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FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION: INTO OUR 2ND CENTURY

Tuesday, July 29, 2008

8:40 a.m.

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

FEDERAL TRADE COMMISSION

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P R O C E E D I N G S

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1 security to get back in, so leave some time for that. If
2 there is a fire or some sort of evacuation, where you come
3 out of the building, turn right, go down to the corner over
4 here. Across from the FTC is Georgetown Law Center and you
5 will see to the front sidewalk here at the end, kind of
6 across the street here from Georgetown Law Center is our
7 rallying point. There will be somebody checking in to make
8 sure everybody made it outside okay.

9 In the event it is safer to remain inside,
10 security will let us know about that. If you spot any
11 suspicious activity, please alert security.

12 Now, all those details out of the way -- oh, by
13 the way, I am Maureen Ohlhausen. I am the Director of
14 Policy Planning at the Federal Trade Commission. I left
15 that out.

16 So, it is my pleasure to turn over the podium to
17 FTC Chairman William Kovacic. At least I remembered to
18 introduce him. Bill?

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SESSION 1: FTC MISSION, STRUCTURE, AND RESOURCES

1 I can assure you this. It is not the second." And I would
2 say the same about the work of this agency.

3 But the purpose of this undertaking is not to
4 celebrate. The aim is to be better, to look at investments
5 and efforts that the agency should make so that when the
6 centennial of the agency does come about in six years that
7 we will have a lot to celebrate; to put in place the
8 foundation for celebratory activities in the future.

9 Why do a self-assessment? Very simply, it's what
10 successful institutions do. Whether it's the business
11 school jargon about continuous process improvement, whether
12 it comes from other directions, political science about the
13 importance of regenerating organizations, the critical
14 perspective where the agency asks what can be better, rather
15 than having those questions forced upon it by outsiders, is
16 a key focus, a key ingredient of success.

17 And I'd like us basically to focus on two
18 questions, both today and in the other proceedings: First
19 is what's worked and how to preserve it. The good things
20 that have happened here, generally speaking, have not
21 happened b000 000 0.w6ffectW00050.4002e 0.00 0kna edi hade

1 And I'm convinced that the successful agency of the future
2 is going to feature institutional innovation and adaptation
3 which can only be driven by an internal process of
4 self-examination, but also, an awareness of things that
5 other organizations have done successfully.

6 To do this, we are drawing upon, especially today
7 and tomorrow, upon a great body of alumni and friends.
8 They're on the panel with me today. But we haven't asked
9 for our friends to come and praise us, at least not too
10 much. The idea is for the trusted, sympathetic friends to
11 be critical observers; to draw upon their extraordinary
12 experience to tell us how to do better; to speak about what
13 they think did work well; perhaps to tell us things about
14 what they would have done if they could have; how would they
15 have played different shots differently given the chance to
16 do it again; knowing the place as well as they do, how can
17 we improve?

18 I'm hugely grateful to Maureen Ohlhausen, who
19 spoke a moment ago, for putting this all together. As you
20 all know, to be the producer of this kind of enterprise is
21 an event that takes years off of the life span, but
22 Maureen's tough enough, and I know that she will go well
23 into her second century, so we're not drawing too much upon
24 those resources.

25 The first session to start looks at larger

1 questions about the purpose, the mission of the agency, its
2 structure and its resources. And with us today, Jodie
3 Bernstein, Tim Muris, Tom Leary, are three folks who, by
4 reason of experience and perspective, have a unique point of
5 view about the agency. Not only did they have longevity --
6 and we certainly don't celebrate that for its own sake --
7 not only do they have experience, but, quite pointedly, they
8 were good at it. They were really good at what they did.
9 They made this place a great place. So, if last weekend was
10 a Cooperstown gathering in New York to celebrate admitees to
11 the Baseball Hall of Fame, we have our own equivalent, and
12 we know who they are, and three of them are here to talk
13 about how to play well, how to play better.

