than you may at Justice where that authority is more diffuse.

MR. WEISER: Jim, what's your experience been and how does that bear on what the Agency is to do with

respect to remedies in the guidelines?

MR. LOWE: I think I would echo what John said about my experience with remedies. There is compliance at the FTC, which creates both some benefits and detriments frankly in the remedies process, and Justice, you're dealing with individual sections which may have different views. Operations does sit over that to some extent, but it's not the same as compliance involvement in the process. On the other hand, it does create the sense I think for at least some staffs at the FTC that we've come to remedies, and that's compliance's problems, and it's not our problem which creates a disconnect between the analytic portion of the case and the remedies portion of the case.

That having been said, I think I'm also with John on the notion that the merger guidelines are addressing the analytic mode, the mode of analysis for whether there is competitive harm in a transaction and that remedies is, in a sense, a separate process after you've done that analysis. I do worry that an effort to expand the guidelines to include remedies, A, will complicate and delay process of revising the guidelines that we have now, and B, create potentially a distraction both in the courts and in the community, particularly if you're at a level of generality of the

sort that Connie is talking about, that while there may be common principles there, it still leaves a lot of questions that will be unanswered by those principles.

MR. WEISER: So I want to start from the premise that we don't stop at Connie's recommendation, and we don't keep the high level principles, but that there's a view that this is our one chance to harmonize two agencies, and we're going to do it in the guidelines and then address a series of the issues that I think if I understand the thrust of Connie's recommendation, not be put in the guidelines.

So, for example, substantive questions about how do you select a buyer? Do you act for buyers upfront? Do you allow a fix it first solution as opposed to one that's subject to consent decree? How do you view crown jewel approaches, et cetera? These are all right now best practices sort of and thought of in sort of the commentary type terms policy guide, but let's say hypothetically we're going to put them in the guidelines as a way to rationalize the approach of two agencies.

Substantive reactions on those sets of issues? First I'll start with Alvin: Do you have any sort of overarching approaches to remedies? I know in your comments, you didn't talk about it, but if you have some thoughts as to what considerations and/or procedural

strategies are good or not so good when it comes to remedies.

MR. VELAZQUEZ: Well, honestly I think in the labor context one of the challenges is that we're caught between figuring out do we do we care more for structural remedies or for conduct remedies? I think typically a lot of the labor type issue, not just -- I guess previewing what I'm going to say on efficiencies, we're talking about product degradation, product quality type issues that come up in remedying those.

Those seem to be much more easily remedied through conduct than structure from my outside perspective. However, I know that's typically disfavored amongst most antitrust practitioners, and my sense is it's very difficult, especially if you're talking about skilled labor, for example, we represent nurses or other skilled trades, to fashion a structural remedy that makes sense.

I think there's sometimes -- how do you get a skilled set of labor out of an entity and create a stand alone entity that will be competitive in the marketplace without other tools, other scales. I mean, I just don't see how you can create a competitive entity by itself.

MR. WEISER: So one thing that is done, let me turn to Connie, with this is insist on what sometimes is

called a clean sweep of assets, which means you don't try to allow mix and match to create a new entity. You insist on some entity that has a corporal existence with some high level of confidence stand-alone. That is a principle, for example, that is in FTC's divestiture study, and of course it's an important one.

Connie, among the other principles, one, this is really -- what's important when you think about remedies or this isn't so important? How do you look at the different ideas that are out there and suggest what is the best practices and approaches.

MS. ROBINSON: Approaches, I really view all of those things, fix it first, upfront buyer, clean sweep, as potentially tools in the toolbox that you are using to try to effectuate a remedy that's going to work, and while I do not believe they belong in guidelines because I think they're very case specific, and you really need to know the facts of the case and the facts of what the proposed divestiture is, and then evaluate what's the best thing that you can get.

There's always the pragmatic concern that you have to throw in about how strong your case is. But in general, I think you want a strong efficacious remedy. It may be that you can do that without a clean sweep. It may be that having the flexibility to do that will

enable you to get relief faster, quicker, get someone in there and avoid a problem if you have a little flexibility.

So I guess I favor types of processes that allow you to have the maximum flexibility, but at the same time, you have to be conscious about what works and what does not work, what risk is there that we won't get someone quickly, should we just sue and block the whole thing?

It's a continuum, and I don't think you can sit here in a vacuum and say, this works and this doesn't work. I think the divestiture study that the FTC study did was an attempt to say what worked in our cases, and one question I would say is that I know when we thought about this many years ago, we were trying to evaluate why is it that the FTC has an upfront buyer, and the DOJ really doesn't use that, although it has a fix it first, which arguably is essentially the same thing, except it doesn't require a decree.

The best answer I could come up with at the time, and I know Tim Muris and I debated it for awhile, was maybe because it's because of the types of industries each Agency looked at and particular circumstances that occurred within those industries that made that seem like the right way to go for that Agency.

So that goes back to case specific guidelines.

MR. WEISER: Since I was the only person who went to the New York workshop, and actually Howard Shelanski just came in, Kevin Arquit said to that question -- I don't know if this is helpful, but he said that back in the 90s what happened was the other FTC Commissioners wanted an opportunity to be involved in that decision. If it was fix it first, it would be done by the Chairman and the Bureau Director and not necessarily widespread Commissioner involvement, and that was the real reason.

MS. ROBINSON: I thought there might be difference because of the different multiple agencies.

MR. WEISER: That's what he said. That was his point. John, we had this overall talk this morning about the set of meta-theme of leaving thoughts of flexibility versus trying to pre-commit to certain strategies or approaches. This issue obviously applies in remedies.

Are there some remedial strategies that you think deserve a pre-commitment strategy which is never do this or always do this? Any of those that you focus on?

MR. NANNES: I would have felt more confident articulating 48 hours ago because I would have made

strong statements about what appear to be the Agencies' commitments to structural relief versus some form of behavioral relief. Obviously, you have a very significant consent decree that was announced yesterday that had was both. I think it probably is true all things being equal, you prefer structural, but the problem is all things are not always equal.

One of the things I think would be useful, but I don't know how far you push things in a common direction, I think there is a perception and I think the perception is an accurate one that there is a substantial diversity between the way the two agencies approach remedies, and some of them may owe to historical evolution, for example, of the upfront buyer concept, some of them may be jurisdictional in the sense that if someone comes with a fix it first solution to the Justice Department, the Justice Department doesn't have an option to take the parties to court and ask the court to enter a consent decree where there's no violation no matter what problematic overlaps there might be.

But, for example, in the use of upfront buyers, it's certainly something that the Division could seek more frequently. In fact, in the decree yesterday in Ticketmaster there was an upfront buyer for the divested

asset, and I think that's a very interesting policy question and certainly realizes -- and if you go back and trace what FTC has said about the rationale for upfront buyer, one can see if you like the divestiture, it can be consummated more quickly and the other is the upfront buyer is a way of testing the situation where you have some assets and not a freestanding business.

So you're testing the marketplace, but in my experiences at the FTC and they are more limited than at Justice, there also becomes the enormous temptation because of the FTC's involvement from the get-go in the divestiture process, so they become almost a co-party to the sale of the assets, and in certain circumstances I think that leads the divesting parties to say, "Look, this is now an impediment to getting the deal consummated, unless we can get this completed to the satisfaction of the FTC," and sometimes what that leads to is selling the divested assets to an entity that has the biggest footprint in the space rather than a fringe player or a potential disruptive new market entrant because the agency doesn't authorize such a divestiture. Then that can turn out not to be as successful in the long run.

So I think if there were an opportunity to come to prepare best practices between the Agencies, you

might get agencies moving in both directions with the FTC leaning a little more to the DOJ and the DOJ to the FTC and I think that would be a benefit. I don't see any stronger case for having divergence in the remedial tactics than I do having differences between the substantive principles applied by the agencies.

MR. WEISER: Jim, let me add one we haven't talked about, the use of monitors as an enforcement mechanism in consent decrees and merger remedies.

MR. LOWE: Sure. Let me just say this, because I do want to emphasize that there are fundamental differences that exist between the agencies, both in the process and the outcome of remedies. We've had situations where we've had teams in our firm negotiating remedies with the same two agencies at different times with a very different process and results. Also, there was an ABA program where the differences were presented by DOJ. So, going back to my prior concern, I'm worried about unnecessary delay in the process of the guidelines revision because there are fundamental differences there.

The fact that DOJ goes to court and has a supervising judge which creates an easier effort to get contempt hearings than the FTC has. We need to address those differences, and it can create very unequal

results, and some of it may have to do with industry, but some of it clearly doesn't have to do with the differences in industry.

Monitors are another way of associating with them. They have costs related to the efficiency of the divestiture. There are clearly circumstances in which monitors make sense. DOJ uses them as well as the FTC, though less frequently than the FTC does, but again it is not clear to me as a practitioner necessarily what the principles are that currently underlie the assignment of monitors in particular cases.

It would certainly be valuable to have those laid out. I think it does need to be in situations where there's a clear concern or reasonable concern about the wasting of the assets pending divestiture. There certainly are industries in which there is a history of the wasting of assets pending divestiture. Those are cases that justify monitors. There are sometimes customer bases for example in defense transactions where monitors are regularly put in place because of DOD's request for one.

Monitors are an area at the moment of significant difference, and it does create burdens for parties where they're forced to pay for these monitors who often engage in strategic behavior related to their

pay that the agencies need to think about as part of the process.

MR. WEISER: Connie, before we move efficiencies, any other thoughts on remedies that you want to share?

MS. ROBINSON: I would like to echo what Jim is saying about monitors. I think that the DOJ uses them occasionally, I think in their words, rarely, and the FTC more routinely. I think they impose tremendous costs because obviously if you're a monitor on a decree that lasts for a number of years, it's a great job. Nobody is really reviewing your bills, and the company pays it. There's no check on it, and I think that's a problem. I think you sort of get over-enforcement, if you will.

I've always sort of thought that it almost suggests an attitude to me that suggests that the companies are not really going to try to comply with the remedy they've got. In my experience most corporate entities with their antitrust counsel are trying to be good corporate citizens, and we are, after all, talking usually about merger cases. We're not talking about criminal cases. So, it seems to me that it should be the special case, not the routine case, where a monitor is used.

MR. WEISER: I'm going to move on to efficiencies with the following question, and I'll start with Alvin on this one: Thinking about efficiencies, there is an often critical question about whether or not the relevant efficiencies are passed through to the consumer. That begs the question of the method of analysis, the burden of proof and the relevant evidence to be looked at in this context.

Alvin, how do you conceive of the question of what is a cognizaeable efficiency and how do you determine this pass-through issue, which the guidelines seek any merged parties to establish?

MR. VELAZQUEZ: Obviously, as I've been thinking about this pass-through issue, about what are consumers -- I think typically the paradigm people look at labor cost and say that as labor costs get reduced, that should be a net good to the consumer. They should be able to realize savings. They should be able to get better, cheaper cars, for example, or cheaper services.

To be honest, I think we kind of see this in a different way, and I would say that labor's pain isn't always the consumer's gain, and here's the reality of it. In some of the markets we operate in or that we're involved in, what we will see is that mergers occur or that acquisitions may occur, and we see two things.

We'll see product degradation or service degradation occur on the one hand, and, on the other hand, we usually see a correlation with a decrease in labor standards. Getting the metrics down, for example, in some of our industries such as in security and in healthcare is very difficult to do. There are metrics for evaluating it.

One thing that comes up pretty frequently with our nurses is staffing ratios in terms of how many nurses are caring for many patients because a lot of times they'll say, look, after a merger occurs, oh my goodness, I'm taking care of many more patients, and it's much more difficult to take care of those patients.

So I think that a lot of times the consumers are not necessarily seeing the benefit of merger, especially in a dysfunctional market. We've seen it occur enough. There is a substantial literature out there that holds that as labor standards are decreased, product quality standards also decrease.

I think a lot of times it's a type of literature that hasn't really come into the antitrust world. But, if you think about the implications of what that means, it means that typically any type of indicia of either labor decreasing or product standards decreasing may, in certain cases, actually result in consumer harm. I

think that the traditional paradigm has been that workers lose and consumer's gains, but I think there's really times when there's an alignment of interest between consumers and workers.

MR. WEISER: So, Jim, I want to turn this to you and note that Alvin took what I thought already was a hard question and made it harder, but to repeat the question, thinking about this pass-through point, how do you analyze it? Who has the burden and what's the relevant evidence?

