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5 Horizontal Merger Guidelines Review Project
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25 Edward Leto, CSR

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1 P R O C E E D I N G S
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3 INTRODUCTION AND WELCOMING REMARKS
4 MR. WEISER: Let me welcome you all here to our
5 Second Workshop Review of the Merger Guidelines. For
6 those who are new to NYU, I can say that this is a
7 special place for me. I went here for law school and
8 graduated in 1994, and it launched my new career in
9 every way, including my interest in law and economics
10 and my intellectual curiosity for law was very well
11 cultivated here. I've had some wonderful professors
12 and some of them are here today.
13 We have to start by acknowledging Harry First
14 and Eleanor Fox. Where is Harry, and where is Eleanor?
15 They are truly the dynamic duo of antitrust and they
16 bring together expertise that they could have been
17 together on one panel where we discussed the
18 international and state levels of enforcement.
19 For those who don't know about Eleanor's work,
20 internationally, it's pioneering in every sense of the
21 word. It's great to have her here.
22 On that dimension, for those who don't realize
23 that Harry played a critical role in the New York
24 Attorney General's Office heading up the antitrust
25 division, working on the Microsoft case, you'll know

1 more about it when his book comes out -- it won't be
2 the first word, maybe it will be the last word on the
3 Microsoft case, probably not, but it will be worth
4 reading. It's worth reading.
5 Harry and Eleanor also run the program here in
6 trade regulation and are hosts today. Nicole Arzt in
7 the back is an organizer extraodinaire. The people
8 from the DOJ who worked on this, also Jeanie Miekel
9 deserves thanks and said, "Do you want me to come down
10 to watch to make sure things are well done?" I said,
11 "No, Nicole is here." We're going to be in great
12 shape. So, Nicole, thank you for your great work.
13 So we have a very simple agenda today. We are
14 looking to be intellectually engaged and to have people
15 from the audience as well as those on the panel provide
16 some thoughtful food for analysis and we are going to
17 have a wonderful menu of sort of courses over the
18 course of the day. For those who didn't see the
19 background, we have 20 questions that we put up on our
20 website. That was the starting point for analysis. We
21 got 37 comments there on the website. Today we're
22 going to chew over all of that with you. We had our
23 first workshop. We got a lot of good thoughts from
24 that experience and we're looking forward to this one.
25 Harry, do you want to say a few words before

1 introducing --
2 MR. SHELANSKI: Well, after listening to Phil,
3 I'm not sure if I work for the FTC or the FDA, or maybe
4 the USDA, but I want to thank all of you for coming. I
5 want to recognize Liz Callison, an economist from my
6 bureau who is going to be responsible for making sure
7 the transcripts of these proceedings are accurate and
8 edited, so watch what you say. This will all be a
9 matter of public record.
10 I really just want to thank everybody for
11 participating. This is a joint effort of the Federal
12 Trade Commission and the Department of Justice. Phil
13 and I are two of the people from the respective
14 agencies running this workshop. We had a workshop
15 earlier -- last week in Washington, which was our
16 kick-off. We have one in Chicago on Thursday. We have
17 one in Palo Alto in January and we will conclude with a
18 final workshop on January 26th in Washington.
19 So those of you who are interested in seeing
20 how these questions get answered from somewhat
21 different angles and perspectives across those
22 different workshops, you'll be able to find a webcast
23 of last week's conference as well as transcripts of all
24 the other ones available for you shortly after each
25 workshop takes place.

1 So without further delay, I'd like to introduce
2 Dean Ricky Revesz from the NYU Law School. Ricky has
3 just been a wonderful host and, also, I would say, in
4 many respects, a mentor to many of us. Phil alluded to
5 his time here at NYU Law School as a student. I was
6 not a student here, although my mother was, and I had
7 the privilege of being a visiting professor here last
8 year. I can tell you it is a truly wonderful place and
9 we're grateful to them for hosting this event.
10 Dean Revesz.
11 DEAN REVESZ: Thanks, Howard. I'm delighted to
12 have been invited to give you, like, a minute of
13 welcome, and then I will leave, and the average level
14 of knowledge about the subject matter in the room will
15 rise dramatically as soon as I walk out, -- this feels
16 a little bit like a faculty workshop last year since,
17 as Howard mentioned, both Howard and Phil were visiting
18 professors here, and I used to see them around as
19 colleagues. It's nice to now see them back as
20 exhaulted government officials and the law school who
21 thinks of them as part of the permanent academic
22 families, extremely proud of them. We're also really
23 proud. There won't be any law school that will have
24 more alums as FTC Commissioner, chair of the FTC, John
25 Lebowitz, is one of our alums, and Julie Brill, who has

1 just been nominated by the president as an alum as
2 well, so we feel good about that, and hopefully this
3 close relationship will continue.
4 So I was delighted when Harry and Eleanor told
5 me that the Justice Department, the FTC, had decided to
6 do one of their workshops of this sort of five-workshop
7 marathon around the country here at the law school, and
8 I'm really delighted that you are here.
9 Harry and Eleanor are terrific colleagues. I
10 know that our program is in great hands, and I was very
11 pleased when I found out they were going to have this
12 leading role in working with Howard and Phil in putting
13 this together.
14 So if there's anything that any of my
15 colleagues or I can do to make your day better and work
16 more smoothly, let us know. Nicole can pass along the
17 information. We really want it to be a great moment,
18 and thank you very much for being here. It's a great
19 honor for the law school.
20 Thank you, commissioner, for coming and for
21 moderating the next panel. Have a wonderful wonderful
22 day, and I hope great things come out of these
23 proceedings and that our nation will be enriched by the
24 discussion that will take place here today. Thank you
25 so very much. And I guess, Harry, one of the

1 organizers, is on the program to say a few words before
2 the first panel.
3 MR. FIRST: Well, you all know that I'm not
4 really an organizer of this at all. It's Howard and
5 Phil. So I want to thank them again and, Nicole, in
6 particular. Bruce Prager said to me that this is even
7 nicer than the conference room at his law firm where
8 the New York State Antitrust Section meets, so I want
9 to welcome you to NYU and to the facilities we have
10 here.
11 I did just want to put in another NYU plug in
12 addition to having Howard and Phil, who we consider now
13 part of the NYU community, which is great. This is --
14 as those of you who are here, and I see even some
15 former students, current students, a great time for
16 antitrust and a busy time for the law school. It is, I
17 think, really fabulous, particularly, for NYU.
18 So I just want to alert you to two things
19 coming up at the law school both of which are open.
20 The first is "The Next Generation of Antitrust
21 Scholarship Conference," which we're having here on
22 January the 29th and we're cosponsoring with the
23 Association of American Law Schools and the ABA section
24 of antitrust. It will feature 12 papers by -- I'd like
25 to think of them as younger scholars. They certainly

1 are younger than I, but the future scholarship of
2 antitrust, and there were applications, people put in
3 papers from really all over the world. This should be
4 a very exciting time. So 12 papers. People will be
5 commenting on them, and you can find information about
6 that on our website.
7 And then on February 19th, our Annual Survey of
8 American Law is having an antitrust conference. This
9 is -- in the whole time that Eleanor and I have been
10 here, the first antitrust conference, at least that I
11 can remember, that was put together by our students.
12 So something's happening out there, an interest
13 in the area that we find really interesting, and it's
14 going to be a fabulous and exciting conference with
15 excellent people. I won't embarrass Laura Collins,
16 whose sitting in the audience, and is really the prime
17 mover, but she's over there, and has put together an
18 extraordinary program to which again the community is
19 invited. So you can find both of those things up on
20 our website and I look forward to an exciting and
21 interesting day talking about antitrust. What could be
22 bad about that?
23 So, with that, I turn it over to whoever's --
24 how is this going from here? Who is starting the first
25 panel?

1 PANEL 1: WORKING WITH INTERNATIONAL
2 AND STATE AUTHORITIES
3 MS. JONES HARBOUR: Good morning. I'm really
4 delighted to moderate today's panel on Working with
5 International and State Authorities.
6 It is a particular pleasure to share the podium
7 with the talented group of panelists, most of whom I
8 have known for many years and all of whom bring a
9 tremendous amount of expertise to these joint FTC/DOJ
10 workshops.
11 As you may know, prior to joining the FTC
12 commission, I spent most of my career as antitrust and
13 consumer protection enforcer in the Office of the New
14 York State Attorney General. Not surprisingly, I have
15 a very high degree of respect for the intrinsic value
16 of State Enforcement. And, as my colleagues will
17 attest, that whenever the Federal Trade Commission is
18 involved in a major merger investigation or it's
19 contemplating a possible enforcement action, I always
20 ask them whether the States are involved and what level
21 of cooperation is ongoing.
22 So perhaps my background gives me a unique
23 appreciation for some of the complex coordination
24 issues that arise in the international context.
25 As a strong believer in antitrust federalism, I

1 have always been guided by the principle that each
2 state is sovereign and has the right to protect its
3 citizens as it sees fit, in addition to whatever relief
4 the federal government might require.
5 And along those lines, I'm often struck by the
6 parallels between State and International practice,
7 especially with respect to the interrelationship with
8 US federal enforcement. And that is why, as the FTC
9 and DOJ contemplate the possible revisions to the
10 Horizontal Merger Guidelines, the topic of today's
11 panel makes perfect sense.
12 Therefore, without further ado, let's begin.
13 And, in the interest of time, I am not going to read
14 our panelists' full bios, which I believe are readily
15 available on our website or elsewhere.
16 So let me just go ahead and very briefly
17 introduce the panel and then we're going to begin our
18 discussion. We have structured this program entirely
19 as a Q&A, in that format, so there will be no
20 affirmative remarks by any of the panelists.
21 We're going in alphabetical order beginning
22 with Melanie Aitken. She is the Commissioner of
23 Competition for the Competition Bureau of Canada. She
24 was appointed to a five-year term on August 4th, 2009,
25 having served as Interim Commissioner since January

1 2009 and in other leadership positions within the
2 Competition Bureau since 2005. Melanie also has
3 extensive experience in private practice before her
4 government service and she certainly has earned her
5 reputation as a rising star in the competition
6 community.
7 Jim Donohue is the Chief Deputy Attorney
8 General of the State of Pennsylvania and he's head of
9 the state's Antitrust Section, a position that he has
10 held since 1997. He has been with the Pennsylvania
11 AG's office since 1985. In July of this year, Jim was
12 named the chair of the National Association of
13 Attorneys General Multistate Antitrust Task Force.
14 Eleanor Fox who we all know and love is the
15 Walter J. Derenberg Professor of Trade Regulation here
16 at the NYU School and we do thank NYU for graciously
17 hosting today's session.
18 Eleanor is a renowned competition law scholar,
19 especially in the area of International and Comparative
20 Competition Law. And you will only have to look at her
21 bio to fully appreciate the depth and breath of her
22 experience. Eleanor is also of counsel at the law firm
23 of Simpson, Thatcher & Bartlett here in New York.
24 And last, but certainly not least, is Milton
25 Marquis, a partner at Dickstein Shapiro in Washington,

1 DC. And he is a member of the firm's State Attorneys
2 General practice. Milton has extensive government
3 experience with the Department of Justice's Antitrust
4 Division, as well as with the Virginia and
5 Massachusetts offices of the Attorneys General.
6 So, now let me open our discussion with a
7 question regarding the implications of
8 multi-jurisdictional review. And I pose this question
9 generally to the panel, and I'll let you jump in, but
10 core concepts from the 1992 Guidelines have been
11 incorporated into ICN Best Practices or have otherwise
12 been adopted by other nations, and are now routinely
13 applied by state enforcers as well.
14 So should we be more cautious about changing
15 some of the elements of our guidelines that other
16 jurisdictions have followed? Eleanor?
17 MS. FOX: Thank you very much. Thank you,
18 Howard and Phil, very much and also thank you for
19 agreeing to have this panel here which is really great
20 for NYU.
21 My answer is no, we should not be more cautious
22 in changing guidelines because elements are reflected
23 in guidelines around the world. We have to do the best
24 we can do in terms of guidance and analyzing mergers.
25 To me, it would be absurd to think, for

1 example, suppose we were back in our 1968 guidelines,
2 and the whole world had adopted them, and we have an
3 idea that is better than our 1968 guidelines and we
4 say, oh, no, we had better not change because this is
5 the standard for the world. Convergence is not an end
6 in itself. Convergence is what happens when you have
7 good ideas and other people see that they are good
8 ideas and therefore adopt them too.
9 MS. JONES HARBOUR: Does anyone else care to
10 comment?
11 MR. DONAHUE: Yeah, Pam, I would agree. Even
12 though we rely on our guidelines and the other
13 guidelines in our analysis. The guidelines have many
14 principles that don't really match with the current
15 state of the law or current economics and they should
16 be changed to reflect that.
17 MS. AITKEN: I'll just chime in as, from a
18 jurisdiction that would have been one of those
19 converging with you in the sense that we modeled our
20 guidelines on yours up in Canada. Obviously, I would
21 share my colleague's view in that guidelines should not
22 be static if we think that what they really are,
23 they're not a rule book or something that puts
24 predictability above all other values, but, rather,
25 something that's an expression of what the enforcement

1 agencies at a particular point in time believe is the
2 best possible, you know, exercise with the discretion
3 in terms of enforcing the law that they're charged to
4 enforce and, in that respect, it would be foolish to do
5 anything but try to be as iterative as possible in
6 reflecting those guidelines, the most current and best
7 antitrust that you can come up with, and I liked
8 Eleanor's way of expressing it. People adopt them
9 because they're good ideas and the currency of the
10 debate that follows from an articulation of a new
11 enforcement perspective can only be a good thing.
12 MR. MARQUIS: Well, all that needs to be said
13 has been said. So I'm going to be unlike most lawyers,
14 I'm not going to repeat all the wise things that have
15 been said. I'm sure there will be opportunities for
16 some disagreement, but this question certainly is not
17 an area where we disagree.
18 MS. FOX: So we converge.
19 MS. JONES HARBOUR: Now, if we change the
20 standards around which convergence has developed, will
21 we lose any of those benefits to the convergence?
22 MR. DONAHUE: No, the guidelines are
23 guidelines. The idea of the guidelines is to present
24 to those who are lawyers and the business community
25 what we think we would do in terms of enforcement when

1 presented with specific instances.
2 The guidelines are not court decisions.
3 They're not a legal precedent. Those things ultimately
4 decide how you enforce a case or what you do.
5 So I think changing the guidelines isn't going
6 to really influence what we do in the going forward
7 basis.
8 MS. JONES HARBOUR: And do you think that
9 coordination will become any more difficult? Should we
10 change them, or --
11 MR. MARQUIS: Well, I guess the only thing that
12 I would add is that, as one of the panelists mentioned,
13 this is not a static process. That as the DOJ and the
14 FTC continue with the process of evaluating possible
15 changes, amendments to the guidelines, that I would
16 expect, of course, I would never be so bold to speak
17 for my colleagues in Canada, that Canadians and the
18 state AGs and other competition enforcers would --
19 maybe there would be another round of convergence.
20 So I think that the -- from a business
21 perspective, the bottom line is that we want the latest
22 thinking that takes into account, if not science,
23 certainly economics and, at the same time, maximizes
24 transparency, so that we really understand what is it
25 that our clients can expect as they contemplate

1 transactions. So I'm more interested in getting things
2 right than whether everybody is agreeing from day one.
3 MS. FOX: The assumption so far has been that
4 the US guidelines are the leader in the world so, if we
5 change, we're breaking out of a mode to which everybody
6 is converged to us.
7 Maybe by changing our guidelines we might be
8 converging with somebody else. Maybe, for example, if
9 we include buyer power in our guidelines, we'll be
10 converging with European Union.
11 MS. JONES HARBOUR: In 1992, when the current
12 guidelines were drafted, today's level of
13 multi-jurisdictional review might not have fully been
14 contemplated, particularly, with respect to
15 international aspects.
16 Would you recommend any particular guideline
17 revisions that would perhaps better account for today's
18 realities of multi-jurisdictional merger review and
19 enforcement?
20 MS. FOX: I think in general that the fact of
21 multi-jurisdictional review is not so material to the
22 substance of how you analyze a merger. So, in general,
23 no, that there would not be any change in the
24 guidelines to recognize multi-national review. Unless
25 the guidelines should branch out to include issues

1 other than they include right now, an issue which I
2 think we might discuss later, and I don't recommend.
3 The one aspect that I would mention is market
4 definition and geographic market definition for the
5 following reason. As we all know, a lot more markets
6 are international or transnational today, and many
7 jurisdictions are looking at, for example, the same
8 merger in the international market.
9 The guidelines that we have now do not limit
10 geographic markets to US shores, but I want to
11 emphasize that it's very important not to think of
12 limiting markets to US shores because we'll get the
13 best picture if we have markets that are commensurate
14 with the real market wherever it is, for example,
15 international, and we'll also be able to talk to our
16 colleagues in other jurisdictions better when we have
17 analyzed the merger according to the real markets that
18 might include these many jurisdictions.
19 MS. JONES HARBOUR: And with respect to market
20 definition, to what extent would US deemphasis of the
21 market definition step, even if only in a small subset
22 of cases, how would that complicate, if anything,
23 coordination and discussion of particular matters by
24 the agencies?
25 MS. FOX: I don't think it will. My plea in

1 the first instance was just recognizing reality when it
2 crosses borders and, even if you start in a unilateral
3 effects case, not with the market definition, you're
4 recognizing the important facts or analyzing the merger
5 and it should not make coordination more difficult.
6 Another point is, supposing that we became less
7 insistent on market definition as a first step, in
8 general, does that make coordination more difficult?
9 Frankly, I don't think so, because I think all
10 jurisdictions generally are looking for the story to
11 see where and how a merger harms competition.
12 MS. JONES HARBOUR: If you were to recommend
13 any particular guideline revisions, would the same
14 revisions capture both state and international issues,
15 would different revisions be called for? And I'll turn
16 to you, Jim.
17 MR. DONAHUE: You know, I think there are
18 certain areas where there is now a disconnect between
19 the guidelines and either what the law has evolved to
20 or what we typically do in practice. Market
21 definition, if you look at, say, the FTC's Evanston
22 case, there's sort of a unique market definition type
23 of methodology that was used in that case that is going
24 to be a little bit different than what's in the
25 guidelines. And I think for healthcare types of

1 transactions you have to take the Evanston case, which
2 I think is really an excellent decision, and devise a
3 market definition process for healthcare that's maybe a
4 little bit different than some other areas.
5 I think as a pragmatic matter, you know, some
6 of the other parts of the market definition, the SSNIP
7 test, are very confusing to business people. You look
8 at the HHIs, that's another area where there's a
9 disconnect. You know, there are numbers in there that
10 nobody brings a case with an 1,800 HHI and increase of
11 a hundred points in the HHI.
12 So those are areas we have to think about, and
13 I think at least in terms of the states in the program,
14 we're all faced with the same precedent. We're faced
15 with the same precedent from the Supreme Court and the
16 Circuit Courts of Appeal, so I don't necessarily think
17 there would ultimately be a divergence in where we come
18 out.
19 MS. JONES HARBOUR: Can we turn for a moment,
20 if the other panelists don't want to add anything on
21 this topic, let's turn to the topic of remedies.
22 How does multi-jurisdictional review affect the
23 consideration of merger remedies and, more
24 specifically, one of the questions that the agencies
25 put out for discussion is whether a discussion of

1 whether remedies should be incorporated into the
2 guidelines themselves?
3 MS. AITKEN: It looks like maybe it's my turn.
4 I think -- and we had a little opportunity to discuss
5 this earlier, and I don't want to speak for others, but
6 there's a general reaction that that would be quite a
7 significant departure from the sort of topic in terms
8 of substantive analytical frameworks that we include in
9 the current guidelines in Canada as well, and I think
10 our general sense was that that was a departure that,
11 for these guidelines we didn't think, or at least I
12 guess I should speak for myself, don't think it's
13 necessarily the right direction to go. Up in Canada we
14 did issue distinct guidelines with respect to remedies
15 in merger cases and, to my mind, it fits better and the
16 discussion of the sorts of principles you want to have
17 I think works better in a separate context from your
18 analytical framework where you found your problem, and
19 you're now going to talk about the type of problem, and
20 you're going to talk about the ways that you might go
21 about addressing a problem.
22 It also allows for a better place, at least
23 from my perspective for a discussion in terms of what
24 you would want to do by way of international
25 coordination. In Canada, for example, you know, in

1 appropriate circumstances, we would not defer, we
2 obviously have our responsibility, but if there are not
3 unique Canadian effects in a particular circumstance,
4 the remedy that's agreed to elsewhere, usually is
5 sufficient here. We will, you know, require less
6 memorialization of a deal. We'll allow, for example,
7 our colleagues at the FTC or the DOJ to vet a buyer.
8 That sort of thing. But to my mind that fits more
9 neatly into a separate document.
10 MR. DONAHUE: I think coordination of remedies
11 is important. I think the guidelines should recognize,
12 when you have a multi-jurisdictional case, there should
13 be coordination remedies, and the other people who are,
14 the other jurisdictions that are involved should be
15 recognized.
16 You know, I tell the story of the case we were
17 involved with the Department of Justice, where we're
18 down in one of their conference rooms in DC, and the
19 merging parties present to the Department of Justice
20 the following, they said, we'll fix your problem in
21 Albuquerque and Cleveland if you give up on Harrisburg
22 and, obviously, we're not interested in having them
23 give up on Harrisburg, because we think those citizens
24 should be protected as well as people in other states.
25 The basis for that was sort of the scale of the

1 different markets and how big they were and the
2 important amount of commerce that's affected there --
3 so I think there should be some recognition that when
4 you have a multi-jurisdictional case, that's being
5 reviewed, there has to be coordination of the remedies.
6 Now, the specifics of the remedies, whether
7 they should be structural or conduct, that's maybe a
8 whole different set of guidelines. I don't know if
9 they go on those guidelines, but I think there should
10 be some recognition of the need to coordinate.
11 MS. JONES HARBOUR: Milton?
12 MR. MARQUIS: Well, just picking up, Jim, on
13 your -- I guess this is a real example. I was going to
14 say hypothetical. International competition
15 authorities often are in different places, and I think
16 your example highlights that. There may be greater
17 concerns in certain areas than in other areas, but if
18 you're in representing a state where your concerns are
19 -- I guess your issues are less concern, you're still
20 representing that state. You're not representing the
21 State of Arizona or Texas, for example. And so there's
22 going to be an natural tension. I don't think that the
23 guidelines can do anything about it. I think that
24 that's just reality of federalism, the world that we
25 live in, the country that we live in, more specifically

1 with respect to the states.
2 But, commissioner, getting back to your larger
3 question as to whether remedies should be included in
4 the guidelines, I guess my position is, yes. I'm sure
5 there are all kind of reasons why number one, it hasn't
6 been done before. Well, okay, I don't think that that
7 should necessarily inform us today.
8 We're all searching for transparency. When a
9 client comes to you and they ask you whether this deal
10 will fly, one of the things that you're looking to
11 would be if the government were to have concerns about
12 it, would they, under their current enforcement
13 philosophy, believe they could fix it? If the fix is
14 going to be worse than the alleged problem, maybe you
15 don't try to block the merger or you look at the
16 consequences of not being able to remedy a merger and
17 maybe the -- you lose all of the efficiencies that, of
18 course, your clients will be more than happy to
19 estimate.
20 So I think that it's not putting the cart
21 before the horse to think very early on about potential
22 remedies, and it seems to me that having the agencies
23 consider remedies while examining the merger guidelines
24 would be a helpful process. Now, that is not to say
25 that there's not guidance out there. Certainly the

1 Department of Justice in their statement or their
2 document where they talk about the remedies has been
3 very helpful I think to the antitrust bar, but I think
4 that the current thinking in the agencies is that they
5 will start thinking about remedies pretty early. And I
6 know that when we've had clients that have either
7 complained about mergers, they say, well, how would you
8 fix it? Of course the answer, oh, it can't be fixed.
9 Then, of course, we say, well, maybe if you have this
10 sort of licensing and these sort of divestitures, maybe
11 you can restore competition.
12 So I guess my thought is that having remedies
13 as part of the merger guidelines would increase
14 transparency and help focus the thinking on what makes
15 sense and what doesn't make sense.
16 MS. JONES HARBOUR: And would it be useful if
17 the guidelines specifically addressed the resolution of
18 potential conflicts among remedies imposed by different
19 jurisdictions? And I'll turn to Eleanor to answer that
20 question.
21 MS. FOX: I'll pick up where Milton left off.
22 Milton, I think you make very good points. I conclude
23 though that these merger guidelines are not the right
24 place for doing what you want to be done, which ought
25 to be done, and I would begin in the following place by

1 saying, there are many things that are adjacent and
2 very important to the substantive analysis of mergers,
3 and remedies is one, and conflicts is another.
4 When you talk about conflicts and the guidance
5 on conflicts, you would be talking about much more than
6 horizontal mergers, the remedies for all mergers, and
7 much more than mergers. So I think that it would be
8 very important for the Justice Department and Federal
9 Trade Commission to consider a guidance paper on that
10 other set of issues -- now I'm talking about conflicts,
11 the other set of issues of conflicts and coordination
12 on substance and remedies in general and not just on
13 mergers, and probably to get to it before there's a
14 next revision of the guidelines on international
15 operations, just because I think it's going to be a
16 really long time before one gets to a revision of the
17 guidelines on international operations.
18 MS. JONES HARBOUR: Let me move on to a
19 different topic.
20 One perspective that we really haven't
21 addressed yet is that of the merging parties
22 themselves, especially where multiple authorities are
23 asserting jurisdiction over a transaction. Inevitably
24 this process is rather difficult to navigate, even
25 where procedural cooperation is strong and substantive

1 convergence is likely.

2 I'm going to look to Milton to spearhead the

3 answer here, and possibly Melanie, but are there any

4 particular guideline revisions that you believe would

5 alleviate the burdens on merging parties?

6 MR. MARQUIS: Well, I think that this probably

7 is not the type of issue that can be addressed in the

8 merger guidelines, because I see the merger guidelines

9 as more substantive. The issue of burdens on the party

10 when there are several states or international

11 competition authorities, a lot of it is around

12 procedure.

13 Now, my view is that certainly with respect to

14 the states, and the federal agencies, that convergence

15 has largely occurred for many of the reasons that Jim

16 mentioned that federal agencies and the states have to

17 consider what sort of evidence they need to win. I

18 think it's a practical matter that the states, and Jim

19 can correct me, have pretty much adopted the federal

20 guidelines so certainly they're informed a great deal

21 by the federal guidelines. I think that there are

22 difference between the state's approach and the federal

23 guidelines on efficiencies. I think that the states

24 are probably less willing to credit efficiency

25 arguments than the federal guidelines.

1 But I think that in terms of decreasing the
2 burden, that's mostly in the realm of process. One of
3 the things, if I could pat myself on the back just a
4 little bit at the Justice Department, when I was there,
5 we, along with the FTC -- and I see Mark Whitener and
6 other people who were there at the time, we attempted
7 to draft a set of protocols that made it easier for the
8 agencies to cooperate on merger matters addressing such
9 things as confidentiality. States do not have an HSR
10 statute and many states have very, what I call liberal,
11 or open records acts that make it very difficult for
12 parties to share information with the states.
13 We want to do so because it's usually in the
14 party's interest to get the states and the federal
15 agencies aligned. It's not in anyone's interest to
16 have witnesses interviewed multiple times by different
17 agencies. I don't think it's in the agency's interest,
18 certainly not in the interest of our clients from a
19 time perspective.
20 And so the protocol is designed to address
21 those issues, facilitate communications. Now, I've
22 been in situations and, through no one's fault, I'm
23 sure, where I have either passed on to the federal
24 agencies or to the state, an AG is working on a matter
25 that one of the other agencies has scheduled an

1 interview with my client. That's not good. Now that's
2 not a merger guidelines issue. That's a process issue,
3 that's a communications issue. What we found is that
4 the level of communication really varies by staff
5 within the agencies.
6 I mean, you have different sections within the
7 FTC that I have observed, worked better with the states
8 than others, and the same thing with the Justice
9 Department. I'm not naming any names. I'm not here to
10 do that, but that's just the reality of it all.
11 MS. JONES HARBOUR: May I ask you this, and
12 perhaps Jim could comment as well? Do you think that
13 these protocols should be referenced in any revision to
14 the guidelines or included in the guidelines? Jim?
15 MR. MARQUIS: I'll let Jim answer that.
16 MR. DONAHUE: I think that coordination of
17 jurisdictions should be referenced in the guidelines,
18 whether its coordination with the states on the, you
19 know, a merger that affects this country or
20 coordination with the Canadian government, or the
21 European government, if it's a more international
22 merger where there are world wide markets that are
23 affected.
24 So I certainly think that should be referenced
25 and it should be acknowledged that there is this

1 coordination process that that goes on. We do try to
2 work to get on the same time schedule as the federal
3 agencies. Sometimes there's difficulties with that,
4 but that's one of the things we're trying to address.
5 MS. AITKEN: Excuse me, since you invited me,
6 I'll just make a couple of comments. I agree
7 completely with Milton that it's really on the
8 procedural front when it hits the road in terms of the
9 burdens on merging parties that are cross border. In
10 particular, in my observations, and there's things we
11 can do, and we've just moved to a timing process that's
12 similar to your second request which I think is
13 facilitating the coordination that Jim was talking
14 about in terms of collecting information, analytical
15 work, interviews of witnesses and the like.
16 I guess for what it's worth, I would think
17 there could be some value to writing that down
18 somewhere in terms of a protocol insofar as there would
19 be a recognition for merging parties that that's what
20 they could expect. I think it is the practice
21 increasingly with the FTC and the DOJ, but there's no
22 harm in sort of solidifying it for posterity, if you
23 will, and future mergers.
24 I think some things like a common notification
25 form, a standard waiver form. We don't technically

1 require waivers but those sorts of things for the
2 parties that can eat up a lot of time depending upon
3 what could be a quite arbitrary factor that's feeding
4 into one of the party's counsel's mind as they're
5 trying to struggle through these issues, and I think
6 from a practical prospective some type of just
7 off-the-shelf might be helpful.
8 I think in terms of substantive, which is
9 really what we were trying to address with this
10 question, one, I would point to, I guess, is
11 efficiencies. We have quite a different framework up
12 in Canada, and I won't bore you with that, but suffice
13 to say ours is more of an exception rather than part of
14 the holistic analysis of anticompetitive effects and a
15 creature of our statute.
16 But I think trying to marry up the two analyses
17 in the middle of everything else that is going on in a
18 merger review can be challenging and it would be
19 helpful to have more guidance in the US guidelines, and
20 no doubt in the Canadian guidelines as well on
21 efficiencies, although we've done what we think we can
22 do for now.
23 The other area that I guess, just maybe it's a
24 personal experience issue, and we, as well, could use
25 some more guidance on it, but is minority interests and

1 how those are evaluated. That's something that I,
2 again, as counsel, and then as head of mergers,
3 appreciated that there really isn't all that much
4 guidance out there and I'm not sure it lends itself to
5 safe harbors or whatever, but some analysis on the
6 point could be helpful.
7 MS. JONES HARBOUR: The questions that were put
8 out for discussion by the agencies address a number of
9 substantive issues, Melanie touched on efficiencies,
10 there are others as well.
11 Can we draw lessons from any of the other
12 jurisdictions on any of those issues, for instance,
13 with respect to HHIs, does it make sense to have a
14 single threshold, or is the reality that different
15 thresholds apply in different types of markets. Can
16 you answer that?
17 MR. DONAHUE: Sure. I think that HHIs are an
18 area where we really have to think about whether we
19 want to make some sort of distinction among industries.
20 If you take healthcare, for example, and take
21 hospitals, which I have a lot of experience in, I've
22 worked a lot with both the Federal Trade Commission and
23 the Department of Justice on hospital mergers, there
24 are very few markets in the country, Philadelphia is
25 one of them, where the HHIs might be below 1,800 for

1 hospitals. All the rest of the markets in the country,
2 except for the very large cities, the HHIs are already
3 3,000 or higher. So maybe you need a different
4 framework when you're talking about that.
5 There are other industries, maybe retailing,
6 where the efficient scale is much lower and where there
7 could be a competitive effect where there is a merger
8 with HHIs in the 2,000 range. So, you know, I'm not
9 sure how you do this, but I think it is something that
10 you have to recognize, that sort of the
11 one-size-fits-all-HHI analysis may not provide the sort
12 of guidance the guidelines are intended to provide.
13 MS. JONES HARBOUR: And, Eleanor, from the EU
14 approach, anything to add on that score?
15 MS. FOX: On HHIs?
16 MS. JONES HARBOUR: Yes.
17 MS. FOX: Right. In the EU guidelines, HHIs
18 are very similar, just slightly higher than the US. I
19 don't have any wisdom to add by looking at the EU
20 guidelines. I agree with Jim that the HHI thresholds
21 do very very little, and that you can see a very
22 concentrated market when you look at it and that, to
23 some extent, they're intended to give some comfort
24 below the HHI levels but, as Jim said in the hospital
25 industry, that's meaningless.