14 Debbie Majoras graciously agreed to come
15 initially, but she is in the grip of getting her feet on the
16 ground in a new job, and I'm grateful to her for even
17 thinking about doing this, and certainly her suggestions and
18 observations will make this whole enterprise successful, and
19 I'm hugely grateful to Debbie for not only handing the baton
20 so well to me four months ago, but considering doing this.

21 How to structure the panel: I see us as
22 addressing, again, three broad topics. I'd like to first
23 look a bit at what we are intended to do and how well we
24 fulfill those expectations. As you know, we have three
25 communities, basic operating units, on the inside:

1 upon the reorganizations that are thought to be inherent in
2 having a multi-member decision-making body? To turn last to
3 resources, what's the right size for this agency, especially
4 given new duties? Are we making the right investments in
5 people and technology?

6 And I think I'd close, I'll spend a bit of time at
7 the end to turn to Jodie, Tim, and Tom to ask if they were
8 looking ahead -- and part of the purpose of this exercise is
9 to look ahead five or six years. I am a great skeptic of
10 many shorter term transition exercises, and again, my
11 skepticism is rooted in my own experience, and to the extent
12 that those have sometimes been shallow or short-sighted
13 exercises, I speak with authority, because I participated
14 in them.

15 So, I wanted to do something that was decoupled
16 from any electoral cycle and look further over the horizon.
17 So, looking ahead to the point at which we do want to
18 celebrate six years from now, to close by asking, what are
19 the key investments that we have to make to be the agency we
20 want to be and to ask them perhaps if they could do it all
21 over again, what would you put back on the list? What would
22 you do that you weren't able to get to originally?

23 Let me go back to the first question dealing with
24 mission, the purpose of the agency, and there again -- and
25 I'll invite each to jump in as they like -- one of our main

1 my mind, quite frankly, is a more imaginative use of Section
2 5 of the FTC Act than we have undertaken in the past.

3 I'm not one of these people who believes that
4 Section 5 of the Federal Trade Commission Act is designed to
5 fill the gaps in the antitrust laws, to make up for what
6 Congress forgot. I think that the antitrust laws, quite
7 frankly, are flexible enough to take care of perceived
8 changes in economic knowledge and in the economic
9 environment. And where I think Section 5 would be useful --
10 and in retrospect, I kind of wish we used it in a couple
11 cases.

12 For example, the Schering case and the Rambus
13 case. These are not cases -- these are cases where I
14 believe there were clearly antitrust offenses, but they were
15 cases where there was not a large body of law existing and
16 where there could be perceived very, very Draconian,
17 retrospective consequences as a result of our actions.

18 And thinking back on it, I'm kind of sorry now
19 that we didn't give it more careful thought, and it may be
20 that someone would have talked me out of it, because I
21 haven't vetted this with anybody, but if we had given more
22 careful thought of using Section 5 as a tool with a very
23 overt purpose of saying, "No, we do not intend to go beyond
24 antitrust; we think this is the way antitrust is going to
25 go, but we're ahead of the wave, not behind the wave, and

1 therefore, we're deliberately using Section 5, in effect, to
2 signal to the world that we believe we're reacting ahead of
3 the wave instead of behind the wave."

4 And that would be, I guess, my first suggestion to
5 you from 30,000 feet, that you give very careful thought to
6 that, and then I guess we will get a little bit closer down
7 to -- closer support as we go further.

8 CHAIRMAN KOVACIC: Could I turn to Jodie or Tim,
9 with respect to the broad questions about integration of
10 functions, that is, thinking again of the things that are
11 supposed to make the Commission special, genuine integration
12 of functions, our role as an administrative tribunal, our
13 skill because of all of our capabilities in setting
14 strategy, our connection to other policy-makers, general
15 thoughts about how we're doing?

16

1 for the kinds of claims that they were making. They said
2 they didn't know.