What I took Alvin to say is, well, however you think you can do all that and the come to a conclusion about what benefits make the best of a consumer, be careful you may think you know, but it may not be a real, let's say, a savings in price, when you factor in the fact that you could easily have quality degradation.

MR. VELAZQUEZ: That's exactly right.

MR. WEISER: So with that nice wrinkle, how do both emerging parties trying to establish efficiencies and the enforcement agencies go about this exercise?

MR. LOWE: Well, I would like to know how the enforcement agencies go about it because I'm not sure I know the answer to that question.

MR. WEISER: It's in the guidelines, right?

MR. LOWE: Well, Alvin raises a very interesting

point, and it's one that I don't think, at least to my knowledge, has been necessarily well explored in the antitrust community, which is: Is there a difference between cost savings and efficiencies in the setting that Alvin describes?

Namely, I can ship all of my production to a low wage country but may actually use significantly more resources in producing the same number of products. I just do it at a lower hourly rate, so I may use more people. I may use more energy but because I'm in Vietnam as opposed to in Connecticut, I can do it cheaper, and is that really a societal efficiency? I think it's a very interesting question. I'm not sure it's one that the guidelines can or should try to struggle with at this stage, but the agencies probably should struggle with it.

I think I'm a sceptic on how much of a difference efficiencies actually make in the analysis at the end of the day. Though there clearly is value in pass-through and I do think that the mode of analysis needs to be explained.

As I understand the mode of analysis now, the likelihood of pass-through depends on the likelihood that the competitiveness of the market forces the merged firm to pass-through those efficiencies. Now, that all

seems a little circular to me because if there are sufficient number of players in the marketplace to force the pass-through of the efficiencies, then there wasn't a competitive problem caused by the merger, and therefore we'll never get to the efficiencies defense.

By contrast, if there are not enough firms to cause the pass-through of the efficiencies to consumers, then there's a competitive harm and the efficiencies's defense won't be sufficient to overcome that harm because the efficiencies will never be passed through. If that's true we've ended up sort of nowhere.

I think there is a question, when you are putting together an efficiencies defense, there is a challenge to try to say that there will be sufficient competitive impact in the marketplace post transaction that the merged firm will be forced to pass through those efficiencies. But exactly what that measure is, at least to me, remains somewhat undefined. I think it creates a real quandary for parties trying to put together an efficiencies defense to understand better than the '97 edition of the guidelines provides what it is that the agencies are really looking for from the parties on pass-through besides a rather basic competitive analysis.

MR. WEISER: John?

MR. NANNES: I think the best thing I can say about an efficiencies defense is it hasn't been one that historically the parties have had to establish in order to get their merger cleared because I think it is, in many ways, the most difficult inquiry that is countenanced under the guidelines, and I'm not sure how to get from here to there.

I think one of the problems is that if you look at this in kind of an uninformed way, your intuitive judgment going in, is that you wouldn't expect there to be passing on of the efficiencies in a context where there's a highly anticompetitive merger because the parties don't have to pass on the efficiencies in order to respond to the competitive conditions.

I'm kind of reminded about some old testimony, maybe someone else recalls it, but Bill Baxter was testifying back in the '80s and trying to explain to a Congressional committee why, when a competitor comes into complain about a merger, Baxter's immediate reaction is the merger ought to be approved, and the first intuition of the Congressman was, "Well, how can that possibly be," and Baxter explained to him, "Well, if they're coming in to complain, it must be because they fear greater competition."

So I think, similarly, you have to get past this

intuitive judgement about pass on, and then look to see what is really underlying that. We understand some notions about basic economics, that even a monopolist, whose marginal costs can be reduced, is likely to reduce its price, but once you get to that question, then you're asking, "Well, how much has got to be passed on? All? Substantially all?" Maybe the test is pass on enough to offset any likely price increase.

The inquiry gets extraordinary nuanced, I just don't know that the economic science is available to test those propositions in any meaningful way. So, I kind of come back to where I started on this notion, which is maybe it is an area where it's of great intellectual interest but maybe, hopefully, of limited practical application given the infrequency with which the problem arises.

MR. VELAZQUEZ: I was actually going to say disagree about as this pass-through, at least if you think about one of our biggest industries in the U.S. which is healthcare. It's a dysfunctional market. I think that's putting it lightly insofar as we see the third-party payer issue. There's issues of how do you measure it, but I think in terms of how to measure some of those things, I think it can be done with retrospective studies.

I was surprised that in creating models based on the retrospective studies. For example, I was studying about the Firestone example and how tires blew up randomly in the late '90s and the early part of this decade, and that result was partially because there were labor problems that had occurred at the plant that was making the tires that were blowing up. It wasn't intentional sabotage. It was actually, based on their investigations, just that there were lower incentives to work. Honestly, there were lower incentives to create tires that were safe, and I'm using that not to say that the work is easy, but I think there are possibilities within each industry, in fact, that can be explored and models that can be developed and applied on a going forward basis. I agree that there's a difficulty in collecting then evidence, but I think there's a real possibility that can be done.

MR. WEISER: Connie, there's a lot of skepticism on the table about the ability to make a credible efficiency defense. Do you want to try to offer a more generous interpretation of this opportunity? Do you tell your clients don't bother trying? I mean, it sounds like that's sort of what people are saying.

MS. ROBINSON: We tell them: Entry, let's look at the entry story. I think it's very difficult to find

an efficiencies defense that's powerful enough for the government. That's not to say it's impossible, and I think it depends a lot on your industry.

In the healthcare industry, I think a lot of hospital merger cases were decided up front based on can you really get these efficiencies that we're talking about. I think in telecom, people have acknowledged that there are network efficiencies that, in some cases, overwhelm any potential anticompetitive effect, and I've seen those credited. I remember a case that shows up in the commentary that it was back in 1996 which I actually was telling John about the other day because I did remember it. It was one involving efficiencies and had to do with where two mines were. The fact of the matter was that even though the market was a fairly concentrated, whatever it was they were mining, they could get out of the ground and send it to the first mine a lot cheaper than the mine that it had at the time, and so the merger was allowed to go through.

So they're real, but I think they're somewhat rare, and I don't think that it probably makes a lot of sense for a client to spend a lot of time and effort on efficiencies in most cases, quite frankly. That's sort of my pragmatic approach.

MR. WEISER: John?

MR. NANNES: Just one observation. I recall back maybe four or five years ago working on a transaction that had a U.S. dimension and an EC dimension, and we're trying to figure out what arguments to make, and we said we can make these efficiencies arguments to the U.S. but we shouldn't make them to Europe because if you make them to Europe, Europe will see the efficiency argument as creating a barrier to entry.

And I'm not completely sure that the assumption that you wouldn't run into a similar initial resistance in the U.S. was a sound one, because I think that at least with the legal staff, at the kind of first level of contact, there's perhaps greater skepticism about efficiencies than there is if you go to EAG at the first meeting or work your way up the chain of command.

So it's kind of a risk reward balance as to whether or not you plow a lot into the efficiencies, and I think you do when your transaction is so likely to be problematic based on a competitive effects analysis that it becomes kind of your last salvation opportunity.

MR. WEISER: So let's assume for this next question that the agencies mean what they say and take efficiencies defenses very seriously, and let's then raise what is a difficult theoretical question. Maybe

it doesn't come up a lot in practice, but I think it can, where you have a merger that involves more than one market segment. In one market segment, it's a very powerful efficiency story. In the other market segment, the parties are basically almost having to concede there's an anticompetitive effect. What type of linkage between those two markets would you require to allow the efficiencies in one market to, in a sense, justify harm in another or would you take the view that you should never allow such a balancing to happen? John?

MR. NANNES: Obviously, you're referring to footnote 36 in the guidelines. I actually think that the footnote basically gets it right because part of it turns on whether or not you can attain a remedy in the market that has the problematic competitive anticipated effects from the transaction without undermining the benefit achieved from the overall transaction.

Now, I don't know how often this comes up, but I was trying to come up with an example that I thought would demonstrate the principle, and I think there may be one, and that would be if you take a look at airline mergers. If you take an airline merger, especially one say between two domestic carriers, they're each likely to have one or more hubs in the U.S. and be providing a service out of their hub to somebody else's hub.

If two merging parties provide non stop service between their respective hubs, they're likely to be at least historically two of a very small number, and maybe just the only two that are providing the service. But, the great majority of the competitive interfaces these carriers have are on connecting service, and so you well may have a situation where you can quantify economic harm in the hub to hub markets and then kind of do some kind of proxy analysis of what the efficiencies are on an overall systems integration basis and conclude it's virtually impossible there to design a remedy that we eliminate the anticompetitive harms in the hub to hub market while preserving the efficiencies associated with the overall transaction.

If that's where you were to come out, then I think that would be a good case for application of footnote 36. The critical question, obviously, would be how much anticompetitive harm in the problematic markets are you willing to assume and accept in order to get the efficiencies that are likely to be more indirect in the other markets that don't have a competitive problem?

MR. LOWE: Actually the EC struggled with exactly that question in the Endlift Tunza (phonetic) and SM Brussels last year, so I know they spent a lot of time on that issue.

MR. WEISER: Let me now take it one step farther. What if a State Attorney General decided they wanted to challenge the merger because they were living in one of those areas where the harm was and they thought the Clayton Act said any geographic market in any section of the country would make a merger illegal, and thus they would argue that you shouldn't use that sort of balance?

MR. NANNES: That's why I used the example I did because I think airline markets are often defined on an origin and destination basis, and if you're in Detroit and want to go to Washington, the fact that you have 19 carriers that can take you from Detroit to Houston doesn't really solve your competitive problem.

It's unlike the situation in the commentaries that Connie brought to my attention about two bakery companies that were merging, and one of them served the fast food segment of the market and the other served non fast food outlets, and query was whether they were in the same product market or in a different one defined by their customers.

I guess the question is: In what position are you? If you are the counsel to the merging parties, I think you make the best economic argument that you can, that, in particular in the airline industry, passengers

flying from point A to point B on Tuesday, maybe going from point A to point D the following week, and thus even a passenger in the city of sympathy to the State Attorney General is over time going to get benefits in the markets that are not competitively problematic, even if they suffer incrementally and occasionally in the markets that are.

So that might make it an easier swallow because you can say even to that state AG that his or her constituents are likely to share in the benefits of a transaction that is predominantly procompetitive, even if, on occasion, they're going to suffer some competitively adverse price effect in the overlapping hub to hub markets.

MR. WEISER: Alvin, how do you think about the balancing efficiency between markets?

MR. VELAZQUEZ: I have to admit, I get very torn about this because on the one hand, I guess it depends on the market definition, but typically the markets we deal with, which are service based, are going to be very localized markets. For example, you're not going to go to contract with a company in Chicago for security services in Rhode Island, or vice versa.

Unless you're in an emergency healthcare situation, you're not going to go 150 miles away to the

hospital unless it happens to be the nearest hospital. My sense is generally that I would be skeptical of crediting the competitive efficiencies in one market versus another, and I guess one of the concerns we have or I have is: At what point do the competitive efficiencies by the output market weigh against those on the input market, which is the interest I've been representing here on this panel?

Like I said, I would be very skeptical of some of the market to market claims because I think in some cases, you're going to get efficiencies in one market on the output side, and I think -- honestly, I know I'm complicating the question in some ways, and then you're going to have anticompetitive issues on the input side in a different market.

Those are, to me, comparing apples and oranges, and I don't think I have an easy answer as to how to resolve that, other than to point out that there's an issue there.

MR. LOWE: The efficiencies in two-sided markets is a very difficult problem, and enormously expensive to deal with from the parties' side if you have to try to address those questions.

MR. WEISER: Connie?

MS. ROBINSON: It seems like you ought to do

some kind of balancing and weighing, that you ought to be able to say that in 45 point-to-point markets in the airline merger, we see benefits, efficiencies, and in five we see potential anticompetitive effect, and you ought to be able to say on balance this is a pro-competitive merger.

I think that part of the issue is: What weight do you give and how do you evaluate -- where do you balance the efficiencies? Where do you balance the anticompetitive harm? Because we all know that the anticompetitive harm we're postulating is actually speculative. We don't know if it's really going to happen. We're making a good guess about it, but similarly, the efficiencies are speculative.

I think there's a tendency that the harm gets a greater weight than the potential efficiencies. I also think there's a really interesting policy argument lurking in here, and that is, Let's assume you as an Agency did decide that, overwhelmingly, there would be efficiencies from this merger, that there was competitive harm but it would be small and there would be efficiencies?