1 MS. JONES HARBOUR: Let me move to the issue of
2 large, powerful buyers. Merging parties sometimes
3 argue that the presence of power buyers will displant
4 any ability to exercise market power and that they
5 therefore should be an important consideration in
6 government review.
7 How are large buyers handled in the
8 international or state context? More specifically, how
9 are buyers handled with respect to merger review by a
10 state authority where one of the merging parties or one
11 particular customer with a stake in the deal has
12 significant presence in the state.
13 Jim, I'll turn to you for that,
14 MR. DONAHUE: You know, I think the sort of
15 sarcastic response is, well, how is that working out
16 for us? If you look at healthcare, this is one area
17 where we have lots of power buyers. We've heard over
18 and over again over the past several months that most
19 markets have one or two insurance carriers that
20 dominate. Those guys are power buyers because, if you
21 think of health insurance, what they're really doing is
22 they're going out and buying doctor services and
23 hospital services at a discount and reselling them to
24 you.
25 In this market, we shouldn't be having, if

1 power buyers are so effective, we shouldn't be having
2 an insurance crisis, or a healthcare crisis, or an
3 affordability crisis, because these power buyers would
4 be keeping prices down and keeping everybody operating
5 at an efficient level.
6 That doesn't appear to be the case in
7 healthcare, and I'm skeptical whether it would be the
8 case anywhere else, because I think you end up with a
9 sort of dueling monopolies situation where they
10 ultimately figure out that combined, they can charge
11 consumers more, but that's my very skeptical view of
12 the power buyers. I should say it's my view and not
13 the views of anybody else.
14 MS. JONES HARBOUR: On the international side,
15 Eleanor, how are powerful buyers handled in a situation
16 where a large buyer is currently or was recently a
17 state-owned entity?
18 MS. FOX: I cannot answer that because I have
19 not found such issues.
20 MS. JONES HARBOUR: Melanie, have you found any
21 issues of that type?
22 MS. AITKEN: I can't think of anything off the
23 top either. I guess a very practical observation is
24 that often we see, at least in Canada, and maybe we're
25 just less sophisticated, but we see some pretty

1 unsophisticated submissions with respect to buyer power
2 that really don't talk about the issues that you're
3 looking for. They just sort of bid, bid is, of course,
4 not entirely determinative and you need to really probe
5 the issues as to the ability to vertically integrate,
6 or to sponsor entry or whether you've got sort of
7 smaller buyers who actually make up enough of the
8 consuming public for that good such that just because a
9 few big guys can take care of themselves that's not the
10 full answer.
11 MR. MARQUIS: Well, I know that Jim was only
12 speaking for himself, but I believe that his views
13 reflect those of many of his colleagues, if I can be so
14 bold as to say that.
15 So, I guess, what I would add is that I would
16 suggest that the agencies consult with people like
17 insurance commissioners who regulate insurance
18 companies and kind of get their views because I think
19 when you're talking about healthcare, that is a heavily
20 regulated, state-regulated-type industry.
21 And so I would suggest that you seek their
22 views and see how well -- of course, they're going to
23 say they all do a great job because there are
24 colleagues who aren't doing a great job in regulating
25 this market, but I would get their views on that and

1 really listen to what the states have to say on that
2 issue.
3 MS. JONES HARBOUR: And speaking of powerful
4 buyers, to what extent do the guidelines adequately
5 address the issue of monopsony power?
6 MS. FOX: First, I want to add a little to the
7 discussion of power buyers. I was answering your
8 question about -- that were recently state owned, and I
9 don't know of any recently state owned, but I do want
10 to address the issue generally about, should buying
11 power be in the guidelines?
12 And while I think -- you know, Jim makes some
13 very good points which I agree with, which maybe I
14 over-generalize to say, usually when parties to a
15 merger defend that they didn't have any market power
16 because the buyers were so big, usually the facts don't
17 work out in that direction, that the big buyer, bigger
18 smaller did not have enough power to counteract the
19 negative effects of the merger. That is taken into
20 account in the EU guidelines.
21 I want to say first a word about countervailing
22 buying power as a proper element of guidelines. I
23 think it is a proper element of guidelines. The
24 European Union includes it and includes it in a very
25 prominent place and says that when you do have powerful

1 buyers that will counteract the negative effect, that
2 that is definitely an important factor to consider
3 because you want to know whether they'll counteract the
4 negative effect even after the merger. It then goes on
5 to say, there are a lot of instances in which those
6 buyers will not counteract or will not fully counteract
7 the effect.
8 For example, it may be that, before the merger,
9 a buyer could counteract the effect, but after the
10 merger the buyers lose an alternative and they no
11 longer have that power. So I do recommend to the
12 drafting teams that they look closely at the
13 countervailing buyer power section of the EU guidelines
14 which are on paragraph 64 through 67, and include about
15 six or seven of the EU cases in which these issues have
16 been raised and, in most of the issues, the buyers
17 didn't counteract the effect.
18 They also have an interesting point here that
19 power buyers could possibly counteract an effect on
20 themselves and not for the rest of the industry. And
21 here is where point on price discrimination comes in,
22 and I think about the Kodak case, which was not a
23 merger case, but it was true that there were some big
24 buyers of these imaging machines that got a good deal
25 even in the aftermarket, but the court said that they

1 didn't counteract the effect on the smaller companies
2 that were the buyers. Okay. So that's for the
3 countervailing buyer power.
4 And, Pam, you've just invited me to talk about
5 the other side of the coin which is what about mergers
6 that create buying power? And European Union
7 guidelines include that also in their guidelines on
8 paragraph 61 to 63, and have a number of cases that
9 talk about this problem.
10 I think that the creation of buying power that
11 is an anticompetitive creation of buying power through
12 a merger should be given credence, and I know the
13 Justice Department is now interested in, for example,
14 some problems in the agricultural markets. In all
15 markets in which you might find such an effect,
16 agricultural markets are one in which you might.
17 This is an issue which developing countries
18 have raised because they see some very big mergers that
19 are creating buying power against their -- it could be
20 cocoa producers. They see big cocoa companies that are
21 merging and creating a price squeeze in those
22 developing countries. So I think that these issues
23 ought to be given credence and probably should be a
24 part of the merger guidelines.
25 MS. JONES HARBOUR: I'm going to move on to

1 another topic and I also want to try to leave a few
2 minutes for audience questions, but moving on to
3 guidelines reform efforts in other jurisdictions.
4 My question is, are there any lessons that we
5 might learn from guideline reform efforts in Canada, in
6 the EC, the UK, or elsewhere? And, Melanie, I'll turn
7 to you to start us off here.
8 MS. AITKEN: I can be quite brief in the sense
9 that we did issue some guidelines in the merger area
10 but they were purely procedural guidelines,
11 consequential to significant amendments we had to our
12 act introducing an analog to a second request two stage
13 merger review process.
14 The only thing we have done is we issued a
15 supplementary bulletin on efficiencies and merger
16 review in 2007 to try to articulate a little more
17 completely how we would approach an evaluation of
18 efficiencies. We have, obviously, the same challenges
19 that you do in terms of probing and getting any kind of
20 substantiated sense of efficiencies at an early stage
21 of a transaction.
22 So, again, I guess I'd probably come back and
23 say that that's an area that would be helpful to have
24 more guidance on and -- but those would be my comments.
25 MS. JONES HARBOUR: Let me turn to you, Jim,

1 and I want to ask this question. You know, the NAAG
2 merger guidelines have not been revised in quite some
3 time now. Have the states given any thought to
4 pursuing guideline revisions of their own?
5 MR. DONAHUE: Yes. We've given a bit of
6 thought to that. I think that we have a list of
7 priorities right now, and those priorities are first to
8 deal with the issue of confidentiality of information
9 in merger cases. That has been a problem that slows
10 down our coordination with the FTC or DOJ. It's a
11 matter of frustration for us, and it's a matter of
12 frustration for the parties we're dealing with. So we
13 want to deal with that.
14 A number of states are very interested in the
15 agricultural workshops that are being done by the
16 Department of Justice, so we're doing some work on
17 that. We want to prepare some comments for this
18 process here, the guideline process. And we want to
19 really focus on bringing some cases.
20 So after we've done those things, then we're
21 going to look down the road to revising our guidelines.
22 And we're not sure what the revision may be. It may be
23 that when we see what the product is of the FTC/DOJ
24 process, we say may say, those are really great
25 guidelines, we should adopt them. It may be that we

1 continue to do what we've done in the past and say,
2 they're really great guidelines but there's two or
3 three areas where we disagree a little bit or where we
4 had additional thinking.
5 I think if you look at our efficiency analysis
6 guidelines, they're much more evidence based than what
7 is currently in the FTC/DOJ guidelines. So I don't
8 know how going to come out, but it's something we're
9 going to do, but we're not going to do it tomorrow.
10 MS. JONES HARBOUR: Okay. Milton.
11 MR. MARQUIS: Well, if I could applaud the
12 order in which you are approaching this issue. I do
13 think it's important for NAAG after this process ends
14 and, of course, to participate in this process which
15 NAAG is doing to take a hard look at the NAAG
16 guidelines. I think that there is a truth-in-
17 government function that's served by having guidelines
18 that people actually know and adhere to. So I applaud
19 that I think that's the right order.
20 Just for some of us who are old enough, of
21 course, Jim and I started about the same time, but not
22 saying he's old, he's much younger than I am, that, you
23 know, the NAAG guidelines were reaction to perceived
24 inadequacies of some of the earlier US DOJ/FTC
25 guidelines, but I do think it's important for NAAG to

1 either revise, review, or rescind the guidelines
2 because I think it's important that the government
3 increases transparency and does what it says it's going
4 to do.
5 MS. JONES HARBOUR: All right.
6 MS. FOX: First, a comment on the NAAG -- on
7 the sequencing, and then a comment on Europe and US end
8 process. On the sequencing, might it be better if NAAG
9 has conversations on reforming guidelines now while the
10 Department of Justice and FTC process is going on so
11 that NAAG could possibly have a formulation that it
12 thinks is a good formulation so it's part of the debate
13 before the Justice Department and FTC adopt their
14 guidelines, say it's guidelines on efficiencies and you
15 have a different idea, and you know you have a
16 different idea, would it be good to surface it at a
17 point at which the Justice Department and FTC could
18 recognize it and take it on board, maybe be influenced
19 by it?
20 MR. DONAHUE: I think that's our intent. Our
21 intent is to do comments in this process and, you know,
22 I'm perservating here. I think Bob Pratt from
23 Illinois, the Chicago Workshop, we are communicating
24 with the agencies, all the time on a variety of issues,
25 on the guidelines, but we have a number of merger cases

1 we're doing with both agencies, both small local
2 mergers and one or two larger ones.
3 MS. FOX: My point on the US EU process is, I
4 think very helpfully, sort of in the world today, at
5 least with these two big players, US and EU, the
6 process of guidelines and guidelines change has been
7 helpfully very open on both sides of the ocean,
8 inviting people from all around the world, not just
9 your own national constituents, but all around the
10 world to give their inputs on it. I think that is
11 actually one of the cross fertilizing aspects that can
12 lead to convergence and is very useful.
13 And now one point on substance, as the EU
14 revised it's merger regulation and issued guidelines,
15 it, of course, had -- and this was done ending in 2004,
16 it, of course, had the US material before it. And it
17 came to a different -- to a partly semantic conclusion
18 regarding unilaterally effects.
19 When it was revising it's merger analysis, it
20 definitely wanted to include unilateral effects, but
21 thinking about and reading all the work that had been
22 done on it, it decided that the concept was not really
23 unilateral effects but non-coordinated effects, and
24 that is on the theory that where you have a unilateral
25 effect and you have a price rise, because of the

1 uniqueness in some way of these two firms, then the
2 rest of the industry under a lot of circumstances has
3 an incentive to adjust their prices upwards. So it's
4 not just unilateral, it's market wide, and that's what
5 non-coordinated effects are.
6 And I thought that the Justice Department and
7 the FTC probably ought to consider this history and
8 conclusion on the other side of the ocean that the
9 unilateral effects problem is really not just
10 unilateral, and maybe they will be merging a common
11 terminology of non-coordinated effects.
12 MS. JONES HARBOUR: Let me turn for a moment to
13 the consumer friendliness, if you will, of the
14 guidelines. There have been some concerns expressed in
15 the antitrust bar that the merger guidelines are overly
16 theoretical, somewhat esoteric, and may be written in
17 the language of highly technical merger experts.
18 Now, can any of the panelists speak to the idea
19 of making the guidelines more consumer friendly, that
20 is to say, keeping them simple and practical so that
21 they can be understood by generalist judges and by
22 business persons?
23 MR. DONAHUE: You know, I think they should be.
24 I have an anecdote to relate, and I have been in a lot
25 of cases with the federal agencies, and there's a SSNIP

1 test, and somebody will invariably ask when we're
2 interviewing business people, suppose you were faced
3 with a small but significant non transitory price
4 increase, say approximately five percent, what would
5 you do? And answer to that question all the time is,
6 "huh?" Because the business people don't think that
7 way. That's not the language of the way businesses
8 operate.
9 I guess, there's sort of a conflict between
10 what an economist -- how an economist would describe
11 something and how a business person would describe
12 something, which does create some sort of confusion,
13 especially on the business side. Obviously, the
14 antitrust lawyers, they know what all this means, but
15 the business community finds part of it very confusing.
16 Now I don't know exactly what to make of that -- how to
17 solve that problem, but I think we should work on
18 making the guidelines -- or the guidelines should be
19 more user friendly.
20 MS. JONES HARBOUR: And perhaps in the merger
21 commentary, there could be more explanation for the lay
22 person or the business person, that might be helpful.
23 Let me talk about for a moment the incipiency
24 standard of Section 7 and Type 1 and Type 2 errors. I
25 saw that in the AAI's comments to the agency, the

1 institute pointed out that the merger guides give only
2 a passing reference to the incipiency standard and
3 basically ignore Congress' clear intent in this area,
4 and then the comments go on to say that since Type 1
5 and Type 2 errors are inevitable, then the guidelines
6 should be amended to respect Congress' wishes and that
7 the guideline should err on the side of
8 over-enforcement rather than under-enforcement.
9 So, to what extent, if any, should these error
10 cost considerations play into the guideline revisions
11 either in the United States or elsewhere?
12 MS. AITKEN: I'll make a go at that. I think
13 in the merger context, I guess I'll speak personally,
14 but also in my role, that I would consider that you'd
15 want to be erring on the side of under-enforcement not
16 over-enforcement in the merger area.
17 I think in guidelines obviously you're trying
18 to strike the right balance between predictability,
19 transparency, but also preserving a certain enforcement
20 space, if you will. In a recent experience, not in the
21 mergers context, but we had to issue guidelines in
22 connection with new cartel provisions and a new
23 agreement among competitors provisions, and given the
24 limits of the English language we were doing our best
25 in our guidelines to build a fence, if you will, around

1 the cartel provision to provide comfort so that we
2 didn't chill pro-competitive agreements among
3 competitors, and I think we did what I believe is the
4 right thing to do in enforcement guidelines, and that
5 is, to the greatest extent that you can, try to think
6 hard about what you think is the most important thing
7 for you to achieve as an agency in terms of your
8 enforcement discretion and, in our case, we actually
9 explicitly took off types of agreements. Like, we took
10 them off the table for the prospective of treating them
11 as criminal even from an investigative perspective so
12 that there could be greater predictability in terms of,
13 yes, we might look at your agreement but, if we did,
14 we'd be looking at it civilly and, therefore, providing
15 guidance to business folks to have the confidence to
16 try creative things, to be innovative.
17 So I think that's a long way of saying that I
18 think you have to sometimes be brave and take as a
19 matter, not of law, that's not what these are, these
20 are enforcement guidelines, and guides tell you you can
21 exercise your discretion, to my mind anyway, and you
22 should take that opportunity to try to articulate where
23 it is that you really think you need to go in and you
24 need to enforce so as to allow for the good parts in
25 the case of mergers or agreements when competitors are

1 to be fostered.
2 MS. FOX: Going back to the comments that you
3 were referring to of the AAI, we are so far from
4 enforcing the intent of Congress in Section 7 of the
5 Clayton Act that I just put that out of my mind. We're
6 not anywhere near there.
7 However, there's a different set of factors
8 that play in my view in terms of intervention, and not
9 intervention, and when do you make the decision, and
10 which side do you want to make the error on.
11 We have erred so far on -- or at least gone so
12 far in the direction of non-enforcement for a decade,
13 and we've gone in a direction of non-enforcement by
14 using certain default presumptions about how markets
15 work and how close the potential competition is that,
16 in my view, don't reflect reality.
17 So I think we have to adjust to reality and, if
18 you adjust to reality in the United States, you're
19 doing more enforcement. And the guidelines aren't
20 going to tell you this, and I don't know how guidelines
21 will say this, because the real things that matter when
22 you have a merger in an area that might be problematic
23 are very subjective. I shouldn't say the real things,
24 but sort of a take on how dynamic this market is, how
25 likely is it to capture for itself the market to take

1 care of any tendency of anticompetitive effect or not.
2 MS. JONES HARBOUR: And you mentioned the
3 potential competition doctrine, and I know that this
4 doctrine was explicitly included in the 1982 and the
5 1984 guidelines, and it was omitted in the 1992, and
6 then, of course, in '97 when it was revised for
7 efficiencies. There have been several recent mergers
8 and cases which involve potential competition at both
9 the FTC and the DOJ. At the FTC, it was DoubleClick,
10 it was the Hospira Mayne Pharma case; at DOJ, potential
11 competition investigation involved Delta Northwest, and
12 then a number of the telecommunications mergers.
13 Can anyone discuss whether the guidelines
14 should be updated to address mergers that eliminate
15 potential competition?
16 MS. FOX: First, on potential competition,
17 usually these are potential horizontal competition.
18 It's very interesting the EU guidelines includes it in
19 the horizontal guidelines. I think it should be
20 included. I think one should take a look at the EU
21 guidelines and perhaps include it in these guidelines.
22 Second is, if I can extend your question,
23 conglomerate in general. We have the Comcast -- we, in
24 a sense, the Comcast NBC merger is pending in the
25 papers every day. There are no guidelines. There's no

1 guidance to go to in the United States. In EU there
2 is. Isn't this a big hole? Shouldn't there be some
3 guidance from the agencies to suggest the kind of
4 framework for analysis that they are doing?
5 I realize these hearings are about horizontal.
6 It could include potential horizontal as EU does under
7 horizontal. I think for another day, but another day
8 really soon, there should be guidelines that are on
9 conglomerate.
10 MS. JONES HARBOUR: And before I open it up to
11 the floor, let me pose one more question to the panel.
12 How do you think other jurisdictions will react
13 to any changes in the US guidelines?
14 MS. AITKEN: I think it will be positive to the
15 extent that they're good ideas, obviously, but I think
16 that the openness to articulating a view that is more
17 reflective of what you're doing or is sort of the one
18 goal in the statement from the agencies, or to simply,
19 you know, modernize an approach to the most
20 sophisticated antitrust thinking, that's all good. And
21 I think we're fortunate today to have for a like, the
22 ICN where these can be, you know, quite readily
23 debated, communicated, adopted, if thought appropriate
24 by other countries, so perhaps we're in a better
25 situation than we used to be in terms of just being

1 able to talk and debate in a pretty expeditious
2 fashion.
3 MS. JONES HARBOUR: I open up the panel for
4 questions from the floor, if anyone would like to pose
5 any. No? Okay.
6 Well, let me ask you this. To what extent
7 would introduction of any new paradigm, for example, I
8 heard of the upper pricing pressure formulation. How
9 would any new paradigm potentially complicate
10 interagency analysis and discussion and would it or
11 should it lead to specific changes in any of the
12 foreign guidelines?
13 Eleanor, do you want to take that?
14 MS. FOX: Well, as you know, I think that any
15 discussion that goes in the direction that we, whoever
16 "we" is, decide is better analysis is good, I think
17 that our counterparts in other parts of the world would
18 accept it as that, and be very happy to engage with new
19 concepts. I mean, for example, I think working out
20 innovation and when a merger harms innovation, when it
21 helps innovation, is one of the most important things
22 that should be on the table and it would, it could
23 change guidelines.
24 I think there ought to be an international
25 community thinking about these issues and I think

1 they'd be receptive.

2 MS. JONES HARBOUR: We didn't talk about entry,
3 so let me ask this. Would the consolidation of the
4 US's guidelines separate treatment of uncommitted and
5 committed entry be favorably viewed by the foreign
6 authorities since other guidelines don't tend to deal
7 with the two types of entries separately? And that
8 will be my last question because I believe we're out of
9 time.

10 MS. FOX: I give the same answer. If it's a
11 good idea, it ought to be surfaced and adopted.

12 MS. JONES HARBOUR: All right. Thank you very
13 much. Appreciate it.

14 (Applause.)

15 (A break was taken.)

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1 PANEL 2: MARKET CONCENTRATION
2 AND STRUCTURAL PRESUMPTION
3 MR. SHELANSKI: If we can get started with our
4 second panel so that we can remain more or less on
5 time, that would be great.
6 The next panel is going to cover the questions
7 of market concentration and structural presumption. We
8 have a lot to talk about. And an extremely
9 distinguished panel needing no introduction, but just
10 to say, I want to thank Ilene Gotts from Wachtell
11 Lipton; Rich Gilbert, a former professor and long-time
12 colleague from Berkeley, thank you for coming all the
13 way out here. Michael Salinger, former director, the
14 Bureau of Economics at the Federal Trade Commission and
15 a wonderful economist. Thanks for coming down from
16 Boston to help us out. And Ron Stern from General
17 Electric, their chief competition counsel. We're very
18 grateful for his taking the time to be with us.
19 Now in talking about market concentration and
20 structural presumptions, we are going to have an
21 operating assumption in the background that at least
22 some people in this room might take issue with, and
23 that is that we actually care about market
24 concentration and that we may want to have structural
25 presumption.

1 All of this presupposes, in other words, that
2 we are going to go through some exercise of market
3 definition. And indeed the operating assumption of our
4 guidelines review project is that while market
5 definition has probably been overemphasized and led to
6 some unfortunate outcomes in the courts, where courts
7 have insisted on bright line market divisions where
8 such divisions simply don't make sense. So we think
9 they've been overemphasized and market definition needs
10 to be re-thought.
11 We are not at least suggesting or supposing
12 that we will do away with the exercise altogether or in
13 any truly fundamental way. Now, again, there are
14 contrary views that we will probably have a chance to
15 have aired today, but for purposes of this panel, I
16 think we will stick with the operating assumption that
17 market definition is going to happen and then, once it
18 happens, what should we draw from market concentration
19 and what kind of presumptions should we make.
20 So what I would like to do is just start out by
21 posing a question, a very basic question to the
22 panelists, and they can really answer in any order, but
23 maybe I will start with Ilene.
24 Do the HHI thresholds in the current guidelines
25 continue to provide useful guidance to merging parties?

1 Have they ever? Should they be adjusted and, if so,
2 how?
3 MS. KNABLE GOTTS: Thank you, Howard. I'm
4 going to start out with disclaimers. It's not just the
5 government who has disclaimers. The views that I'm
6 going to express today are not the views of the
7 antitrust section of the ABA, Wachtell Lipton, or any
8 of my partners or my clients, they're mine alone.
9 So with that sort of statement, I think the HHI
10 presumptions that are in there are totally misleading.
11 They do not reflect what the agencies do or should do.
12 If I had my druthers, I would get rid of them totally.
13 Although I do think concentration does play a role and
14 is something you look at because you have to know how
15 the marketplace performs; you get a false sense of
16 security when you can play with numbers and get a
17 sense. As Eleanor said in this morning's panel, when
18 you can get a sense of whether a market is concentrated
19 without HHIs presumptions -- you can get a sense by
20 looking at the market. And the market definition
21 question I think you really do have to go through, by
22 the way, although you didn't ask that question.
23 So I'm not going to get in my way. You're
24 going to have some kind of HHIs here. I assume that
25 there will be something in it. So then let's focus on

1 what should be modified. It's widely accepted that the
2 current HHI thresholds do not reflect reality. The
3 only places where you get an enforcement action
4 anywhere near them is in petroleum.
5 It would be nice to be why petroleum,
6 especially when you look at terminals, is treated in
7 some other way other than that Congress, every time you
8 have a merger, will scream at you. I would hope that's
9 not the reason why. And the fact that there also has
10 been only one litigated case in the petroleum industry
11 in a couple of decades or more, means that really the
12 agency is the one who decides this.
13 So if they don't reflect reality, the first
14 step is to get them to reflect reality and to recognize
15 that one size does not fit all, which goes back to why
16 I worry about using HHIs. Wouldn't it be better to go
17 into the factors, that one looks into to decide whether
18 or not a marketplace structure which includes
19 concentration, but it might also matter how or where
20 the two merger parties are situated in the marketplace,
21 how close is the competition, all these other factors,
22 wouldn't those be things you would want to at least
23 explain? So maybe you give a range of HHIs. Maybe you
24 figure out what sort of factors should go in there.
25 Use some of the industries as examples pointing out

1 that industry structure could change, so even those
2 presumptions and suggestions might not be accurate.
3 What might today be an unconcentrated market might
4 become concentrated, or because of changes in
5 technology, convergence of two marketplaces, what was
6 looking pretty ugly might become less ugly, or
7 regulation might be replaced by competition, like
8 you've seen in the FCC sort of area. There might be a
9 lot of other factors why taking that snapshot today
10 might be totally different tomorrow.
11 I think also one other problem I have is the
12 way the HHI's read today. It basically has these
13 thresholds that are unrealistic and then it says, and,
14 if you go above that, there's a presumption of being
15 challenged. If we were to flip it around instead,
16 there should be a presumption of a safe harbor, if
17 you're below certain numbers, and what those numbers
18 should be as a screening to say if you're in these
19 other numbers, then that suggests maybe this warrants
20 further investigation.
21 And the burdens of proof, because this is,
22 again, when we go to court, it might be appropriate to
23 have sliding scales and having shifting burdens when
24 you look at the case law, I'm not going to fight 30
25 years of case law, but when you're in an agency, you're

1 trying to make the right decision on whether to bring a
2 case, and to start shifting presumptions once you kind
3 of make one thing and say, okay, now parties, you have
4 this overwhelming presumption to show us that there's
5 going to be positive effects from this deal and
6 countervailing factors, that's not what it should be
7 about. It should be a dialogue so that you get to the
8 right outcome.
9 So anything that suggests some kind of legal
10 presumptions and tipping of the scales to me causes
11 some real concerns, so that's kind of where I would
12 start out.
13 MR. SHELANSKI: Ron, if I could ask you from
14 the corporate perspective to give your reaction to
15 Ilene's words, but also your answer to the question
16 from the inside, what kind of guidance do the current
17 thresholds give you and how do you see them as in need
18 of revision?
19 MR. STERN: Thank you. I would basically say
20 that the current guidelines -- I agree with a lot of
21 what Ilene said. The current guidelines would be
22 misleading to people on the inside who are not
23 knowledgeable about practice under the guidelines.
24 And, therefore, it would be helpful to revise the
25 guidelines so they weren't misleading and they did

1 reflect the practice.
2 It seems to me it's important to revise them in
3 two ways. It seems to me the most important thing to
4 do is to eliminate the numerical presumptions, as Ilene
5 mentioned, that a merger with an HHI of greater than X,
6 and an increase of greater than Y, is likely to create
7 or enhance market power.
8 I don't think that this process should simply
9 lead to the numbers going from 1,800 to,
10 hypothetically, 2,500, and from 100 to, hypothetically,
11 300. I think the presumptions, based on the numbers
12 should go away. The numbers should be a starting
13 point, as Ilene mentioned, and I think that's really
14 the reality and basically the consensus.
15 There are a whole number of places where that's
16 been recognized. There was a 1994 Defense Science
17 Board Report that Bob Pitofsky who was the chairman of
18 the FTC, would chair, and Carl Shapiro was on that
19 group, and I participated, and even back in 1994, the
20 theory was, the numbers are just a starting point. The
21 commentary says that. That I think is the strong gist
22 of the 2008/2009 International Competition Network
23 Recommended Practices that the Department of Justice
24 had an important hand in.
25 And then I think the second issue is, should

1 there be a safe harbor, should there be a higher HHI
2 number for the safe harbor? I think that would be
3 helpful. I think that would be realistic. I
4 understand the issue that the agencies would face in
5 not wanting to set the safe harbor too high and worry
6 about a soft safe harbor, but I think it would be
7 helpful to move it up significantly while noting that a
8 number -- that it's just the starting point. So that
9 there's no presumption clearly if you're outside the
10 safe harbor.
11 MR. SHELANSKI: Rich Gilbert is easily found in
12 Berkeley because he may be the only person in the
13 United States whose license plate reads, "HHI 1,800."
14 So, he's a safe driver. So, Rich, do you need
15 to change your license plate?
16 MR. GILBERT: I have a vested interest. I have
17 a vested interest in the merger guidelines threshold,
18 so I would have to change my license plate.
19 Well, certainly, I think both Ilene and Ron
20 make some very good points. The real action in merger
21 analysis is in Section 2 of the guidelines, it's not in
22 market definition. That's been my experience at the
23 Department of Justice. It's been my experience working
24 as a consultant for the Department of Justice, and
25 working with private parties.