3 My initial reaction was, "My God, you have got a
4 million lawyers out there, and you still don't know what
5 substantiation was?" But then, in thinking it through, I
6 thought this is a relatively new industry, it's a relatively
7 new set of statutes, because the FDA had received a new
8 statute, and so we undertook to provide guidance to that
9 industry with much specificity, with many examples, and I'm
10 very proud of it, because it is used to this day, and it's
11 very much prospective guidance to an industry that was
12 without it.

13 So, I would urge more use of that ability. I
14 think it is welcomed by the industry groups that I have
15 worked with and would begin to reposition the agency as one
16 that is able to educate the public and educate the
17 industries that are subject to its jurisdiction.

18 CHAIRMAN KOVACIC: Thanks.

19 Tim?

20 MR. MURIS: Thank you, Mr. Chairman. It's a
21 pleasure to be here amongst so many old friends. I first
22 started thinking hard about this place almost 35 years ago,
23 when Jim Liebler offered me the opportunity to come back and
24 meet Jodie. He didn't phrase it that way, but --

25 MS. BERNSTEIN: That's what he meant.

1 MR. MURIS: That's what I meant, sure, but little
2 did I know on Thanksgiving Eve in 1973.

3 The FTC is almost a hundred, and most of its
4 history, in percentage terms, has not been happy, and if you
5 step back and look at the traditional legal tools, it gives
6 you some idea of why. The statute is way too broad in
7 providing any sort of rigorous guidance. The legislative
8 history is not a source that can be relied on, except
9 circularly, because the legislative history essentially
10 says, particularly in the context of the Standard Oil case
11 and the 1912 Election, the legislative history says, you
12 know, be an expert, and so relying on the legislative
13

1 There are the academic community, you know, there
2 are the other peers in government. So, I think what you
3 need is some understanding of the core mission that has
4 support amongst that constituency, not just today, but over
5 long periods of time and through electoral cycles. You have
6 had periods, '50s and '60s, where the FTC had a mission that
7 was understood, a core mission within the staff. The
8 Robinson-Patman Act, the Woolies, but that eventually
9 collapsed because it did not enjoy support within that broad
10 constituency.

11 More recently, the FTC -- and then, you know, the
12 '70s, which I'm sure I will refer to again, are a -- one of
13 what Jodie referred to as a period of excess, a nice,
14 understated way to describe the '70s. And then since then,
15 I think there has been agreement, with obviously some
16 disagreement around the edges, but agreement about a core
17 mission. And most broadly stated, it's the idea that the
18 FTC is a process-oriented agency. There's a lot of humility
19 required. The FTC is an umpire. It's not one of the star
20 players.

21 Finally, I would say that at this very abstract
22 level, it's not enough to have a core mission and to define
23 it, even however generally I did. You're going to need a
24 strategy to implement it, and I assume we'll talk a lot
25 about that, and the strategy does require continual new

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1 Guides. You go back into the '70s --

2 MR. MURIS: Russell Stover.

3 CHAIRMAN KOVACIC: Pardon?

4 MR. MURIS: Russell Stover.

5 MR. KOVACIC: And the Eighth Circuit tossed that
6 aside, Russell Stover. It's not in the '70s. By my count,
7 you have to go back to the famous Shrimp Peelers case, not
8 the Lee Peelers case, but the Shrimp Peelers case in the
9 mid-sixties and to the FTC's prosecution of Brown Shoe for
10 exclusive dealing.

11 And the question I ask for myself is, is it a
12 phantom? That is, is the -- if the courts of appeals are
13 umpires in this case, are they ever going to call that a
14 strike?

15 MR. LEARY: Well, if it is a phantom, and maybe if
16 it's not practical, then maybe you have to ask yourself the
17 fundamental question is, why are we here?