The question I have is: Would you insist on a divestiture for that small piece of anticompetitive harm?

MR. WEISER: If you couldn't, I think John was saying that the interesting question is when you can't do it.

MS. ROBINSON: If you can't, if you can't.

MR. WEISER: But if you could, then that is an interesting question as well.

Let me put my last question out there, and then I want to get to any from the audience. Are all efficiencies created equal? Can you conceptualize different kinds of efficiencies that should be given different levels of weight by the agencies? Should the guidelines point to different kinds of efficiencies?

Alvin mentioned one and I think John has talked about the issues around labor savings as one efficiency. One can posit other ones like, we can do more effective R&D if we bring our two complementary asset classes together. So, are there different types of strategic justifications for a merger including ones that are backed up in their documents that seem very credible as opposed to other ones that we should be less confident in? John?

MR. NANNES: I'm tempted to say that I think all efficiencies are created equally, but it doesn't mean they have to be treated the same. What do I mean by that?

I think that once you decide that you're going to take efficiencies into account as a possible defense to an otherwise anticompetitive merger, you have to be open to considering whatever efficiencies may be advanced by the parties, whether they're variable cost efficiencies or fixed cost efficiencies or something else.

The credence that the Agency gives to those claims and their assessment about whether they're likely to outweigh the anticompetitive concerns has got to depend on the facts and circumstances of a particular transaction.

I was intrigued because I kind of bought into the presumption of the guidelines, that variable cost efficiencies are considered more readily and deemed potentially more credible than fixed costs, until I read some of the comments that came in in response to the workshops where people tried to identify particular industries, whereby given the nature of the industry, it may in fact be that fixed cost savings could have some very significant impact on price and on innovation with some examples being those characterized by high R&D investments or particularly low variable costs.

So I think you have to be open to considering them once you open the door, but it depends on the

particular industry and the particular case that can be made as to whether in any particular instance you're going to give a higher value to one or the other.

MR. WEISER: Jim?

MR. LOWE: I agree with that. I think interestingly on the fixed cost, if you actually go to the commentary, in the commentary there's actually a discussion of the fact that in certain cases fixed cost efficiencies have been taken into account, and that becomes a more interesting and perhaps important question when you look at the fact that a lot of quote, unquote, manufacturing companies now contract manufacture their goods.

So actually while you're creating a merger, all you're doing is merging two contracts for contract manufacturing. You're not actually merging manufacturing facilities anymore, so the classic marginal cost analysis that you do in a manufacturing industry becomes very different when you're dealing with contract manufacturing.

So I agree with John that there are a number of different types of efficiencies, that once again, as always is true in merger analysis, it's very fact specific. But, I do think that in terms of looking at the current guidelines and the statement on

efficiencies, they not only don't currently reflect the agencies' actual practice right now, but they also don't reflect the way markets have changed and industries have changed since 1997, and need to look at and reflect the fact that other types of efficiencies, other than pure marginal cost efficiencies, are being taken into account.

The question of the weight given to particular efficiencies, I agree with John, really will depend on the particular industry and transaction involved.

MR. WEISER: Alvin, would you suggest there's some type of efficiencies that we can categorically treat different from others?

MR. VELAZQUEZ: I was going to say, I think honestly the answer to that question from my perspective would have to be constrained by the ultimate goals of antitrust law to be honest, as simplistic as that might sound.

The ultimate goal of antitrust law is to protect consumers, and at the end of the day, I think what we're trying to say here is that the efficiencies that we're bringing and discussing are just efficiencies that haven't ever seemed like they've really been discussed, and that those types of efficiencies should at least be looked into more in-depth when a merger is being

scrutinized.

MR. WEISER: Connie, I'll give you the last word before we take other questions.

MS. ROBINSON: I think rather than say this efficiency should be counted more than that efficiency. I think you need to really do sort of an analysis into: How large do we think these efficiencies are? How certain do we think they're going to be accomplished and in what timeframe? You may find out that putting together two lines in a manufacturing facility is going to happen faster, be more timely, be more certain and be a certain magnitude of size rather than R&D efficiencies, but I think you have to do the analysis and decide in the particular industry how important is it.

MR. WEISER: Do we have any questions from our audience member?

All right. Seeing none, I will then give each member of the panel a chance for let's say 30 seconds or a minute, final thoughts on remedies or efficiencies.

I will say this panel was fairly harmonious and definitely wasn't too comfortable biting the bullet, so to speak, on any hard and fast rules when to keep generally a more flexible factors and approach which I think the guidelines do generally aspire to, but if you

have any sort of closing thoughts, I'll give you a change. Jim, first?

MR. LOWE: Sure. Two other topics we didn't touch on, Phil. One of which is a burden of proof in efficiencies. I think there is a sense in a lot of people in the bar that the burden of proof placed on the parties for efficiencies is higher than the burden that the agencies place on themselves for showing competitive effects.

That may have to do with the nature of what it takes to prove efficiencies, but it's something that should be clarified, what the burden on the parties is, so the parties can know whether it's worthwhile pursuing that in a particular matter because in many cases, it's not possible to meet the necessary burden of proof with the information available.

That goes to the second issue, which is to make sure both in terms of what the guidelines say and also, frankly, on how the guidelines are disseminated to the agencies that we don't unintentionally create an efficiencies offense, namely that if you fail to come in with an efficiencies story, that there's some sort of a suspicion that there must be something wrong with your transaction.

And I've actually run into staff that appear to

have that attitude, and given the burden that does exist for trying to show efficiencies, to have an expectation that the parties will come in with efficiencies or that the parties will even try to justify what the investment bankers said in the 4-C documents is frankly unreasonable.

MR. WEISER: John?

MR. NANNES: Just one observation. I don't know that the answer is clear at the moment, but when I think about efficiencies, and I think about the UPP test, it does pose a question for me, and that has to do with the following: At present it seems to me that in the vast majority of cases, the transaction the parties bring to the agencies for review, it's not necessary to conduct a sophisticated efficiencies analysis because the screening, and sometimes even the ultimate decision, gets made often and without having to go to a significant examination of efficiencies.

I think that has some benefits if you believe that some of the difficulties that have come out here today do effect the ability to make a persuasive efficiencies showing, but as I understand the UPP, the UPP would look more regularly at efficiencies as the offset to whatever upward pricing pressure seems to be caused by the transaction, and the way that the UPP is

defined, if you have companies that are anywhere near one another's space, there is likely to be some upward movement, although you would likely have to quantify it.

I guess my thought or my suggestion, the question I'm going to leave with people kind of rhetorically is: If we're going to go down the UPP process a little bit, it would be nice if there is a way to design it that didn't require the parties to incur all of the difficulties associated with an efficiencies analysis in order to make use of whatever UPP screen test might be utilized by the agencies to identify what transactions look to be potentially problematic, and those that don't.

MR. WEISER: Thank you. Connie?

MS. ROBINSON: Thanks for having us, Phil, first of all, and I just want to applaud the process because I think it is really valuable to invite multiple opinions when you're thinking about a guidelines revision.

On the remedy point, one thing I was thinking I would like to see happen, although it's not really in a guidelines perspective, and as I said I think the major principles would be useful in the guidelines, but it would be good for some more transparency about why certain agencies accept certain remedies and why they solve the problem.

On the efficiency side, I tend to think that the guidelines really have the structure. It's a matter of the weight and looking at them more carefully. Thanks.

MR. WEISER: Alvin, give you the last word.

MR. VELAZQUEZ: Sure. I also wanted to echo my thanks for being able to participate on this panel and bring my perspective here. I think as a final thought, I was having a conversation with someone who is an economist and a lawyer, and he says, "You know, the economist part of my brain wants to say that the types of stuff that you're talking about will typically represent a net social good overall."

I said, "But, Kevin, isn't the point of the antitrust at the end of the day to ensure that customers have good choices and that there's competitive markets?" And he was like: "And therein lies the tension between I think sometimes what happens in the economics sphere and in the legal realm."

So I would just urge that as the process continues forward, to sometimes be able to harmonize at the end of the day the principles of antitrust laws with the economics because I think there seems to be somewhat of a disconnect there.

MR. WEISER: Thank you all. We will take a ten minute break, come back around 3:10 for our final panel.

(Applause.)

(A brief recess was taken.)

PANEL 5: CLOSING PANEL

MODERATOR: PHIL WEISER, Deputy Assistant Attorney General

PANELISTS:

WILLIAM BAER, Partner, Arnold & Porter, LLP

THOMAS O' BARNETT, Partner, Covington & Burling, LLP

EINER ELHAUGE, Petrie Professor of Law, Harvard Law SCHOOL

JOHN FINGLETON, Chief Executive, UK Office of Fair Trading

JANET L. MCDAVID, Partner, Hogan & Hartson, LLP

MR. WEISER: Thank you all. We have come to the end of the road, and there were several roads along the way, but THIS is the first road we're on, and this road is the workshop part of the road, and I will say I was among the people more confident that this was worthwhile, doing a lot of conferences, and all of us had our expectations exceeded.

The engagement we've gotten has been very high, and one thing which is attributed to the antitrust bar and it maps the profession's ideal version of itself, is that we have seen a considerable amount of intellectual honesty and statements that I will say are not necessarily reflective of particular client's interests

but instead are reflective of the best view of the law. That level of engagement I think is absolutely what we hoped for and I think we have gotten it in spades.

So this panel has some very accomplished people on it. Let me introduce them, starting on my left. Janet McDavid is former head of the antitrust section of the ABA, and chair of the Hogan & Hartson antitrust practice and has been a very accomplished practitioner for a long time, and it's great to have you here.

Next to you is John Fingleton. For those who don't know the Office of Fair Trading UK you are missing out on a highly professional operation. If John is not busy enough heading up that office, he's also the head of the International Competition Network and has done great things leading ICN, and we're glad we could have him as part of the international antitrust community. Among other things, he is an accomplished economist and has really been doing a lot of terrific work around the world.

Next to him Einer Elahuge, who is, by many accounts, one of if not the, leading antitrust scholars, in the legal academy. He's the coauthor of the still to call Areeda sort of treatise. His most recent article came in the Harvard Law Review, and he really made an effort to join us here. He talked this morning, flew

down today, has to fly right back, so Einer, thanks for being here.

We also have two other people who have served in high government posts here in the U.S., Tom Barnett, the most recent Assistant Attorney General in the Antitrust Division. I think when the guidelines were put out were you the head of the antitrust at that time, Tom?

MR. BARNETT: The commentaries.

MR. WEISER: The commentaries, rather?

MR. BARNETT: Not the guidelines, no.

MR. WEISER: We've had others from that era, and we just talked about the efficiencies guidelines from '97. Bill Baer was the head of the Bureau of Competition at that time. He also was there when they did the divestiture study that was referred to. He's now at Arnold & Porter. Tom is back at Covington and Burling, so thank you all for joining us.

The first question, which kind of goes back to the first panel of the day, is: What to do about the HHIs? Christine Varney's speech stated that the current levels are an affirmative misstatement of Agency practice, and you have to hire a lawyer to know to tell you that the guidelines are not something that you should be relying on with respect to what's likely to happen.

So let me stop with the high level question first: Is it advisable to maintain some what's called a three tiered model? The first tier is, in effect, a safe harbor. You won't get challenged. The second tier is: You're going to have to tell a story. You're going to get scrutinized, and the third tier would be something on the order of a structural presumption the merger is presumptively open to challenge, and you have to be ready to go to court.

Secondly, if you have ideas about what indicia map on to that, be it particular HHI numbers or changes in the HHI or for that matter numbers of significant competitors, I would welcome that as well, but I guess as a matter of analytical structure, is that sound?

Tom, I'll let you start out with that question. Is that a sound methodology or has the whole structured outlived its usefulness?

MR. BARNETT: I guess I would say, it's largely outlived its usefulness. Certainly the idea of setting out some sort of safe harbor, it's hard to do harm with that. But when you move into the area of structural presumptions based upon HHI analyses.

As a first point I guess, it may depend on which of the original authors of the '92 guidelines you talk to, but some of them would say that they were not

intended to create a structural presumption, but certainly the trend seems to have been pretty strongly away from structural presumptions.