1 I think it's a noteworthy fact that even within
2 the agencies, they care about competitive effects and
3 market definition is something that interests them, but
4 is not the main part of the analysis.
5 Now I will point out that we are talking as if
6 the market is something that's an objective fact. And
7 if we talk about an HHI of 1,800, well an HHI of 1,800
8 and what? Or 2000 and what? The point of this is
9 guidance. The point -- I think the merger guidelines
10 provide a very important role in helping private
11 parties understand what's going on at the agencies to
12 some extent; and an important role in guiding what goes
13 on within the agencies. But, in giving that guidance,
14 you obviously have to be concerned about shackling your
15 own enforcement and limiting what you can do. So I
16 think the kind of guidance you can give has to be
17 limited.
18 I'm all for safe harbors, but I don't think we
19 can give a safe harbor of an HHI of 3,000, and a delta
20 of a thousand. That's not going to work for many
21 reasons. But I think some kind of safe harbor would be
22 advisable, if you're going to use a structural
23 presumption at all.
24 A structural presumption in the other
25 direction, of course, has the problem that we know that

1 market statistics, market shares, market concentration
2 is not a sufficient statistic for market power and, at
3 least from an economic perspective, we're concerned
4 about mergers that will enhance market power.
5 MR. SHELANSKI: Michael.
6 MR. SALINGER: Well, I agree with much of
7 what's been said. The word presumption is a loaded
8 term, and I'm not sure what the better term is. But I
9 still think it's useful to have thresholds and that in
10 thinking about the threshold, you should ask two
11 questions. One is, where, as an enforcer, do I start
12 to get nervous?
13 So everyone agrees that -- almost everyone
14 agrees that two to one is something that we're really
15 nervous. And that even three to two virtually everyone
16 agrees I think people get really nervous, and you'll
17 have some people say, well, sort of four to three is
18 the typical threshold of getting really nervous, which
19 would mean that you would choose 3,000 or 3,500 as your
20 concentrated market. I'd be surprised if the agencies
21 were really willing to go quite that far.
22 So I would pick 2,500 as the upper range, right
23 now, the thousand number is completely useless and
24 provides no information. But what you do want is,
25 well, are there are there some markets that are

1 different like petroleum? And, yes, I mean it is true
2 that petroleum is different because Congress screams
3 very loud and it's very unpleasant when they scream,
4 but it's also true that the demand for petroleum
5 products is highly elastic, so the risk of the
6 potential harm from the exercise of market power is
7 greater in petroleum.
8 And so I would -- I would pick 1,500 and if you
9 ask me to defend 1,500 versus 1,550 versus 1,450, I
10 can't do that, but it's just guidelines and I think
11 that those numbers would provide useful guidance to the
12 parties.
13 MR. SHELANSKI: Thank you. It's extremely
14 helpful to put some numbers to that. Obviously on the
15 2,500, you're in good company with what the EU has
16 done. I think that's a very interesting suggestion on
17 the lower threshold of the 1,500 threshold. Thank you.
18 MR. SALINGER: Can I just say one more --
19 MR. SHELANSKI: Sure.
20 MR. SALINGER: The numbers that are completely
21 worthless are the 1,500 and that has to be either
22 eliminated altogether or changed substantially.
23 MR. SHELANSKI: Do you want to say a little bit
24 more about that because that's a very interesting
25 point? Where would you go with that? Would you

1 eliminate them, or would you change them, and, if you
2 would change them, where would you go,
3 MR. SALINGER: I haven't thought it through as
4 carefully as I should have given that I was going to be
5 on this panel, but my inclination would be to eliminate
6 them.
7 MR. SHELANSKI: Yes.
8 MR. GILBERT: A comment on that. I do think
9 that one of the most useful principles that we have in
10 economic analysis of competition policy is the notion
11 of the market share screen, and that is, if you see a
12 conduct or a merger involving parties with very very
13 small market shares, you can confidently predict that
14 that's not going to be a problem. And I think sending
15 that message, even if it's a small number, is a useful
16 message to send, but the number has to be small enough
17 so that you don't wind up making, you know, whether
18 it's Type 1, Type 2 errors. I always forget which one
19 of those, and putting yourself in a position where you
20 can't actually enforce an action you would like to, in
21 fact, restrict.
22 Now you can always do that with these great
23 guidelines, words like absent special circumstances or
24 unlikely or whatever, but some kind of guidance like
25 that would be useful.

1 MR. STERN: Just a quick follow-up on Michael's
2 comment, if I understood, and 1,500 and the 2,500.
3 It seems to me the agencies have an important
4 responsibility to look at the track record and do
5 something that's credible in light of the track record
6 and, as I noted in my first comment, understand the
7 concern, and Rich mentioned it also about not setting a
8 safe harbor too high.
9 But if you look back at the FTC's numbers that
10 were put together going over kind of more than 10
11 years, you'll find that when you get into the other
12 markets, you get out of oil and groceries and the like.
13 There was one challenge below 2,400 and only 10 percent
14 of the cases below 3,000 were enforced.
15 So it seems to me that moving from 1,000 to
16 1,500 doesn't really do you any good and really
17 wouldn't be very credible. And it seems to me that
18 it's probably better to come up with a more realistic
19 safe harbor number if it will be credible consistent
20 with prior practice and maybe make it soft, if you're
21 going to keep numbers, and, above it, I wouldn't have a
22 presumption. I would have a starting point for jumping
23 into the guts of the analysis, the competitive effects
24 analysis and not have a presumption.
25 MS. KNABLE GOTTS: I want to add on. Even

1 there, Ron, when you're talking about the statistics,
2 we're talking about decisions in which enforcement
3 actions were taken. We don't really know for a fact
4 that that's where problems really existed because there
5 don't tend to be many challenges and we haven't had
6 much in the way of retrospectives.
7 I'm not sure how I come out on retrospectives.
8 I know most clients would hate it because it's a cost
9 and their deals have gone through, and then to find
10 that the deals that were allowed to happen caused
11 problems. You know, they're going to hate me.
12 But maybe we need to be looking a little bit
13 more at what the evidence really shows and understand a
14 little bit better under what sort of market
15 characteristics do we really have problems beyond just
16 a head count of the four to three or the five to four.
17 MR. STERN: I guess my point was that if, not
18 even half of the cases between 2,500 and 3,000 were
19 enforced, wholly apart from whether there was an
20 underlying problem. It's difficult to square that with
21 have a presumption if there is a problem.
22 MS. KNABLE GOTTS: Exactly.
23 MR. SHELANSKI: I would like to turn to a
24 slightly different question and I'm going to ask Rich
25 Gilbert to start off answering this question. When

1 Rich was Deputy Assistant Attorney General for
2 economics in the mid '90s, he did some classic and
3 groundbreaking work on innovation and the treatment of
4 innovation in merger analysis.
5 So my question to have Rich start us off on is,
6 how should market concentration be measured and
7 interpreted in technologically dynamic markets? Should
8 the guidelines try to say more than they do currently
9 about structural presumptions and technological
10 innovation?
11 MR. GILBERT: Well, Howard, I think your
12 questions raises at least three separate issues. One
13 is, can we even define a market in a dynamic industry?
14 Does it make sense, for example, to define a second
15 generation mobile telephony market? Or is it the case
16 that the third and fourth generations are going to
17 happen so quickly, that it's just meaningless to define
18 a market like that? Maybe the market should be high
19 speed mobile telephony or something like that. So
20 that's one issue.
21 A second issue relates to entry. Many people
22 looking at dynamic markets say that entry is so
23 unpredictable, can happen so quickly, the consequences
24 can be so catastrophic with Shumpeterian creative
25 destruction and all of that that we don't even have to

1 worry about market power because it's going to be
2 undone.
3 And a third issue relates to, is there a
4 relationship between market structure and innovation.
5 So let me touch on these questions a little bit.
6 The first point about stability of the market,
7 I think that demands that you look at what the relevant
8 consumer choices what are the relevant consumer choices
9 in the telephony case, as it's high speed not second
10 generation.
11 With respect to entry, I have a difficult time
12 with the concept that, because there may be
13 catastrophic entry, that we shouldn't be concerned
14 about conduct or mergers that create market power in
15 the present. It's certainly the case that the
16 possibility of drastic entry can make the adverse
17 consequences of a merger much less durable, but that
18 doesn't mean we shouldn't care about it at all.
19 So I don't think that that requires any
20 fundamental change in the way we presently think about
21 mergers. We already think about entry. I think
22 sometimes we even talk about potential competition, at
23 least in the entry context, and so I don't see a need
24 for rethinking of the approach to merger analysis due
25 to entry.

1 The third question, obviously, is one that
2 intrigues me a lot. Can we say more about the effects
3 of mergers on the likelihood of innovation? I think we
4 can. The issue is, can we say anything about structure
5 and innovation? It's obviously a complex and unsettled
6 issue, but there are some conclusions that have held up
7 quite well, both in theory and in empirical validation,
8 and that is that, when a merger involves companies in a
9 market for which there is a high degree of
10 appropriation, either through intellectual property
11 rights or first-mover advantages, or whatever things
12 protect your innovations from competition, then there
13 are reasons to be concerned about structural impacts
14 from a merger. It depends upon a lot of things. There
15 are a lot of issues that have to be addressed, but
16 there are concerns in that instance.
17 On the other hand, when a merger does not --
18 well, when a merger may actually enhance
19 appropriability, in that case innovation can have an
20 efficiency effect from a merger. So that should be
21 considered as a possible efficiency defense.
22 It's not right to simply, as we have sometimes
23 seen, challenge a merger because it is likely to raise
24 prices and then just add a boiler plate addendum and
25 say -- and also harm competition. That does not

1 follow.

2 But I do believe that the guidelines could help
3 by saying when the agencies would be concerned about a
4 possible impact on innovation and that would correspond
5 to a market in which the merger does not enhance
6 appropriability.

7 MR. SHELANSKI: Ron, as someone who actually
8 works for a company that occasionally does some
9 innovation, and faces entry from those who do competing
10 innovation, do you have a view on this?

11 MR. STERN: I do. I think in a lot of cases
12 mergers and industries that involve a lot of
13 investment, that's certainly true of a lot of the
14 industries that my client is involved in are driven by
15 a desire to try to put one self in a position to
16 innovate successfully. So it's getting pieces of
17 intellectual property, or distribution, or something
18 that will foster investment to take the next step, come
19 up with the next best product. Sometimes it's simply
20 talented individuals at the other company.

21 And I think in many cases, as long as there are
22 enough other companies out there getting larger global
23 scale, for example, to have a better opportunity to get
24 a return on your innovation, that all of that -- that
25 mergers can stimulate innovation. And I think Rich's

1 comment that it depends is really true.
2 So I don't think that there should be market
3 concentration or market structure presumptions or
4 guidance. I think it really is individual and case by
5 case and looking at the factors.
6 So I'm going to continue to beat my drum that
7 it's not the structure or the numbers, it's going to
8 look at the individual facts of the individual
9 marketplace and understand what the competitive effects
10 are going to be.
11 MR. SHELANSKI: Thank you. Ilene.
12 MS. KNABLE GOTTS: I think part of it is when
13 you look at the merger guidelines you get the static
14 approach. And what we're talking about here are
15 dynamic markets. So I think of what you were saying,
16 Rich, in the example of the mobile phones and goes back
17 to the all the Telecom deals that I did over the last
18 couple of decades, market definition, if you read the
19 guidelines, literally became a problem, because they
20 didn't really reflect looking forward, only looking in
21 the back mirror of how markets were converging and
22 where competition was going to come from. So that's
23 one thing that you have to take into account.
24 Building a little bit upon what Ron had said
25 here about looking at not just the number of players

1 that are there but understanding a little bit about
2 what's happening. Mergers can really be disruptive.
3 They can be totally game changing transformational
4 situations where, as a result, you now have, due to
5 efficiencies and just putting together the different
6 components of the companies, technology or whatever,
7 you might actually have a leap frog in the technology
8 that everyone else has to run to catch up on. So
9 although there might be one less player; it's not one
10 size fits all.
11 Again, when you're looking at this, I think the
12 guidelines would really benefit from explaining how, in
13 rapidly changing markets, because of technology,
14 because of convergence, I would even add situations
15 where the market might instead be dying, it would be
16 nice to at least explain how those factors go into such
17 things as market definition, looking at concentration,
18 looking at whether there will be mavericks created,
19 whether they'll be disruptive, whether they'll be a
20 creation of market power, whether on the other hand
21 there might be the creation and entrenchment of a
22 dominant firm, whether there might be network effects,
23 or lock in, to actually talk about those factors so
24 that people who don't live and die this stuff, actually
25 know what to ask their clients so they can come in

1 informed.

2 The one area that I would also suggest that we
3 need to look at is the supply side substitution
4 question. In these industries, kind of focusing on a
5 one year or two year time frame might not really give
6 you a good sense of it. I understand why we do that.
7 We think maybe there's a greater likelihood we'll get
8 it right if it's closer in time, but for certain areas
9 like Pharma, we can see what the pipeline looks like.
10 We might be able to get a much better sense on how that
11 is and that might be true also in some of the FCC
12 industries and some of the other high tech areas. So
13 those would be the few things that I would suggest that
14 we do.

15 And I think the reality is that the agency
16 staff does do this stuff, it's just that the guidelines
17 don't reflect it, and if you don't live and die this
18 stuff, you're not going to know that.

19 MR. SHELANSKI: Michael, before I turn to you,
20 let me actually turn to you with a somewhat more
21 generally-phrased version of the question because what
22 has come up so far is some very interesting thoughts,
23 that you've got questions of disruptive entry by
24 innovative players, Shumpeterian kind of creative
25 destruction, if you will. You've got the possibility,

1 something came up in the last panel and that we've
2 heard some echos of today, in conventional markets of
3 potential competitors coming in in differentiated
4 product markets. You have the possibility of product
5 repositioning in response to price increases by a
6 rival. So this leads me to think more generally about
7 the question and, let me rephrase it to you in this
8 way.
9 Should the antitrust agencies be considering
10 additional or alternative measures of market
11 concentration in these kinds of markets, differentiated
12 product markets, technologically dynamic markets or any
13 settings in which current market shares may be less
14 indicative of market power than they might be in the
15 static model of competition?
16 MR. SALINGER: There's not much use in trying
17 to adapt the framework of defining a market and
18 defining concentration of the market and the changing
19 concentration with respect to innovation. There are
20 good reasons -- there can be good reasons to block a
21 merger because of concerns about reduction of
22 innovative competition and, what would cause you to do
23 that would be that you look at how the companies made
24 their decisions about how much to spend on innovation
25 and who they were concerned about, and so the classic

1 case would be that you have two companies and they're
2 the only two companies that are trying to develop a
3 particular technology and each of them is trying to
4 beat the other and you know that, and so then you would
5 block -- absent some reason to believe that they were
6 going to do it better in a joint effort, which, you
7 know, which happened with the Genzyme Novazyme merger.
8 Then you'd block it for innovation reasons but there
9 would be no reason to say, well, this is going to
10 create a 10,000 herf in the innovation market and the
11 change in the herf of 5,000.
12 It's really more from the direct evidence of
13 head-to-head competition. And, in a way, it's an
14 approach, it's a little bit like the upward pricing
15 pressure approach that the guidelines -- the approach
16 of defining a market and looking at concentration and
17 the changing concentration can be useful in some cases,
18 but there are other cases where really the best
19 evidence for the competitive effect of the merger is
20 that you have evidence that these companies view each
21 other as strong direct competitors and that that's
22 going to change if they merge.
23 MR. SHELANSKI: If I can just follow up on
24 that, that prompts a couple of questions.
25 I'm inclined to agree with you and I think that

1 that's a very important point about how we would look
2 at a merger when we're considering its effects on
3 innovation.
4 Do you see the roots of the problem as being in
5 the difficulty of drawing presumptions about the
6 effects of market structure on innovation, or are the
7 roots of the problem in identifying the universe of
8 competing innovators or is it a combination of the two?
9 What leads you to the more fact base
10 case-by-case approach when it comes to innovation
11 effects and, what I read in your remarks, an
12 abandonment, if you will, of this sort of standard
13 structural presumptions in hat area?
14 MR. SALINGER: Well, probably the reason lies
15 in a lot of the points that Rich was making which is
16 that as imperfect as the structure performance model is
17 for handling price effects, it's even harder in
18 innovation and so it's already a controversial tool
19 with the standard price and output decision, so that
20 when you then make the tool even more imperfect it
21 ceases to be useful.
22 MR. SHELANSKI: Rich.
23 MR. GILBERT: And if I could just add to that.
24 I agree with what Michael said, but obviously when we
25 look at innovation we often look at R&D effort and, of

1 course, R&D effort is an input not an output to
2 innovation, and we're concerned about the output of
3 innovation and not the input of R&D. So you could have
4 a situation where two firms merge. It's clear that one
5 firm is going to drop an R&D project. It may not be a
6 bad thing to do. It depends. And you have to consider
7 what else is going to happen in that event. And so
8 it's not something that lends itself easily to a
9 structural analysis. It has to be an effects-based
10 analysis as is often the case for price competition as
11 well.
12 MS. KNABLE GOTTS: I think that's right because
13 that focus is -- looking at the counter-factual, would
14 you have had two firms out there and, also, part of
15 this has got to be, what will be the response of others
16 in the marketplace. Even though these two firms might
17 have been going head to head, is there someone else who
18 can keep the competition up afterwards, might be a
19 relevant --
20 MR. STERN: Let me just jump in. It seems to
21 me to kind of make this simple. I don't think that
22 market share numbers are really going to help you at
23 all. If you use Michael's example of two firms that
24 are the only two firms that are pursuing a certain
25 product characteristic that might be important and they

1 merge together, and the other firms in the industry,
2 let's say there are four firms, they each have 25
3 percent share of however you define the market, but
4 these two firms may be innovating in some important way
5 and competing with each other. If they go together,
6 there may be barriers, patents, or other things to keep
7 the other two players from pushing them on price or on
8 innovation.
9 If you just change the hypothetical around and
10 find out that one firm is pursuing this, it's not one
11 of the merging firms, the two merging firms see this as
12 an opportunity and are willing to invest money, but
13 they either lack IP that they would get through the
14 merger or capabilities or scale to make the investment
15 work, then you can turn a merger with the same market
16 structure from being one you would be very worried
17 about to one where you'd say that the merger really
18 presented a lot of benefits because it was likely to
19 stimulate innovation and create competition for the one
20 firm that was already well in the lead in doing the
21 innovation in this particular product characteristic,
22 which is, again, why I think you don't look at
23 structure, you don't look at numbers, you look at the
24 facts and the particular market context.
25 MR. GILBERT: May I just add one thing? Except

1 for the safe harbor. Because we already do have a safe
2 harbor if we look at the IP guidelines. Of course,
3 it's not directly merger related. Then there's also
4 the competitive collaborative guidelines that have an
5 innovation related safe harbor and, for good reasons,
6 because you would not expect innovation effects to
7 develop where you have, you know, multiple players that
8 can, in fact, do the same sorts of things.
9 MR. SHELANSKI: Okay. So what I would like to
10 do next, starting with Ron and working our way down the
11 row to Ilene, I would like each of you to take a couple
12 of minutes to summarize your recommendations and, if
13 you will, articulate your wish list to the agencies on
14 the question of concentration structural presumptions.
15 What are the two or three things you think we
16 should do? And summarize your views on that.
17 MR. STERN: I'll go down my laundry list
18 quickly. Before I do that, I'd refer you to the
19 comments that Mike Whitener and I filed that cover
20 areas more broadly than market structure. Mark is here
21 with me today as a former Deputy Director of the Bureau
22 of Competition and my colleague at GE.
23 The first thing I would do is remove the
24 current HHI presumption, which I mentioned several
25 times, and I wouldn't replace it with a higher number.

1 I would have the structural approach just be a starting
2 point. I'd revise the guidelines to increase the safe
3 harbor at which no further analysis is required. But I
4 don't think that's as important as removing the
5 presumption based on numbers.
6 I would focus on competitive effects as the
7 core of merger analysis. I think that's quite
8 important. And I'd also avoid replacing the HHI
9 structural presumptions with any other structural
10 presumptions based on numbers or formulas.
11 We've talked briefly -- it was mentioned about
12 upward pricing pressure. I think that could be well
13 part of the analysis of unilateral effects, but I think
14 and, as we've pointed out in our comments, that if you
15 look at the numbers taking lots of industries including
16 industries that my company is involved in that have
17 high variable margins, you end up with presumptions
18 under what I understand the UPP analysis to be, that
19 are presumptions we've all rejected based on the HHIs,
20 seven to six mergers become potential problems, and I
21 think that the agencies ought to be very cautious
22 before they adopt presumptions of any kind that don't
23 reflect historical practice and aren't well accepted.
24 And then finally to touch on a point that came
25 up in the first panel, I do think that it is very

1 important for the Department of Justice and the Federal
2 Trade Commission at this stage to understand the impact
3 of any revision of the merger guidelines in the world
4 that we live in with globalized markets and a hundred
5 agencies approaching that number anyway that have
6 merger review, some very new to the process.
7 I think a lot of progress has been made on
8 working towards a consensus in which we don't rely on
9 numbers and presumptions and mechanical approaches. We
10 rely on competitive effects analysis. I think a lot of
11 progress was made led by the Department of Justice and
12 the merger task force that Phil Weiser now heads in
13 getting the recommended practices approved, and I think
14 it is important for the US to build on those and to
15 build towards international consensus.
16 Yes, all the good ideas ought to be built in,
17 but we ought to realize we're not operating in a
18 vacuum, and we ought to think about the messages we're
19 sending internationally.
20 MR. SHELANSKI: Thanks very much Ron.
21 Michael.
22 MR. SALINGER: I would -- forgetting my wish
23 list, I would just echo the point of how influential
24 these things are across the world. I was always struck
25 at how many countries had followed the US lead in

1 having tying be a per se violation of the law. So
2 these can be powerful for bad and for good and so you
3 have to be very careful.
4 The essential dilemma of merger policy is that
5 we want merger review to be forward looking and we want
6 merger review to be based on facts. And the problem is
7 we don't have facts about the future, and that means
8 that there are mistakes that are going to be made. And
9 so I believe that, I mean, putting aside whether
10 presumption is the right word, some sort of structural
11 guidelines are necessary and I would use the 1,500 and
12 2,500, and I recognize the point that the reality might
13 be a little bit north of that now, but I would have a
14 bigger role for efficiency analysis, so that the reason
15 for having a somewhat low number for the threshold is
16 to say, okay, well beyond that, this is where we start
17 to get nervous, and so this is where we would expect to
18 see some credible information about the efficiencies to
19 make us less nervous.
20 In our discussion about innovation, a lot of
21 the discussions, well, you put two R&D shops together,
22 you might get efficiencies from it and that's true, and
23 that should be taken very seriously.
24 But it strikes me as being a big problem that
25 the efficiency analysis, there's this chicken and egg

1 problem that people believe the agencies aren't going
2 to take efficiency analysis seriously, so they come in
3 and provide efficiency analysis that the agency
4 shouldn't take seriously.
5 So I would stick with the structural
6 guidelines, have a bigger role for analysis.
7 And then, finally, on one of the issues giving
8 rise to these proceedings, you have to say, well,
9 sometimes there's going to be a decision to block a
10 merger based on the structural analysis, but there will
11 be other cases where we have direct effects -- direct
12 evidence of anticompetitive harm that's coming through
13 with a different analytical approach and so, when we
14 have that, we're going to rely on the direct evidence
15 of anticompetitive harm, and we're not going to have to
16 rely as much on the structural tool.
17 MR. SHELANSKI: Thank you. Rich.
18 MR. GILBERT: It's not an easy job to write
19 guidelines, I can tell you from some experience. What
20 some people want is plain and simple language. You
21 know, two to one is bad, really bad; three to two is
22 not so good either. And end it at that. But the
23 merger guidelines in many respects have come to
24 represent really the collective wisdom that we have
25 when it comes to analyzing competitive effects from

1 mergers and acquisitions. And, in many ways, it's the
2 bible of competition policy. I do think that we have
3 learned a great deal since the fundamental principles
4 were laid out in the guidelines in the '80s, and our
5 knowledge has pointed us in new directions, and that
6 would be helpful to communicate those new directions
7 both to, well, to practitioners, to the public, and to
8 the people in the agencies who do this. It provides a
9 useful function for all three of those constituents.
10 When it comes to structural presumptions,
11 they're useful as safe harbors, but it will be faced
12 with the criticism that it's irrelevant because nobody
13 actually brings mergers that fall in those -- close to
14 those safe harbors anyway. So we could make the HHIs a
15 little bigger, maybe the deltas a little bigger, change
16 the language to say instead of a presumption of harm,
17 we will say that if it's below this level, it's
18 unlikely that there would be harm from this merger. It
19 would be useful, I'm not sure it would make that much
20 of a difference. I would urge the agencies to
21 communicate the more integrative view of merger
22 analysis that is consistent with what they presently
23 do, which is to really think about the second section
24 of the guidelines about the competitive effects and to
25 analyze transactions in that context.

1 And I'll give you an example which is developed
2 in much more detail, or more detail, I'm not going to
3 say much more detail, in my comments that I filed with
4 Dan Rubenfeld, which is, that when you think about the
5 SSNIP test for differentiated product markets and price
6 taking firms, well, the SSNIP test which says, you
7 know, small but significant non-transitory increase in
8 price, if you apply that to a differentiated product
9 market -- differentiated products industry, it's really
10 close to asking the question, "Will the merger raise
11 prices?" So it is the competitive effects analysis.
12 So, why are we kidding ourselves and thinking that that
13 is a separate analysis that we're doing in the context
14 of market definition? And, for that reason, since so
15 many markets are, in fact, differentiated product
16 markets, where we think about unilateral effects, we go
17 right to that Section 2 of the guidelines, and we
18 should think about it that way, and we should think
19 about that analysis as contributing to and informing
20 the process of market definition. If you can actually
21 develop a good competitive effects story, there should
22 be a market that you can define that is consistent with
23 that story. And that I think is one way that the
24 guidance could be improved in the guidelines to talk
25 more about how we, in fact, do unilateral effects

1 analysis.
2 With regard to dynamic industries, I don't see
3 a need to change fundamentally the approach due to
4 entry. I believe that firm repositioning, and that
5 sort of thing, are well handled in the guidelines
6 today. But the guidelines could provide some
7 commentary about innovation incentives and there --
8 while I don't support a structural presumption for the
9 same reasons that I wouldn't support one for price
10 effects, there's ample reason to provide a safe harbor
11 and to focus on the principle that we're going to be
12 concerned about innovation effects in mergers only if
13 the merger doesn't enhance appropriability or maybe a
14 better way to put it would be to say, a necessary
15 condition to be concerned about innovation effects in a
16 merger would be in a market where there is a lot of
17 appropriability.
18 MR. SHELANSKI: Thank you.
19 MS. KNABLE GOTTS: I'm not going to repeat what
20 everyone said. We're out of time pretty much, but I
21 pretty much agree with what Rob has said about the
22 HHIs, so one thing Rich I would state a little bit
23 differently, I think on the entry question in dynamic
24 industries, we should do more. It goes back to
25 Michael's question, when you look at the two firms, do

1 they really look at each other as really competitors in
2 innovation and looking at what timeframe that really
3 influences them. And that's going to vary from
4 industry to industry. Some industries you start making
5 your decisions 10 years in advance because responding
6 to what's out there. So I think there needs to some
7 recognition of that.
8 The only other thing I want to point out is,
9 there are times -- well, two more things. One, when
10 you want to look bidders' models. When looking at
11 market structure and market shares, again, you get this
12 false sense of some kind of impact and where, because
13 of the responses of customers and firms, it's really --
14 and capacity that might be out there, a one over n
15 might be a more appropriate way to measure it.
16 And the other aspect is to kind of focus on
17 what the guidelines are for. They are more the bible.
18 They're not the Talmudic Readings or the latest flavor
19 of the month or whatever. So I worry about trying to
20 do everything and, in there, perhaps putting in the UPP
21 test, for instance, even if the agencies are today
22 really testing that and trying to see how that works.
23 Put that in a speech. So that is something we are
24 today looking at kind of like the European Union has
25 the economists talking about the sort of the evidence

1 that they look at, you can put that in there, but I
2 don't think it's tried and true enough of a test that
3 putting it into guidelines today and accepting that in
4 some elevated status as how we're going to decide
5 whether something has competitive effects is the right
6 thing to do. So that -- was that quick enough?
7 MR. SHELANSKI: That was great. Thank you very
8 much.
9 We have time for a couple of questions, if
10 there are any. Louis Kaplow.
11 MR. KAPLOW: (Technical difficulty.)-- and to
12 talk about two that I think that the discussion doesn't
13 fit very well. So one is the traditional coordinated
14 effects which we talk about almost not at all. Number
15 one, when there's actually coordinated effects going
16 on, the price elevations are often much much larger
17 than the things that we're talking about in the
18 unilateral effects analysis, if it actually ever
19 happens.
20 Number two, if we look at, say, prosecuted
21 price fixing cases over the last couple of decades in
22 the US, Europe, or elsewhere, we see again evidence of
23 much much larger elevation than anything being talked
24 about in merger analysis, and we often see that there
25 were five to eight firms, meaning industries that would

1 be in the safe harbor range of what's being talked
2 about.
3 So this raises a question, you know, three, so
4 why is it we can ignore this? We've got two
5 sub-categories, A, we have, say, express price fixing.
6 If we think we can adequately catch it, deter it, and
7 sanction it, we're fine. I think there's a lot of
8 evidence suggesting we're not there yet which may be
9 cause for revisions elsewhere, but it's to keep in
10 mind.
11 B, if we're talking about tacit coordination
12 which we maybe think isn't even illegal so we're not
13 going to hope or even try to deter it, then we're going
14 giving up on it.
15 So that then leaves a fourth point which I
16 don't have an answer to, which is, how can we look at
17 mergers and figure out when they're going to
18 significantly raise the likelihood of coordinated
19 effects? Much can be said about it, but not very
20 sharp. But it seems to me that implicit in the
21 discussion of the numbers, is we're giving up on that
22 pretty much entirely, we're going to call all of those
23 really safe harbor cases that we don't even get worried
24 about.
25 And then the second one which Rich was talking

1 about in some of his latter remarks is we have the
2 highly differentiated product merger. There's 15 firms
3 an two that are close that are merging. It seems that
4 either the market share is 100 percent or well under
5 the safe harbor. And Rich would say, and I would
6 agree, and others would agree, that we need to do the
7 competitive effects analysis, see if price will go up a
8 lot and then we're done. But if that's a real answer,
9 then what was the safe harbor?
10 The safe harbor, if we just did a conventional
11 market definition which would be broad, let's say we're
12 not even allowed to get to that step because they're in
13 the safe harbor, but if we always ignore the safe
14 harbor and do all of the analysis and then go back and
15 define the market definition from which we can then
16 figure out whether we were in the safe harbor, how is
17 it a safe harbor, and how does it give any guidance? I
18 guess that had a question mark at the end.
19 MR. SHELANSKI: Does somebody want to react
20 quickly to listening to that remark?
21 MR. GILBERT: Yes, Louis, two excellent points.
22 The problem with the structural presumptions, whether
23 the presumption of harm or presumption of safe harbor,
24 they're built on shifting sands. So it's fine if we
25 know what the market is, but we don't know what the