18 CHAIRMAN KOVACIC: Yeah.

19 MR. LEARY: If we're just another prosecutor, what
20 is the point of having myriad prosecutors in the United
21 States? And I think one of the problems we had was, number
22 one, that the FTC lost its credibility because it started to
23 create an internal jurisprudence that was not moored in
24 antitrust, and I think the second thing -- and that
25 continues to the present day. As you -- as some of you up

1 here at the table know, I'm not all that keen on some of the
2 recent notions that the FTC should have the authority to
3 impose retrospective consequences in the antitrust field, at
4 least, because to me, that undercuts our basic mission, and
5 there's a very, very serious risk that we'll lose our soul,
6 because it's -- I think I wrote this when I dissented in
7 Mylan -- that it's very, very seductive to go out and -- I
8 think that's one of the problems that the Department of
9 Justice Antitrust Division faces, that it is -- the big
10 bucks are -- the big bucks are where the action is.

11 And on consumer protection -- and you are not
12 going to like to hear this, Jodie, maybe -- but I think that
13 -- I'm not so sure there's any reason why the FTC should
14 focus, to the extent that it does, on hard-core fraud. Why
15 do you need a fancy body with five decision-makers to bring
16 fraud cases against people operating out of their garage?

17 CHAIRMAN KOVACIC: Why is it always the garage?

1 probably needs to be re-assessed in terms of the amount of
2 resources that are being used, and at this point, I would
3 think a really serious evaluation of how much has been
4 accomplished, how much has been given in the overall fraud
5 effort.

6 I think it -- and to use your term, I think the
7 -- I think that's very seductive in the sense that it's
8 pretty easy to do in the sense of acceptability. There's
9 very little controversy over particular cases. It doesn't
10 require an expansion of any legal theory. It is relatively
11 quick. It gets good applause from everyone, because nobody
12 can oppose an effort to stamp out fraud.

13 So, I don't disagree. I do think there is a role,
14 because the FTC has been very effective in terms of
15 ferreting out and identifying new scams that I think no one
16 else has the capacity to do. So, there is a leadership role
17 for the Commission, I believe, in consumer protection to
18 continue to do that. So, that would be -- I think that's
19 the kind of effort and re-assessment that should be a part
20 of that re-assessment.

21 CHAIRMAN KOVACIC: Tim?

22 MR. MURIS: Yeah, on fraud, the truth is that
23 whether they're in the garage or, unfortunately, on the
24 Internet, they cross all boundaries there.

25 MR. LEARY: That's true.

1 MR. MURIS: And there is no -- by default, the FTC
2 has become the -- not just the nation's, but the world's
3 fraud policeman, and I think in -- I think this is what
4 Jodie's talking about -- in organizing, ferreting out,
5 investigating, working with criminal authorities, working
6 with state and local authorities, working with everyone, the
7 FTC has performed extremely well. It needs to continually
8 assess and re-assess how it can do it better, but it seems
9 to me to be a natural role for a federal consumer protection
10 agency. Fraud, after all, is tantamount to theft.

11 And if you look, since the program was created now
12 27 years ago, I think the FTC has continued to do that sort
13 of re-assessment, to do it better, but it does have to
14 happen and go on all the time, continually. If you look at
15 the innovations that you all made with the -- you know,
16 with the Internet --

17 MS. BERNSTEIN: Right.

18 MR. MURIS: -- a lot of what came out of the
19 strategic planning process, if you look at the expansions
20 internationally, if you look at the expansions to
21 Spanish-speaking media, the creation of the Criminal Liaison
22 Unit, it's just been, you know, a continual expansion to try
23 to grapple with the problem, and I think, like theft, we
24 will never get rid of it, but this agency has positioned
25 itself at the center, and I think it would be foolish for it

1 not to continue.

2 MR. LEARY: By the way, I don't want to --

3 MS. BERNSTEIN: Oh, excuse me. I just wanted to
4 say that that is really my view as well. I just wanted to
5 focus, at least briefly, on an issue of does it become
6 all-encompassing in terms of the agency's agenda in consumer
7 protection?