I don't really think that that's the way the agencies approach them now, so if I were going to recommend a change in this area, it would be to make clear that it's probably, first of all, more of a sliding scale, that there is certainly some relationship between the HHI concentration levels and the likelihood of a significant investigation or possibly the likelihood of a challenge, but that a decision to challenge is going to be based upon an analysis of all the factors in the guidelines, relevant market, competitive effects, entry efficiency, et cetera, et cetera.

So I think it would be useful to clarify that the HHIs play a much more limited role than some people may fear. Whether you need a three tiered structure or not, that's probably more refined than it's worth.

MR. WEISER: Bill, what do you think of the existing three tiered structure?

MR. BAER: I think you start with the premise that if you're going to have guidelines, they should say what they mean but they have to mean what they say. And, if you've got language which says things are going

to happen that don't happen, that's not a healthy thing. If you're going to rewrite the guidelines, let's try and reflect as best we can what it is we're trying to do.

I do think, though, that in looking at the purposes to which the guidelines are put, how they're used, they obviously have a critical role in the analytical framework the Agency and the staff use. They have a critical role in the interaction between merging parties and third parties and the staff. They really set the framework for debate, and from '82 on forward, they were helpful I think in really getting people channeled about how you talk about the concepts of a merger.

They're obviously helpful in informing the courts about how the agencies view current economic thinking or antitrust thinking as ought to be reflected and applied in Section 7, but there is -- and this tends to I think get understated -- a critical role in providing some sort of filter or screen for companies thinking about what they want to do, and you need something that allows lawyers and businessmen to talk about the risk associated with a particular transaction.

So having something in the guidelines that purports to offer something of a screen I think is very, very useful for that front-end part as well as useful in

parts two and three. So, I would keep some sort of structural analysis as part of the front-end screen. And, because you should mean what you say, I wouldn't say we're going to challenge.

I thought Tom had it about right. You talk about the likelihood of an investigation, and maybe you do have a safe harbor, and you talk about the likelihood of a very, very serious investigation, so it's really two tiered plus maybe that second tier is where you get into a continuum and the greater the delta, the greater the preexisting concentration in the market, the more you need to expect a very serious vigorous inquiry that will examine the other factors we're laying out in these guidelines.

MR. WEISER: Jan?

MS. MCDAVID: I guess I'm going to echo what Tom and Bill have had to say. Those of us inside the Beltway who play repeat games at the Agency know that they don't mean what they say. People outside the Beltway don't necessarily know that.

I've actually had clients come to me asking my views on a transaction after they've run the HHIs and said: "We assume this is dead on arrival, we have a 1,900 HHI," and then I get to sound like a savior of some kind by explaining to them that indeed that's not

the case. Now, if you guys want to continue to make us look good, that's fine.

But principally they're useful as a first screen, and I think it is important, as Bill said, that they reflect actual Agency practice. The courts don't really treat them as presumptions anymore, and I don't usually run HHIs except as a first screen, because one of my criticisms of the HHIs has always been they create an artificial significance of precision.

You have a number. It seems to reflect a number that's in the guidelines. What you've got is a market share. The market share is only as good as the market definition and the information you've got about the inputs or output sales of the companies involved. It doesn't become any more precise because you square it.

So that's always been one of my biggest concerns. I think actually the data that the agencies put out in, and in particular the FTC's data, Joe and Howard, are extraordinarily useful to us in counseling our clients, and that's how we really conduct these investigations at the agency. It's much more about the number of significant players than whether some firm's market share is 18 or 23 percent.

So let's have the guidelines use something like an HHI as the first screen, but identify it as what it

is, and be honest about it. The number of significant competitors is usually more important as part of the analysis at the agencies than the HHIs ever are.

MR. WEISER: Let me segue to John and ask this point about: At what point do we start to get very nervous and maybe deserve a structural presumption, if you're talking about a say five to four, four to three, three to two mergers of competitors? Do you think there's a role for a structural presumption?

MR. FINGLETON: We don't use a structural presumption. We particularly don't use HHIs. I mean, I think the structural presumption risks putting too much emphasis on structure over dynamics in the equation. You can have markets that have six or seven players where a merger can be anticompetitive. They're rare but they could be, think about capacity restraints and so forth and for some of the other firms in the market, that could be a problem.

And in other markets where we've seen three to four and even some two to one mergers, those that have gone through in the UK, it doesn't tell you the full story, so we have to look at the dynamics.

So I think there's a risk using a structural threshold or a structural presumption of just putting too much emphasis on static over dynamic factors.

I think if you do need for legal reasons or for legal clarify for the stakeholder community to have something like that, I think it's much easier to describe it in terms of three to two or four to three where I think the probability clearly goes up as those numbers go down, and so there's some mergers of seven to six, you can probably say they look fairly low probability of being a problem, but when you get to three to two and four to three, that's where a lot of the action is.

So I think that where we do use HHIs is in coordinated effects cases, simply as a description of the increasing concentration and the increase in symmetry because symmetry is a factor in coordinated effects cases, and HHI is a good way or a summary statistic for trying to capture both of those. But, outside of that particular realm, I think it's not obviously a better statistical than three to two, four to three, and try to avoid the bias towards structural presumptions.

MR. WEISER: Einer?

MR. ELHAUGE: So I think obviously you have a ton of cases so you need some rules in order to be able to sort among them and screen among them. But, I guess I agree with Bill that to the extent that presumption

should be about anything, it should be about the likelihood of investigation, not on the substance of the ultimate prediction of whether or not these mergers are going to increase prices or not.

I think HHIs in particular have lots of problems. One is the generic problems of market definition as Jan mentioned, I think we're going to talk about that more later, but it is a serious problem that it really turns upon the ability for market share to be a very imperfect proxy for the relevant elasticities. As long as we're making judgments based on subjective assessments of elasticities, it seems to me you might as well go directly to them and predict price increases.

HHIs in particular seem to be problematic because what they relate to best is Cournot effects, but they don't particularly relate well to unilateral effects or to coordinated effects.

So for that, for example, I worry about it. I don't think there's no problem with the safe harbor. It could be -- for example, suppose in the Staples case, the market had been defined more broadly, so only 5 percent and HHIs were low. Still there were price effects, so it seems to me that if there were adverse price effects, it should still be challenged. On coordinated effects, I agree with John and Jan that

probably the number of significant players is much more important than HHIs.

One last point it seems to me, is that it's not clear that these thresholds should be the same for all industries. It might be that they should vary for different industries, and if you have one overarching threshold, for example, oil seems to be treated differently, even though I think if you look through the stats, if you wanted to ask is a merger more likely than not to be challenged at 1,800, I think it would be hard to defend, maybe over 3,000 nowadays as a matter of practice, but the oil industry still seems to have a lot of challenges in that range.

Are you going to have a different threshold for them? If not, there's a worry that any presumption you have overall is going to lead courts to say, well, you said it was only more likely than not to be anticompetitive if it's over 3,000; therefore we'll exempt everyone under 3,000. So screens, not substance, and I think for substance it is better to look at more direct indications of price effects?

MR. WEISER: Tom?

MR. BARNETT: If I could briefly follow-up, one, I should clarify, Einer gives me an opportunity. Certainly a safe harbor could do harm. If you set a 100

percent safe harbor, that could do some significant harm, so I'll qualify this statement by at the level that the agencies are likely to set. I think it's highly unlikely to do harm, but I want to underscore -- now that I brought the lights down -- a point that Jan mentioned, I want to pick up on briefly.

If the goal is not to set a structural presumption, and I don't hear much support for that, at least on this panel, and it's more to educate the community about when an investigation or serious investigation is likely, the data releases are a much more flexible, timely effective way to do that, and indeed some of the comments that Einer was making about what particular market shares or HHIs should mean kind of underscore that it may not be very appropriate in the guidelines to try to say anything concrete about that.

I would urge the agencies to step back and think about all of the other tools that you have available in terms of data releases, commentaries, closing statements, competitive impact statements, et cetera, et cetera, and use those tools as well.

MR. WEISER: So the next question is the related side of the coin: To have such a thing as an HHI or initial screening, you have to have some market definition, which begs the question: How do you

conceive of the role of the market definition? Some have criticized it as being an end all, be all, or overly rigid structure, and I've also suggested the step wise fashion is not always the way the entities proceed.

So my question is this: If there's an aspiration that the market definition should be subservient and should serve the cause of ultimate competitive analysis, how do you operationalize that, and what should an undertaking mean? Einer, you anticipated this question with your last answer, so let me start with you on that point.

MR. ELHAUGE: Well, I guess I'm inclined to say it's not necessary at all, that the guidelines should emphasize it's just one way to try anticompetitive effects.

The problem I see with market definition is the this in brief: It relies on a prediction about elasticity in the hypothetical situation involving hypothetical monopolist, that we then use to generate market shares, the weight of which we base on subjective assessments of rival supply elasticity, and we're told to remember that we made an all or nothing judgment about market definition, and that we really should consider the demand elasticity that we used to get that market definition as well.

So we already have all these elasticities built into market definition, and it seems to me -- and this is the thrust of the slides I submitted here -- that if we really have those elasticities, we could measure price effects directly, and even to the extent we think it's hard to do, to measure these. I think it is easier nowadays with modern scanning technology, modern data -- even to the extent we think it's hard to do it, it's better I think to have explicit guesses and estimates of elasticity than implicit ones.

In any event, it seems to me it should be emphasized more in the guidelines, at least as an alternative way to look at cases, particularly I think in unilateral effects cases where it seems to me that market definition has led to some important Agency losses in court in part because they're fixated on the market and how small the share looks within what feels intuitively to a judge like a market.

MR. WEISER: So, Jan, at least two points what I've heard. First off, market definition is maybe particularly challenging as is classically done in unilateral effects cases, and number 2, if you can prove competitive effects effectively, you should be able to back into a market definition as opposed to having to go through what would seem to be an unnecessary exercise?

Do you agree with those two propositions?

MS. MCDAVID: By and large, I do. When I'm in practice, when I'm handling a transaction before the agencies, we almost never define a market. We instead focus on whether there are, in fact, significant alternatives available to consumers, and whether those guys matter, and then we go to competitive effects analysis and focus on all of those other factors.

You can't dispense with it entirely because of course the statute requires something, and as a practical matter, the Agency is going to have to explain in court why those other competitive alternatives don't matter, why they aren't sufficient, and that's been I think part of the failure in a couple of the cases. I think particularly of Oracle PeopleSoft, and probably the Grant refining case, where the courts were looking at what appeared to be kind of a jerry rigged market; in the case of Oracle, something that didn't bear any resemblance to the parties' own definitions to even the way the customers particularly thought about it.

The Judge kept saying, you're ignoring this company, you're ignoring that company, they really matter, they are alternatives, so as a practical matter you can't get away from talking about who are the competitive alternatives available in the market.

Now, whether you do that as part of market definition or you do it as part of competitive effects analysis, that's how we do it when we're defending a transaction before the agency, and I think it makes a great deal more sense, and it's easier frankly for the clients to understand than what appears to be a jerry rigged market definition in a unilateral effects case in particular.

MR. WEISER: I was waiting how long this panel would take to get to talking about Oracle PeopleSoft. Tom, since it came up and you had a close view of that case, that has become -- and literally through the workshops, I think every single one, it's been cited often for the proposition we have to be concerned about how we define markets that don't look jerry rigged and unilateral effects.

What are your thoughts on that general proposition and whether and how Oracle PeopleSoft is relevant to the question?

MR. BARNETT: Well, let me start by saying that I think that the Agencies should not try to abandon or walk away from the requirement that they define relevant markets. There are both practical reasons for it. I mean, Jan quite eloquently laid those out, and indeed from that perspective, it seems a little I'll say not

persuasive to me to say that, look, you've gone into court and you've tried to define a relevant market, and that's been not credible to the judge, so instead we're going to come in and throw a bunch of economic or econometric analysis to the judge and merger simulations, and to somehow think this is going to be more pervasive to the judge.

I actually think the contrary is true, but I go further with respect to relevant market definition. I think it's an important discipline in the process. Now, there are a lot of statements about -- well, if we can measure the price effect directly, then why should we define the relevant market. How do we know that we've accurately measured the price effect?

There's a tremendous amount of uncertainty involved in this predictive exercise, and so in my view, if you cannot describe your competitive story in the -- in terms of a relevant market, take what Jan was talking about, the key competitors who comprises a relevant market. In Oracle PeopleSoft, I think it was incumbent upon the Division to explain why Lawson and some of the other sort of mid-tier enterprise software companies were not a viable competitive alternative to these large companies.