1 market is, so I'm not sure it creates all that that
2 much value, if it represents all that much value to
3 begin with.
4 And that's particularly the case with
5 differentiated products. And many many markets have
6 differentiated products so is the market, you know, all
7 cars, or is it just luxury cars, or is it just small
8 cars or compact cars, and so this problem comes up time
9 and time again.
10 With respect to coordination, I mean that's a
11 fascinating issue as well. I think the Clayton Act
12 talks about transactions that are likely to harm
13 competition and -- so what do you do with a market that
14 is already -- where the parties are already doing a
15 good job of coordinating, so they've already imitated a
16 concentrated outcome. So, how do we apply the Clayton
17 Act there?
18 I do think that the approach should be, let's
19 look at, what is the potential to increase coordinated
20 activity. It is my view, but it's just my view, that
21 that is much more likely when we're in the highly --
22 significantly more concentrated domain, assuming the
23 market is properly defined.
24 MR. SHELANSKI: Michael.
25 MR. SALINGER: I'm glad you raised the

1 coordination issue because I think that's really the
2 main reason why we still need structural guidelines.
3 If you ask the question, "do we ever know that a merger
4 is more likely than not to increase the risk
5 coordination?" The plain answer to that is no. We
6 don't -- you know, what we know is there's a mutual
7 incentive to coordinate and we know that if firms are
8 coordinating, there's a private incentive to cheat and
9 when one wins out and the other wins out, we just don't
10 know.
11 So, if the legal standard is more likely than
12 not, then we should just get rid of coordinated effects
13 as part of the law altogether because we're never going
14 to know it.
15 On the other hand, as you pointed out, we know
16 that coordination occurs, because we see all the
17 price-fixing cases, and we know that the congressional
18 intent in passing these laws had to do with preventing
19 coordinated behavior. So that's why I think you need
20 some structural guidance.
21 MR. SHELANSKI: Very quickly, Ronald.
22 MR. STERN: Very quickly. I really do think
23 that there are two different categories in there need
24 to be treated differently. If there's an actual cartel
25 agreement, I don't believe the fact that they occur in

1 industries with eight players or 10 players would be
2 below the guidelines is any reason to change merger
3 analysis. It's a reason to reinvigorate anti-cartel
4 enforcement.
5 If you're dealing with tacit collusion which is
6 legal, and you have an industry in which you have well
7 functioning tacit collusion, then you need a lot of the
8 criteria for why it is you shouldn't allow an
9 additional concentration to reinforce it because the
10 factors that are well established in the guidelines for
11 dealing with coordinated effects are there, and you're
12 likely to find a problem.
13 So I would put these in two very different
14 buckets, and I think it is a red herring and dangerous
15 to say that because we have cartels in industries that
16 are not highly concentrated, somehow we ought to be
17 knocking down mergers because we don't know if that
18 would facilitate a cartel.
19 MR. SHELANSKI: We have time for one final
20 question. Eleanor.
21 MS. FOX: Yes. I wanted to ask a question
22 about the law and particularly about Philadelphia
23 National Bank, and also particularly about litigation
24 presumptions.
25 What does the panel think about, should the

1 Justice Department, FTC abandon the Philadelphia
2 National Bank presumption which is basically a
3 correlate with the presumption in the guidelines, if it
4 is not abandoned, could it be retained with the
5 statement in the guidelines to say this is a
6 presumption that arises from law? Of course, I'm
7 assuming you know what your market is or that there
8 will be a market defined which is often quicksand, but,
9 if it isn't, anyway, so is there any thought of saying
10 in the guidelines there is a presumption that arises
11 under the following situation, and we're going to
12 define the situation as this much concentration, this
13 much increase in concentration. It is not necessarily
14 a logical inference. It shifts the burden of going
15 forward.
16 Actually, whether it shifts the burden of going
17 forward or burden of proof, I think judges are often
18 not sure, and this would give some certainty that is
19 only shifting burden of going forward, and now it's
20 just the firm's chance to speak and say why this is
21 isn't anticompetitive.
22 MR. SHELANSKI: Ilene, do you want to take a --
23 MS. KNABLE GOTTS: Well, actually, that was
24 something, Eleanor, I said in the beginning of what I
25 commented on. I think the guidelines should give an

1 indication of where the agency, as a matter of
2 prosecutorial discretion, how they're going to go about
3 analyzing cases, and not in any way try to impact how
4 courts today or may in the future based on judicial
5 precedent decide to do it.
6 We're not going to do away with the fact that
7 courts do put in certain burden shifting and
8 presumptions, the balancing act, which is why in the
9 antitrust section comments that were filed in this
10 proceeding, we did drop a footnote recognizing that
11 that presumption does exist today in the law without
12 suggesting that necessarily the guidelines need to take
13 the exact same approach.
14 MR. SHELANSKI: Ron.
15 MR. STERN: Just a very quick comment. I would
16 certainly hope that the Department of Justice and the
17 Federal Trade Commission don't turn the merger
18 guidelines into a statement of, you know, what their
19 presumed enforcement policy would be but not guidelines
20 akin to other statements that have been issued recently
21 not in a merger context.
22 And I do think that if we have outdated case
23 law that isn't reflective of where the guidelines are,
24 a whole discussion of presumptions and HHIs and
25 statistics are such that I would hope that if it in

1 fact is a good idea not to have the same kind of level
2 of presumption as the Philadelphia National Bank, and
3 that that's established and is a consensus, that we
4 wouldn't have litigating positions that are
5 inconsistent with the merger guidelines.
6 MR. SHELANSKI: Okay. With that, I would like
7 to thank our panelists. That was extremely helpful.
8 We're going to take a break until 11:30 and then we'll
9 come back with our next panel. Thank you.
10 (Applause.)
11 (A break was taken.)
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1 PANEL 3: MINORITY INTERESTS
2 AND FAILING FIRM DEFENSE
3 MR. SHELANSKI: Okay. We're going to get
4 started with our next panel so we don't get too far
5 into the lunch break that we have.
6 This next panel is going to be on Minority
7 Interests and Failing Firm Defense.
8 We're very lucky to have a wonderful group of
9 panelists, we want to thank everybody for their
10 willingness to take time out of their day for this.
11 MR. JACOBSON: I'm going to kick off the
12 discussion on that. A couple of things. Obviously
13 partial ownership is not discussed extensively in the
14 guidelines. I think one can read them backwards,
15 forwards and sideways and not find a word. And I
16 actually think there is a reason for that. The
17 question that was posed is, "When should partial
18 ownership be treated as a merger?" And the correct
19 answer I think is never, because partial ownership does
20 not have the efficiencies that distinguish mergers from
21 other types of transactions.
22 Price fixing is illegal per se because it
23 eliminates price competition but mergers are viewed
24 under a rule of reason because they're associated with
25 efficiencies.

1 And partial stock acquisitions, unless they
2 involve some integration which then, it really is a
3 merger, are not properly viewed as mergers. But
4 partial stock acquisitions can cause competitive
5 problems in four different areas, and I would commend
6 to you the ABA comments which address most of these
7 issues, but let me just tick them off and then we can
8 talk about them later in more detail.
9 The first is, you can get de facto control even
10 without an integration of resources through a minority
11 stock acquisition. I think Carl Icahn minority
12 investments up to a certain percentage can give you
13 effective control of a board of directors if you have
14 42 percent, and the largest, the second largest owner
15 has one percent, you can have effective control of the
16 company, a lot of it has to do with the voting rights
17 associated with your stock as opposed to the others,
18 but you can get de facto control of a company with less
19 than 50 percent.
20 Second, and we're going to talk about this in
21 response to another of Howard's questions. There are
22 unilateral effects consequences from passive stock
23 ownership even without any voting control and we'll
24 leave further discussion of that later, but this is the
25 analysis that Steve Salop popularized and creates some

1 interesting issues.
2 Third is access to information, a right of
3 stock ownership is access to information. This usually
4 runs in one direction so it's not an exchange of
5 information, but there are competitive consequences for
6 a competitor having access to confidential information
7 of its rival.
8 And the fourth, which is rarely discussed out
9 in the open, but those of you who represent clients I'm
10 sure have had this discussion which is one rival buying
11 a minority stock interest in another company can
12 present a obstacle to the next largest competitor's
13 attempt to acquire that company, and that can have
14 competitive consequences as well. I don't think anyone
15 has heard of a legal challenge to that. It would have
16 to be by the agencies because the courts have
17 established the private parties pretty much never have
18 standing in that context. But that can be that if an
19 acquisition by B of C would be procompetitive, and A
20 buys a minority interest in C to prevent that result,
21 that can have anticompetitive consequences.
22 The guidelines address none of these issues. I
23 do think we need some guidance particularly on the
24 passive ownership, but why don't we leave that until
25 later discussion.

1 MR. SHELANSKI: Hit your button. Say that
2 again.
3 MS. OVERTON: Hi. I think I've got it here.
4 It's very nice to be up here in New York for this. And
5 even though I'm no longer with the government, I'll
6 give a disclaimer that my views don't necessarily
7 represent those of the firm or any given client. For
8 the reasons that Jonathan laid out, there are going to
9 be considerations, analytical considerations, when
10 you're looking at a partial ownership transaction, that
11 are just going to be different than when you are
12 looking at a merger. If you've got companies that are
13 still competitors in the marketplace, for example,
14 you're going to have this concern about competitive
15 information sharing but, to the extent that you are
16 proceeding under Section 7 rather than Section 1, it
17 just goes back to the basic question here in terms of,
18 is this transaction substantially likely to lessen
19 competition.
20 Now, again, there may be reasons that a partial
21 ownership transaction is less likely than a full merger
22 would be or perhaps more likely. But I think that's
23 going to be a factual inquiry.
24 MS. FORREST: Well, I guess -- I wanted to
25 start off by saying that -- if I think I heard you

1 right, Jon, you said, when should a partial acquisition
2 be considered to be a merger, and I think you said
3 never. Is that right?
4 MR. JACOBSON: Yes, I always like to --
5 MS. FORREST: It's like Ilene Gotts saying take
6 the HHIs out of the merger guidelines, you know,
7 starting off her panel that way.
8 I actually would disagree with that, and I
9 would say that there are certainly circumstances when
10 you have got real financial control and/or you've got
11 effective control as you have mentioned of the decision
12 making of the firm where you effectively really have
13 control of that firm which is control in the sense of a
14 merger.
15 And while the guidelines don't address this
16 front ways, backwards, sideways, or in any other way, I
17 do think that it's appropriate that partial
18 acquisitions which result in a form of control should
19 be appropriately analyzed as a type of merger.
20 I think the questions become who is making the
21 acquisition and how much are they, in fact, acquiring.
22 And the who and the how much I don't think are, in
23 fact, amenable to numerical tests in any way. I think
24 they are highly fact and circumstances driven, sort of
25 a reverse Copperweld analysis, if you want to think of

1 it like that.
2 But I think that depending upon the who, if
3 it's a competitor acquiring a partial interest in
4 another competitor that obviously could lead to some
5 interesting issues. Even a competitor who is not
6 acquiring a necessarily controlling interest in another
7 competitor would obviously have interesting issues.
8 A competitor that is acquiring in the context
9 of an otherwise fragmented ownership structure may
10 raise interesting issues. If you've got, let's just
11 say you've got a 39 percent acquisition. Not
12 necessarily even in the high 40s, but 39 percent, but
13 let's say the remainder of the ownership structure is,
14 in fact, fragmented, highly fragmented, and the
15 competitor is acquiring that interest in either
16 possibly in another competitor that can raise some
17 issues.
18 Even in a situation where there is not
19 necessarily a competitor acquiring a horizontal
20 interest, but a vertical interest you might have some
21 interesting issues if it's highly fragmented enough.
22 And the how much then I think becomes an issue
23 as to both, whether or not you can achieve effective
24 control through financial control, or whether or not
25 what you've done is you've achieved control through

1 governance means. And if you achieve it through
2 governance means, sometimes you can acquire a much
3 lower level of financial interest, but still through
4 governance means it might be simply veto rights over
5 certain kinds of transactions, or it might be a board
6 seat which provides you with certain kinds of either
7 super majority voting control or other things. Those
8 all I think need to be taken into consideration.
9 So when I think about partial acquisitions and
10 mergers, I think that there are certainly circumstances
11 where they should be considered to be mergers.
12 However, I think that if the merger guidelines are
13 going to take these into account, and I encourage them
14 to because I think they're increasing numbers now of
15 significant partial acquisitions, and a real paucity of
16 guidance, and the merger guidelines after all are
17 supposed to be about guidance.
18 So if they take it into consideration, I think
19 that what they need to do is to provide examples of
20 what are some of the structural issues that can raise
21 concerns, what are some of the financial triggers that
22 may or may not raise concerns, and it's almost as if
23 what you want to do is add examples into the guidelines
24 for this purpose.
25 So that's my -- and one last point.

1 Efficiencies. I do think that partial acquisitions can
2 result in efficiencies, and I think this is what Steve
3 Salop's paper in part addressed, which is, you can have
4 capital efficiencies, you can have a scarcity of
5 resources that bring efficiencies, even through a
6 partial acquisition. So while they're not a typical
7 kind of a merger efficiency that you might see in
8 another context, they certainly exist, and should also,
9 if the merger guidelines deal with them, be taken into
10 consideration.
11 MR. NEILL: I wasn't going to talk much about
12 minority ownerships but, I guess, in general, my view
13 is that most of these things, unless you get to very
14 high percentages, can be dealt with pretty easily
15 through conduct restrictions on governance and whatnot,
16 and probably the next part of this is going to be the
17 incentive effects theories which I personally think are
18 highly tenuous and really shouldn't be much of a
19 concern and probably don't need to be addressed.
20 To me, it's so improbable that the acquirer is
21 going to alter its business, especially if it has
22 conduct restrictions with, vis-a-vis, the target on the
23 theory that it's going to somehow derive a benefit --
24 it's going to lessen its own competitive vigor in the
25 hope of recouping some of that, you know, from the

1 target. That just seems highly tenuous to me.
2 MS. OVERTON: Oh, I was just going to clarify
3 that I think that there needs to be some guidance in
4 the horizontal merger guidelines if you all are going
5 about the process of updating them.
6 MR. SHELANSKI: Well, before I return to that
7 issue, because I think it's helpful, I want to go back
8 to a point that was echoed in Kathy's remarks, David's
9 remarks, pretty much all of you, about the different
10 kinds of partial ownership interest we might see. And
11 you talked about the difference between pure financial
12 ownership and actual governance.
13 So let's talk about passive ownership interest.
14 Under what conditions do you think, and I want to start
15 with you on this, Kathy, because I think you addressed
16 the point most directly, under what conditions do we
17 think partial ownership interests will ever raise
18 concerns, and when you say we should give guidance in
19 the guidelines, is there a safe harbor you would
20 propose, is there a set of factors that you would
21 propose that we're looking at to determine whether
22 concerns should be triggered? And speaking
23 specifically about passive ownership interest.
24 MS. FORREST: Passive?
25 MR. SHELANSKI: Passive.

1 MS. FORREST: And not partial?
2 MR. SHELANSKI: Well, passive partial.
3 MS. FORREST: Right. Passive partial. Well,
4 with passive interests I think that the question is,
5 how passive really is passive. I think that you can
6 have a couple of different situations that are hard,
7 apart from the HSR rules and regulations where you've
8 got an investment-only exception, okay, putting that
9 aside for a moment, that's a very helpful thing to have
10 out there. But putting that aside, you can have a
11 situation where you've got a passive ownership of one
12 competitor and another competitor.
13 Then I would suggest to you that that's not
14 truly investment only and could not really be
15 investment only. It's going to affect incentives. And
16 it might lead to potential misalignment of incentives.
17 So I don't think that you can have an equity
18 cutoff, purely equity cutoff, that would lead to a safe
19 harbor. You can also though have a different situation
20 where you've got multiple competitors who are at the
21 same time, let's assume for the moment that
22 hypothetically they're going to trigger the HSR
23 thresholds for filing, multiple competitors who are all
24 going to make equity investments in a third party. And
25 that's also very hard to deal with in terms of a safe

1 harbor.
2 Now, I agree with David that you could have
3 some behavioral conditions put around that, that's
4 typically how it would be dealt with, where you would
5 try to prevent other kinds of potentially Section 1
6 type of behavior leaking into your board room. But
7 that is the kind of thing where with, you know, that
8 would be a passive investment perhaps if -- well, with
9 the board room, you wouldn't be passive, okay, let's
10 just say it's an equity interest, but even some types
11 of passivity you might not take governance rights and
12 call that passive, but I have seen situations where
13 people have attempted to take a veto right and call
14 that passive.
15 And they have said, well, we're not governing,
16 we're not actively involved, we don't have operational
17 control, but we have got a particular kind of veto
18 right.
19 So what is passive? So what I would suggest is
20 that the conditions of passivity are the conditions of
21 investment only, and it's truly got to meet the kind of
22 investment-only criteria that you otherwise have in the
23 HSR rules and regulations for just a filing. And
24 that's the kind of passivity I think that we're talking
25 about for being able to remove it from a true merger

1 review. And, with competitors, I think, you know,
2 almost from the beginning I think it's very hard to
3 think of a competitor acquiring a passive interest in
4 another competitor, and I would add potential
5 competitors doing the same thing and having that be
6 truly passive in a way that you'd be comfortable having
7 some sort of number safe harbor threshold to eliminate
8 review. So I guess I don't see a safe harbor, but I'm
9 probably an outlier here on this panel and that one.
10 MS. OVERTON: Assuming that you can have a good
11 definition of passive that is truly passive and doesn't
12 have -- doesn't have governance rights, doesn't have
13 competitively sensitive information access those types
14 of things, I think it's worth considering whether you
15 can get to a safe harbor for a small enough percentage
16 where you wouldn't have even really the theoretical
17 concern that Salop and others talk about in terms of
18 the unilateral incentives even in a passive context for
19 the acquiring firm to raise its prices.
20 So I think that it is a fruitful exercise to
21 explore a safe harbor.
22 MR. JACOBSON: Yeah, I would echo that. Let me
23 go back to another point. Kathleen, I don't think you
24 and I really disagree except on semantics on the first
25 point because, what I was talking about, the reason I

1 would not treat partial stock deals as mergers is that
2 there's no integration of resources. So there may be
3 some capital efficiencies, but those are not the sort
4 of things that I would suggest involve the type of
5 analysis that we see in the merger guidelines.
6 On acquisitions of partial ownership of a
7 direct competitor, with absolutely no voting control,
8 totally passive interest, the agencies have been
9 active. There's been the Univision case, DOJ case in
10 2003 requiring a 30 percent interest be divested down
11 to 10 percent within six years. There's the Clear
12 Channel AM/FM deal in 2000 requiring total divestiture
13 of the 29 percent interest in AM/FM.
14 There's the discussion in the Sixth Circuit
15 decision in the Dairy Farmer's case. There's
16 Continental Northwest where the interest had to go down
17 to seven percent as a result of the settlement. It
18 started at 50 percent.
19 I agree with David that the Salop -- I wouldn't
20 go quite as far as you do, that the analysis of, gee
21 whiz, if I raise my price by $30, I'm going to get four
22 of those back because I own X percent of my rival,
23 probably doesn't explain a lot of real world behavior.
24 So, for that reason, I would suggest that there
25 ought to be some cutoff point below which you just

1 don't worry about this and you can advise clients, it's
2 just okay to do the deal.
3 Now, if there are two firms in the industry and
4 they're buying some stock in each other, you begin to
5 worry that maybe something is going on beyond passive
6 stock investment, but in the general run of the mill
7 case, I would have a cutoff at 10 or 15 percent as a
8 general presumptive safe harbor for these cases, and I
9 think that's consistent with what the agencies have
10 done in actual practice.
11 MS. OVERTON: I would agree that the number is
12 probably somewhere around there because I think that,
13 as Jonathan pointed out, if you get much higher, then
14 you do start to wonder, well, what are these
15 investments really about? Are they really about just
16 investment, or is something else going on? And, you
17 know, I think that even Salop would probably agree that
18 even with his theory of harm with something as low as
19 10 percent or even maybe 15 percent, you're probably
20 not going to have that incentive.
21 And I think that when dealing with passive
22 interests like this, it is important for the agencies
23 to take into account these real world considerations.
24 And I'm not saying that the real world considerations
25 mean that it's not ever worth it or appropriate for the

1 agencies to explore these because we do have theories
2 that suggest consumers could be harmed here. But it is
3 important to think about, are there other factors
4 whether it is for whatever reason the acquirer is not
5 agnostic as between a dollar earned in its own firm
6 versus money earned from sharing in the profits of the
7 acquired firm. And there could be again other
8 shareholders and just all sorts of other reasons that
9 the theory does not play out in the real world.
10 So I think it would be useful for the
11 guidelines if they could to reflect some of those real
12 world considerations.
13 MS. FORREST: Can I just throw out a question?
14 I'm just sort of curious -- Leslie, what your view is
15 on this? What if we had a situation where, again,
16 assuming thresholds are met, and assuming no governance
17 rights, you've got a scenario where you have several
18 different competitors acquiring a passive interest in
19 another company, and the question really ends up being,
20 do you have a safe harbor where you remove it from
21 review of the agencies where it's otherwise, you know,
22 where you're going to file, but, essentially, it'll be
23 passed over fairly quickly? Or do you want the
24 agencies or do you expect or is it appropriate for the
25 agencies to look into whatever structural governance

1 protections there are there to protect against sort of
2 Section 1 issues?
3 So, I guess my question is, let's take passive
4 to more than one player and you've got more than one
5 player whose exercising their ability to acquire a
6 passive interest at the same time and they're
7 competitors, does that change your view?
8 MS. OVERTON: We're still assuming that there
9 are no governance rights, and so it is purely a capital
10 investment.
11 MS. FORREST: And I guess the question is, do
12 you think that the government should be able to look at
13 whether or not there are any governance rights or
14 whether or not there are any veto issues, things that
15 provide some quasi control.
16 MR. JACOBSON: I would say always. And if
17 rivals are jointly or sequentially purchasing interests
18 in another competitor, I'd want to know why, and I'd
19 want to know, you know, what else is going on.
20 I can think of some benign reasons the rival
21 may be faltering, we'll get to that later, and may have
22 some IP that no one wants to be appropriated, so
23 there's an actual agreement that, you know, the
24 companies will prop up the competitors so that no one
25 gets the IP competitive advantage. But, generally, I

1 would be very suspicious of that behavior.

2 MS. OVERTON: And in terms of how a safe harbor

3 would work, I'm not thinking that it would be an

4 exemption where you wouldn't have to file, it would

5 still get filed because it's not within the passive

6 investment exemption, because it's a competitor, so

7 you'd still file, and I agree it's still appropriate,

8 very much so, for the agencies to look and see, is this

9 something that could harm consumers?

10 But if the agencies can quickly, I would

11 imagine, be assured that there aren't the governance

12 rights, there aren't those types of veto rights or

13 anything that could raise a possibility of consumer

14 harm that, at this level, the unilateral concerns about

15 the unilateral effects concerns about passive interest

16 in the Salop article and elsewhere would not be in play

17 at these low levels.

18 MR. NEILL: Yeah, and I just want to clarify --

19 and I would agree also that definitely government

20 should be able to look at governance and conduct

21 restrictions. That was the premise of my initial

22 comment. The assumption in my mind is that, if such

23 prohibitions are in place, it would be very difficult

24 for the acquiring firm to cause the target to give it

25 dividends or otherwise for the acquiring firm to recoup

1 the profits that it supposedly is diverting toward the
2 target through these incentive effects and that's why,
3 to me, if you do have actual passivity, the incentive
4 effects are so tenuous so as to be not -- just unlikely
5 and not really worth worrying about, frankly.
6 MR. SHELANSKI: Thank you. There are many
7 follow-up questions that suggest themselves, and maybe
8 at the end I may circle around to a couple of them.
9 In the interest of time, I'd like to shift
10 gears a little bit and move to some of the failing
11 flailing firm questions that we have.
12 I'd like to start with a question that I would
13 ask David Neill to address first, which is -- and this
14 can be addressed in the context of a specific industry
15 or more generally but, under what conditions, if any,
16 should a firm in crisis be considered sufficiently
17 flailing that it's acquisition entails reduced
18 antitrust concerns or would warrant reduced antitrust
19 scrutiny?
20 MR. NEILL: Sure. I've had some experience
21 with this lately, at least in the banking world. In
22 general, I don't think that determining when a firm is
23 failing or flailing is all that difficult or even
24 controversial. I think the real issue -- well, just to
25 address things separately, in the merger guidelines

1 themselves, and in Section 5.1 I think the real thing I
2 would take issue with are the third and fourth prongs
3 of the failing firm defense. The third one being that
4 you have to show there's no less restrictive
5 alternative, and the fourth one being that you have to
6 show that the assets will exit the market, but for this
7 merger.
8 And I think it's the certainty, first of all,
9 of the asset exit test which -- and the way in which
10 it's phrased, which is really contrary to the
11 predictive probabilistic nature of the merger
12 guidelines in general which is, you know, in Section 7,
13 generally, which is a predictive exercise. It imposes
14 a level of certainty in proof that, you know, really is
15 inconsistent I think with the general tenure of the
16 guidelines and Section 7 analysis. And I think the
17 least restrictive alternative test is also overbearing
18 in that regard and, in fact, doesn't even mirror the
19 equivalent language in the competitor collaboration
20 guidelines, and I think that's one thing at least that
21 language should mirror the joint venture guidelines
22 language in terms of being a more pragmatic test of
23 showing that there's not substantially less restrictive
24 alternatives.
25 The other thing about that, the third prong, is

1 I think it's subject to gaming by badly-motivated
2 competitors who may be favored by one agency or another
3 and this, in fact, happened in a deal last year in the
4 Land America deal, it was a title insurance company
5 that was in bankruptcy court, and it had a merger
6 agreement with its leading competitor.
7 It was a failing company for sure. And a
8 smaller competitor that was favored by the FTC came in
9 and suggested, we'll make this offer. It was costless
10 for that third party to propose this, and it was really
11 a way of gaming the failing firm defense.
12 Fortunately, I think the FTC stood back,
13 observed in the court, and let the judge cross-examine
14 the nature of that offer, the third-party offer, and
15 determine it really wasn't bona fide. I think even the
16 Nebraska Insurance Commissioner agreed. So they
17 dismissed it and the FTC did not issue a second
18 request. Had it done so in the alternative, Land
19 America would have gone into liquidation and run off
20 and that would have not served anybody's purposes.
21 So I think in terms of the merger guidelines,
22 those would be my two major criticisms of it. And
23 knowing that it probably reflects the state of the law
24 the common law, but I think as a matter of
25 prosecutorial discretion, it probably should be amended

1 in that respect.
2 The other aspect -- and I would recommend here,
3 there's an article from the spring 2009 Antitrust
4 Magazine by Ramsey Shahata and two of my partners, Joe
5 Larson and Ilene Gotts, I don't mean to needlessly plug
6 them, but I think it is a very good article in terms of
7 showing other considerations with respect to failing
8 and flailing firms, namely, that you really should
9 account for the partial exit that occurs with assets in
10 these situations just through depreciation.
11 Even if the company is not completely failed,
12 it turns out, as we have seen in the past year, that
13 equity markets, capital markets are not at all perfect,
14 and completely froze up. This was especially true in
15 the banking world, and the inability to solve these
16 liquidity crises leads to underinvestment in products
17 and probably to partial exits while the investigation
18 is going on.
19 So I think the point is, investigation of this
20 defense, if it's prolonged and costly, is not costless
21 at the end of the day, and I think that should be
22 explicitly accounted for. In the banking world, and
23 it's really not part of the merger guidelines, per se,
24 because there are a separate set of interagency
25 guidelines that apply just to bank mergers. They've

1 been entered into between the Justice Department and
2 the banking agencies, and it's a different world,
3 really, and it's sort of an odd result because, here,
4 the Federal Reserve Board, for instance, doesn't give
5 any consideration to anything short of a failing firm
6 defense, and they have no consideration of or, at
7 least, explicit consideration of a weakened competitor
8 defense.
9 The DOJ, on the other hand, actually employs in
10 its section of those bank merger guidelines from 1995
11 some consideration of General Dynamics types of factors
12 in evaluating a weakened competitor in the banking
13 world. Though it turned out that in the actual
14 practice of this last year, the Wells Fargo Wachovia
15 and PNC National City deals, neither agency really gave
16 much explicit recognition of these factors in which I
17 disagreed and, actually, the DOJ obtained more
18 divestitures than did the Fed at the end of the day, at
19 least in the PNC transaction, which was kind of an odd
20 role reversal given their stated positions.
21 And I do think when you have frozen capital
22 markets and the high cost of capital, that flailing
23 banks in particular face because their deposit mix
24 changes, they can't reach the securitization markets,
25 they're basically shut down. They can't lend because

1 they don't have the cost of funds capable of doing so,
2 that those factors really need to be taken into
3 explicit account by the agencies and I have
4 recommendations which we could deal with at the end,
5 but I do think these are criticisms and considerations
6 that really need to be addressed.
7 MR. SHELANSKI: Thank you very much, David.
8 There was a lot there. That was very helpful.
9 Leslie, you look like you're ready to jump in.
10 MS. OVERTON: Sure. I think that there have
11 certainly been suggestions that aspects of the failing
12 firm defense need to be changed, whether it's removing
13 no possibility of reorganization requirement or what
14 have you.
15 I'm not of the view that change is necessary so
16 much as I share the view of David that we should
17 question why the burden of proof is so high in terms of
18 the certainty required that the assets will exit the
19 market and that there's not a competitively preferable
20 alternative.
21 Because I think that there are a number of
22 situations where you could have, say, a 70 percent
23 chance that the assets are going to exit the market,
24 and it would be worth potentially applying the failing
25 firm defense, depending on what is causing that 30

1 percent uncertainty.
2 If it's a situation where there is a possible
3 capital infusion separate from this merger and that, if
4 that comes through, then the firm will remain
5 competitive, then you wouldn't want to necessarily go
6 with the failing firm defense. But if it's a situation
7 where absent the firm's assets exiting the market,
8 they're going to be in but limp along so badly that
9 they're really competitively insignificant, then I
10 think that that is something worth considering.
11 Now some might say, well, we already do that in
12 terms of the General Dynamics, a flailing firm
13 consideration is part of the competitive effects
14 analysis, and that may be the case in certain
15 situations, but I think more guidance on flailing firm
16 analysis would be useful, first of all. But I think
17 also when you have a little more skepticism sometimes I
18 think that comes into play of the firm's claims that
19 really were flailing, and this deal should go through.
20 You know, certainly, a healthy level of
21 skepticism on behalf of the agencies is good and good
22 for the consumers, but I think that more guidance on
23 the flailing issue particularly if there is no change
24 in the burden of proof standards would be useful.
25 And, again, I guess I'm not totally clear, I

1 don't think that the burden of proof as currently
2 stated is necessary to protect consumers because, if
3 it's a situation again in many cases where the firm
4 really is very close to meeting these standards or it's
5 highly likely, then in the absence of the merger
6 happening, chances are in the number of cases, the firm
7 is going to be so impaired as to not be competitively
8 significant.
9 So, again, very fact-based analysis as always
10 in the merger context, but I think that burden is out
11 of place with the rest of the guidelines.
12 MS. FORREST: Yeah, let me just sort of echo a
13 couple of these points. One is that I think with
14 flailing firms, which are not dealt with in the
15 guidelines, they certainly could be added to the
16 guidelines, and, in any event, the guidelines
17 requirement that you've got to demonstrate that you
18 cannot successfully emerge from Chapter 11 is a very
19 very difficult burden to meet.
20 I would suggest that there is, for flailing
21 firms, that there is a level that is far short of that
22 -- which is also echoed by what Leslie and what David
23 have said -- which is, you've got a situation often
24 where a competitor is no longer really viable as a
25 competitive restraint on anyone else.