8 MR. LEARY: Yeah. I don't want to sound
9 completely critical, and I'm not at all, because I'm real
10 proud of this place and proud of my service here, but one of
11 the things that -- where the FTC has played a leadership
12 role, and which is so -- in my view so important that it
13 ought to be added. I've never thought that competition
14 advocacy and competition R&D -- to borrow your phrase -- is
15 a support service of the two bureaus. I've always thought
16 if we could rejigger the budget process to make that part of
17 our core mission, I'd do it, just to emphasize how important
18 it is.

19 And the role that the Federal Trade Commission --
20 the lonely role that the Federal Trade Commission has played
21 in recent years, for example, in urging Congress not to do
22 something stupid, like control the prices of gasoline, is a
23 very proud moment. But that's simply a demonstration in
24 another arena of the Federal Trade Commission playing an
25 educational role, and I think that I would like to see

1 somehow or other its consumer protection -- and it does in
2 the consumer protection area, too -- focus more on the
3 educational role and less on the punitive role.

4 CHAIRMAN KOVACIC: And one question that your
5 comments collectively raise is I think you all point to ways
6 in which the agency's work in several areas has evolved in a
7 very thoughtful and effective way.

8 MS. BERNSTEIN: Um-hum.

9 CHAIRMAN KOVACIC: I'd like to ask, how did that
10 happen? That is, where did the ideas come from? And the
11 more general question being, how should we go about deciding
12 what to do? That is, does it depend -- does it depend
13 entirely on having wise bureau directors and chairs,
14 commissioners? That is, is our strategy in planning
15 principally the function of who happens to inhabit these
16 jobs at different times?

17 They're aware of what happens has happened before,
18 and they're wise enough to learn from that. They bring
19 their own ideas from them, so there is some regeneration,
20 but how should that -- how should we go about deciding what
21 to do? And it's not just in terms of general programs, but
22 deciding whether to bring a case, to issue a rule, to
23 provide a guideline, to invest in a study, to do
24 after-the-fact assessments. How should we do that?

25 And I guess a more specific way of thinking of it

1 is in the context of the fraud case, the case of fraud, the
2 prosecution of fraud. How do we replicate that experience?
3 That is, you take where the agency was in 1970, and if you
4 compare it to the present, again, that's an extraordinary
5 story of improvement. I guess partly for Jodie and for
6 Tim, who were intimately involved in the engine room making
7 that happen, but later in policy-making positions do promote
8 it. How did that come about and how do we do it again? Is
9 there -- are there larger lessons about how that transpired
10 that can be built into the way we work?

11 MS. BERNSTEIN: You start this time, Tim.

12 MR. MURIS: Yes. I always do what Jodie tells me,
13 so... .

14 Let me approach this from two different
15 directions, because I've wondered a lot about this, too,
16 without clear, clear answers. Obviously, I think Jodie and
17 I both -- and one thing that worries me about the future --
18 you know, Jodie and I wear the '70s as part of us. I mean,
19 it's just completely in our -- it's completely ingrained in
20 our --

21 MS. BERNSTEIN: In our DNA.

22 MR. MURIS: Yes. And out of that, I think -- you
23 know, and we may disagree about the merits of some of it,
24 but we don't -- I'm sure we don't disagree about that it led
25 to excess. Out of that led a search for a more humble --

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1 thing would be true -- you could carry that one step
2 further. We published a violence report. I think you were
3 still around when that was done.

4 MS. BERNSTEIN: Yes, I was, the first violence
5 report.

6 MR. LEARY: And basically in that violence report,
7 you may remember the Federal Trade Commission encouraged
8 distributors of motion pictures to boycott -- we didn't use
9 the word -- to boycott exhibitors who did not monitor
10 admission to -- minors' admission to -- now, that's --
11 that's not -- again, that's not a demand-side distortion.
12 That's, I guess, in order to deal with an economic
13 externality.