We can debate about the credibility of the

evidence. The Division thought it had it. Judge Walker thought they didn't, but I think that's a healthy debate, and I think that's a debate that should be had.

So bottom line is, if you can't put in a relevant market context, I would question how reliable and how much confidence you can have in your other techniques. I'll end with the note that the reason why I think people are nervous about this in the unilateral effect context is the logical consequence is you're now talking about what looks like a very narrow relevant market.

Well, if you're going to bring a merger challenge based upon that, be upfront about it, and try to convince people about it. Now, if judges are a little bit skeptical about that, there may be valid reasons for that.

MR. WEISER: Tom, just to follow-up a little bit with that and then Jan, I don't think there's necessarily an inconsistency with what Jan said and what you said in the following sense: You talked about a rigor to the market definition process, and that can be conducted by evaluating who are the relevant competitors vis-a-vis one another.

Neither of you, however, invoked the hypothetical monopolist test or the SSNIP, which is

often the focus of the market definition exercise, so I guess to rephrase the question, and I'll invite John to answer this first, but you can come in as well, when you think about market definition, one can say you can do the rigorous defining of the market through the direct competitive analysis that Jan talked about, or you could do it through the SSNIP test. How valuable is the SSNIP test as a tool to get there as opposed to other tools?

John, do you want to take that first?

MR. FINGLETON: When I was doing exams, I used to write the exam answer and then go back and write the introduction at the beginning once I had worked out what the structure of the answer was, and that's a bit how we use market definition. So, if you read our decisions through, it looks like we started market definition and then we worked through. But, really what we do is we work through the competitive effects analysis, and then we write-up the market definition, and we use the market definition while structuring our thinking and analysis of the case.

So I think it meets Tom's criteria about being disciplined and consistent in the way we present the cases, but I'm not sure about how we do it. We never really start with market definition. It's more important for homogenous goods, I think, than for

differentiated products, so we're more inclined to think of it as being important in terms of that, but then it's a bit easier for homogenous goods. The problem arises with differentiated unilateral effects cases.

In differentiated unilateral effects cases, we try to measure the competitive effects directly and then back out the market definition. I think in practical terms, I mean the cases to look at, Global GCAP where it was radio stations merger, and what we did was we identified the areas where there were overlaps, and then focused in the competitive effects analysis there, and then having done that went back and defined the market based on what we learned from the coordinated effects work. Or, in retail mergers where we're trying to look at the geographic market in local areas, how much overlap is there in a local area, and we do a thing called an isochrone analysis where you measure equal time to travel to stores and how many stores are in the area. We use that to screen out all the non-problematic markets and then have a decision about the problematic ones. When we then look at the analysis of that, we'll be able to go back and do a check on whether the screen we used was a good one, and then we write it up as sort of a consistent story.

I should preface all of my remarks by just

staying there are three important differences between our system and your system. Where the FTC is a phase one body. We go further than your phase one, but we do phase one work. Secondly it's a voluntary, not mandatory, merger regime, and thirdly, it's an administrative decision making system.

So some of the arguments about what evidence you need and how it's presented are different in that context, but I don't think it's not applicable, but that's basically how we do it.

MR. WEISER: Tom, with that, does that meet your discipline or do you think the hypothetical monopolist test and the SSNIP actually would be a requisite part of any analysis, even if you did it the way John mentioned?

MR. BARNETT: When I was referencing relevant market definition, I was assuming that you were using the SSNIP test or some version of it, and I think you need that. Now, does that mean you're going to run a regression analysis to show it? If you have scanner data, you may be able to do that but let's go back to Oracle PeopleSoft.

The question ultimately is: Is Lawson an adequate alternative to Oracle and PeopleSoft and SAP? Well, that's got to relate to price. At some level you could hire 100 green eye shade accountants that could do

all of this stuff manually, but it would cost a fortune, so, yes, it was an alternative, but would they have switched in response to a price increase?

In that case, there were difficulties in actually measuring what the price was because of the way the products were sold and bundled with other products how and discounts were spread across products, that sort of thing, and that's a complication. But, the core analytical point that you're trying to drive to is: Would a SSNIP lead to a switching to these other suppliers?

MR. WEISER: Bill, how do you conceive of the role of market definition and where the SSNIP test ideally fits in?

MR. BAER: I was going to say we should write the guidelines the way John Fingleton described what he does, and then he mentioned something about isochrone, and I said, nope, we can't go there now. It's too complicated.

Look, I think the revised guidelines need to make it clear that you are trying to identify the risk that an acquisition will create enhanced market power. Then if you look at it as that's the core thing, and you have various inputs into that analysis, that's probably analytically a better way of looking at it than the

linear approach that's in the guidelines, but nobody has to disagree with that.

Then the question is: What tools do you use? And the SSNIP test, I think, is a useful tool. It has limited value in certain acquisitions because testimony doesn't really help. You can't get your mind around it. And, in other acquisitions, it does, so to make the guidelines more explicit that we have a bunch of tools that we're going to try to utilize, and what we may do in a differentiated product market where we're looking at unilateral effects, the precise meets and bounds are going to be less important than the competitive dynamic we're exploring.

The guidelines can say that and it sort of gives some guidance, and in products which are undifferentiated or you're looking at coordinated interaction, I think market definition -- the precision of market definition takes on more value.

The key concern I would have as an enforcer, and actually on the outside, is we have to move the courts along. We have a body of law that really focuses on market definition as the be all and the end all. When we litigated the Staples Office Depot case, we basically saw market definition as irrelevant to the competitive dynamic that was going on, but you couldn't litigate it

that way because the precedent wasn't there, and the judge clearly felt more comfortable that we gave him the tools to plug this into the traditional market definition.

Now, the guidelines can, as a matter of fact -- because they should say what they mean, mean what they say -- begin to move the courts towards an understanding of how the agencies think merger analysis ought to be done. But, I don't think it's a smart idea basically to abandon it all together or to move too dramatically in that direction.

MS. MCDAVID: One of the points that was made by some of the panelists this morning was that an important role of the guidelines isn't just for folks like me and for our clients, but it is in fact to bring the courts along, and you are stuck with the statute that has particular language in it, so unless you're going to litigate all of your cases under Section 5, you have the language of Section 7 that you have to live with.

MR. WEISER: You can't look at me when you say that. We don't have that option.

MS. MCDAVID: I was looking at him. So you're going to have to live with language of the statute. You have to live with the precedents, and you have to bring along a judge who in the morning is sentencing drug

defendants, in the afternoon is trying to define markets. I mean, they're not experts in this, and you've got to make it easy for them and intuitive.

Telling the story of why this competitive set matters and why the other alternatives like Lawson really weren't really, which in fact I think, Tom, your witnesses did, the judge just didn't listen, is what you have got to do. You have to have a story in which the econometric evidence fits with the documents, fits with the testimony, and it all holds together and tells a story of why the loss of competition between these two particular firms actually matters.

MR. WEISER: Tom, did you want to jump back in? Einer?

MR. ELHAUGE: I was going to say, the statute requires to define a line of commerce. It doesn't require defining a market, so you could have a bigger line of commerce, and I think often the difficulty with defining the market is they run very contrary to commonplace intuitions or they make things turn oddly on whether you can come up with a nice short linguistic phraseology for the market, so in this Whole Foods market case, what was that market defined as?

MR. WEISER: Premium natural organic supermarkets, also known as PNOS.

MR. ELHAUGE: So PNOS, so I think if you just said, "Look, the line of commerce is supermarkets, and there's this predicted price effect because they're very close to each other on the line of commerce," it's much more intuitive. It's true that legally you don't get an advantage of the prima facie presumptions unless you've defined a market and had a certain market share, but I've heard judges say, "Well, if the Agency didn't pursue the case on that basis, then unless they pursue it directly, then we wouldn't have to worry so much."

MR. WEISER: We had earlier a motion for the safe harbor model, where you have safe harbors and you use the broad market. Even if they're localized effects, you could find yourself in a problem area as well.

MR. ELHAUGE: That's another problem with the market if you couple it with safe harbors, because I think to many people the Staples market seemed counterintuitive because it's exactly the same thing being sold in different stores. One could have imagined that case defining the market as office supplies instead. The HHIs would have been low, below any safe harbor, but yet there were adverse price effects.

So it's not -- I don't think we really need a market. I do think though, I totally agree with Bill,

I'm not talking about abandoning the markets. In many cases actually the market is easy to figure out, particularly medical markets. There's just no substitute at all for something. Everybody agrees what it is, and then you might be able to rely on presumptions.

I'm just still talking about adding some alternative in the guidelines where you could pursue a case directly, and it would explain to courts what that would look like, because I think one difficultly in bringing the courts along is they look at the guidelines, and they don't see that approach clearly laid out.

MR. WEISER: So I want to make this even more complicated in the following sense: The guidelines' markets as traditionally constructed are what you might call producer centric and assume that producers are constrained by any other producer within the geographic area.

Overlooking -- with one exception, it's notable exception except people often gloss over it, the possibility that you could have customer centric markets where customers are treated differently. Some are more vulnerable than others because of price discrimination.

This I think is one of the ideas that was

lurking in the Oracle case and in the Whole Foods case and in both cases I think the challenge of bringing the courts along was brought home, so that raises a question: How can the dynamics of price discrimination and the possibility of some customers being left more vulnerable than other customers be well framed and analyzed through a merger review process?

Jan, do you want to take a whack at that? How is that happening now? How can it happen better, and can a possible revision of the guidelines be valuable in clarifying this issue?

MS. MCDAVID: I think the price discrimination concept actually makes a great deal of sense. There are some customers who are more vulnerable. The key is also explaining that not only are they more vulnerable, but they can be identified by the merging parties and targeted in some ways because unless that's the case, I think it is really much harder.

Once we start thinking about particular firms as possible victims, then we also start thinking about who else might be able to serve them and what are the practical alternatives available to those firms, so it takes you back to what I think is part of the core of the analysis, which is what's the competitive set, not necessarily the relevant market, the competitive set

that matters for purposes of analyzing this particular transaction.

MR. WEISER: John?

MR. FINGLETON: I'm not sure I have so much to say about this. The UK statute allows costs to one set of consumers to be offset against benefits to another in the same merger, even across different markets in the same merger. We've rarely used that provision.

I think that we tend to look at the set consumers as a whole and whether we think the merger would be good or bad for them taken as a whole, and we try not to get too involved in distribution issues amongst consumers if it's in the same relevant market, and I think that's very difficult to call, and I can't think of a case off the top of my head that particularly illustrates something that would be useful for others to look at.

MR. WEISER: Let me add one concept, which the EC guidelines have that the U.S. ones don't. Power buyers or powerful buyers or whatever term you want to use could be buyers who could protect themselves for any number of reasons, but there could be other buyers who let's say are less capable.

That's a dynamic in the market, which you can imagine where the powerful buyers can protect everyone

because you cannot price discriminate or you can imagine where they can protect themselves, and they're not hurt by the merger. They're not willing to complain about it but others are going to be hurt.

MR. FINGLETON: But then there would be consumer harm, and it wouldn't be obvious that there was compensating benefit on the other side, so I think either it falls in the side of, there's a group that suffers, and it's not obvious that other groups of consumers do well, in which case, it's a problem, or we have a situation where there's one group of consumers that does well, and another group does badly, and it's difficult enough to work out if somebody suffers as a result of the merger, but it's quite another order of magnitude to then calculate where the one group of consumers is better versus another.

We do try to think through that, but I'm struggling to think of a case where that's come up and where we've resolved it satisfactory. We see it in sort of cases like transport where two bus companies merge, and some of the consumers have alternatives to traveling the train and others don't, and so you get a pocket of consumers that don't have a competitive alternative so the market definition is sometimes wider for one set of consumers than another.

But in those types of cases, either they're de minimus, too small to worry about, or we think there's a problem and we send it off to the Competition Commission.

MS. MCDAVID: The absence of much articulation about what a powerful buyer means in the guidelines is one of the holes I'm hoping you're going to fill, because it happens all the time that my clients say, of course we can't harm these buyers, these are the largest, most sophisticated companies in the world. And then we walk them through, "Well, exactly what they would do."

Assume you raise prices or assume you reduce the output, what alternatives are practically available to them? So we talk about whether they could sponsor entry, whether they could vertically integrate. There are a range of options available -- I would like to echo the praise that John Thorne gave this morning to Mary Lou Steptoe's article about power buyers, which I think is a really coherent explanation of the range of alternatives that might work out and how that would be analyzed.