1 So you've got someone who meets the definition
2 of being a horizontal competitor in a marketplace, they
3 may want to have a horizontal merger with someone else
4 within that marketplace. Together, let's just assume
5 for the moment that there are four participants in this
6 particular hypothetical. Let's assume that the market
7 share for one of them is over 60 percent, and that the
8 remaining three sort of split up the 40 percent that's
9 remaining, and let's just say that one of the three,
10 not the two merging parties, let's just say that
11 they've got 20 percent of the share.
12 So if you ran your HHIs, your famous HHIs,
13 you're going to come up with an extraordinarily high
14 concentration, increase in concentration, possibly, in
15 the overall marketplace, but you're going to run into a
16 situation where the analysis there, if you've got one
17 of those four competitors, and I can see that Howard is
18 actually running the HHIs in his head and is wondering
19 whether I'm right, but whether or not -- if two of
20 those four competitors, or one of those four
21 competitors is not really a viable competitive
22 constraint any longer because they are unable to
23 invest, they're unable to really compete, they can't be
24 a competitive constraint. They're flailing along, but
25 they're not going to die. For whatever reason they're

1 going to just hobble a long, I think as Leslie said,
2 they're going to hobble along for a period of time and
3 flail along but not die, that, I think, ought to come
4 out in a merger analysis as not resulting in a kind of
5 competitive -- anticompetitive effect, so maybe we'd
6 come to the right result anyway, but certainly guidance
7 could exist within the guidelines themselves about
8 situations where you've got the behemoth and the
9 non-viable competitor who is flailing along, unable to
10 invest adequately as a competitor, but not going to
11 die. And there are examples I think that you could
12 usefully include in the guidelines to deal with that
13 situation.
14 MS. OVERTON: And just one more point. I will
15 also flag the Gotts Shahata article, and I'm not a
16 partner of Ilene's, but I also would point to the
17 Sheldon Kimmel and Ken Heyer EAG working paper on
18 financial distress, because I think those are
19 legitimate considerations and it would be useful to
20 have some transparency about -- and for parties and the
21 agencies to be on at least roughly the same page as to
22 what needs to be shown, what types of considerations
23 are relevant.
24 But I think that Ken and Sheldon just also make
25 the good point that in a merger of a company that's

1 flailing or failing, it's important to look at, what
2 are the efficiencies that come from that? Is it a
3 situation where there's going to be an investment of
4 capital and the like? And, so, looking at the
5 efficiencies to see whether it would indeed benefit
6 consumers.
7 MR. JACOBSON: So part of the problem here is a
8 case that has nothing to do with a failing company but
9 it's Ralph Winter's decision in Waste Management which
10 basically says everything in the guidelines can and
11 will be held against you, and so the guidelines on
12 failing companies say basically "over my dead body,"
13 and whenever you have a discussion with a client, they
14 go, well, you know, I had a bad quarter and, you know,
15 can't we use the failing company defense?
16 This is an argument that you are constantly
17 pressured by your clients to rely on, and it's always a
18 comfort to me to go back and say, well, you know, here
19 are the guidelines and they say "over my dead body."
20 The question then is, really, "is this a
21 problem in the real world?" I think the agencies
22 really get General Dynamics. I think they apply the
23 failing company defense pretty flexibly. If there are
24 some adjustments to the guidelines, I wouldn't object a
25 lot, but I would not do any wholesale overhaul here

1 because I think it can cause more problems than it
2 solves.
3 MR. NEILL: I do actually believe that the
4 agency practice probably is more lenient than the
5 portrayal in the guidelines. I'm just saying that I do
6 think the language in the guidelines doesn't meet
7 either agency practice or the general tenor of the rest
8 of the guidelines in terms of the kind of predictive
9 nature.
10 And one other point about the Chapter 11 point
11 which someone mentioned. It is very difficult to
12 really prove that, or even to really often times to
13 predict, that the company will or will not emerge from
14 Chapter 11 successfully. That happened repeatedly over
15 the past year. A number of retailers, for instance,
16 entered Chapter 11 thinking they would successfully
17 reorganize and then capital markets completely shut
18 down and they couldn't get debtor and possession
19 financing and they all ended up liquidating.
20 So it's actually very hard to know whether
21 something, especially in capital markets like the ones
22 that have existed for the past year, what might happen
23 in a Chapter 11 situation.
24 MS. OVERTON: I was just going to say, I think
25 that's a good point by David, but I think, again, going

1 to a softening of the burden of proof, and so we
2 probably wouldn't be able to emerge as opposed to we
3 definitely couldn't.
4 MR. SHELANSKI: I mean, that's a very helpful
5 suggestion. Certainly the case of the agencies do not
6 always apply the current very high barrier, which is to
7 say sometimes the defense is recognized.
8 On the other hand, it's extremely useful for us
9 to have that high barrier given the number of cases in
10 which these kinds of issues are raised. I mean, it's
11 become almost pro-forma now in hospital mergers and a
12 variety of other cases to hear about financial
13 distress. I know there's at least one person in this
14 room who thinks we don't get it right all the time and
15 apply too high a standard, and it can be very difficult
16 when you've got a fragile innovative company that is on
17 the borderline. And there's no question that this is
18 an area in which a lot of thought is going to have to
19 be given.
20 So when you talk about "softening the burden,"
21 this isn't probably the right forum to do it, but it
22 would be interesting to know more specifically how we
23 can do that and still preserve the ability to turn
24 around and say, as Jon can do to his clients, over my
25 dead body, you don't want to try this here, and we want

1 to say that to probably the majority -- the vast
2 majority of cases in which the defense comes to us.
3 MS. OVERTON: Right. And, Howard, I think
4 that's a fair point. I don't want to have a loophole.
5 I don't think anybody wants a loophole on this panel at
6 least, that would lead to anticompetitive transactions
7 going through.
8 I'm just saying, like I said, it's worth
9 considering, maybe there's something in between the
10 standard in the rest of the guidelines, and that
11 standard that might be appropriate here.
12 MR. SHELANSKI: That's an excellent point and I
13 don't think we would disagree. We don't have terribly
14 much time left. It's been a great discussion.
15 I would like to offer each of you, as I did on
16 the last panel, to summarize your recommendations/wish
17 lists on these topics and to give us sort of a summary
18 -- just a summary of your views.
19 I'll start with Jon and we'll just move down to
20 our left here.
21 MR. JACOBSON: So I do think a discussion of
22 the competitive implications of partial stock
23 ownerships would be a valuable addition to the
24 guidelines. There is nothing in there now.
25 I think there should be a discussion of what is

1 the sort of de facto control, or what are the control
2 or voting right issues that we would be concerned
3 about. When are we going to apply the unilateral
4 effects analysis to purely passive stock acquisitions?
5 Are we going to have a safe harbor? As I indicated, I
6 think there should be one. There should be some
7 discussion of access to information. When can that be
8 a competitive problem?
9 And this is more difficult, but when can
10 prevention of a more competitive merger be viewed as an
11 anticompetitive effect? The law may be an obstacle on
12 that, but it's worth at least some discussion.
13 Then on failing company, I might add something
14 on just incorporating the General Dynamics
15 considerations, although I think those are fairly
16 reflected in the guidelines in any event. And I
17 wouldn't change too much of the text of the failing
18 company defense for the reasons I laid out.
19 MR. NEILL: As to the merger guidelines,
20 flailing firm defense, I think the standard of proof in
21 probably the second and the fourth prongs should be
22 modified to at least inject some likelihood language or
23 something to make it more comparable to the other
24 aspects of the guidelines.
25 I think in prong four, you might want to

1 consider some explicit recognition that partial exit of
2 assets does occur through depreciation in industries
3 that can't get access to capital, and that should be a
4 consideration.
5 And as to prong three, I don't see any reason
6 why that language shouldn't mirror what's in the
7 competitor collaboration guidelines in terms of what a
8 less restrictive alternative inquiry should be. And I
9 think that might be enough to address the gaming issue
10 that I referred to, but I'm not sure. I mean, that
11 does and has occurred and it occurred just recently.
12 And in terms of the bank merger guidelines,
13 obviously this isn't necessarily an issue with the FTC,
14 but it is with the DOJ. If they could reach some
15 interagency agreement to modify the existing guidelines
16 with the bank regulators, I think it would be helpful
17 to keep up and have some consensus among the bank
18 regulatory agencies in terms of agreeing with what's
19 the DOJ's current statement regarding the consideration
20 of General Dynamics effects and factors in that
21 analysis.
22 It may well be useful to reflect what
23 essentially is current agency practice anyway that
24 would create a safe harbor, a higher numerical HHI
25 threshold, or whatever it may be, 2,200, 250, for bank

1 mergers where the target is already a clear bright line
2 if the target's already operating under a memorandum of
3 understanding, or a cease and desist order with a bank
4 regulatory agency, that would seem pretty easy. Or if
5 there's some, perhaps even a rule of thumb to discount
6 the market's -- target's market share because the
7 invariable problem is that the data is so lagged and
8 these crises hit so fast that there's no way to really
9 know what reality is in these situations.
10 But that's not for these guidelines but the
11 parallel set that the Justice Department definitely is
12 involved with.
13 MR. SHELANSKI: Thank you.
14 MS. OVERTON: I just want to thank the agencies
15 again for even considering updating the guidelines,
16 they are important. And like anything else important,
17 maintenance is good.
18 So I would consider adding something short
19 about partial acquisitions, as we've talked about,
20 providing some explanation regarding which theories the
21 agency might rely on, some of the types of evidence
22 they would consider regarding control, influence, and
23 incentives.
24 Again, I think that a safe harbor is something
25 fruitful to explore but, as we talked about, it would

1 not be a safe harbor that would prevent the agency from
2 getting the information it needed to be confident that
3 there weren't lurking governance issues and that
4 passivity wasn't really passive.
5 Just a quick issue that we didn't really get
6 into, but in terms of remedies for dealing with the
7 competitively sensitive information sharing issue, the
8 guidelines may not be the place to deal with that, but
9 there currently seems to be at least a facial
10 disconnect between the DOJ and the FTC when you look at
11 the DOJ's remedies guide, and its statements on fire
12 walls and its preference for structural remedies and
13 the like.
14 So I think it would be useful, if not in the
15 guidelines, for at least the DOJ to clarify in its
16 remedies manual that fire walls can be an appropriate
17 way to deal with these information sharing concerns.
18 And then on failing firm, I made my point
19 before about the standards and exploring whether there
20 is a little lower standard that's closer to what you
21 have in the rest of the guidelines but could still
22 protect consumers.
23 MS. FORREST: I think there have been so many
24 good points raised, I don't have a lot to add. Let me
25 just say that I do think that starting from the failing

1 flailing firm prospective, I do think it would be
2 useful to make the General Dynamics factors more
3 explicit in the guidelines.
4 If that is prevailing practice, it's always
5 useful to have it in there so that you've got people
6 who are able to give guidance to their clients. And I
7 think that that does not mean that you're going to be
8 giving them a huge hole through which you can drive a
9 truck of hope that their bad quarter will necessarily
10 result in being able to take advantage of this flailing
11 firm, but it does give them some guidance as to what
12 the criteria are that you might be applying.
13 I also think that in terms of your concern what
14 is it that you can do with the Chapter 11 piece in
15 order to solve that without going too far, I think
16 that, frankly, if a firm has entered Chapter 11, in a
17 way the presumption ought to shift, because the
18 requirement currently is you've got to have a
19 successful emergence from Chapter 11. Most companies
20 don't want to go into Chapter 11. They're not going to
21 do it just for you, and so the fact that they've gone
22 into it, I think should be a presumption in favor that
23 they are at least flailing, okay? Which means that
24 they're not really a viable competitor for some period
25 of time in a short term horizon. So that's a

1 possibility, at least something to be thinking about in
2 terms of the wording.
3 In terms of partial ownership and passive
4 ownership, I think that that could be dealt with, as
5 Leslie said in a short section, I think they can be
6 dealt with together. I think that in my mind, this is
7 amenable to examples, and it ought to be something
8 where you've got a series of examples where you can
9 talk about the kinds of times when partial ownership
10 may or may not result in a merger-like review, and you
11 can have a working definition of passivity.
12 What is the agency's working definition of
13 passivity for people to have, for entities to have as
14 guidance? I think that would be very useful. I don't
15 think it's impossible to come up with this. I think
16 you can come up with it in broad language, which is
17 sort of the specialty of the merger guidelines. Broad
18 enough language that it gives you some guidance but yet
19 doesn't give you so much specificity that you folks
20 don't have the maneuvering room that you need.
21 So I would make changes both to the failing
22 flailing firm but it wouldn't be more than double its
23 current length, and I would add a section on partial
24 acquisitions and passive ownership.
25 MR. SHELANSKI: Thank you very much for all of

1 those. Those were very helpful recommendations.
2 Needless to say, they're going to give us an awful lot
3 to think about, and we may be coming back to some of
4 you for follow up in the months that lie ahead of us
5 when we're actually going to be revising perhaps.
6 Perhaps. We have a time for a couple of questions.
7 MS. CHOI: Hi. I'm Joyce Choi from Wilson
8 Sonsini. Regarding the safe harbors that Jon and
9 Leslie mentioned for partial ownership, I was wondering
10 whether to the extent that the concern is maybe
11 unilateral effects, whether you would suggest
12 incorporating some analysis of the diversion ratio
13 between the two firms rather than just focusing on the
14 amount of the acquisition?
15 MR. JACOBSON: That's too smart a question for
16 me.
17 MS. OVERTON: I think that -- again, certainly
18 I think that the agencies should look at this safe
19 harbor issue and try to find the right level but,
20 hopefully, the goal would be that you wouldn't have to
21 get into something as complicated in terms of analysis
22 as diversion ratios. I think it's a pretty
23 straightforward thing for the agency to figure out,
24 well, what are the governance rights and do we really
25 have true passivity? But I think if you start to get

1 into diversions and the like that would take away the
2 benefits you would get from the safe harbor. So I
3 think you probably need to set the safe harbor low
4 enough so that you're comfortable that it really is
5 safe.
6 MR. JACOBSON: Yeah, I actually completely
7 agree with that. So I may need to know the margins and
8 all sorts of information. The whole point of the safe
9 harbor is to be able to tell the client, you know, you
10 can do 10 percent, maybe 15 percent, 16 percent you're
11 going to get reviewed, and I think the diversion ratio
12 is once the review begins.
13 MR. SHELANSKI: For our last question is Janusz
14 Ordover.
15 MR. ORDOVER: So perhaps there is this problem
16 of failing or flailing firm that can be seen through
17 the eyes of a maverick strikes me that if we are
18 serious about your coordinated effects and if we try to
19 discombobulate the industry, that may appear to be not
20 functioning as well as it ought to, for tacit and
21 collusive reasons, then the removal of failing or
22 flailing firm could be a way of stabilizing the
23 industry that otherwise can be discombobulated.
24 So perhaps it would be desirable if the
25 guidelines could indicate whether or not that concern

1 should or should not be taken into account when
2 considering those kinds of transactions, and I have
3 heard it said to me, and I have told that to people who
4 came to see me at my old job that there may be some
5 benefit to the marketplace from letting the firm bleed
6 itself to death as long as the assets are not leaving
7 the industry, which is why the condition number four in
8 that section, to me, is the really the critical one.
9 Anyway, so some guidance on that issue may be
10 desirable as well.
11 MS. FORREST: Can I just comment on that for
12 one second? Which is, I think that sometimes there is
13 a phrase used of assets leaving the industry or leaving
14 the marketplace, and I want to suggest, and I think
15 that this is implicit in our comments that we've had
16 here today, that you can have a negative consumer
17 welfare effect when you have a partial set of assets
18 leaving the industry.
19 So you don't have to have all the assets leave
20 in order to have a problem or have a negative consumer
21 effect. You can actually only have a few. So you can
22 have sort of reduction in capacity and reduction of
23 output that can leave some consumers with negative
24 effects.
25 So, in that sense, if you fixed the flailing

1 firm or you allow the flailing firm to no longer flail,
2 you can increase consumer welfare.
3 MS. OVERTON: And, in my experience, Janusz,
4 the agencies are currently taking those types of
5 considerations into account in terms of, is it a
6 benefit to consumers to -- are consumers benefitting
7 from this firm flailing around?
8 Then we get to the questions of, is its
9 flailing competitively significant? Because you can
10 have a firm that's flailing and having an impact, but
11 with the flailing because it's discounting so heavily
12 and the like, or it's flailing because it hasn't
13 invested in the assets, or they've lost so many assets.
14 They're flailing but nobody really wants it at any
15 price. So I think that goes to the competitive effects
16 analysis.
17 MR. NEILL: I would think that -- in the
18 situations that we've been describing, and almost the
19 assumption is that flailing occurs because there are
20 costs, their capital costs are rising in a way because
21 they don't have access to fundings, such that it's
22 probably unlikely -- it's most likely the case that the
23 opposite is occurring, far from being a maverick that's
24 disciplining the industry, these companies, at least in
25 banking, they're not disciplining anybody, and they're

1 just circling the dream pretty much. Even short of the
2 absolute failure. So I guess that would be my
3 response.
4 MR. SHELANSKI: With that image, I would like
5 to thank our panelists and say that we'll reconvene for
6 the afternoon panels here at 2:00 sharp.
7 Thank you very much.
8 (Applause.)
9 (Whereupon, at 12:35, a lunch recess was
10 taken.)
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1 AFTERNOON SESSION
2 2:00 P.M.
3 PANEL 4: MERGER REMEDIES
4 MR. WEISER: Thank you all for coming back
5 after the lunch break. The morning discussions I
6 thought were extraordinarily interesting and I will
7 have to add, some of the interchange with the questions
8 from the audience that came were really great.
9 This audience, we know, a number of you could
10 have been on the panels, and for those of you who are
11 students, we welcome your intellectual curiosity, so
12 I'll try to leave some time for that.
13 Let me introduce our group here, not that many
14 of them need an introduction. Kevin Arquit was at the
15 FTC during the 1992 guidelines process. He was general
16 counsel there, head of the Bureau of Competition. He's
17 now at Simpson Thatcher and is one of the deans of the
18 antitrust bar, I would have to say.
19 Next to him is Bruce Prager who is, I think, by
20 all accounts, one of New York City's finest antitrust
21 lawyers. Has been involved in the bar here and is at
22 Latham & Watkins.
23 Next over is Debbie Feinstein. Did you come
24 from DC, by the way, are you a DC person? I thought
25 so. So, like myself, coming up here for the day to New

1 York. She's with Arnold & Porter and part of their
2 very deep bench is in antitrust. She has also served
3 in the government at the FTC with Dennis Yao, I guess
4 overlapping with Kevin, back in that era. I guess you
5 got out before the '92 guidelines, but you knew they
6 were in the offing --
7 MS. FEINSTEIN: I was there for the sausage
8 making, but not for the --
9 MR. WEISER: All right. There you go. And
10 then finally, Art Burke, who is at David Polk here in
11 New York is, among other things, a good friend of
12 Howard Shelanski's, and a very well accomplished, truth
13 be told, that his qualification of, and he's also a
14 very thoughtful practitioner.
15 So remedies is our topic for today. I should
16 add that Art and myself were at a conference that
17 Howard put on about -- I think it was convergence and
18 remedies with the EU and with the US.
19 One interesting question about convergence and
20 remedies that came up really nicely in our first panel
21 is, we don't have guidelines that talk about remedies,
22 we have a policy guide at the DOJ. The FTC has done
23 some studies. The EU has a thoughtful statement on
24 remedies. The threshold question is should remedies
25 and so some maybe high level principles be in the

1 guidelines or, as some people argued this morning, is
2 it more appropriate for some other document to handle
3 remedies?
4 Kevin, what do you think on that?
5 MR. ARQUIT: Well, I guess at first glance they
6 would seem to be more suited for policy than guidelines
7 because the guidelines are really kind of the
8 application of micro-economic principles to corporate
9 combinations, whereas, remedies are a little bit
10 messier. They're really the practical implications
11 that flow from a transaction the government has
12 concluded is problematic. But I actually at the end of
13 the day think there should be guidelines, and my reason
14 for it is really one that comes from my perspective as
15 an outside practitioner. I presumably would not have
16 thought this way when I was at the FTC, but when it
17 comes to remedies, unlike the substance of a
18 transaction, the parties are completely at the whim and
19 behest of the staff.
20 There is no way if you want to recommend a
21 remedy and the staff doesn't like it, to get your issue
22 before the commission, unlike the substance of a
23 transaction. And, in particular, in situations where
24 you want to engage in a remedy so you don't have to go
25 through the expense of complying with a second request,

1 even Hart Scott Radino clock doesn't start to run until
2 you've complied with the second request.
3 So you go to the staff with a proposed remedy.
4 No, we don't like it. Well, what do you like? Well, I
5 don' know what we like, we just know we don't like
6 this. Well, can you give us some guidance? And it
7 just goes on and on. And, if you haven't complied with
8 the second request, there's absolutely no -- you're
9 pushing against a string. There's no leverage for the
10 staff to really engage you on it, and because the
11 policies of the Bureau of Competition, and pretty much
12 the same with the Justice Department to get your issue
13 before the commission, or before the front office, you
14 have to have a signed consent agreement. In other
15 words, you have to have reached agreement with the
16 staff on the remedy before the front office ever looks
17 at it.
18 And, so, since you have a situation with
19 remedy, and because it is so important, it's a less
20 analytic area where there really isn't a way to get to
21 the front office on it. I think the guidelines that
22 had some benchmarks would impose some discipline on the
23 process. I think that these benchmarks would be such
24 that there would be at least some increased ability for
25 practitioners to be able to go to the staff and perhaps

1 even then to people beyond the staff, if the staff
2 doesn't want to accept any remedy, so you can get some
3 engagement on the issues the way you can on the
4 substance of the transaction.
5 MR. WEISER: Bruce?
6 MR. PRAGER: It may be that my difference with
7 Kevin is more semantic than substantive because I
8 certainly agree with all of his assertions about the
9 difficulties of the process, but come to the opposite
10 conclusion, which is that -- I don't think that the
11 guidelines are the appropriate place to be dealing with
12 remedies for a couple of reasons.
13 One, I think that the guidelines should be and
14 have shown themselves to be enduring over a very
15 extended period of time, whereas I think that the
16 practices with respect to remedies are somewhat more
17 transitory and perhaps ebb and flow more freely than do
18 the principles that underlie the guidelines.
19 However, that's not to say that I don't believe
20 that there should be clearly articulated practices and
21 policies. Both the FTC and the antitrust division, the
22 antitrust division has their policy guide to merger
23 remedies and the FTC has their statement of the Bureau
24 of Competition on negotiating merger remedies.
25 I think it's a mistake that we have two

1 separate sets of policies and practices. I think that
2 the FTC and the Justice Department should engage in a
3 process that is similar to this and should come up with
4 a single set of practices and policies.
5 I think that we have enough of a sort of
6 Hobson's choice with the fact that we have two separate
7 agencies that we've got to deal with that have
8 different procedural practices without there being
9 separate policies. Those of us who have dealt with
10 both agencies in terms of negotiating settlements know
11 that they don't take the same view, that the FTC's
12 perspective on fix-it-first is not the same as the
13 DOJ's, that the DOJ's perspective on conduct remedies
14 is not the same as the FTC's, and I think that
15 convergence within our own government on important
16 issues of that sort is essential, and I think would
17 achieve the benefits that Kevin is looking for, but I
18 think that if we tried to do it in the context of this
19 guideline revision, we'll be still working on new
20 guidelines as we enter 2020 instead of 2010.
21 MR. WEISER: Debbie.
22 MS. FEINSTEIN: I guess the question is always,
23 what's the purpose of it? I think the documents that
24 are out there right now, the DOJ policy statement, and
25 the FTC statement of the Bureau of Competition, and the

1 frequently-asked questions do a really good job of
2 explaining exactly what both the agencies do. You
3 know, reading through them, unlike the merger
4 guidelines where you can come up with lots of things
5 where you think, well, that's not how they implement
6 it, or they don't talk about this issue.
7 I think for the most part, those documents
8 really do explain what each of the agencies does.
9 There are differences around the margins. You know,
10 we'd all edit them differently if we had a crack at
11 them, but they're basically right. So then the
12 question is, would it be nice to have convergence? You
13 know, maybe. I'm not sure how important it is, as long
14 as they're at least telling you what it is that they're
15 doing, and I think they're pretty good at that.
16 If the convergence meant that the FTC would
17 accept fix-it-first occasionally, but that DOJ would
18 almost inevitably require buyers up front, I don't know
19 how much we've gained. We've all gotten used to how it
20 is to deal with two of the agencies.
21 I think the tougher issue is that what's lost
22 in sort of documents that are meant to be enduring is
23 the kind of regular updates about things. You know,
24 the FTC document mentions that supermarket mergers of
25 the sort and retail mergers of the sort, where it's

1 almost always important to have a buyer up front
2 because of their bad experiences. Well, that document
3 was written in 2002. They were saying this privately
4 in the mid '90s.
5 But you didn't know that unless you had a deal
6 before them, or sort of been around people who were
7 mentioning this. There was no sort of commentary on
8 this. There aren't a lot statements explaining why
9 they came to the view that they did with respect to
10 particular divestitures.
11 What I find would be much more useful than a
12 particular merger guideline section on divestitures is
13 sort of regular reporting about change positions, why
14 it is that they decided that a buyer up front was
15 important here in this case and not in that case, and I
16 would be more interested in something like that.
17 MR. BURKE: I mean, I agree with the points
18 that Bruce made about why convergence within our own
19 government are desirable, and it's one of the most
20 frustrating and complicated things to do to explain to
21 a client that we don't know which agency's going to
22 review a transaction and that it may be significant as
23 to which the outcome of a review is going to be
24 depending on the choice of an agency.
25 So I think this is one manifestation of that,

1 and if there could be greater convergence, I think that
2 would be a good thing, and if we could resolve perhaps
3 the differences on the buyer up front issue and the
4 fix-it-first issue, that's desirable.
5 So then the question turns to, is this the
6 right vehicle to accomplish that, and I guess maybe I
7 differ from Bruce a little bit on that question. I
8 mean, we do have this effort underway. There's a lot
9 of people who are putting a lot of effort and thought
10 into this, and this is a golden opportunity to, I
11 think, encourage the agencies to confront these issues
12 and try to resolve these disputes, or differences of
13 emphasis, perhaps, is the better point.
14 So I'd say let's take advantage of this
15 opportunity to try and address this issue as part of
16 the overall revisions of the merger guidelines.
17 The other argument I would make for considering
18 addressing this now is that there is obviously an
19 interrelationship between the merits of merger review
20 and the remedies issue. And so to sort of separate
21 those things out is to suit two separate projects.
22 While it probably could be done and might be
23 done at some point in the next decade, there is perhaps
24 some benefit to confronting those two sets of issues
25 simultaneously. I recognize that that does add a lot

1 more work to the agencies who are confronting a major
2 task already, but I would encourage them to consider
3 doing it.
4 At the very outset, it was mentioned that there
5 are a set of merger remedy guidelines that have been
6 adopted by the European commission which, you know,
7 basically surveyed a few of my colleagues who practiced
8 in Europe and I think the general reaction was that
9 those are very helpful and useful practical things, and
10 so it would be I think useful in the US to have a
11 uniform set of guidelines as well.
12 MR. WEISER: So let me follow up, and for those
13 who are not inside baseball, we have three concepts
14 that have been thrown out; buyer up front, which means
15 you want to do a deal, you got to come to us with a
16 buyer as part of the realm divestiture.
17 Second is regulatory relief conduct remedies
18 versus structural relief, do you want some ongoing
19 supervision versus, you know, it's done; and, finally,
20 are you open to the so called fix-it-first strategy
21 where you take care of the overlap up front or you have
22 a consent decree that has some ongoing supervisory
23 role.
24 Those are often the top three issues that
25 presumably if there was a remedies part of the

1 guidelines, would be dealt with at some at least level
2 of principle, maybe leaving some room, you know, that
3 would happen, but it at least it would provide some
4 structure so people wouldn't be in the situation Art
5 noted that's awkward that you can't actually advise a
6 client without knowing which agency has the merger.
7 So, Art, let me start with you, if you had to
8 do what Debbie said she's not sure she wants to see
9 happen, which is to have a single choice convergence on
10 each of those, which way should the convergence go?
11 MR. BURKE: Maybe I'll just take a few examples
12 and not do all three because I think we can take up --
13 I don't want to steal time from all the other folks.
14 Maybe I'll just single out fix-it-first because
15 I think that's an example of something that I've had
16 some experience at both agencies dealing with. You
17 know, perhaps, needless to say, coming from the private
18 practice side of the bar, I would encourage the
19 commission to be more open to that as a way of
20 resolving problems. I think, logically speaking, if
21 you engage in some kind of transaction that eliminates
22 the competitive harm or the threat to competitive harm,
23 that that should be a sufficient way to resolve the
24 competitive concerns, either through divesting some
25 asset or also entering into contracts with customers.