14 And, again, we're encouraging a supply-side
15 restraint in order to deal with an adverse economic
16 externality. That's economics, again, used in an innovative
17 way and in a daring way. And I think that that's -- the
18 recognition that consumer protection offenses are grounded,
19 and it's just the difference between the supply curve and
20 the demand curve, that's the reason. We all learn in
21 Economics 101 that that's how you set a competitive price
22 and you establish competitiveness, and that's why the
23 fundamental logic of having those two things in the same
24 agency, because they're just other sides of the same coin.

25 So, I think we're already doing it to a degree,

1 and all I'm suggesting is that we be more candid about it,
2 perhaps, and be -- and apply it in other arenas as well.

3 MS. BERNSTEIN: I sometimes refer to those that
4 you just specifically identified, the examples of the red
5 flag and so forth, as the use of the bully pulpit by the
6 agency, by the bureaus, which is a very effective tool --

7 MR. LEARY: Sure.

8 MS. BERNSTEIN: -- and should be considered, I
9 think, as one of the principal tools. It goes with
10 leadership, of course. Tim used it. Obviously, other
11 chairmen have as well, and it will continue to be used.

12 I would like to just comment on this subject that
13 I think the way that -- at least while I was here, that we
14 went about looking at the fraud program was really to
15 liberate, if you will, or encourage, motivate the staff to
16 tell me what was needed. That was part of a process that we
17 did call strategic planning, and one of the functions that
18 it served was to open up the Bureau so that I knew what the
19 best thinkers were thinking, what their experience was and
20 how I could build upon that to construct a program that
21 would make good sense and how many resources would be
22 allocated to it.

23 It was invaluable to us and I think to the
24 Commission. I certainly shared it with the Commissioners
25 and it sort of set out a roadmap so that I had a sense of

1 where we were going. That didn't mean that there was not
2 flexibility built into the roadmap so that things inevitably
3 occur that are not anticipated and one would have the
4 ability to deal with them.

5 I cannot speak highly enough, as everybody has,
6 about the professional staff at the Commission. It
7 continues, as it was when I was here, to be absolutely first
8 rate. And as Tim said, I think there will be perhaps some
9 turnover because of age. Some of us do not pay any
10 attention to age, but others do. And that will be something
11 to be faced in the future.

12 CHAIRMAN KOVACIC: In thinking about how to come
13 up with good ideas, one approach that Jodie just mentioned
14 is that a senior manager within a specific operating group
15 goes to her people and says, I want to hear what we might do
16 to make us better, bring me your good ideas, and then
17 incorporates those within that operating group into a plan
18 or program that's examined over time.

19 Tim, when you first worked with Jim in the '70s,
20 you were part of an office that had the words, policy,
21 planning and evaluation in it, and I think that was a
22 response to the ABA Report's observation in 1969 that the
23 agency had simply passively responded to things that came in
24 through the front door, the dreaded planning by the mailbag,
25 being a source of great criticism and that you needed a

1 central forward-looking process to set plans ahead.

2 Tom's watched the results of both of these. One
3 model is that you have each bureau engage in that kind of
4 practice, in that kind of approach. That is you have bureau
5 by bureau come up with your plan. Another approach is to
6 have an agency-wide planning exercise that goes beyond sort
7 of the sterile decision-making of the budget process itself,
8 budget meetings that have all the spontaneity but none of
9 the charm of meetings of the Supreme Soviet talking about
10 grain production in the 1950s.

11 **(Laughter.)**

12 CHAIRMAN KOVACIC: Or you could have -- maybe you
13 have with respect to research. Should you have a research
14

1 If we were looking ahead, from what have you seen,
2 what is the right mix of this decentralized activity at the
3 bureau level? Board level decision- making within the
4 Commission. Maybe an instrument that we do not actually
5 have now that ought to be added. You know, Tim referred,
6 and this is an elusive element of this, this hierarchian
7 like process of the completely decentralized decision-making
8 and ideas come up and you count on wise managers to say that
9 is a good idea, let's do that.