But, you've got to do that next step. It's not just enough, as too many of my clients think, to say these are very large, sophisticated, powerful companies.

MR. WEISER: Einer?

MR. ELHAUGE: I guess I'm very skeptical about the powerful buyers defense, much like the merger commentaries seems relatively skeptical too, and part of it is for the reason that you mentioned, that they might just protect only themselves, but I think it could actually even be worse. That is, if you're a power buyer and you've buying at a price that's competitive, the upstream price is competitive, you can't get an advantage over your rivals, but if it's super-competitive, you could get a special discount and thus -- if you're passing on most of that price downstream, you can create anticompetitive effects at the next level and enjoy even more power at your level.

So a powerful buyer may actually have affirmative incentives to favor a merger that creates a super-competitive price increase because that's where they get a special advantage -- in order to engage in various vertical agreements that creates super-competitive profits and then split them.

So I don't think we can assume that powerful buyers either are able to offset the adverse effects nor the whole market or that they'll be motivated to do so.

MR. WEISER: Tom?

MR. BARNETT: Two comments. I'm not sure I

should give the names, so I will say as a DOJ economist once told me and to be clear, I don't see him or her in the room, but if you're a power buyer and you have the pre merger world where you have these two firms and you had the post merger world where these two firms are combined, everything else is the same, but you may have lost some bargaining leverage, so the power buyer is not -- I agree with Jan, not the be all and end all of a defense.

You need to work through exactly what it is they can do, and it may be that large sophisticated buyers that the sellers may exercise market power to are more constrained than if you have smaller dispersed less sophisticated consumers.

The second comment is to come back to your question about price discrimination, the guidelines, while they don't have an extensive discussion of price discrimination, do currently identify the key factors, as Jan points out. The fact that there are some consumers who might be disadvantaged only matters if the sellers can know that and offer them a different price. If you can establish that, the framework is already there to bring a challenge.

So I guess the question is whether somebody is suggesting that you need to do something further.

MR. WEISER: Let me put that to you, Bill. The idea would be the courts, and I think you said this before, we have to bring them along and they have not, at least in Whole Foods and the PeopleSoft cases, been as comfortable, and maybe the agencies haven't explained the issues well to them, that there could be price discrimination going on.

Are there ways to better frame, articulate, explain the relevant concepts that the guidelines could accomplish in this regard?

MR. BAER: Well, Tom is certainly right. The concept is in there, and it was a good first start at the concept. I do think elaborating a little more, and if you do it in the context of making the guidelines process appear to be less step wise and more balancing of various factors, you can get there and, I think, help inform the court.

MR. WEISER: Einer, let me start with you on a suggestion that comes to us: Tim Muris on the opening panel said one of the most important things, if not the most important thing, that the guidelines could do is be transparent about what analytical tools the agencies use and what types of evidence they look for, and he I think said or others have said things like diversion ratios and price cost margins as well as the documents of the

companies at the time when they're looking at, other competitor's documents are some of the most important tools and evidence respectively.

Others have noted that the history of a maverick by a firm might be a particularly salient. Do you think, A, that exercise is one that we should concentrate on, and, B, what candidates do you have for insightful tools or types of evidence that should be focused on?

MR. BAER: First of all -- was that to me?

MR. WEISER: I was going to Einer first.

MR. BAER: Go ahead.

MR. WEISER: You can go second though, Bill.

MR. ELHAUGE: I think that would be a good idea, and I think diversion ratios, and to the extent you're using critical loss or critical elasticities, and outlining some of the virtues and problems with all these, the original merger guidelines are a great advance, but I'll give you one data point.

When I edit my case book in antitrust I've increasingly just come to the conclusion they're just totally inadequate to prepare my students because there are all these other techniques that are being used, so I have this huge section of merger commentaries in there, and those are terrific. They add a lot to it, but

they're long, and they're not quite written in the guideline type form to be as accessible and as directive, so I think that would be a move in the right direction.

MR. WEISER: This is the law professor case book writing constituency for the guidelines.

MS. MCDAVID: It's a small price discrimination market.

MR. WEISER: Bill, you want to add to that?

MR. BAER: Actually I agree with the way Einer phrased it. I think this notion of describing in the guidelines what the toolkit is, what are some of the things that are in the toolkit, again, is a helpful device to inform a whole bunch of people including, the courts, about what folks are looking at.

MR. WEISER: Tom?

MR. BARNETT: I'm going to come back to this notion that you have a richer array of guidance tools available to you. The merger guidelines are only one. Indeed they're a small minority, and I think it's important to focus on what the purpose of the guidelines is, and to me the current guidelines have endured and I think achieved a lot of success and consensus because they're pitched at a fairly high level of generality.

They set a framework. They identify the issues

to focus on. They do not attempt to tell you about the econometric du jour, and I think it's a mistake for the agencies to try to interject too much of that into the guidelines. You could list the toolkit, but then people would say, well, what do we do with the tools, and it's going to be very difficult at the guidelines level to get into that, and I'll be specific.

Upward pricing pressure, very interesting articles. Should that be something that we're talking about and debating? Absolutely. Should that be in the Horizontal Merger Guidelines? Absolutely not, not today.

We may at some point get enough of an understanding, enough of a consensus about how to do critical loss, how to do UPP, how to do whatever, that you can say things in the merger guidelines, but I would strongly suggest that today is not that day.

MR. WEISER: I want to come back to that point, but first I want to add a different criticism of the toolkit that I thought Tom was going to say, but he didn't say, so I'll add it and let Jan react.

If you do the toolkit, including let's say upward pricing pressure, diversion ratios, critical loss, then what happens if there's a new tool out there? Is it somehow not favored because it's not in the

guidelines? Some people said that's a real reason to be cautious about how to do this. Tom has a different one in there which is: The guidelines should only include something with maybe a high level of confidence or consensus or experience tested. I guess that would be a second one.

MR. BARNETT: I'll take that amendment. I would have intended to include that. The whole point is that the debate about these tools, which ones to use, how to use them, is something that should occur at a level below, in specific actions and commentaries and articles, not in the guidelines level.

MR. WEISER: So having taken the amendment, I'll put the pushback on the table and let Jan react to both sets of the whatever, so the other one is: Well, if you took that very seriously, then Baxter would never have put HHIs in the guidelines because at the time he did that, it was still a topic of economic discussion, but there hadn't been tested as much.

So how do you resolve that tension between capturing best of learning as well as waiting until you have a higher level of experience?

MS. MCDAVID: Well, not all of these tools are appropriate for every case, and I start -- I always start with kind of the more traditional evidentiary

tools, ordinary course business documents. The first things I ask for, the first thing I always ask the client: What do you want to do and why? And, the why part drives a lot of the analysis, but the why part then takes us naturally to the strategic planning documents, to the marketing planning documents.

We go back with those several years, and then the routine win/loss bid data, that many companies keep regardless of whether they bid or not -- they keep track of who they lose their business to and why, and who wins and why, and that stuff frankly gives you a snapshot that is usually a pretty accurate reflection, and the rest of it I regard as refinements, and maybe not even necessary in many cases.

MR. WEISER: So win/loss data is essentially, to put it broadly or crudely, a close cousin of diversion ratios? Who are you losing business to?

MS. MCDAVID: Preexisting data set.

MR. WEISER: But the difference is it's a preexisting data set that you have, so I guess there's a question as to how you marry the concept of types of evidence and analytical tools. Obviously analytical tools are drawing on some types of evidence. One might be more comfortable with types of evidence than with analytical tools?

MS. MCDAVID: Will the diversion ratio data take you to the same place that the win/loss data do and tell the same kind of story? Then, I would be a lot more comfortable with, and be more likely to use it in a particular case?

MR. WEISER: John, how do you resolve this?

MR. FINGLETON: First, I would rely on internal company documents as a rationale documents. We rely probably more than you do on third-party commentary, and that's because of we are an administrative decision making body. We are required to listen to what third parties say, including competitors. We don't necessarily have to put weight on competitors, and we've tried not to, but we have to listen carefully to what they say about the deal as well, and our stakeholders have looked for a lot more detail in our guidance.

We also have to publish recent decisions in all cases fully, including clearance cases, and that necessarily means -- actually one of the good thing is the parties now increasingly come to us with the evidence prepared in advance, so they'll bring the survey evidence in. They'll come with the economic evidence, and we try to give a lot of clarity about what evidence we want.

If I can make two side remarks. One is on the

maverick, and it's on the substance rather than on what the guidance should contain. The banking merger that went through our parliament, it had had been a maverick in a previous study earlier, two years ago. We had seen it as a maverick in the market, but what had become obvious as we looked at it more closely in the context of the merger was that as its market share converged on the market share of the other banks, its behavior was less maverick, and that set me thinking about what a definition of a maverick should be.

And I thought, well, maybe the definition of a maverick should be a firm whose committed strategies are different in a symmetrical equilibrium, rather than a firm whose competitive strategy was just different, because otherwise you confuse the size effect, because smaller players in lots of markets where there's switching costs and so forth are necessarily going to a more aggressive growth strategy, and you could confuse that for maverick behavior.

I came and asked people on this side of the Atlantic whether there was any case law or cases that teased out these two effects, and I didn't find anything, but I just think people used this term, bantered this term maverick about, and I think we're still looking for a definition for that.

The other area where I think we are unclear and I think one leaves them open in the guidelines but one flags them up as issues that need to be addressed, and the other where I think this is most important is in efficiencies, because I think we think efficiencies are more likely to be useful in non horizontal cases, but we struggle to incorporate the into horizontal cases like the Global GCAP merger, where we did take account of efficiencies.

We tried to distinguish the supply side, which is also the capabilities efficiencies from the demand side, which are more about incentive efficiencies, and we're increasingly wondering whether we should be as rigid about marginal cost reductions, or whether we should allow fixed cost reductions based on evidence that we see about average cost pricing.

So we struggled with these areas, and I knew the really important thing in the guidance is to keep open the possibilities that you develop new ways of doing these things and not necessarily to crystalize one approach, but to set out the set of factors you will take account of and to relate it back to the consumer welfare test, because you need to make sure that you can find a link between harm to consumers or harm to the competitive process and the particular evidence you're

looking at.

MR. WEISER: So that nicely sets up the context here, which is the next question, unilateral effects. The '92 guidelines did just that. They said there's another species of harm than the coordinated effects species that had been the motivating case of the prior guidelines.

It's unilateral effects, and it didn't provide a great deal of explication as to how you identified, diagnosed and evaluated unilateral effects, which has allowed the last 18 years to do that.

The question for a possible guidelines revision is: What, if anything, can be done to provide greater analytical clarity? What are the tools for determining unilateral effects?

Earlier I think the suggestion was HHIs and market definition, call it the hypothetical monopolist test and the SSNIP, may not be the best tools in all unilateral effects cases, and I think a couple people said that you had the dynamic of trying to, if you will, do it at the back end after you identified the harm, but that of course still begs the question: How do you identify the relevant harm in the unilateral effects cases, and are there general principles that one glean?

Jan, do you want to start with that question?

MS. MCDAVID: Well, it's pretty clear, you just have to read Judge Walker's decision, to know that the unilateral effects discussion in the guidelines wasn't terribly useful to him so he crafted his own, which required a merger to monopoly. I don't think any of us, even those on the defense side, think that really should be the standard for unilateral effects.

One of the things you have to get to in all of this again is: Does the elimination of the competition between these two particular firms really matter, and what alternatives will remain available? And you have to find a way to articulate that, and the 35 percent standard in the guidelines isn't well articulated. It's not clear what it means, but the one lesson I take from it is if the combined firms only have 35 percent, there are likely to be a lot of competitive alternatives. So if you're going to try to challenge that case, you're going to have to explain to somebody why they don't matter.

Now, customer evidence is really important here too, and I would like to go back -- it's slightly relevant but it also goes back to the toolkit. Obviously, the agencies rely enormously on customer evidence. It's not evidence that is available to us as the merging parties, but I think it's really important

and is critical.

Saying something about the value of customer evidence might actually validate it in a way that requires the courts to take greater notice of it so that someone, like, say Judge Walker, doesn't just say, Daimler Chrysler didn't walk in here with an Excel spreadsheet that explained all of the alternatives they considered and how they monetized them, and demonstrated that indeed Damiler Chrysler's testimony that the loss of this competition mattered to them was therefore not credible, if you find a way to explain the value of customers in the guidelines, judges may take better notice of it.