1 I think that's another way that I've seen the
2 Department of Justice get comfortable with the
3 competitive threat that a transaction might cause to
4 certain customers, is to have the parties enter into a
5 long-term contracts with those customers that
6 effectively eliminate any risk of a problem for a long
7 period of time into the future.
8 The down side to that is lack of transparency.
9 And I think that's a fair criticism that when you use
10 fix-it-first to get rid of a problem, there is an
11 absence of transparency to the outside world. But I
12 think that is a cost that's worth bearing if it's a way
13 of eliminating competitive harms and competitive
14 threats in an efficient way that allows mergers to
15 proceed in a timely fashion.
16 So I'll just give that answer on one and leave
17 some of the other folks time to comment on the others.
18 MS. FEINSTEIN: Well, I don't think there
19 should have to be a choice, and I think anybody who has
20 practiced before the agencies would say is that the key
21 to making divestitures work in a way that actually can
22 save efficiencies of transactions is to have some
23 flexibility.
24 I think the agencies sometimes get too set in
25 their ways and sometimes I think they're very very

1 flexible on remedies. I think of some of the things
2 that we propose that I thought, I wonder how they'll
3 react, and they've reacted extremely well to it because
4 it really did make sense for that particular case.
5 I think there are situations in which
6 fix-it-first absolutely, it's incredibly easy, it can
7 be done quickly, and it can be transparent. I can
8 remember doing a fix-it-first with the Department of
9 Justice where they issued a press release bragging
10 about it and we were completely comfortable with that.
11 They had told the world that they were willing
12 to let a particular transaction go because all that
13 needed to happen to fix the problem was for the
14 manufacturer to set up another entity as an authorized
15 repair shop, to give them the standard book, to give
16 them the standard license.
17 There was no black box. There was no magic.
18 All they had to do was give them the stamp of approval
19 and hand them the manual, and they could say they were
20 an authorized servicer and that is what was necessary
21 to get a new entrant in that case. Very easy, very
22 quick.
23 At the commission we would have spent three
24 months getting through drafting the consent decree,
25 going through the bureau, going through the

1 commissioner and losing all the efficiencies of the
2 deal. So I think fix-it-first can be very useful.
3 I can understand why the agencies want in some
4 cases a buyer up front, and I'm not going to argue that
5 it's never the right thing to do because sometimes I
6 think it is the right thing to do and, frankly,
7 sometimes it's easier to find the buyer than to enter
8 into a consent decree that would deal with all the
9 eventualities if you had to write them down about what
10 happens to be divested, but I would hate to see a loss
11 of flexibility if the agencies felt like for them to
12 agree on one document, that fix-it-first would go out
13 the wayside, which is frankly my biggest fear.
14 MR. WEISER: So, if I can follow Debbie on
15 that, the risk is, if you make a pre-commitment, you
16 may later regret it, there may be a sequestration issue
17 could do it. We had the discussion earlier that you
18 can use weasel language like absent extraordinary
19 circumstance or something of the like, which gives you
20 a little room.
21 The question that I had in the case you
22 mentioned is, was there a concern that the support
23 provided would be subject to a breach without ongoing
24 oversight, because the FTC model is premised on, you
25 can't ever trust parties to follow through with their

1 stated fix-it-first commitments and, in terms of a DOJ
2 experience that I was involved in that gives some
3 support to that, people may be familiar with the MCI
4 World-Com deal where Inter MCI was spun off to cable
5 and wireless, and what cable and wireless ended up
6 getting was a breach contract lawsuit which they
7 actually did settle for a substantial amount of money
8 suggesting that there was probably some cause for
9 concern there.
10 So how is that concern dealt with in the case
11 you mentioned, as well as more generally in the
12 fix-it-first context?
13 MS. FEINSTEIN: In the case that I mentioned,
14 it really was, one thing happened, and we could show
15 that the thing that happened was a one-time event.
16 Once the -- literally, it was a manual that was
17 transferred and it was allowing somebody to say, I am
18 an authorized blank service repair shop. That was what
19 was necessary to restore the competitive problem.
20 So we could show that once we had turned it
21 over, there was no ongoing relationship. There was
22 nothing to do there. Now, that may be in a minority of
23 cases, but it's not in a trivial minority of cases
24 that, once you've completed the act required, whether
25 it be a divestiture or some other authorizing act, that

1 you're done, and there really doesn't need to be
2 oversight.
3 I think it's become too easy to say, well,
4 we'll just slap a monitor or it, or we'll make sure
5 that there are compliance reports when 99 times out of
6 a hundred nothing happens. And it's not because
7 there's government oversight. It's because it really
8 is so easy to implement the remedy, that there's really
9 nothing to do that's ongoing once it's done and,
10 therefore, in this case, the Justice Department made
11 sure that it saw that what we were required to do had
12 been done before they cleared off and the deal that was
13 really that easy, but didn't make us go through the
14 whole consent decree process, the Tanyak (phonetic)
15 process. And I think there are cases where that's
16 really enough and you don't need ongoing 10 years worth
17 of oversight on a divestiture where it's just really
18 not needed.
19 MR. PRAGER: I totally agree with Debbie. I
20 think that flexibility is the key, to borrow her word.
21 And that the FTC has been unreasonably intransigent in
22 terms of its view on fix-it-first.
23 I may have had the misfortune of litigating the
24 penultimate, or the ultimate example of that in the
25 Libby case where, had we been able to negotiate

1 fix-it-first with the FTC, perhaps the merger that
2 ultimately is blocked by the court might have been able
3 to go forward, but the unwillingness of staff to even
4 discuss a fix-it-first -- and I know that that's a long
5 ago case for some of you, but the offending assets were
6 being left behind with the seller, and the commission
7 went so far as to vote out a new complaint when the
8 judge questioned whether there was even a controversy
9 before him, reflecting the fix. So it's just one
10 example.
11 And on the other side, I've had instances with
12 the Justice Department where it took nothing more than
13 a letter agreement saying that we would divest the
14 offending assets before the closing occurred.
15 Everybody was happy and it made a lot less work for
16 lawyers. No judges. No ongoing 10 years, as Debbie
17 said.
18 But on the other side, the Justice Department
19 tends to be rather rigid in terms of conduct-related
20 decrees. They're not very receptive to fire walls or
21 other fixes of that sort, which the FTC has routinely
22 accepted over the years, particularly in vertical
23 cases.
24 So I think that flexibility and a willingness
25 to examine under the facts and circumstances of the

1 individual merger is really critical and, while it may
2 be slightly afield from the specific question that Phil
3 posed, I do also think that that same requirement of
4 flexibility needs to extend to the terms of decrees.
5 I can't tell you how many times I bang my head
6 against the wall in dealing with staff where they're
7 insisting on provisions because it's part of the
8 standard decree, and it may be totally irrelevant, even
9 counterproductive to the particular transaction that
10 you're dealing with.
11 In one instance, where there was going to be a
12 completed transaction in an FCC approved procedure,
13 they insisted that the seller be a Defendant on the
14 decree and it almost killed the deal, because the
15 seller was going to have nothing to do with it, the
16 divestiture was not going to take place for some period
17 of time because of the need for FCC approval, and the
18 Justice Department insisted because its directives say
19 so that both parties had to be defendants on the
20 decree.
21 MR. ARQUIT: Well, I don't want to repeat what
22 others have said since Phil said that my time at the
23 FTC, referred to it as an era, and called me a dean,
24 and I guess maybe that hopefully gives me a little bit
25 of opportunity to provide some historic perspective to

1 the fix-it-first and the FTC.
2 Because when I was there, which was 20 some
3 years ago, this was a huge policy debate because the
4 Justice Department allowed it and parties were coming
5 in and, frankly, some of the staff people were
6 interested in allowing merging parties to do it.
7 It's interesting when you hear all this theory
8 today about the doctrinal reasons for the difference
9 and so on. It had nothing to do with that at all.
10 What it had to do with was human nature.
11 There's always some tension that exists between
12 a chairman and commissioners in a multi-person agency.
13 The chairman is always going to know a little bit more,
14 chairwoman, than the other commissioners, the staff.
15 The senior staff's handpicked by the chair. And the
16 other commissioners are concerned about their
17 prerogatives and they're concerned about decisions
18 being made that are essentially agency decisions that
19 they don't have any input into.
20 At this point in time there was more there one
21 commissioner that said, if there's fix-it-first, I
22 don't have any say in this. I'm a presidential
23 appointee, and if there's a fix-it-first, it means
24 that the staff has decided, A, there was a competitive
25 problem, and, B, that this was a sufficient fix to it,

1 and it never came before me. I didn't get a chance to
2 look at it. And that was the reason.
3 And, believe me, the staff was beat over the
4 head very hard by commissioners when they tried to show
5 any independence in that regard. And, frankly, you
6 know, Bruce, I agree with you. Of course, some of this
7 the boiler plate stuff is nonsense to put in here, but
8 I think it's some of that same concern on the part of
9 staff. I mean their bosses are the commissioners at
10 the FTC, and if they depart from boiler plate, they're
11 departing from something that the commission has
12 previously said was acceptable, and they take some
13 personal risks when they do that, that they'll be told
14 that if they're not insubordinate, at least they're not
15 being responsive to the commission.
16 So I think it should be -- fix-it-first should
17 be accepted at the FTC and I don't think people should
18 worry about doctrinal reasons because, to my view,
19 there weren't any.
20 On the buyer up-front issue, again, here, I
21 think some of this when you're on the outside looking
22 in you have a different perspective than when you're on
23 the inside, but from the outside, you look at buyer up
24 front and you say, the deck is stacked fully in favor
25 of the government. Because, first of all, what they'll

1 say in the guidelines is, if the buyer of the divested
2 assets is itself a competitor, that ain't gonna work
3 because you may be creating market power in a different
4 arena.
5 On the other hand, if it's not a competitor,
6 and it's somebody new to the market, well, they don't
7 have the experience to buy these assets so, whose left?
8 Okay. Often nobody or very few. Combine that with the
9 fact that the buyer up front, once one of these very
10 narrow entities is selected, they have to get their
11 deal closed before the bigger deal can close. The
12 merging parties are desperate to get this other deal
13 closed.
14 Think, in today's world, where credit -- your
15 financing doesn't often exist beyond six months, in
16 fact, that's pretty generous these days. Your
17 drop-dead dates are six months down the road. You've
18 got to find a buyer. You've got to find one of these
19 small people who agrees and their deal closes before
20 yours does.
21 This buyer of the assets knows they've got you
22 completely over the barrel and, what happens is, the
23 assets are sold at a fire sale, and even beyond that,
24 the commission or the Justice Department staff sits on
25 the side of the buyer of the assets essentially saying,

1 well, don't you want this? Don't you want that?
2 Because, you can imagine, their incentives are to make
3 sure that the buyer of these divested assets is one
4 that's going to be viable and able to compete. So they
5 always will err on the side of adding assets to the
6 transaction.
7 So, to my mind, this buyer up front things is
8 something where it's developed in a way that makes it
9 very unfair to the merging parties, and I think that
10 from the government's perspective, they openly admit
11 that, and no one will argue that sometimes you're not
12 taken for a ride, but they say, look, our focus is on
13 restoring competition to a market and, if you want to
14 get your larger deal done, that's the price you have to
15 pay.
16 So there's two sides to the coin, but obviously
17 the one that I'm more sympathetic to is the one that I
18 hear from the clients a lot, which is that you're
19 basically just writing off the assets you have to
20 divest, that you're not getting anywhere near the value
21 for them.
22 MR. PRAGER: Phil, can I just add something?
23 MR. WEISER: Please.
24 MR. PRAGER: A follow on to Kevin's point.
25 There's even one additional catch 22 which, if the

1 price goes down too far, then the agencies say that the
2 buyer doesn't have enough skin in the game, they can't
3 be assured that the buyer will stay in it for the long
4 haul and actually make a competitive go because they
5 don't have much of an investment. They've essentially
6 gotten the assets for free.
7 MR. WEISER: So I've got one more doctrinal
8 issue, to use Kevin's terms, and then I want to turn to
9 a couple of institutional questions.
10 The doctrinal issue is one that Debbie raised,
11 so I'll let her go first. To what extent is it
12 important that the remedy address the competitive harm?
13 And just to give people a flavor of this issue,
14 let's say you've got a merger involving two markets,
15 and they could be either product markets or geographic
16 markets. And let's say that you have divestitures that
17 are -- the harm is in market A, you've got divestitures
18 in market B, the deal may be such that they're linked
19 together, and you get more competitive benefits by
20 divestitures in B than you had harm in A.
21 In the efficiencies world, it's commonly
22 suggested that that is sound enforcement practice
23 because, if you get a lot of efficiencies in the deal,
24 even if there's some harm in different markets, many
25 would say the -- deal's overall procompetitive, you got

1 to let it go through.
2 Should you apply that reasoning to remedies if
3 one said flexibility was the touchstone? That would
4 seem to be a flexible standard for remedies, but others
5 say it might be not fully lawful in the sense that
6 you're not faithful to the core competitive concerns.
7 So, Debbie, how do you think through that?
8 MS. FEINSTEIN: Well, I think there aren't many
9 cases that really put the issue as starkly as that, but
10 we certainly have seen the very large deal that raises
11 virtually no issues, that's incredibly procompetitive,
12 huge amounts efficiency, there's a good for reason for
13 it to get done and to get done quickly, and everybody
14 knows the deal will be done, and yet you find staff
15 looking to see if they can find some little problem in
16 some tiny little market which accounts for single digit
17 millions dollars in revenue, and then holds a
18 transaction up for a really long time. I think that's
19 an unfortunate situation that shouldn't happen.
20 If there's real competitive harm, it's going to
21 become clear quickly. If there's, on the margin,
22 possibly some competitive harm to a small number of
23 customers who, in these big situations, are often the
24 same customers but different purchasing departments, as
25 are getting all of the benefits of the deal, I think

1 there ought to be some prosecutorial discretion and
2 there's not today.
3 I would not argue, because I don't think that
4 it would be defensible under the law and I think it
5 would be tough, is to say I have a really big problem
6 over here, but I have a really good solution or really
7 good efficiencies over in this market, so I get to
8 completely divorce the two in a situation where the
9 customers are completely different, but I think in a
10 lot of situations, there really are, you know, tiny
11 little tails of wagging dogs here and I think that's
12 something that I think that is fair and the government
13 should look at more carefully.
14 MR. WEISER: Kevin, how do you see that issue?
15 MR. ARQUIT: Well, I largely agree with Debbie
16 on this one, except that I do think -- maybe I take a
17 stronger view on the legal point. This is a place
18 where my position is exactly the same as it was when I
19 was in the government, and that is that Section 7
20 refers to any line of commerce, and what that means is,
21 that if there's a problem in a line of commerce,
22 meaning a product market, then you either stop the
23 transaction or you get relief that addresses that.
24 Because of that, we're the only product at
25 issue in the transaction, the government presumably

1 wouldn't have any problem in challenging it and
2 demanding relief in that market. Why should it be
3 different because it's part of a multi-product merger?
4 And so I really think that that -- once you deviate
5 from that, you really have some serious issues.
6 The point I hadn't really thought about until
7 Debbie just mentioned it was where you got the same
8 purchaser largely for the multi-products of the merging
9 companies. And if it's just different purchasing
10 departments within the same entity -- I guess the way
11 you'd look at that is even if believe in things in
12 consumer welfare, there your consumer is the purchaser.
13 I'm thinking a lot in the pharmaceutical
14 industry that this might have application, that you're
15 selling to a GPO or something like that. I guess
16 there's more reason to accept it because, at the end of
17 the day, there's not net harm to that buyer.
18 But even there, that buyer is an intermediary,
19 it's not the final consumer. And if you assume that
20 some level of cost or anticompetitive effect flows
21 through to the end consumer, I think that there still
22 could be some problems with it.
23 But I also agree with Debbie. I don't think
24 that this situation comes up that often.
25 MR. WEISER: Art? And, Art, I should add that

1 I know you practiced some before the FCC, which has a
2 different philosophy here, and if you want to bring
3 that into your answer as well.
4 MR. BURKE: I don't know that I would call it a
5 philosophy, but -- I think I agree with Kevin
6 doctrinally that it is a line of commerce so, as a
7 purely legal matter, if you've got a very large
8 transaction that is largely okay, but you've got one
9 market where it's having an adverse effect, that is a
10 legal basis to challenge the transaction.
11 I think as a matter of prosecutorial
12 discretion, one might take that into account in
13 evaluating, A, whether to, in fact, challenge the
14 transaction, and in B, whether it's an appropriate --
15 what sort of standard to apply in evaluating a remedy
16 to address that -- maybe that small concern in a
17 relatively remote part of the transaction. So I do
18 think it's fair to take that into account.
19 The question ultimately would then come is, how
20 would one ever incorporate that kind of thought into
21 guidelines? And I think this is where guidelines
22 probably do breakdown, and it really does become a
23 question of the good judgment of the people running the
24 agencies.
25 I'm not sure how one would articulate what I've

1 just said in a way that is actually useful in a
2 guideline, and I think that does go to a problem with
3 guidelines in the context of remedies, because they are
4 so -- there is this prosecutorial discretion element to
5 them. There is a lot of informality to them. There is
6 a lot of, you know, case by case elements to them.
7 So it's just going to be hard to capture all
8 the nuances of these kinds of issues in the context of
9 an -- in the context of guidelines.
10 Now the interesting contrast, as you say, is
11 the FCC which does tend to impose, you know, very very
12 detailed conditions in connection with the approvals of
13 transactions and, you know, it's not a situation that's
14 typically reviewable by a court.
15 So I think what one has seen very frequently is
16 lots of things get sort of piled on to those kinds of
17 remedies that may not really have a very close
18 relationship to the merger-specific concerns.
19 Fortunately I don't think we've seen that with respect
20 to the antitrust agencies and we certainly discourage
21 it.
22 MR. WEISER: Bruce?
23 MR. PRAGER: I don't buck the trend on this
24 one. I pretty much agree with everything that my
25 colleagues have said. In my experience, generally what

1 you find is not the kind of dichotomy, Phil, that you
2 pose which obviously presents some more interesting
3 doctrinal questions, but more frequently you've got
4 some markets, whether they be product or geographic
5 where the violation is clearer, and some that are
6 viewed as more marginal, and so it becomes a horse
7 training process, rather than one of truly balancing
8 efficiencies as against competitive harm.
9 At the end of the day, you know, one supposes
10 or establishes the transaction as a whole is efficient,
11 and then there are determinations made under the sort
12 of constraints of resources and trying to achieve a
13 result of getting the big deal done, that you agree to
14 give up things. There are some that are marginal that
15 you may hold on to and, at the end of the day, the
16 process tends to be one of negotiation rather than one
17 of analysis.
18 MR. WEISER: So I'm going to go to the last,
19 what I'll call doctrinal issue before we get into a few
20 institutional ones, which is, the common law, if you
21 will, of divestitures.
22 In the buyer up-front discussion, we had some
23 key points that were noted as possible criteria, and
24 Kevin very nicely explained how they are at war with
25 one another. Just to recap. That was -- you need to

1 have someone who pays enough money to have skin in the
2 game, but if you require buyer up front, that may
3 actually be at war with that idea.
4 You need to have someone who is knowledgeable
5 about the industry, i.e., not a novice, but you also
6 don't want someone who is a competitor and whose
7 purchase creates its own market power problems.
8 Another dimension, I don't know if this also
9 has an internal contradiction or tension, but there may
10 be some requirement that there be an auction so it's
11 the highest bid, but the agency may also want to
12 reserve the right to be able to pick or at least
13 approve the buyer. I guess my question to you is a
14 couple fold.
15 One is, are there useful criteria to think
16 about how to manage divestiture remedies in the context
17 of mergers? What have we learned, generally, from
18 efforts like the FTC study and one in Europe? And how
19 would you advise, if you were trying to come up with
20 some codification of principles to provide some
21 guidance and some hopefully best practice as a way to
22 go about doing this?
23 Kevin, do you want to start with this one?
24 MR. ARQUIT: That's a lot. I think here that
25 both the European guidelines and the US ones have it

1 right directionally, which is that divestitures are
2 clearly going to do a better job structuring relief
3 than will conduct remedies because they're clean.
4 If they're not clean, that's one of the things
5 that should be put into guidelines as to when it's
6 allowed to be something less than clean and, by that I
7 mean, one, where there's a continuing supply agreement,
8 or there's some continued linkage providing a license
9 under intellectual property, transitional services,
10 that type of thing because those frankly do lead to
11 real dangers of not just anticompetitive collusive
12 exchanges, but a lack of cooperation on the part of the
13 seller, because, after all, it's counterintuitive.
14 If you're going to end up wanting to destroy
15 this company in the marketplace, why do you want to
16 give them an extra inch beyond what the government says
17 that you need to give to them?
18 But I guess looking at the study that the
19 Bureau of Competition did that talked about the
20 problems that were inherent with divestitures, I don't
21 know where that leaves you, because if you have
22 admitted that divestitures are better than conduct
23 because of the lack of need to monitor, and the
24 divestiture issue isn't taking you where you need to
25 go, what's left?

1 And I think there that I saw some aspects of
2 that study that I would think suggest it may be flawed
3 and therefore, that that study shouldn't necessarily be
4 taken at face value.
5 First of all, the concept in that report that
6 talked about the fact that many times buyers overpay
7 for assets. Well, who are the Bureau of Competition at
8 the Federal Trade Commission, the Department of Justice
9 to make that determination? Don't you think that
10 somebody whose putting their own money up and their
11 financiers for that have a much better handle on what's
12 an appropriate price than folks that have never worked
13 in the industry?
14 But are there -- and looking at it from
15 perspective as enforcers and, even if it is in some
16 nominal sense too much, that doesn't really affect
17 competition unless there's a cash flow problem and a
18 need for heavy investment that's taken away because of
19 the fact that the money has to be used to pay down the
20 debt.
21 But I guess the other thing, the failure of a
22 divested -- and here's what I think is the real
23 problem. The failure of a divested entity to
24 ultimately make it in the market does not necessarily
25 mean that the remedy failed. I mean, we're all about

1 competition and in competition you have failure.
2 There's supposed to be failure. No one's guaranteed a
3 place in the marketplace.
4 So if a divested entity gets off to a fair and
5 even start, the fact that they ultimately don't do
6 well, well, the reason for the merger in the first
7 place may have been because one of the parties didn't
8 think that it could achieve sufficient scale without
9 the merger.
10 So, the fact that that was a problem that
11 existed before the merger, and the divestiture is only
12 meant to restore the competition that was lost as a
13 result of the merger, and the other entity that's been
14 created is presumably more efficient, is there any
15 surprise that some of these divested entities don't
16 make it even though the divestiture itself could have
17 been done completely properly, and I'd suggest that
18 doesn't show a failure of the system of divestiture,
19 it's simply an economic reality.
20 So I think that, yes, divestiture is probably,
21 and structural remedies, if they've got it right, to
22 say that is the preferred mechanism. And so I think
23 that both the -- all three sets, the Europeans, the
24 DOJ, and then the Bureau of Competition policy pretty
25 much handled that the way you'd want them to.

1 MR. WEISER: Art, what do you think?
2 MR. BURKE: I'm not sure that I have a lot to
3 add to what Kevin was just saying. As we sort of said
4 from the outset here, greater transparency is a helpful
5 thing with respect to all of these kinds of principles,
6 and, you know, my greatest concern is really what I
7 said at the outset, which is, to the extent that there
8 is divergence between the agencies, that really is
9 something that we should be concerned about, and this
10 is a golden opportunity to try to address it.
11 But with respect to the written versions that
12 actually have been put out there, I also agree with
13 what Debbie said. There are actually some very helpful
14 guidelines out there that have been put out by the
15 European Commission and, obviously, by both of the
16 agencies in the United States.
17 The Q&A format that's used by the FTC is
18 perhaps a little less useful in terms of getting a sort
19 of overarching view of their approach, but if you go
20 through it you can sort of generally discern what the
21 views are, but, again, from my perspective I would
22 prefer if there was greater predictability by having a
23 common set of views on that.
24 MR. WEISER: Debbie.
25 MS. FEINSTEIN: Thank you. I think the buyer

1 up front, for the most part, actually works pretty
2 well, but it depends a lot on convergence, at least at
3 the FTC, and that's convergence between staff, and the
4 compliance division.
5 Sometimes you get it in spades and sometimes
6 you don't. When it works incredibly well, you can
7 literally send an e-mail saying, here's our proposed
8 buyers, I do a lot of retail transactions, and there
9 you're going to have dozens and dozens of markets, and
10 so you really need real time reactions and, when it's
11 working well, I think it's great. You can get
12 real-time reactions to, is this buyer acceptable or not
13 because there are some times where it's on the margin.
14 Where it doesn't work well, and I don't think
15 guidelines can do anything about this, is where it
16 becomes a guessing game. Where you go down a path and
17 you think you have things worked out and somebody says,
18 the buyer paid too much, the buyer paid too little,
19 even though the multiple may be the exact same multiple
20 that your client just paid for for the overall
21 transaction and somebody is buying a divestiture
22 portion at the same multiple, why is that suddenly too
23 much? There is nothing tethered to it, and those sorts
24 of things can be frustrating and, unless there's some
25 rigor and economics between why somebody thinks that's

1 not appropriate, I think there's a problem.
2 So unless you can articulate it in guidelines,
3 staff shouldn't be doing it, and I think that's the
4 real -- the real trick to a lot of this is, there are a
5 lot things that if you were to interview individual
6 staff people, individual compliance people, they would
7 say a lot of, well, this is just the way it is, or we
8 never accept, or we always insist, and I'm not sure
9 that the people down the street in the commissioner
10 offices or the bureau offices or the front office of
11 DOJ have any idea that staff is saying as many "always"
12 and "nevers" as they are.
13 So, you know, in that respect, if there were
14 guidelines that might keep people a little more
15 tethered to whether it's really the case that paying
16 too much or too little is a problem and why that might
17 be a helpful thing.
18 MR. PRAGER: Just a few. I think that Kevin
19 really got it right in his overview which was an
20 excellent summary.
21 Then just following up on some of Debbie's
22 comments. I think that even more than in any other
23 part of the merger process, we, and even more so, our
24 clients get frustrated with staff in the divestiture
25 process where staff all too often seems to want to

1 substitute its own judgement for that of the people who
2 are in the business.
3 As to what the package should look like, what's
4 necessary, who is a good buyer, who is going to be an
5 effective competitor and who isn't, I think the
6 dichotomies, Phil, that you posed in your question are
7 genuine dichotomies but ones that staff is often ill
8 prepared to address and, given the normal skepticism of
9 the process, not terribly willing to hear what the
10 parties have to say as to the way weighing or the
11 outcomes of those inconsistencies.
12 Just to throw out another one, buyers often
13 want protections from the seller in a divestiture, and
14 it's a general proposition I think at both agencies
15 that things like non-competes are frowned upon because
16 the whole idea is to have them compete and, yet, there
17 may be some sense in which you're actually
18 disadvantaging the divestiture buyer by refusing to
19 allow them the kinds of protections, that in a normal
20 arm's length business transaction, they would otherwise
21 receive.
22 Similarly, sellers are often hamstrung, and I
23 understand why, but by the limitations on seller
24 involvement once the divestiture has occurred.
25 You know, by refusing to allow supply

1 agreements in some instances, by refusing to allow
2 earn-outs, by refusing to allow royalty payments over
3 time, these are all things that disadvantage the seller
4 in the process.
5 And so the divestiture process is, by it's very
6 nature, one of compromise and one of trying to get the
7 best out of a difficult situation.
8 I'd add one final observation on this point
9 which is that the clearest thing I think is that when
10 approving divestiture buyers, the role of the
11 government, whether you refer to staff or to the agency
12 management, it is not to be one of social engineering.
13 It's not to choose who they would like to see as the
14 buyer, and do what they can to favor that particular
15 firm. I think it really should be a thumbs up, thumbs
16 down. These three buyers are qualified. Go do your
17 deal with any of those three, and not a situation where
18 there's a thumb on the scale.
19 MR. WEISER: So had you not answered the first
20 question the way you did, Bruce, I would have thought
21 that was an impassioned plea to adopt some guidelines
22 on remedies.
23 Can you remind me to come back to that?
24 Because Kevin made such an impassioned plea, and then I
25 thought you disagreed with him, but it sounds like many

1 in the maybe in the course of the panel you've come
2 around to Kevin's way of thinking a little bit.
3 MR. PRAGER: No, no, no. I said from the very
4 outset that I thought that there should be a written
5 statement and it should be --
6 MR. WEISER: It just shouldn't be in
7 guidelines.
8 MR. PRAGER: I think it's impractical for it to
9 be part of this revision of the guidelines, both from a
10 time perspective, because I'm hoping that these
11 revisions will come out sometime in the next 18 months
12 to two years.
13 MR. WEISER: You and me both.
14 MR. PRAGER: And I really --
15 MR. WEISER: If we do it, if it doesn't come
16 out in that time period, hopefully we'll say, we're not
17 doing it, and we decided not to do it for whatever
18 reason, so --
19 MR. PRAGER: And I think that having a written
20 document, whether you call them guidelines or not, is
21 an absolutely brilliant concept that there ought to be
22 one such document.
23 I was just taking from the outset what I
24 thought to be a relatively pragmatic approach that said
25 it's going to be hard to do it in this context. There

1 is nothing on this side of the Atlantic that has ever
2 purported to be remedy guidelines, and I just think
3 it's biting off more than the agencies can chew in a
4 meaningful time period.
5 MR. WEISER: And Art's retort is, effectively,
6 Howard's not afraid to work hard, so that it'll be
7 fine.
8 So my last question is an institutional one.
9 It goes like this. If you have a concern that Kevin
10 articulated of some, either conduct remedies that
11 require oversight or ancillary contractual obligations
12 pursuant to a divestiture, how do you deal with what
13 new institutional economics, and Oliver Williamson just
14 won the noble prize, formerly of the antitrust
15 division, we're very proud of him -- Calls this the
16 trading hostages solution, which is some hammer that
17 ensures that when two people have to deal with one
18 another, you can have a level of assurance.
19 So one way the FTC is fond of in this regard is
20 the so called Crown Jewel Provision which means, if you
21 violate some of the terms of the decree, we're going to
22 take or keep this Crown Jewel that you have somehow
23 kept available to us, and maybe you have to divest that
24 as well, or for purposes of the new institutional
25 economics perspective, you can just destroy it, and

1 that would actually ensure it never had to be done, the
2 thing about it as a death penalty threat.
3 The other one, which somewhat confuses, we're
4 going to appoint a monitor whose going to play a role
5 of overseeing the conduct and have some authority to
6 recommend or impose some sort of sanction.
7 So thoughts on that, Debbie? You posed this.
8 What do you think about this institutional concern
9 about the need for oversight and, if so, how to manage
10 it?
11 MS. FEINSTEIN: Look, I think there are some
12 cases where it does make sense, where you've talked the
13 government into something where there's going to be an
14 ongoing relationship with the parties, and it may not
15 be straightforward and they want to make sure something
16 happens.
17 I mean, the first thing is, the parties do have
18 to put in compliance reports and, you know, the
19 agencies do look behind those. I mean, the FTC will
20 call with questions on a quite regular basis, and the
21 mere act of having to put in those compliance reports
22 means you think hard about behavior and what you're
23 going to say about it. You know the other side can
24 pick up the phone and complain.
25 But I think what has become too easy lately is

1 just to write in a monitor. And I actually happen to
2 think that most of the people I deal with at the FTC
3 Bureau of Competition Compliance Division are a heck of
4 a lot better at figuring out what's going than most of
5 the monitors we get assigned. Yes, we can choose them,
6 but sometimes you don't have a monitor that the
7 commission thinks is right, so you basically have to
8 hire one of these professional monitors because that's
9 who the commission will accept. And I've had monitors
10 who, frankly, even after getting the set of consent
11 decrees and after multiple meetings, really don't
12 understand the problem that was being solved.
13 Why the consent is written the way it is, why
14 the divestiture agreement between the parties is what
15 it is, and actually creates problems rather than
16 helping them.
17 It becomes an incredible administrative burden.
18 Their job, their incentives are to make money and their
19 incentive, therefore, is to foment dissent between the
20 two companies which is exactly the opposite of what it
21 is that the parties want. It's exactly the opposite of
22 what the commission wants.
23 I've had some lucky experiences with some
24 monitors that we found who are very good, only to have
25 those monitors rejected in the next situation because