10 From the mix of experiences that you have seen in
11 the agency, would you add anything to what we do now?

12 MS. BERNSTEIN: I think I would because among the
13 things I know that your questions sort of raised directly
14 and indirectly, Bill, were is there a role to somehow better
15 integrate the functions of the bureaus and thereby be better
16 positioned to be able to attack the problems as they occur.
17 It seemed to me that that has been something that I guess we
18 have all talked about and I do not know how well it's really
19 been accomplished.

20 A couple of ways that I was thinking of would be
21 to, for example, have the Bureau of Economics take a lead in
22 identifying issues that may involve both bureaus or all
23 bureaus, and might even be states or others as well. And
24 then bring together ad hoc groups within the bureaus to be
25 able to address them and quickly come back to the Commission

1 with the sort of course of action that might be appropriate.
2 That was at least my thought about perhaps not making
3 permanent changes, but rather, as I am always in favor of,
4 trying something out first to see whether it would work. I
5 do think that is one area that could be further explored,
6 developed and some research done.

7 MR. LEARY: I think you can make and should make
8 greater use of the ability of the Commission to function
9 collegially because the Commissioners ultimately are the
10 people who are going to have to set policy and make these
11 decisions. And as you all know, the Commission is
12 structured in such a way that it is not responsive
13 immediately to the electoral cycle. That was done
14 deliberately.

15 And two things stand out in my mind as outstanding
16 examples of collegiate interaction, and one of them was
17 relatively early on in your tenure, Tim, when we had some of
18 those -- in Ted Cruz's operation when there were these
19 background papers being prepared which were going to be used
20 in support of the Commission's advocacy role. And we met
21 simply to discuss these various drafts of positions that the
22 Commission might take on important matters of competitive
23 policy, the extent of the state action exception and things
24 of that kind.

25 And it was not in the discussion of a particular

1 And those are just two suggestions for you.

2 CHAIRMAN KOVACIC: Tim, other thoughts about if
3 you were going to add or subtract from the mix of things
4 that you see us doing on setting an agenda, formulating
5 policy, strategy, anything you would add or subtract?

6 MR. MURIS: Well, again, this is a question I have
7 thought a lot about and do not have clear answers. I do
8 know that the desire, the thrust, the emphasis for
9 innovation in Washington so often leads to bad things
10 happening. And it is because Washington has a focus on
11 action for action's sake.

12 CHAIRMAN KOVACIC: Oh, no.

13 **(Laughter)**.

14 MR. MURIS: And at a place like this, the
15 decision-makers often are not around when the consequences
16 come home.

17 CHAIRMAN KOVACIC: We get graded by departures,
18 not arrivals.

19 MR. MURIS: And you get graded on column inches.
20 And I do not see anything wrong with column inches. I
21 always did well in the column inches world. But, you know,
22 success has got to be measured over a longer period of time
23 and over these shared understandings. And I do think,
24 unfortunately, it is where Jodie's great phrase about the
25 '70s being in our DNA, you know, had a lot to do about the

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1 interpretation of the Sunshine Act has overly restricted
2 itself. And, as I said, it may be a benefit, it may be a
3 disadvantage. You may not want to be able to meet all of
4 the time. But I think it is something that could be
5 reassessed.

6 And the other thing that I thought we had not done
7 and perhaps, as Tim said, that it became routine, we had not
8 had joint hearings with the bureaus participating together
9 or joint strategic planning exercises that I think would
10 have, in a way, energized both bureaus by getting to know
11 each other, getting to see what their ideas were. By way of
12 example, when I first arrived, the bureau I thought was
13 functioning as silos. Each division was totally by itself
14 and did not have any idea of what other divisions were
15 doing. So, there was no sense that we were all conducting
16 consumer protection, or very little.

17 I think, to some extent, that is true of the
18 existing bureaus now and may have some of the same benefits
19 that we achieved by bringing, I think, the silos together to
20 be all aware that our job was consumer protection and not Ad
21 Practices.