MR. WEISER: John?

MR. FINGLETON: Well, we have adopted an approach of applying a rebuttable presumption that if we see high diversion ratios, high price cost margins, it gives rise to potential unilateral effects problem, and we've done that -- the CC, the Competition Commission, hasn't done it to quite the same extent.

I think it reflects a concern of getting dynamics right. In particular what we're trying to do is to see how big is the jolt to the system, how big is the equilibrium likely to change, and try to get a handle on that. I will stress that the presumption has

been rebutted in several cases, so we have allowed mergers through where parties have been able to provide evidence to rebut it?

MR. WEISER: Do you call that upward pricing pressure?

MR. FINGLETON: Yeah, it's another way of describing it.

MR. WEISER: Is that in your guidelines or going to be in your guidelines or that's just sort of everyone knows that's what you do?

MR. FINGLETON: It's a decision of practices emerged, and we're currently discussing whether to put it in our revised guidelines, which we're hopefully doing at the same time, and hopefully doing as a joint project with the FTC and EC. So we have similarities with you.

The other thing that has been really interesting is that the presumption has been mostly used in an exculpatory sense because it's been applied mainly in retail chain mergers, where supermarkets, home improvement stores, movie theaters, book stores, these types of mergers where you have overlaps in dozens or hundreds of localities and where there's been a useful way of teasing through whether there's competitive effects in it.

Once we have worked out the areas where there are overlaps, and so we use it also to try and filter the analysis in some way. So, I think we're very happy with the use of it, and this is just a part of the measuring the unilateral effect directly and trying to get and trying to get to the heart of the issue quite quickly.

MR. WEISER: Einer, do you share that confidence, that you can measure the unilateral effects directly through these sorts of tools?

MR. ELHAUGE: I guess my confidence instead, it's better to try to measure them directly than to subjectively guess about them, and that the 35 percent quasi safe harbor is affirmatively misleading it seems to me. Often it bears no particular connection to whether the diversion ratios are high enough to create this price effect, and that part seems to me definitely should be changed in the current guidelines.

The guidelines do not a bad job of intuitively explaining what's going on. To me, the problem is it remains too subjective, that is, are things close enough? Is it easy enough to reposition? These are all potentially measurable things and, unlike Tom, I think the upward pricing pressure model is very useful.

You could have a useful presumption of that. My

concern would be whether it goes far enough. That is, it seems to me it nicely quantifies part of the equation, the cross elasticity among these particular merging parties, but the repositioning is still left rather subjective, and if we believe we could understand the likelihood of other firms repositioning, then we actually have basically an elasticities measure, and we could actually predict the price effect.

Generally the presumption is designed in that, it seems to me, upward pricing pressure to predict that a price increase of more than 5 to 10 percent is likely, so we might as well give an actual figure to it. But, as a shorthand that's useful to just sort of presumptively indicate is this likely to be of concern, I think it would actually be a big advance over the current guidelines.

MR. WEISER: Tom, what should the guidelines say about unilateral effects? Do the current -- sort of the more parsimonious language give the courts enough guidance or is there more that can be said about how to think through the analysis?

MR. BARNETT: Well, the one thing I guess I would say that the guidelines might more usefully do, although I don't have the answer to this, is to define a little more precisely exactly what is a unilateral

effect versus a coordinated effect, and I will say that when I was at the Division trying to work through this in the commentaries, we wrestled with this, and it can be very difficult, particularly once you start getting into the economics world, what kind of game are you talking about? Cooperative, or non-cooperative game? Are you taking into account the reactions of other players?

Now it sounds like it's a coordinated effect but it's a unilateral effects model. That's something that can create confusion, and this is at a sort of basic fundamental level that's worth trying to clarify.

Beyond that, is there room for further clarification and education, for judges, for practitioners, for staff people about this? Absolutely. Are we ready to enshrine this in guidelines? I kind of doubt that, actually, because there's a lot of debate. Einer finds the UPP process very helpful. Others find it to be subject to substantial criticisms and are more critical about the inferences that you can make from it.

I've had extensive debates with very knowledgeable people about how you do critical loss properly, and some who say if you have a high margin it's going to lead to a presumption in one direction and others who argue quite credibly it's going to lead to a

presumption in another direction, depending on the likelihood of lost sales being unprofitable versus the suggestion that you already have market power.

So, I think it's an area that is worthy of further study and development, but I'm going to sound like a one track record here. I'm not sure it's at the guidelines level. I think it may be a step below that.

MR. WEISER: Bill?

MR. BAER: Let me just -- a couple quick points. First of all, I endorse Tom's point about keeping the guidelines at a is certain level of generality, that too much economics jargon, which was the semi-humorous point I was trying to make with regard to John, ends up confusing people: Committed, uncommitted entry? Give me a break. Why do we need to do that?

So, there's that. But, also I would like to offer a vigorous defense of the use of weasel words that describing where directionally the agencies are going to go, more likely here, less likely there, is almost necessary. These guidelines are descriptive. They're descriptive in analytical process, but the more precision you try and put in, the more trouble I think you get yourself into.

MS. MCDAVID: Well, I agree with that. The reason the guidelines have lasted as long as they have,

frankly, is because they speak in generalities without examples and specificity. And, as Tom has pointed out, you have lots of tools available to explain more specificity, and I would encourage you to do the specificity through that stuff.

MR. WEISER: So one thing that Tom referred to, I want to pick this particular point up, is coordinated effects. Of the 20 questions, we actually didn't ask one specifically on coordinated effects, although it's lurking in many places, indeed was the motivating concern for the original guidelines, and there are a couple slices to the question, I will put out there and, Bill, you can start off on it.

One is can you have coordinated effects harm and unilateral effects harm in the same case as a theoretical or maybe as a practical matter in the sense you have to come up with a way of how to conceive of how to show both harms? Can coordinated effects be more associated with HHIs and unilateral effects with other tools? Or is HHI relevant to both types of harms? And, the presumption, should it be held to continue to exist, should it apply to both types of theories?

Third: What other types of evidence, market factors are relevant to think about a coordinated effects case?

So, Bill, do you want to start off?

MR. BAER: Sure, but I'm going to skip question one because I haven't thought about it enough to really have an informed view on it. I do think, and I think I said this at the very beginning, it may be worthwhile for the guidelines to distinguish between the importance of defining the market in a coordinated effects case and that it is less important in unilateral.

If that's what we do, we should say that's what we do. And so I'd do that. I think that talking about the evidence in a coordinated effects analysis, the evidence of past behavior, of trying to make it clear that we aren't necessarily talking about coordinated interaction that is necessarily as explicit as the guidelines seem to imply currently, to take that down a little bit of a notch, to suggest you're looking at a market that already shows some indication that it's an oligoplastic market, and you're going to apply a higher level of scrutiny to a combination of significant players in that market.

MR. WEISER: Tom, you invited the question that we should say more about coordinated effects and how they fit or don't fit the unilateral effects. Do you have any of thoughts on that topic?

MR. BARNETT: Well, first of all, I'll answer

your first question. I think whether you can have those in the same case as unilateral effects depends on your definition of the two effects, so my favorite answer as an antitrust lawyer, it depends.

I think the guidelines right now have this list of factors that you consider, and we can all sort of get our arms around the maverick theory in some way, although as John has pointed out, we have to be cautious about that even, but they don't really do much beyond that. And, I think a number of folks I've spoken to before about the relative lack of coordinated effects theories in merger challenges in the last 20 years, that may be an imperfectly appropriate level, but it may also be because they're really hard to prove when you've just got a laundry list of factors.

So some thought about the way in which parties can coordinate in addition to just pricing. There are other dimensions of competition that you can coordinate on where you may have the transparency and whatnot, case studies to examine how coordination appears to have occurred, tacit coordination appears to have occurred in the past, may inform the agencies as they move forward.

So, at the guidelines level, I wish I could tell you I know exactly what to say about coordinated effects, other than say I think it's worth further

study.

MR. WEISER: Einer, any questions on coordinated effects in particular? Are there insights from game theory? Mark Cooper suggested on the first panel today that could be illustrative. To what extent do we have enough knowledge maybe from empirical cases such as learnings from experimental economics that certain structural contexts, four to three, three to two, what have you, make coordination much more likely? What's the right way to think about coordinated effects?

MR. ELHAUGE: A few things. On that question I think we really could use a lot more empirical evidence. The empirical evidence we have is relatively scant, and it would be nice to have big cross-merger studies that not only looked at what sort of HHIs levels led to certain price effects, but which particular factors were present.

When I reviewed the literature, it seemed to me the biggest one I could find is the Stewart and Kim study that looked at 119 industrial areas and found that overall horizontal mergers increased prices by 1.5 percent, which actually tends to suggest we're allowing too many mergers -- particularly when you take into account Dennis Carlton's point that in an ideal world, if you're not allowing any anticompetitive mergers, the

average price effect should be negative from a merger.

So, I think we need more empirical evidence. I'm afraid we don't have that fine engrained. Experimental evidence seems to me somewhat mixed, and so I have a hard time drawing strong conclusions.

On your question about whether you could have both in the same case, unilateral and coordinated, I think the answer is yes, and in fact perhaps the worst case is where you coordinate on not invading each other's product space or geographical space, which in some ways was what the Court in Trombly thought was going on, that they weren't conspiring not to invade each other's geographical markets, but in fact were coordinating on that. That could affect also the repositioning.

I think there's also a theoretical question about Cournot effects. As I read the guidelines, I'm not clear where Cournot effects fit in. They're not quite unilateral, and they're not really coordinated in the description that the guidelines give them, but yet they could lead to adverse price effects when the conditions are met, so it seems to me there should be some clarity in the guidelines about that.

Lastly, the one big issue I see as a practical matter is what I call the Catch-22 problem with

coordinated effects, and that is this: The courts tend to say, "Well, prove to me there's actually coordination going on. Otherwise I don't believe that this market is susceptible to coordination," but if you prove there's actual coordination going on. They say, "Well, why is the merger going to make anything worse? We already have coordination, so this merger doesn't really worsen anything."

The one sort of exception one can offer is the maverick one. You eliminate a maverick, and I think John is exactly right that we need more precision about that, but that's not the only way in which a merger might increase the degree of coordinated effects. But, again, there I think we need more empirical evidence, studies to show what sort of factors, particularly for that market, what the effects have been from past mergers.

MR. WEISER: Let me go to John and just throw out there something Lou Kaplow said in the New York workshop, which is unilateral effects, if done well, you have a high degree of confidence of a small price increase. Coordinated effects, if done well, you have a somewhat reasonable degree of confidence that could be a much more significant increase in price. Is that an accurate way to think about these two theories, and if

so, what do you do about it?

MR. FINGLETON: No, that doesn't resonate in quite that way. We try to apply the test which is basically these three limbs: Can they reach and monitor in terms of coordination? Is it internally stable so is it incentive compatible internally and is it externally stable? Are there barriers to entries, small players, et cetera, et cetera.

So it's a nicely framed test that goes with the economic literature quite well. We found that more useful to apply in market sharing than in price coordination cases, where there's a concern that people might be dividing up markets. I think there's a problem. It's a type of catch-22. It's a different catch 22 than the one Einer described here.

There's this concern that you need to be able to show in some sense -- there's already some coordination, some possibility of coordination, and the merger will on the margin increase that, which raises the question about it's relationship with cartel cases, and should you be investigating cartel in some of these industries. So that creates a problem, and so the impala, sort BMG case law coming out of Luxembourg poses a potential in that regard because it seems to increase the bar there.

The other thing I wonder is whether we have

understood enough from what we know about cartels. Kolasky had a nice paper that had Dead Frenchmen in the title where he had gone -- and so some of the cartels, you see 15 players. I mean, was that the New York school milk case where 25 players -- I can't remember all your American cartels and international ones, but often these cartels have quite a lot of players.

So when you look at what we know about cartels, and then when you look at the plus factors approach, where there's a zero coordinated effects, one has to be reasonably agnostic, but I wonder if we are intelligent enough in linking up what we know from our cartel practice with actually what we should be looking for in some of these cases.

So I think there's a relationship between coordinated effects and what we do in our cartel work. It is not fully developed and articulated so I'm not answering your question.

MR. WEISER: We got you here to help, not make it harder. We just got, what was it, two different ways in which you said sort of both ends against the middle or damned if you do, damned if you don't. We have to show that there is some coordination, and then if we've shown it, then we have to answer: Why is this actually going to make it any worse?