1 they don't know the industry where I think knowledge of
2 the industry is typically less important than simply
3 being a good sounding board and understanding how do
4 businesses work, how do companies think about firewall
5 issues, and that sort of thing.
6 So I really think people need to rethink the
7 monitor issue pretty dramatically, because I think in a
8 lot of cases it can do more harm than good.
9 MR. PRAGER: I guess I'll comment on the Crown
10 Jewel point just because Debbie did. I don't think
11 there's anything wrong with the concept of Crown Jewel.
12 I mean, it is a motivator and, where I've seen it, it's
13 generally not been totally arbitrary. It's not just
14 saying, if you don't live up to your obligation we're
15 going to stomp on your head and break it. I think it's
16 where there are two sets of assets that could be
17 divested, one of which is more desirable more or more
18 complete, and where the agency isn't quite sure whether
19 the lesser one will work. This is generally not a
20 buyer upfront situation, where you're going to be
21 finding a buyer over a six or nine-month period, and
22 the concept is, that if nobody steps up to buy the
23 first set of assets, that is proof then that they
24 weren't sufficiently desirable or were not sufficiently
25 complete and that, therefore, you go back to plan A,

1 which is, you got to put out the more complete, the
2 more desirable set, and, yes, there's a punitive nature
3 to it in the sense that it was what the buyer wanted to
4 keep in the transaction, but I think it's really both a
5 motivator and an assurance that you get a good and
6 effective divestiture at the end of the day.
7 MR. ARQUIT: I agree completely with Bruce on
8 the Crown Jewel, and I don't think that its best use is
9 when it's intended to be punitive. And I think the way
10 the European Commission has written this up in their
11 guidelines really articulates that the best way which
12 is, as I understand it, is that you're willing to
13 accept a little more uncertainty with respect to the
14 primary remedy, if you know you got a backup that
15 exists out there, and so you get a little more wiggle
16 room to the parties, but what it means is that the
17 Crown Jewel is the one that has to be pretty much air
18 tight, and that gives the regulatory authorities the
19 guarantee they're going to restore competition, but it
20 also gives merging parties some flexibility. So I
21 think Crown Jewel works and I think that's the way to
22 articulate it.
23 On the monitor, I was particularly interested
24 in hearing Debbie's views as to how incompetent they
25 are since I've served in that position twice, so --

1 and, actually, the point that Debbie makes, because
2 these days monitors are pretty much industry experts.
3 At the time I was named in both of those. I
4 couldn't have been hired as the industry expert, so I
5 had to be something having to do with some knowledge of
6 antitrust law. But that's moved more to the industry
7 experts. I think there is a challenge either way, if
8 you're an industry expert, you don't understand the
9 antitrust aspects, and what firewalls really mean, and
10 if you're an antitrust person, you don't necessarily
11 know -- you don't, in fact, know about how the business
12 is run.
13 So you have to rely heavily, I did, on some
14 senior people in the assets that were going to be
15 divested. Now they have mixed motives. They may want
16 to be part of the company that's spun off, but you
17 don't even know who the buyer is. They may also hope
18 they're ultimately hired back by the seller. So you
19 don't know how objective the advice you're getting is.
20 So it really does have issues. And I think the
21 way, you know, the last thing I'd like to see is see
22 more bureaucracy, but I think that it's probably a job
23 that requires more than one person because no one
24 person has both sets of expertise.
25 If you're going to have this be effective, it

1 has to be somebody that does understand the industry so
2 that they can see when -- if collusion occurring or
3 assets are being degraded, but you also need to have
4 someone they can go to for antitrust advice.
5 And, frankly, yes, you can go to the FTC
6 compliance people and they are very very good and they
7 understand this, but you know when you go there you may
8 not want to up the ante that much because you're trying
9 to find out the answer to a question and you don't
10 necessarily want to unload the whole compliance group
11 with some accusation of a violation.
12 So I think probably that some of the industry
13 experts don't go back and ask the agency in situations
14 where they should if they were allowed to have an
15 antitrust advisor of sorts, that they could go to an
16 attorney/client relationship, that might be somewhat of
17 a fix for it.
18 And the only reason I think -- I agree with
19 everything Debbie said about the problem with monitors.
20 The problem is, if you don't buy into the monitor
21 situation, then you're pretty much back to the buyer up
22 front, and I've already indicated what I think can be
23 real problems with that.
24 MS. FEINSTEIN: If I can just respond to Kevin.
25 You were talking a little bit about a divestiture

1 monitor, which I think is very different than what I
2 was talking about which is really a compliance monitor.
3 Compliance monitor is after the divestiture has
4 occurred. So the seller knows what the seller wants.
5 The business people at the seller have only one
6 incentive which is to do well by the seller's company,
7 and, in that situation, I agree with you, your
8 situation you've got kind of more of the mixed motive.
9 I'm talking about once the deal is done and there's
10 somebody looking over it for two, three, five years to
11 see if things are working, those are the situations
12 where I found it really isn't all that effective and
13 can ferment the kinds of problems that are unhelpful.
14 MR. ARQUIT: And just one observation. I don't
15 want to monopolize this, but it's something I took away
16 from the experience. Right now the agencies are pretty
17 much indifferent as to whether you can divest the
18 buyer's assets or the seller's assets. They just want
19 to see a package. That's a stand-alone business.
20 And I think, in some circumstances, when you
21 allow it to be the buyer's assets that is the subject
22 of the divestiture, that you got an unnatural situation
23 because, particularly, the buyer has some links with
24 these assets it's going to divest. Meanwhile, it's
25 bought some other assets out there that it's going to

1 bring in, and, yet, the assets that it held often, in
2 this case, in the same building, are ones it has to
3 divest.
4 This outfit's going to be divested is
5 compromised of their friends that they have lunch with
6 in the cafeteria every day. That's supposed to be the
7 entity they're competing with even though they've known
8 these people for 20 years, and the company that they're
9 buying is the one that's off distant, that I think that
10 there really can be more compliance issues when it's
11 the buyer's assets that are the subject of the
12 divestiture.
13 MR. WEISER: Although, Kevin, you have a
14 particular idea in mind. You can have a company who
15 has different divisions who aren't in the same building
16 who may not even feel like they're part of the same
17 company. Technically, they can still be the buyer, but
18 you're talking about where there really is an
19 integrated company, it's a much trickier --
20 MR. ARQUIT: Where's the linkage?
21 MR. WEISER: Where's the linkage, yeah.
22 MR. BURKE: I'm not sure if we have much time
23 left, but just one last comment, and I think I'll
24 answer a different question than the one you asked,
25 which is, one can make arguments about individual cases

1 about whether the Crown Jewels are appropriate or not,
2 whether it's appropriate to have a monitor or not.
3 My guess is, that if you were to actually write
4 a set of guidelines, they would not really provide much
5 concrete guidance for those, except to say they're
6 sometimes appropriate and sometimes not appropriate,
7 and here are a few factors that you might consider in
8 addressing it.
9 So I think the comments that have been made are
10 actually very valid ones, but they probably are not
11 ones that really go to the guidelines question. We're
12 not going to rule these out and we're not going to rule
13 them in categorically.
14 One last point I would make though is, I think
15 there is, in going to the some of the questions and
16 complaints, frankly, that have come up here, a lot of
17 it does go to some institutional issues as well. That
18 a lot people that are responsible for negotiating and
19 enforcing these various consent decrees, particularly
20 at the commission, are in a very different group within
21 the commission. That's just the way it's set up.
22 They're the compliance division. And they are somewhat
23 disconnected sometimes from the case itself, and
24 frequently don't seem to understand necessarily what
25 the actual other enforcement staff were interested in

1 or what their concerns were.

2 I'm not sure -- that's sort of the problem with
3 treating remedies as this sort of red-headed stepchild
4 that is a separate issue from all the merits, and I'm
5 not sure that that's -- that can't be solved by
6 guidelines either, but I think it's an institutional
7 issue and encouraging -- thinking about remedies as
8 part of the merits is perhaps some way to try to
9 address that.

10 MR. WEISER: So I would like just to give at
11 least one question from the audience, if someone has
12 one that they would like to share. Yes?

13 MR. LIPKOWITZ: In view of the concern in
14 certain precincts in Washington about Too Big To Fail,
15 do you think that there's any likelihood that the
16 remedy will include some concept such as in the choice
17 between selling off the buyer's assets or the seller's
18 assets, that the relative size of those two entities
19 should be considered, and the larger one should be the
20 one to be sold, rather than leaving it in the course of
21 merger negotiations to the parties to determine whether
22 it's the buyer's assets or the seller's assets that are
23 going to be proposed as the fix-it-first item to be
24 sold?

25 MR. WEISER: Any thoughts on that? If you have

1 a fix-it-first situation, should you have a
2 disposition, say the larger business, can you make that
3 sort of principle to argument?
4 MR. PRAGER: I don't see any reason to. I
5 don't think that you need to have a rule, even if it's
6 not a hard and fast rule that says that it should
7 generally be preferred that the larger group of assets
8 -- it may be that in some instances it will be easier
9 to find buyers for a somewhat smaller more manageable
10 business, and, you know, that business may be more
11 nimble. It may have better technology.
12 There could be lots of reasons why selling the
13 smaller business would be useful. It may not be as
14 tightly integrated from either a production or
15 distribution perspective with other of the assets of
16 buyer or seller, and all of those that are factors that
17 go into the decision of which group of facilities or
18 which business to sell.
19 MR. WEISER: Let me put one other question on
20 the table which we'll then pick up on the next panel.
21 So 30 seconds on what I will call "Unconventional
22 Remedies." Here's three. In a world where the
23 thresholds are higher, a requirement to report future
24 unreportable transactions, this is assuming of course
25 that either you're willing to agree to it or a court

1 would find appropriate, what do you think of that sort
2 of remedy?
3 Number two, a requirement to report pricing
4 behavior after the merger is consummated, either as a
5 safeguard, I'll brandish sunlight is the best
6 disinfectant, or is an opportunity for more data
7 analysis by the agencies.
8 Number three, increasing use of IP licensing as
9 a competitive constraint that would satisfy competitive
10 concerns. Thoughts on those or maybe other
11 unconventional remedies that aren't part of the
12 mainstream discourse we've talked about. Kevin.
13 MR. ARQUIT: Well, on the pricing line, and
14 maybe this reflects again my time back in the
15 government, since you have to file compliance reports
16 anyway -- and if it's a manageable product line, I
17 don't see that big a problem with reporting prices
18 after the merger. I realize companies are not going to
19 like it, but you look at the one case that I'm aware of
20 where a court allowed merging parties to give a price
21 promise as the solution, the North Shore Hospital case
22 in Long Island let two large hospitals merge because
23 they promised not to raise prices for two years. As
24 soon as the two years were over, they raised the
25 prices.

1 So there really -- I think that the reporting
2 part of it isn't the problem, there just needs to also
3 be an understanding on the part of agencies that
4 markets can change and, if the entire demand curve
5 shifts, as opposed to moving along the demand curve,
6 there can be a circumstance where it's perfectly
7 competitive for prices to rise.
8 MR. WEISER: Debbie.
9 MS. FEINSTEIN: I guess I would want to
10 understand the purpose of that because the notion in
11 accepting divestiture remedy and -- you know, I haven't
12 seen a pricing solution in years and years and years,
13 so most of the time it would be a divestiture remedy,
14 and if the notion is going to be whether we're going to
15 test whether or not the divestiture worked by look at
16 pricing, I think that there are a hundred other
17 factors.
18 I think that the notion --
19 MR. WEISER: This could be in lieu of -- this
20 could be, in a sense, the parties say, trust us,
21 there's no harm, you could just say, okay, we do trust
22 you, but we're going to require you to actually report
23 on your prices so we can do some analysis.
24 MS. FEINSTEIN: Well, I think that's an
25 intriguing idea. That goes to the question of whether

1 that enables us to do regular merger retrospectives.
2 I've actually talked about that as a possibility. I
3 think the problem is more a legal one. If you don't
4 have reason to believe that there's violation for
5 remedy, how can you impose a requirement that people
6 turn over pricing data? So I'm in the sure how it
7 works in practice, but if it's the price of getting a
8 deal done, sure. I think a lot of people would do --
9 turn over the pricing data.
10 I'm reacting to the notion that you would have
11 to do a divestiture and then prove that the divestiture
12 accepted by the government, in fact, worked by giving
13 your pricing data and, to me, that's too much to ask of
14 people.
15 MR. PRAGER: My clients always want the North
16 Shore deal where all they have to do is agree they
17 won't raise prices. And they'd take the oversight too.
18 They just don't want the divestiture.
19 I think the IP licensing is becoming a more and
20 more common remedy. I think it's one that should not
21 be viewed with any skepticism. I think that the
22 biggest issues are reasonable royalties. One of the
23 concerns that the agencies always have with anything
24 that involves ongoing payment is that the divesting
25 party, if you will, is getting information about a

1 competitor. That's a tough one. Because if it's a
2 fully-paid license, sometimes that's a big nut that
3 you're asking the recipient of the license to pay up
4 front.
5 There may also be a real disconnect between the
6 licensor being forced to make a divestiture, and the
7 licensee believe are the likely benefits in terms of
8 impact on sales and the like.
9 So I think that there's a little bit of a nut
10 to swallow there in terms of accepting a royalty as
11 part of that remedy.
12 MR. BURKE: But I would say of the three, that
13 seems the least unconventional to me and the one that's
14 the most interesting and the one that should --
15 perhaps, if there is guidelines, the most intentioned
16 because it is -- especially in technology industries
17 that is often the way to resolve an issue.
18 If it's a software product or, you know, some
19 other piece of intellectual property, divesting or
20 giving a license so that effectively should be able to
21 address the competitive concerns, or at least, you
22 know, that the circumstances under which that would be
23 an acceptable remedy are very important. And they're
24 laid out to some extent already in the materials that
25 the DOJ and the FTC have put out.

1 So I guess I would say, the other two are
2 pretty unusual, but that one is very common and will
3 probably become more common.
4 MR. WEISER: I want to thank the panel for a
5 great discussion.
6 (Applause.)
7 We'll take sort of five minutes to stretch your
8 legs, and then have the final panel come up.
9 (A break was taken.)
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1 PANEL 5: GENERAL DISCUSSION AND ROUNDTABLE
2 MR. WEISER: Folks can sit down. This panel,
3 of all the panels that we're having in this series of
4 five workshops, this may well be the only one with
5 three academics on it and only one person from
6 practice.
7 That said, so the practitioner, Joe Krauss, he
8 is, along with Ilene Gotts, who you heard from this
9 morning, the mastermind of the ABA's comments. He's
10 been very involved in their work, and we are so
11 appreciative of the ABA's work. The ABA's transition
12 report, which this time last year that's what I was
13 working on, the FTC transition was valuable reading and
14 guidance to us. Still is. In that, they actually
15 suggested that merger guidelines and merger
16 retrospectives were things we needed to be thinking
17 about. We'll talk about both of those in this panel,
18 and so we're really happy to have you here.
19 Now I said three academics. But these three
20 academics, each of which have a lot that they bring to
21 the table. Janusz Ordover is here at NYU. He is also
22 a former deputy assistant attorney general for
23 economics. He was also there at the creation of 1992
24 guidelines. We will have had Bobby Willig at our first
25 one, he was working with Janusz, and Paul Dennis who

1 will be at the one this Thursday. They were at the
2 Justice Department. Kevin Arquit who we just had has
3 at the FTC.
4 Harry First is, as I introduced earlier, is a
5 critical figure here in the antitrust community in New
6 York. He had been the head of the New York AG's office
7 antitrust section, head of the NYU program on trade
8 regulation. It's an asset to have him here.
9 Finally, Lou Kaplow, who I have a special
10 affinity with because one of his mentors in economics
11 is also one of mine, F.M. Scherer. What Mike Scherer
12 would have brought to this panel, he doesn't like to
13 travel much these days, is an important question that
14 we might start off with is, many mergers don't actually
15 end up providing the benefits that may purport to
16 offer, and there is -- I think appropriate surplus on
17 efficiencies, and so one has an existential question
18 about how to think about mergers and where to push your
19 emphasis.
20 Let me start with that very very high level
21 question about mergers and how to put the emphasis on
22 it. The government is often taking on to itself, and
23 some have said the courts have put on us a high burden
24 to stop a merger with a need to show actual competitive
25 effects. Sometimes a need to show a market that is

1 proven with a real rigor.
2 Is there, to some higher level, sort of a
3 better way to be thinking about this enterprise? Then
4 the sort of stepwise process that the guidelines lay
5 out, or the high level of rigor that may be expected?
6 If you just had to start from scratch, Janusz,
7 what's the right sort of touchstone to think about
8 merger review?
9 MR. ORDOVER: That is quite a question. Thank
10 you. Let me start with a little anecdote. What we
11 finished was the horizontal merger guidelines, I said
12 to Jim Rill, who was my boss at that time, "Why don't
13 we start looking at the vertical issues?"
14 He said, "You do that, I'm getting out of
15 here." So he got out of there very quickly and, of
16 course, never looked at the vertical merger guidelines
17 or the vertical issues in any great detail. They fell
18 into complete disuse. If I were to start, I don't know
19 where I would start. I think we have an excellent
20 document. I cannot be expected to criticize it too
21 heavily, first, because Bobby Willig, my dear friend,
22 I, and others have worked very hard on it, and I think
23 it is a great document that guides a lot of important
24 work that the government undertakes in this arena.
25 I always thought of the merger guidelines as

1 really fairly a document that's quite alive. That it's
2 open enough to bring in a new set of analytical tools,
3 new set of empirical evidence, new sets of experience
4 with enforcement.
5 It is not something that is a dead letter, I
6 guess a dead letter of the law, I never understood what
7 that means. But it is a, I believe, even though it's
8 guidelines, but they are being lived with on a daily
9 basis both at the FTC and at the DOJ.
10 So I believe that the process that is happening
11 right now of looking at where we are some 20 years
12 later, and the process of understanding what is
13 missing, and what perhaps has to be adjusted in light
14 of experience, is the right way to proceed.
15 As I said, I look at the guidelines as cadence
16 of questions and answers, as very dynamic in that
17 sense. Perhaps it starts at the place that some people
18 think is ridiculous, like market definition, we'll
19 perhaps talk about it and I'll explain why I still
20 think it's not a terribly bad place to start, as a
21 useful place to start.
22 So I think if I were to start, I would tell you
23 the guidelines as we have them, and I will devote a
24 fair amount of time thinking about where we can
25 strengthen them, and where we can give more clarity to

1 the parties, as well as ensure, and I think that's very
2 important, that the political super structure that's
3 overseeing the FTC and the DOJ is actually not terribly
4 displeased with the way things are turning out.
5 Because I cannot imagine a worse outcome than to have
6 our elected representatives begin to mess around with
7 what we have in front of us.
8 So there is that issue, and I believe it's very
9 important, and I believe that one has to look to that
10 part of the process as well. It's not only law, it's
11 not only economics, but it's also much more that is
12 often totally uninformed.
13 MR. WEISER: So, Lou, what's your take in
14 thinking about the (inaudible) enterprise and what
15 should be driving it out?
16 MR. KAPLOW: Well, I think I will jump in in a
17 midstream place that you might have partially
18 predicted.
19 So one thing you said in the first formulation
20 is about the guidelines providing rigor and the courts
21 demanding rigor, and how we should go about doing that.
22 I think that it's a good thing that there's an
23 insistence on rigor because anything goes is a pretty
24 bad way of proceeding things. It doesn't give
25 guidance. I think one thing that has been talked about

1 only a little bit, maybe more in one or two of this
2 morning's sessions, is I think the guidelines actually
3 guide the courts a lot, and I think part of why they've
4 been successful is because of the dimensions of
5 soundness.
6 But I think part of why they've been sensible
7 is that most federal district judges don't want to make
8 it all up from scratch on their own and would like
9 something to lean on, and that the guidelines serve
10 that function.
11 So revisions in the guidelines will have that
12 function going forward, and this is also part of why
13 the guidelines, even though they don't purport to tie
14 the hands of the agencies do so, because the district
15 judge being asked to make up something new on the spot
16 that differs from what the government actually said in
17 it's own guidelines, I think is very difficult
18 situation to be in. So I think that's sort of at a
19 very high level of reality.
20 But punching into one in particular, and I know
21 one place where there's been a lot of play, especially
22 in the last decade or two, are the questions of how one
23 proves competitive effect, it relates to the structural
24 presumption panel this morning, the use of market
25 definition and the like.

1 I think that there is some amount of
2 misconception, perhaps reinforced by the guidelines in
3 their current form, about the connection between the
4 market definition, market share, market power,
5 competitive effects inference route, and the idea of
6 rigor.
7 And I guess my views are a bit outside from the
8 mainstream on this, but the more moderate version of
9 them would be that I think it would be good if the
10 guidelines said more, not -- just to say all the steps
11 relate could be said and might be useful but I don't
12 think really says much. But, particularly, competitive
13 effects in the structural approach with market
14 definition, there's a question of the interrelationship
15 there.
16 It's often imagined, and I use the word
17 "imagined" carefully, it is often imagined that one can
18 do step one before one can do step two. I'm pretty
19 imaginative, one might say, an absurdly imaginative
20 character on certain dimensions. I haven't yet figured
21 out how to imagine that.
22 Let me just say two very precise things and
23 then I'll probably stop. It's assumed that if we've
24 defined a market properly, setting aside a moment what
25 that means, we now know how to figure out the

1 competitive effects from the market that we've defined.
2 Well, how does one do that?
3 Well, if one has the kind of evidence of maybe
4 a natural experiment like in the Staples case or a
5 merger simulation, or if one has data or
6 impressionistic estimates and information from
7 customers about who they turn to, under what
8 circumstances, one then can do a lot by way of
9 interpreting.
10 But that sort of stuff are also direct means of
11 answering the competitive effects question. So when it
12 comes to, given a market definition, how do we say what
13 the market share means? If one opens up economics
14 textbooks or economics journal articles, there is no
15 real answer to that question short of direct inquiries
16 into competitive effects -- the agencies more and more,
17 and courts occasionally in cases more, and more are
18 acknowledging this. Many courts have said, we
19 understand it's a means to an end, but I think making
20 that more explicit, whether in a general way or also
21 with specifics would be clarifying.
22 But, secondly, when one goes to the whole
23 enterprise really of defining markets, and an example
24 came up this morning, and many of you were here then,
25 and my comment from the floor coming off Rich Gilbert's

1 comment when you have, say, differentiated product
2 merger, can you define the market without first doing
3 competitive effects? You know, is there really any way
4 of doing it?
5 If the competitive effects are significant and
6 adverse, could one sanely pick a market definition
7 other than one that ratifies that conclusion? And if
8 competitive effects are plainly nonexistent, one should
9 either book pick a broad enough market definition to
10 ratify that, or just skip that step and go home because
11 you've already concluded that there aren't adverse
12 competitive effects, so why does one care about the
13 answer to step one?
14 So the combination of these points suggests
15 that various means of trying to determine competitive
16 effects really are when we try to get more concrete and
17 say, how can we do what's often called step one? We
18 really have to do competitive effects if we're doing
19 step one rigorously.
20 So the notion that the failure to do step one
21 first, or somehow separately, is a lack of rigor, I
22 think really is a confused idea, and not ultimately one
23 that is defensible. And they say, when I talk to
24 people in the agencies and read about different things
25 that they do, I think that is more and more what's

1 happening in the guidelines in some way should say
2 that. I don't have a strong sense on what's the best
3 way to do so.
4 MR. WEISER: Harry?
5 MR. FIRST: Okay. So I want to answer your
6 question, follow-up on Lou, follow up on Janusz, and
7 then say something completely different.
8 So, first, the headline, the top point of your
9 question was Mike Scherer's notion of, you know, merge
10 or succeed. Now, Mike obviously looked at today's
11 paper, Wall Street Journal, which says, "Looking Back
12 on 10 Years and 316,657 Transactions." So this is a
13 story about mega mergers and it's the data, and it
14 says, "It's like walking through tombstones on a
15 battlefield, all the hope left in ruins." And then, a
16 study by some economist which say, "Not every mega
17 merger is bad, but most are."
18 So, now, I don't offer this as sort of
19 enshrining this in the first paragraph of the
20 guidelines, but -- and this is, in some sense, outside
21 the guidelines, but also raises the question, and I
22 think is raised by both people and by you which is,
23 what are the guidelines for?
24 The easier thing for enforcers to do mostly is
25 to not bring the cases because few people complain

1 about that. The harder thing is bringing the cases.
2 So it does lead to some risk averseness. And there is
3 -- has been the concern about -- and I'm glad that Rich
4 Gilbert couldn't remember which was Type 1 and which
5 was Type 2. So false positives and false negatives.
6 And the concern that any enforcer has. You bring a
7 case and you make a mistake, you're out there, and this
8 is not good. And the concern for false positives.
9 But these data say, maybe we've tipped the
10 scale a little wrong. I think, frankly, you know, the
11 world has changed a little bit in enforcement agencies,
12 or at least some people think that it has. And the
13 question is, how do we tip the scale back the other
14 way? Maybe we don't need to be so concerned about the
15 false positives and should be a little more concerned
16 about the false negatives, at least on the theory that
17 if the idea is enforcers should do no harm, maybe they
18 don't won't do any harm, because most of these mergers
19 aren't any good anyway. That's a little beyond sort of
20 the pay grade of merger enforcement. But, it may give
21 a little sense that, as enforcement discretion, we want
22 to move the balance a little bit.
23 Now, the second part of that is, so what are
24 you doing in the guidelines? And if you could rethink
25 this, how would you do it?

1 So my first answer to that is, partly Janusz'
2 maybe -- out of Janusz's observation is -- actually,
3 the agencies don't have the power to rethink it,
4 because the agencies are acting in effect as delegates
5 of congress, which passed a statute which says, whether
6 we like it or not, in any line of commerce in any
7 section of the country, the effect may be substantially
8 less than competition.
9 So, to the extent the agencies have power to
10 articulate their views of what merger policy should be,
11 it's within that delegation, right, and we might not
12 like the democratic process that produced that. And,
13 mostly, we who operate in antitrust don't really like
14 legislatures meddling with our deal, but, in fact, that
15 is the statute.
16 So, it does, to some extent, structure the way
17 we have to think the agencies have to think about it as
18 faithful agents of congress in effect, the way courts
19 are going to think about it. The trick then is sort of
20 how to create the document that will convince the
21 courts that it's both within that delegation and
22 properly done. So there's some faithfulness to that
23 structure while still setting out something that's that
24 convincing.
25 Now, to do this, you may still have to talk

1 about market definition and, you know, you might say,
2 well, we can't -- the real important thing is, we're
3 concerned about competitive effects, and then we'll
4 back out the market definition. But competitive
5 effects, of course, presupposes you've identified the
6 competitors as well. So, to that extent, these two
7 things end up going together.
8 So, I would say in terms of thinking about the
9 guidelines process, and Lou said at the beginning of
10 his remarks, there's probably been too little attention
11 and discussion about the most -- what I think is the
12 most important audience for the guidelines, and I think
13 the most important audience, and it's the one, frankly,
14 that the agencies have had a lot of trouble with, is
15 the courts.
16 The guidelines process started out by saying,
17 well, the down turn is that we should really let the
18 antitrust community know what we're doing. It's to
19 tell them sort of the transparency thing. And I think
20 probably that's how it did start out. Remember, those
21 were the days before websites, and all that
22 information, you know, everything is available all the
23 time.
24 But as it's developed over time, the audiences
25 are much more complex and, in a sense, let's be

1 transparent, may be the least of the audience part. We
2 heard a number of audiences discuss what the guidelines
3 are important for, but I think the really critical
4 part, which may explain why the guidelines are written
5 the way they are, or how they should be written, are
6 the judges who have to be convinced that the agencies
7 who are applying these have applied them with proper
8 thought and principles, and that they make sense so
9 that they do it in a way that the agencies think is
10 right.
11 MR. WEISER: So, Joe, I'm very curious to hear
12 you react to Louis' suggestion because in the earlier
13 comments, you did suggest that the market definition
14 and market concentration presumption approach wasn't
15 optimal. Louis says, forget it, go right to
16 competitive effects because that's ultimately what the
17 agencies are mostly doing and ultimately what matters
18 the most.
19 I don't know if your guidelines are articulated
20 at that point as precisely as what Louis said, is that
21 one that you'd agree with?
22 MR. KRAUSS: First off, I'm humbled being on
23 this table with all these academics. No one has ever
24 accused me of being an academic. I'm a practitioner.
25 I think I've come full circle in thinking about

1 this over the last several months because when this was
2 first thought about, and when the new administration
3 arrived, everyone anticipated that perhaps an effort
4 would be made to revise the guidelines and I, quite
5 honestly, I was of the mind at that point that, yes,
6 maybe we should rewrite these because you look at
7 practice in the agency and, you know, in my 25 years
8 both being inside the agency and outside the agency,
9 trying to compare how staff actually analyzes a merger
10 compared to what the guidelines say, there's a lot of
11 disconnect between the two on the surface. It appears
12 on the surface at least a lot of disconnect.
13 So I started this process thinking that we
14 should revamp it and perhaps, as Lou suggested, because
15 there is an effort to identify the competitive effects.
16 And I kind of refer to these as perhaps shorthand
17 methods that we have developed over the years to try to
18 identify mergers which are problematic in the most
19 efficient way. So one easy way to do it is to look at
20 competitive effects, and try to see head to head
21 competition, where is some actual price effects, ah-ha,
22 we've got a merger that's problematic. So we should
23 adopt that and, is that something that our guidelines
24 should say?
25 That's when I started to have some problem with

1 perhaps redeveloping the guidelines to suggest that
2 type of approach because, when I look at the
3 guidelines, as Janusz says, I have a hard time finding
4 problems with the theoretical basis for the guidelines,
5 and no one I don't think has been able to point me to
6 errors that are in the guidelines.
7 Yes, you know, the elephant in the room perhaps
8 may be what has been touched on. The response of the
9 courts to government challenges and, yes, the response
10 of the courts has not been favorable. Is that a
11 problem of the guidelines? Is that a problem of the
12 court's not understanding the guidelines? Is that a
13 problem of the cases that were brought? I think that's
14 a debate for another day, perhaps.
15 But when I look at the guidelines themselves,
16 is there a problem inherent in the guidelines as they
17 are written? I still have not heard someone articulate
18 where that problem is with the theoretical basis for
19 those guidelines.
20 MR. WEISER: So let me try to -- one of them is
21 channeling your comments, and then I'll let Janusz, who
22 I know started off saying essentially what you said,
23 maybe have a response. Mike Salinger said earlier in
24 the day that basically the presumption or level of
25 nervousness, was the terminology he used, but I think

1 the two are essentially saying a similar idea, is a
2 four to three merger, presumably four to three with
3 very limited opportunity for entry. That's what he
4 said. Others might say, no, it's two on one. Others
5 may say it's three two. But I don't know if anyone
6 other than Rich Gilbert's old license plates say HHI
7 1,800.
8 You said in your -- I think comments that the
9 guidelines should be revised to indicate that there's
10 no magic number, no presumption at all. I think you
11 did say it might be valuable to have the market shares
12 versus at safe harbor?
13 MR. KRAUSS: Right. That's the kind of the
14 tension that we tried to show, is that you need some
15 safe harbors, you need some HHI, and I think our
16 section's comments concluded with that determination,
17 that we need those HHIs. But it's the presumption
18 that's attached to it, that's where the disconnect with
19 practice is, and it's an important disconnect because I
20 think the analytical framework of the guidelines of
21 having the integrated analysis and going to Lou's
22 comment about looking at competitive effects I think
23 the presumption doesn't play in this world as relevant
24 as it may have 20 years ago.
25 MR. WEISER: So I'll come back to that, but I

1 will say to rephrase I guess the challenge to, you
2 know, what you said other people have said is, don't
3 mess with the guidelines I think Bobby Willig, who is a
4 little more of a proud author than what Janusz --
5 Janusz was proud, but Bobby said, the guidelines were
6 born the same year as my daughter, don't mess with my
7 daughter. Something like that.
8 So I think the two reasons that you might want
9 to mess them with them, so to speak, is one is the
10 disconnect between the actual practice and what they
11 say is potentially uncomfortable, and the second point
12 is what Lou has said, which is, well, one of those
13 disconnects is not merely this HHI market definition
14 numbers game, it's also what's really the driver of the
15 analysis which is, you know, a more direct evidence
16 means of assessing competitive effects.
17 So, Janusz, you started out with some prior
18 authorship. Do either of those two critiques suggest
19 to you there are some changes that are warranted?
20 MR. ORDOVER: Well, I think, of course, there's
21 always something to be changed after 20 years of living
22 was a document, but let me address this market
23 definition issue. It seemed to have percolated through
24 a lot of the conversation throughout the day, which is
25 very interesting.