MR. FINGLETON: Why didn't you take a cartel case?

MR. WEISER: Then you have to show why we didn't go after the cartel case. Jan, can you help us out here.

MS. MCDAVID: What we effectively have is a checklist because the analytical framework doesn't really exist. Maybe the case you guys filed against Dean Foods, which appears from the complaint to be on a coordinated effects case, will help us eliminate this.

MR. WEISER: Not if you guys are throwing out more difficult challenges.

MS. MCDAVID: Arch Coal was a lost opportunity in that sense.

MR. WEISER: Tom, can you offer some light?

MR. BARNETT: Well, I don't know about light, but a couple observations on the idea of coordinated interaction versus cartels. You can sort of read that a couple different ways, one of which is -- I'll make the basic point, it's a lot -- my impression, not ever having been a member of a cartel, is it's a lot easier to coordinate when you're sitting around and directly expressly communicating with one another, and so doing that with 15, 20 players is a lot more plausible.

One might ask the question if coordinated

interaction, which is lawful in the United States, was so effective and efficient, why would you see so many cartels? It suggests that there really is a substantial difference if people are willing to take the huge criminal risk associated with going from coordinated interaction to cartels, so I, at least, am skeptical of reading a little too much from the cartel experience.

MR. WEISER: Let me get to the final question, which is the guidelines '68, '82 were forged in the age of steel. We're now in the age of silicon or software, whatever technology metaphor you would like, and that begs a pretty big question as to: How do you build in more dynamics into a model where some has argued it was overly static and focused on price as opposed to, let's say, innovation?

What sorts of lenses, and what sorts of evidence and analytical tools are appropriate to deal with that different context? Jan, do you want to start?

MS. MCDAVID: Well, I think we all recognize that competition takes place across a number of dimensions, and price is only one of them. Innovation is another. Promotion is another.

There are a whole range of things, but they're very hard to measure, and I don't think we have any firm views on how many noses you have to count to have an

effective number of innovators. Is ten really better than three? I don't think we've good much data that suggests that that's necessarily the case.

I would suggest that for now, especially because I do believe as we were talking about earlier, the generality is important in the guidelines in order to make them endure the way they have so far. Talk about the fact that the other kinds of competition are important, but that they're going to be very fact specific, because the whole thing is fact specific, guys. It's really not a cookbook.

MR. WEISER: John?

MR. FINGLETON: I think the principles are the same. You try to work through these cases in the same way, but you think about the effect on R&D, instead of the effect on price. And, yeah, sometimes it's harder to measure these types of thing, but I don't think it should be different.

MR. WEISER: Einer, I guess to ask you the harder version: Some say it's not more difficult to measure, but if you're measuring things that haven't happened, and there is no past track record, right. For a lot of the unilateral price effects, you can look at scanner data. You have a nice data set. If you're talking about innovation and dynamic markets, that may

not be available to you, so what do you look to?

MR. ELHAUGE: I don't know. I guess on this, I'm inclined to the view that we're not yet at a point where we've developed methodologies that should be enshrined in guidelines, or the literature seems to me too mixed, so it may depend on how drastic the innovation is, where someone with market power has more or less incentive to engage in that kind of innovation, may turn on the market, how many innovators you need. It may turn on the kind of innovation. It may be that patents offer enough protection, but there is other innovation for which industries don't use patents, and so they need the market power that they get from having a high market share, and they're more likely to engage in that kind of innovation.

I just think it's a bit too hard to generalize in a way that could make for useful guidelines at this point.

MR. WEISER: Tom?

MR. BARNETT: Well, with respect to trying to address the dynamic aspects of the economy, I agree with the comments, it's inherently more difficult. I agree that the principles are the same. I think that was the question the antitrust modernization commission addressed quite expressly and said the principles are

the same, and you can apply it to high tech dynamic markets, even though it's more challenging to do so.

In many of these instances, with all due respect to my economist friends, you play less of a role because you don't have scanner data. It's a more qualitative assessment, and economists play a role, but it's more of a combined legal business, economic judgment perspective.

With respect to -- you didn't ask about it specifically, but this whole concept of innovation markets that has gone around, my general view is it's that's not the best way to look at it. The best way to look at it is how does this translate into real products and services that either are or are going to be offered in the market.

And the Federal Trade Commission deals with this on a daily basis in the pharmaceutical industry, and their analysis seems to me generally right. Is this going to effect the competition for products that are on the market at some point in the future, a difficult thing to assess admittedly, but that at least grounds the analysis in a way that is very important.

MR. WEISER: Bill?

MR. BAER: Tom's last point I embrace totally, that whole fear over innovation markets when those

guidelines came out was somehow it was going to be a device for the agencies just to circumvent traditional analysis, and whether anyone intended that or not, it's clearly not worked out that way.

It really needs to be grounded in some sort of look at potential competition and development that isn't all that far away from market, and if you ground it in that, you basically I think can get your head around the concept and come up with something that's defensible and is guarding against a legitimate, potentially worrisome outcome.

MR. WEISER: Any questions from our audience members? All right.

I will give you each a minute to kind of sum up. I think we've heard Tom's rallying cry, but you're able to give it one more time, Tom, if you want. Do you want to go first with any guiding advice?

MR. BARNETT: Well, I will say I gave Phil a short paper, which I will give you an electronic version so it can be posted, but the high points are the only best practice is to continually strive for better practices. That's Bill Kovacic's admonition. You're doing that here, and I applaud you for it.

Providing guidance is a better practice. Guidance is a hard thing to do because ultimately you're

constraining your discretion, and that's counterintuitive for many agencies.

Use the guidance tool that is right for the case, in other words, don't forget about commentaries and data releases. Don't fix what isn't broken, self-explanatory.

Market definition provides an important discipline when taking enforcement actions. Put HHI thresholds in proper perspective, meaning no presumptions of harm basically, and don't forget about efficiencies which you dealt with before.

MR. WEISER: Bill?

MR. BAER: Well, if you look back, what is it 18 years, it's remarkable how merger analysis has evolved. It really is, but it's also sort of impressive to look at what remains as the core of these '92 guidelines, and I think that's a concept we need to make sure we don't lose. As Tom Copper talked about this many years ago as the obligation of the story teller, that is to put on the parties and the agencies the discipline of explaining what has happened in the past, what's likely to happen in the future.

And, having that notion of explanation and articulation, Tom makes I think the very valid point that this revision of the guidelines is just one step in

an continually improving process on the part of the agencies to talk about and explain what they do. The data releases continue to update the commentary which is just so helpful I think to help people make informed choices, to help the courts understand what the hell is going on when they see the one antitrust case they'll see in six or eight years, and have to make some quick and important decisions.

MR. WEISER: Einer?

MR. ELHAUGE: I don't want to repeat any points. Let me just say a couple other things. One, there's obviously as good reason to change the articulation of the thresholds since they don't seem to reflect modern practice. But, I am a bit worried about it because it's not like we have empirical validation going from HHI 1,800 to 3,000 has actually been good.

We don't know whether, in fact, current practice is to strict. It could be that threshold should be higher 4,000, 5,000, I don't know. So I'm a little worried about proceeding on that without more rigorous empirical studies. So, I guess on that, I would urge the Agency to focus on the likelihood of investigation rather than substantive presumptions because if it's phrased anyway the judge could read as saying, "Oh, this merger is more likely than not, not to raise prices," it

will be read that way, and you're going to hamper yourself, especially in unilateral effects cases.

Second, we haven't talked about efficiencies at all, but one distinction I think that's important to make about efficiencies. Judge Posner mentioned in a recent article that I think might be useful to include in the guidelines, it's a distinction between things that just increase the market efficiency or that just increase the defendant's own efficiency.

So if you're just transferring an efficiency from other firms to the defendants in a case, it's not clear that on balance is improving the market in a way that leads to lower prices. And then lastly, I'm not sure whether this is within the gambit, but there are these sort of horizontal combinations that lead to partial ownership, that isn't enough to get working control, and there's enough sort of statements by the agencies to suggest that they view it as a viable theory that programs of having a passive stake, an ownership could create anticompetitive effects for incentive reasons.

Yet I don't think there's been an actual case where that's happened where there hasn't been also a working control argument, so I think that's when they could use clarification. Is that really going to be

pursued as a freestanding theory? If so, what are the elements that are going to be used for that?

MR. WEISER: John?

MR. FINGLETON: I was going to say very little, but Einer has prompted me to say two things. One is on efficiencies, is we look at efficiencies as part of the competitive effects analysis, and we try to think what incentives are there on the rivals to achieve the same efficiencies and what does the equilibrium look like? I think that's just an important aspect of doing efficiencies.

On the partial ownership, we have that rule in the UK and in fact, the Court of Appeals handed down the decision on the SKY TV shareholding forcing SKY to sell down its shareholding.

I think in that context, it's arguable as to whether there should be any defense for that because holding shares in a rival, you can think about one or two odd possible efficiencies around that, and our chief economist presented me with two reasons, and it didn't apply in that case.

But then, I think there's no compensating benefit, because you don't get any of the benefits of the merger so I think the standard should be different for that.

I was going to just make one general comment in closing, which is about the context of your guidance, under two different things, one is in an environment where you have to present cases in court, it's very important I suspect to have clear burden shifting rules, presumptions, et cetera, et cetera, and the guidance can set out what you're doing in that regard.

There's a whole other thing going on, which is about: What is in the mind of the decision maker who decides to press the gun to go down that route? And if the guidance is trying to elucidate that rather than to elucidated the various -- where the burdens lie and who should produce what evidence at what point in a court proceeding, that's different because there's two different games going on, and this is about the game before you get to court, about what's in the mind of the decision maker.

The reason I worry about things like very formal approaches in the decision making stage as opposed to the court stage on things like market definition is what you end up doing in the cases that are really marginal, where you really don't know whether the right answer is to refer, not to refer, in our case, clear or not too clear, you end up having a whole series of factors which you have to put different weight on, and what you want

to do is group those together.

You don't want to say, Well, I've carved those ones out, and then we've accepted the market definition because you risk double counting or you risk missing things, so you might have a bit of efficiency, a bit of buyer power, and so on, and you're trying to weigh those up, and I think it's really important that those are taken in the round together rather than separated out at as a structured thing in the decision maker's mind.

Then what we do is we think through Type I, Type II error when we're making those decisions, explicitly in terms of our decision meetings, so we try to think: What's the possibility and what's the cost of doing it that way? So we try to develop that type of approach inside the Agency in doing that?

It's very different than how you articulate it internally, but how do you that in the round analysis is I think what it comes down to, and anything you can do in the guidance to elucidate that more clearly I think would be helpful to the parties.

MR. WEISER: Andy Gavil actually mentioned that point, connecting the role of merger review to the coordinated effects to other doctrines, namely Section 1, and to the extent Section 1 is less robust, that puts more of the burden on Section 7 as it were, so you could

take that and even look at it more broadly with all your tools, if you will. Jan, you get the last word.

MS. MCDAVID: First of all, I want to applaud you guys for doing this. It's really hard, and I think you're doing it in a really good way, but it's important. The guidelines have provided an incredibly valuable framework for the agencies and how they think these things through, for the bar and the business community on how we think them through, for the courts to a lesser extent but hopefully you can continue to influence them and for foreign enforcers. I mean, the role of the mergers guidelines is clear when you look at the guidelines of foreign governments.

So updating these, revising them without a wholesale rewrite so that they actually reflect your practices and current thinking is likely to be important to all of those constituencies, but including John and his colleagues, not in the United States, and so I think what you're doing is great, and I am delighted you decided to undertake it.

When Bill and I were working on the transition task force for the antitrust section, we recommended it, and you guys picked up the ball, and we are really pleased.

MR. WEISER: On an international front, I think

we have to acknowledge John, first for coming over for this, thank you, and also acknowledge the level of development. When '92 guidelines happened, I don't think the agencies spent a lot of time thinking about what lessons we can learn from other countries, but now we're talk that very seriously, and it's a testament to a lot of the fine people abroad.

So thank you all so much. Thank you all for joining us today. This was very helpful.

(Applause.)

(Whereupon, at 4:52 p.m. the workshop was concluded.)

CERTIFICATE OF REPORTER

DOCKET/FILE NUMBER: P092900
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I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the steno notes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: FEBRUARY 1, 2010

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DEBRA L. MAHEUX

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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