1 I really think that one should not look to the
2 market definition step as a step that is anything other
3 than a way of organizing one's industry knowledge other
4 than a way of looking to the documents, and trying to
5 re-read through them to form sound views as to what is
6 the scope of direct competition, what do the industry
7 participants think about the alternative products,
8 which they don't manufacture, what is it they think
9 about the consumers' responses. There's a huge amount
10 of marvelous data in documents that are made available
11 and independent research and research that the
12 economists performed during the review process.
13 I really don't think of the market definition
14 step as something that one has to do or die around. It
15 is a way of getting into the merger assessment. It is
16 a way -- I disagree with Lou, but I will not disagree
17 with him on tax issues, but I would disagree with him
18 on the antitrust issues.
19 I do not believe that one can just, out of
20 nowhere, jump into the deal and infer out of this thin
21 air these competitive effects. No. Please don't do
22 that. Take your time. Even though, of course, the
23 parties would like to get it done as quickly as
24 possible and we are trying to help them get it done,
25 but please try to think about what it is all about. It

1 is about competitive effects, but how am I going to get
2 to that point? I need to learn the microstructure of
3 the industry. I don't learn it from reading The
4 Economist. I don't learn it from reading the New York
5 Times, the reports on these irrelevant findings.
6 I don't learn that always by listening to the
7 industry people. I have to have some analytical tools
8 that focus on such things as analytical tools,
9 diversion ratios, these kinds of things are tools for
10 one purpose and one purpose only which is to answer the
11 ultimate question.
12 And if you don't have a structure through which
13 to look at the data, you're just going to get a mess.
14 I don't like mess because economics does not live well
15 with mess, which is why we have rejected behavioral
16 economics, we have rejected all kinds of stuff because
17 that gives you messes as opposed to neat answers. And
18 I think one can get too far but I'd like to have you
19 think about the market definition step as really as
20 entry point. No more than that.
21 MR. WEISER: Before I let Lou go, I want to go
22 to Harry and I want to frame the question. What's
23 amazing about Janusz' answers, what he didn't say,
24 SSNIP. What I think part of Louis' criticism is, and
25 I'm sorry if I'm stealing your thunder here, Lou, is

1 that sometimes the market definition exercise is not
2 framed the way you just framed it right now, which is a
3 set of tools to understand actual market dynamics, it's
4 framed as a more, some would say, formulaic exercise
5 around this SSNIP market algorithm.
6 Harry, any thoughts on whether or not --
7 because some could say, what Janusz said is actually in
8 the guidelines. It's really much in the commentary
9 that came out in 2006, but yet this SSNIP concept has
10 taken on an almost mystical role.
11 Is that a concern? Is that something we should
12 be -- how should we be thinking about it as we think
13 about what to do?
14 MR. FIRST: Well, I don't know. The SSNIP test
15 has its function. Part of it is to organize the
16 analysis, and that is one way -- I think the problem
17 may be that it's just not the only way of trying to
18 figure out what the set of effective competitors are
19 that might discipline the parties post merger, and
20 that's the question you're trying to answer in, you
21 know, in drawing up a market.
22 It's occurred to me, I must say I think it's a
23 benefit of the discussion from the day. It's occurred
24 to me, something which I haven't thought about before
25 and maybe the problem is not starting with market

1 definition, per se, the problem may actually be in
2 these thresholds that we've been living with and not
3 examining. And I mean on both the upper bound and the
4 lower bound actually.
5 So people will complain about the 1,800,
6 because no cases are brought at 1,800 or 2,000 or, you
7 know, in the low ranges of the HHI, and so why have the
8 1,800? That doesn't answer whether cases should be
9 brought, but assuming that the right cases are being
10 brought.
11 People may -- I don't know why they would
12 complain about the thousand except they want it higher
13 for the safe harbor. But, as you think about it, the
14 reason why it becomes so important to define the market
15 is that people want to know, and you have to know where
16 you fall within these thresholds. Because that becomes
17 very important and it certainly becomes important in
18 presenting the case to the court.
19 So I think about the Whole Foods merger case.
20 Why didn't the FTC define a market of supermarkets?
21 That is what they had done for every supermarket merger
22 case, and the answer it seems to me, it must be fairly
23 clear, it falls in the wrong spot on the thresholds.
24 And the delta was too low, so you can't have that one.
25 Now, if we didn't have the thresholds and we

1 didn't have the delta, you could say it's supermarkets,
2 and now let's look at competitive effects between these
3 two parties and you'd be fine. But you couldn't
4 present the case this way because of the safe harbor
5 part actually of the threshold.
6 So maybe it's time to reconsider whether -- not
7 so much whether this is good guidance or not in terms
8 of what the agencies do, but maybe it's directing the
9 analysis in a way that ends up being unproductive or
10 counterproductive because it's a tool for cutting off
11 competitive-effects analysis, where it should be a tool
12 for asking who the effective set of competitors are.
13 MR. WEISER: Lou, you want to respond?
14 MR. KAPLOW: I will say a couple of things. I
15 do think, and you did partly steal my thunder on that.
16 The first one step one in the guidelines doesn't say
17 organize your data and look at the list things that
18 Janusz mentioned. In fact, none of them are listed.
19 What's listed is a formula that says the agency's do,
20 and then the courts do and, if the courts can't do it,
21 they think a case hasn't been made sometimes, or they
22 might even when competitive effects have powerfully
23 been shown.
24 So if step one said, we should organize
25 thinking about the industry, here are seven kinds of

1 sources and data that should be routinely consulted and
2 many others might well be consulted under the
3 circumstances, and no one should run a regression, do a
4 simulation or do any various other things until these
5 things have been done, that would be just a very
6 different step one from what I think we have.
7 Various things you mentioned, analytical tools,
8 looking at diversion ratios, those don't actually have
9 market definition in them. And, as I said in my
10 original remark, one goes to economic text surveys,
11 things that you've written, it's hard to find in the
12 economics things that any economist has written this
13 animal because it really doesn't exist.
14 So the idea that it's viewed as rigor when,
15 within the actual field, I mean if -- think about
16 Daubert, an expert. How can an economist expert under
17 Daubert say that in the field this is the rigorous way
18 of doing it when the concept doesn't even really exist
19 in the field? So this is I think a rather large
20 conceptual gap.
21 So it seems -- and I could say more about the
22 SSNIP test. The SSNIP test is a hypothetical
23 monopolist test. Why do we do a hypothetical
24 monopolist test to analyze a merger? It's not that it
25 might not help us think about some aspects of it, but

1 why would the first question you ask about a merger
2 between two parties between what would a hypothetical
3 monopolist involving other parties if they were all one
4 company do? It's not irrelevant to some aspects of a
5 merger analysis, but it's hardly the core thing.
6 Now, the one last thing I'd like to say, which
7 I neglected to mention in my first remarks,
8 unfortunately, and I really mean unfortunately, because
9 I think it's a problem, when one goes more to direct
10 effects, it's harder to see how one establishes
11 presumptions and for confused courts that might be a
12 problem.
13 The legislative history says incipiency, the
14 statute says, may tend to lessen. We're worried about
15 Type 1 and Type 2 errors. The main reason I can keep
16 these straight, since I hate the terms, is I'm running
17 some separate work on burdens of proof and the like, so
18 now there are re-burns in my brain for at least a
19 decade, but then I'll forget them again.
20 But it's not only if you go more to direct
21 effects you don't have as much of a template for
22 presumptions to challenge mergers that ought to be
23 challenged.
24 It is also unfortunately really deeply
25 corrosive of safe harbors. Because if everyone agrees

1 the safe harbor is -- if the HHI is under A or the
2 Delta is under B, we're done, well, that's only after
3 you've defined the market. And if you can't really
4 properly define the market, as I was saying before
5 without doing the competitive effects analysis, then
6 how can you say, advise a client this one is just one
7 not to worry about?
8 Now, I think in fact you can. It's just they
9 you can't use the numbers as a crutch. So, if it's
10 fairly plain that any way of getting it competitive
11 effects whether involving an elaborate econometric
12 techniques or talking to the sophisticated buyers and
13 see what they know, would lead everyone to the obvious
14 conclusion that there's nothing there. Well, then one
15 can say that there's nothing there. And it's just in
16 those cases that we can all readily agree on a market,
17 or say this one's good enough and we're below the
18 threshold, but that's because in the back of our mind
19 we've already really figured out that there's no
20 plausible way an anticompetitive effect can emerge. So
21 we're back to where Janusz started.
22 What might a theory of anticompetitive effects
23 be? That theory then structures and organizes your
24 thinking and collecting of data. And if at that point
25 there really isn't a plausible story that gets you much

1 past square one, you are done. But I'm not sure a safe
2 harbor threshold or the SSNIP test or whatever has
3 gotten you there and, actually, to do the SSNIP test,
4 you really have to have done almost all of the
5 analysis. Not necessarily the analysis of efficiencies
6 or entry, but you have to do the more direct step to
7 competitive effects analysis anyhow.
8 MR. WEISER: So let me transition to a topic
9 that is both a ghost of merger review past and
10 something that we can't avoid despite the fact it
11 wasn't on your list of questions which is coordinated
12 effects. I think that came up briefly in response to
13 Louis' question, but hasn't been in a lot of the
14 dialogue today.
15 Getting back to Mike Salinger's point, there
16 was a time, maybe before you redid the '92 guidelines
17 which said, if you can show it's a four to three merger
18 with limited likelihood of entry, you win on
19 coordinated effects. I think that at one point was
20 pretty much the view, and I think if you go back to the
21 Posner Hospital case from the '80s, you know. There's
22 some factors there that I think that even the '84
23 guidelines had about coordinated effects, transparent
24 pricing, homogenous product. So that was at one point
25 the view of the law.

1 I'll start with you, Joe, you said get rid of
2 any form of a presumption. I think it might be fair to
3 say that the presumption was rooted out of that
4 tradition, in addition to the statutory language that
5 Louis mentioned.
6 Is your view, which I think, for example,
7 Dennis Carlton has said it's his view, we shouldn't
8 have a coordinated effects concern in reviewing
9 mergers. That, in effect, the whole world should be
10 based on unilateral effects analysis and we shouldn't
11 worry about coordinated effects and, thus, there's no
12 need to take this presumptive approach or even maybe
13 worry about under what circumstances coordinated
14 effects can exist.
15 Is that something you are inclined towards or
16 how would you suggest we think about the issue?
17 MR. KRAUSS: No, I wouldn't agree with Dennis.
18 Although I think his position may have been the product
19 of the '92 guidelines, and let me explain what I mean.
20 I was still a staff attorney when the '92
21 guidelines were issued. And I remember, you know, when
22 it was issued, we -- staff attorneys, we went around
23 and collected copies of it, and went back to our
24 offices to read this, because is what we had to apply,
25 so we had to learn this.

1 After a few hours, I think all of us -- many of
2 us came out of our office and said, well, coordinated
3 effects is out the window. We don't have any
4 coordinated effects cases anymore because, when you
5 look at the guidelines, the steps, the analysis and the
6 burden that the agency would be under to show a
7 coordinated effects case was suddenly so high, that we
8 were never going to be able to prove a case.
9 Then you see it in practice since '92 with the
10 emphasis on unilateral effects cases, and the very few
11 coordinated effects cases that have been brought since
12 then. I don't know if it was a self-fulfilling
13 prophecy by a staff at the agencies that that is what
14 happened, but that is, in fact, what happened and that
15 was the read that many of us took from the '92
16 guidelines.
17 Now, I think there's still a place for
18 coordinated effects analysis, and I think it would be
19 wrong for us to eliminate that from any new version of
20 the guidelines. I think the problem with the current
21 set of guidelines is in -- some of the panelists talked
22 about it this morning is, trying to show under what
23 circumstances and what evidence is needed to show a
24 change in those -- in those factors that is caused by
25 the merger. And that seems to be really what is

1 missing when you go back and read those elements in the
2 '92 guidelines, is what is the agency going to rely
3 upon to show that change?
4 MR. WEISER: Janusz, did you mean for the '92
5 guidelines to get rid of coordinated effects? In any
6 event, what's your view of coordinated effects and
7 whether it's something that the guidelines should be
8 concerned about?
9 MR. ORDOVER: Well, certainly, you cannot say
10 that we meant to get the role of any type of
11 competitive effects that mergers can engender.
12 Certainly, I am of the view that coordination is an
13 issue and I have lived through several investigations
14 of coordinated effects in transactions. So I don't
15 understand this, why people are all of a sudden so
16 concerned. I thought that what we tried to do, and I
17 think we should revisit that part of the guidelines
18 very intensively, is to put a little bit more structure
19 on that analysis.
20 We tried to come up with some organization of
21 the factors that are either conducive to coordination
22 or impede coordination, and, clearly, at least I
23 thought we were relatively clear on the proposition
24 that -- two things to worry about. One, is this
25 industry conducive or not, and, second, what is the

1 change that arises out of the merger?
2 And I believe that one of the most valuable
3 pieces of that part of the guidelines is the focus on
4 the mavericks or firms that have the strong incentive
5 to, as I said it this morning, discombobulate the
6 industry dynamics, or to refuse to go along with
7 efforts by others to raise prices after the
8 transaction.
9 Since the 1992 guidelines, I think way too much
10 intellectual brain power was devoted to third order
11 questions about unilateral effects, such as, whether
12 the demand that looks like this, or looks like that
13 (indicating), should affect our decision of whether
14 this is a good merger or a bad merger. Trust me, it
15 does, in simulations, okay?
16 So there is a huge amount of mathematics and a
17 huge amount of analytics that went into refining the
18 unilateral effects work, but almost no merger-oriented
19 work that went to refining the coordinated effects.
20 MR. WEISER: How do you explain that, Janusz?
21 MR. ORDOVER: I explained it very simply that
22 there are at least two ways of thinking about it. One,
23 is that economists love tools, and coordinated effects
24 analysis does not give you nice little tools that can
25 be put into a machine that will spit out the answer at

1 the end. So you really have to figure out how to go
2 about that analysis.
3 Whereas, when you do unilateral effects, it's
4 not easy, but at least we know what the right economic
5 models are and we know how to estimate them, and we
6 know how to make the sausage come out at the other end,
7 but we don't know how to do that in the context of
8 coordinated effects.
9 Secondly, it seemed in a way much easier to
10 establish the unilateral outcome. We know -- sorry to
11 speak economics, but we do know in a simple Bertrand
12 differentiated product model, any merger that does not
13 improve efficiencies of the variable cost kind is going
14 to raise price. So we are almost done before we even
15 gotten anywhere.
16 The real exciting part comes to how to undo it,
17 and we have some techniques for undoing it, but they
18 are very under-studied themselves. So I really believe
19 that both the love of tools, both the love of precise
20 answers of merger effects being predicted to the 17th
21 decimal point, which you is can actually do that. I
22 mean, there's nothing stopping the computer to spit out
23 the answer to the 17th decimal point, that led to a
24 huge amount of intellectual capital being devoted to
25 pursuing very deeply these kinds of questions.

1 Nobody was quite interested in the question of
2 coordination, tacit collusion, and so on and so forth.
3 There is a separate line of work, a lot of brilliant
4 people have been undertaking, without almost touching
5 the antitrust field.
6 So I think that the time has come to leave
7 unilateral effects alone for a while and try to focus
8 on coordinated effects to see whether there's something
9 even to be done. If the answer is, there's nothing to
10 be done, may as well get it over with as Dennis said,
11 but I believe there is still plenty to be done, and I
12 believe there is still plenty of beautiful economics
13 that can begin to illuminate this issue.
14 MR. KAPLOW: I think I agree with everything
15 that Janusz just said. But I think that, as I said
16 this morning, at some level, this relates to the merger
17 retrospective question as well, and Ilene mentioned a
18 comment on one of this morning's panels and I think
19 it's not been hit hard enough.
20 Ultimately we want to be driven by empirical
21 evidence and facts about where the problems really are,
22 and we can't just not do anything when we don't know
23 all of them, but that, at the end of the day, is what
24 matters.
25 I think a parallel development to the technical

1 developments that Janusz was describing is that IO
2 economists sort of lost interest about 25 years ago in
3 measuring price elevation in the economy and trying to
4 figure out what it was correlated with caused by and
5 everything else, which both give us a better measure of
6 the magnitude of the problem and of also what we might
7 want to look for in guiding us, since it's not going to
8 be a simple simulation model, but it's going to be a
9 lot softer.
10 So the fact that we need more work on the
11 academic side in order to fuel a better sense of both
12 the magnitude of the problems I think where it is
13 important, as I suggested this morning, because
14 coordinated effects, you know, we do all the work and
15 then government declares victory in the Staples case on
16 an effect of a few percentage points.
17 Coordinated effects can be 10s of percentage
18 points and, in some prosecuted cartel cases, we have 80
19 percentage points. You know, even missing a handful of
20 those here and there in terms of the amount of harm
21 being left on the table is very large, and this goes
22 back to what's the criteria, the Type 1, Type 2 error
23 question and so forth, and I think a sharp way to put
24 it which is really agreeing with what others have been
25 saying, but one way of focusing it is with unilateral

1 effects. We may get very much higher probability
2 estimates with narrower, tighter ranges with less room
3 for error on effects that are often but not always
4 fairly small.
5 We get lower probabilities with coordinated
6 effects on effects that are potentially very large.
7 And the statute doesn't erect a uniform probability
8 standard without regard to effect. It has this vague,
9 may tend to lessen competition, and on an expected
10 basis, the expected harm in the coordinated case that's
11 iffy, but it does have some real foundation.
12 It's not just made up or imagined, but where
13 you've actually looked at whether the conditions seem
14 conducive and what is it about this merger, is it a
15 maverick or is it the case that there's certain
16 asymmetries that are key, or that the numbers are a
17 little too high, but a couple of more mergers like
18 this, and now they'll be small enough that even if
19 someone's speculative, a word that one could never use
20 when bringing a case, the expected harm may be every
21 bit as high or higher than in cases with unilateral
22 effects one would go after.
23 It seems that, you know, as a matter of policy,
24 that's the way to think about it, and I do think the
25 challenge which the guidelines maybe can't do much

1 about other than maybe offer encouragements, and maybe
2 just by devoting a little bit more space that would
3 have a focal effect and leading folks. But we do need
4 more analysis and more empirical basis to really know
5 what a more detailed guideline would say or what cases
6 would look like.
7 MR. WEISER: Just one quick clarification. I
8 assume you're assuming that efficiencies and entry are
9 held constant --
10 MR. KAPLOW: Absolutely. And it's interesting
11 because we know that entry has countervailing effects
12 in all these situations. It's also the case that if
13 you have really high price elevation, you will get more
14 entry as a consequence. That additional entry will, by
15 the way, typically be an additional inefficiency. I
16 mean, it will tend to mitigate price elevation but the
17 entry itself in that setting will be a further source
18 of inefficiency rather than efficiency.
19 So it's not like the fact that, you know, now
20 another couple billion will be wasted investing in this
21 industry to help cut things down is a complete
22 consolation. So the analysis of entry is with very
23 high priced elevations.
24 Then with low-priced elevations, I don't know
25 that we believe price elevations of a few percentage

1 points in unilateral effects cases won't do totals of
2 entry anyhow. Maybe some do, but I'm skeptical.
3 MR. WEISER: Harry, you've been a close
4 observer over this time period. How do you explain the
5 sea-change in the enforcement touchtone and, in some
6 sense, conventional wisdom, and do you advocate a sort
7 of rethinking along the lines of Louis Ed, or how do we
8 approach where we are and where we should be thinking
9 about going?
10 MR. FIRST: Well, first of all, I agree with
11 everyone on the panel, I don't know, that coordinated
12 effects needs to be looked at further, and the effort,
13 because there seems to be a lot of payoff and sureness
14 was put into unilateral effects, and okay.
15 I think, you know, if you're thinking of
16 explanatory factors, I think it goes into the -- sort
17 of the intellectual view of the structured conduct
18 performance paradigm which supported a naive view of
19 coordinated effects every time you had, you know, a
20 merger that produced more concentrated market that you
21 would have, somehow we don't need to say how,
22 coordination. And I think that as that -- as that view
23 lost power, at the same time, there was a view that
24 cartels were rarely formed. And, when formed,
25 instantly broke apart.

1 So whatever one thinks about the loss of belief
2 in the link between structure, conduct, and
3 performance, the notion that cartels are rarely formed
4 and fall apart and don't harm things seems to clearly
5 have been shown to be wrong.
6 So the question is, I think, what can we pull
7 out of the cartel experience and cartel enforcement
8 experience to help inform a notion of coordinated
9 effects where, after all, we're assuming that it's not
10 overt collusion but some tacit game that the people in
11 the industry are playing.
12 So it may be that some of the empirics actually
13 lies in the division which has prosecuted these
14 cartels, and maybe one of the things is to start
15 thinking about whether there are some sort of -- I
16 don't want to say guidelines, but structural aspects
17 that can be pulled out to move away from the notion
18 that coordinated effects is, I'll tell one story,
19 you'll tell another.
20 I'll tell you how easy it is to agree, and the
21 defendants will tell you how absolutely impossible it
22 is. Then, what's a judge to do?
23 So you need some better way of predicting when
24 these games are going to work out. I had one other
25 thing which actually I don't think we've -- in a sense

1 we've talked about when we talk about innovation. The
2 unilateral effects focus, you know, like a laser on
3 price, and price is obviously important, but it's not
4 the only thing.
5 One of the good things about thinking about
6 coordinated effects is that there may be other aspects
7 of the bargain that parties agree on and it may have
8 other harms. One of the harms might be innovation,
9 might be product quality. There might be all sorts of
10 things that we just, you know, don't think about when
11 the focus is so much on unilateral price raising
12 effects. So I think there's a lot of payoff there how
13 you all get this into the guidelines, well, that's --
14 MR. WEISER: One quick question and then I'm
15 going to see if anyone from the audience has any.
16 A number of you on this panel and others have
17 mentioned some form of retrospective. Harry just
18 mentioned one. Looking back at cartels as a former
19 retrospective into understanding the circumstances you
20 can have coordinated effects. Louis mentioned this
21 point as well.
22 How important is retrospectives and how should
23 the government go about thinking about that
24 undertaking? Joe, do you want to start off with
25 something which the ABA transition report, as I

1 mentioned, did suggest should happen?
2 MR. KRAUSS: Right. And I guess with that
3 situation, still have in mind that there has been a lot
4 written about the deficiencies that are in
5 retrospectives, and the potential problems that are
6 there in terms of data gathering and the litany of
7 problems that have been identified.
8 But I think, you know, you look at the
9 retrospectives that the agencies have done. Yes, it
10 takes a lot of time, takes a lot of data, but usually
11 some good comes out of it. I guess that's what you've
12 got to think about in terms of going into it
13 retrospective, what is it that you're trying to get
14 out?
15 Are you trying to, you know, identify cases
16 which were cleared and -- but had a competitive problem
17 so you can go back and try to fix those? Or are you
18 trying to find, you know, examples of cases where, you
19 know, the efficiencies did or didn't work out?
20 You really need to frame up what the intent is
21 from the retrospective and really cabin that so that
22 the end product that you get means something and can be
23 implemented by the agency. Otherwise, you know, I
24 think -- and when I was at the agency, much thought was
25 given to it in the '90s about doing this.

1 I think without cabining that framework, you
2 end up with results which go back to Janusz' can be a
3 mess, and the agencies really spend a lot time and a
4 lot of money doing something that they really can't do
5 anything with.
6 MR. WEISER: Louis, any thoughts on this?
7 MR. KAPLOW: Well, I am inclined to think that
8 even monkey case studies that are subject to multiple
9 interpretations, it's better to look than to rely
10 entirely on what we imagine to be true, because at
11 least it allows the possibility we might want another
12 rise. We can look at effects on price. We can look at
13 entry. We can look at expected efficiencies and a lot
14 of other things.
15 I think a lot of the work, you know, the
16 agencies can only help instigate it, but really can't
17 do it, really falls on empirical industrial
18 organization economists, and going back to doing more
19 things like industry studies, trying to look at prices,
20 doing things in large samples where, you know,
21 basically mergers do involve prediction, so a merger
22 that was let through where prices did go up, even if it
23 was causal to the merger, that doesn't really quite
24 prove it was a mistake given what could have plausibly
25 been known at the time and vice versa.

1 Whereas, one is operating on probabilities,
2 well, that often calls for larger samples. And I think
3 it's an important thing to have in mind.
4 So I do think that the empirical evidence
5 really is big there, and I think the empirical
6 evidence, you know, price effects are essential, but on
7 efficiency effects also because, at the end of the day,
8 we're trading off false positives, false negatives,
9 there's a cost for the different kinds of errors.
10 So knowing what we think in general -- so
11 whether it's reading from the newspaper or various
12 studies that have been done of efficiencies of mergers,
13 looking 10 years later, whatever else, having a sense
14 of what those look like and how they vary by various
15 determinants to give us -- I mean, you still will, in
16 the case, look at the submitted efficiency studies, but
17 having some sense about what kinds of things have
18 actually happened on average, you know, what's the
19 baseline when you approach? Are you baseline highly
20 skeptical?
21 Well, the data shows that if the gains often
22 happen, you shouldn't be nearly so skeptical, and what
23 kind should you be skeptical of?
24 So I think we need priors to bring into the
25 particular cases and that often has to come from wider

1 study.

2 MR. WEISER: Harry?

3 MR. FIRST: Well, first of all, I loved your
4 idea of reporting prices for consent decrees that you
5 do. Well, the idea you suggested --

6 MR. WEISER: I can't take credit. Even worst
7 yet, I can't even remember whose idea it was.

8 MR. FIRST: It's sort of -- I thought this was
9 again channeling Mike Scherer's effort to do on
10 business reporting and all of that. So maybe you
11 should just have that as a standard in every consent
12 decree.

13 MR. WEISER: There is a cost that comes with
14 parties having to do this. I don't know if
15 you --

16 MR. FIRST: Actually, when you think about it,
17 what you raise is a really serious problem for
18 antitrust is that we know distressingly little about
19 the benefits of antitrust enforcement, and it's not
20 just mergers.

21 MR. WEISER: Well, there was a paper several
22 years ago that Bob Krandall I think wrote that that
23 said antitrust unbalance was bad and Roger Noll's
24 response is, only someone who didn't like college
25 football could make that claim. For those who aren't

1 in the know, the NCAA Civil 8 case pretty much
2 increased by five times, the amount of college football
3 on TV, so that was Roger Noll whose also a big
4 sports -- his retort to that paper, but the truth is
5 you're right, Harry, there's a lot out there that we
6 don't know.
7 MR. FIRST: So this is why I have so much
8 football and I hate -- well, anyway. Consumer welfare
9 is a funny thing. So, I mean, in general, we really
10 know very little about the effect of antitrust
11 enforcement and mergers is part of it.
12 The second aspect is -- I mean, it's sort of
13 alluded to, I think in what you said. All the
14 institutional incentives are bad on this. In terms of
15 an enforcement agency whose mission it is to actually
16 enforce and bring cases, to spend a lot of resources to
17 look backwards is maybe asking too much.
18 So I think it's an effort that you want to say
19 you should try to do in some way, but somehow recognize
20 the institutional limits that you're necessarily going
21 to be up against.
22 Now, maybe part of it is, there may be things
23 to which you have access that outside researchers,
24 academic researchers simply do not, for various
25 reasons, and to the extent that the division or the FTC

1 can make use of this, that could be a real plus.
2 So these have to be very carefully thought
3 about or else you're just wasting money that actually
4 could go into doing what I would hope would be good
5 enforcement.
6 MR. WEISER: Janusz, any thoughts on any
7 retrospectives?
8 MR. ORDOVER: Of course, I think it's always
9 good to look back and try to understand what is the
10 course between the predicted outcomes and the actual
11 outcomes. What have we missed in assessing these
12 transactions?
13 I am very unimpressed by the idea of price
14 reporting unless absolutely necessary. In part
15 because, as we already talked about, the issue, prices
16 evolve over time, in response to the huge number of
17 economic factors. When there are market conditions,
18 such as changing balance of supply and demand; there
19 are changes in quality of the products. Cars are cars,
20 but are cars cars?
21 There are all kinds of factors that drive
22 prices in the marketplace. And to get a report on
23 prices when you don't know what it is that those prices
24 stand for, I believe would be a total waste of time of
25 scarce agency resources.

1 I believe that no economist worth her salt
2 would even attempt to write the Ph.D. dissertation on
3 this particular topic, unless that person actually had
4 access to the kind of data that are not likely to be
5 available, i.e., the supply and demand shifters that
6 are used intensively in merger simulation.
7 But when we do merger simulation, we can
8 actually go into the companies involved and ask them
9 for their cost, for their predictors of demand, all
10 kinds of things that are put into that sausage making
11 machine.
12 But somebody wakes up two years later and says,
13 oh, my God, prices went up. What are you going to
14 infer from that? Nothing other than the fact that some
15 prices may have gone up, maybe they haven't because the
16 higher price is correlated with higher quality and then
17 what?
18 So to the extent that you can do anything
19 retrospectively or prospectively, just leave prices
20 alone.
21 MR. WEISER: Well, we have come to our
22 closing time. This panel has wrapped things up in
23 grand fashion. Thank you all so much for a great
24 discussion.
25 (Applause.)

1 (Whereupon, at 4:15, the hearing was
2 adjourned.)
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1 CERTIFICATION OF REPORTER

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14 EDWARD LETO, CSR

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16 CERTIFICATION OF PROOFREADER

17 I HEREBY CERTIFY that I proofread the

18 transcript for accuracy in spelling, hyphenation,

19 punctuation, and format.

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