22 MR. LEARY: You may remember when you were general
23 counsel and --

24 CHAIRMAN KOVACIC: Oh, those were great days,
25 weren't they? A long time ago.

1 **(Laughter.)**

2 MR. LEARY: I would have three Commissioners in
3 the car, we would be going up to Camden Yards, and at that
4 time, one of you thought -- apart from being a delightful
5 guy, one of your functions was to make sure we did not talk
6 any business in the automobile going up there to the
7 ballgame.

8 CHAIRMAN KOVACIC: I like that part of the
9 Sunshine Act.

10 **(Laughter.)**

11 MR. MURIS: Good seats, too.

12 CHAIRMAN KOVACIC: Wow. Great seats, not just
13 good seats. But I suspect one thing we can do is to revisit
14 whether we interpret the Sunshine Act in too restrictive a
15 way. I have had this conversation now with my counterparts
16 at the SEC, at FERC, at the CFTC, at the FCC, and I would
17 say one of the common irritants that everyone mentions is
18 the Sunshine Act. And the question that is posed is are the
19 anticipated benefits of collective decision-making never
20 going to be realized if even under a -- let's call it a more
21 expansive interpretation of what it allows if it stays in
22 place.

23 That is, if I see two of my colleagues in the
24 lunch room and I have an idea I would like to discuss about
25 one of our cases, or if someone has an idea and I would

1 spontaneously like to simply go and gather the others to
2 talk about it, let's the two of us go and see one of our
3 colleagues.

4 MS. BERNSTEIN: Uh-huh.

5 CHAIRMAN KOVACIC: That cannot be done. And, to
6 me, it is insane beyond belief that I cannot do that. What
7 we do, of course, is we circumvent that by relying on
8 advisors. In the upstairs/downstairs world, we have Mr. and
9 Mrs. Hudson going to meet with their counterparts -- it is
10 upstairs/downstairs TV allusion -- to meet with the other
11 folks who live in the servants quarters to talk amongst each
12 other and then they go back to the people that live above on
13 the top floors. To imagine a more certifiably insane system
14 would take a lot of effort.

15 But I suppose one approach is we rethink with
16 whether we cabin ourselves too much. Another is something
17 that I suspect Tim and Jodie may recall is we used to have
18 things called policy review sessions.

19 MS. BERNSTEIN: Um-hum.

20 CHAIRMAN KOVACIC: Where they were not open to the
21 entire world. Transcripts were taken, discussions of cases
22 were excised, but, consistent with the Sunshine Act, the
23 proceedings were made available. And those were mechanisms,
24 topic by topic, by which the Commission, as a board, with
25 our professional staff, would sit and discuss what we wanted

1 have them kind of evolve into things that look more like
2 corporate closings than an open exchange of views, and I
3 have always thought that the more dissension there was at
4 those meetings, the more fun they were. But I do not think
5 any chairmen agreed with that.

6 CHAIRMAN KOVACIC: Chairmen are interested in
7 truth for its own sake from whatever source.

8 MR. L00 TD()Tj0.0000 0.0000 TD(8)Tj79.2000 0.0000 TD()Tj36.0

1 **(Laughter.)**

2 MS. BERNSTEIN: Right, right. I do think there is
3 a need for finding mechanisms, finding ways for the
4 Commissioners to be able to deliberate, to be able to
5 discuss things in a general way without an audience, and I
6 think it would be very, very useful.

7 In contrast to the present Commission meetings,
8 Tim, you may remember the meetings in the '70s were very
9 different. There was much less of a sense that it was a
10 Kabuki theater, that everything had been decided ahead of
11 time or pretty much so, and a very lively discussion and
12 debate. Not always great fun for the bureau directors, I
13 know, because it was, in every sense, a real examination of
14 what was being presented.

15 So, as Tom said, I think you need a variety of
16 means to be able to use to really maximize the benefit of a
17 collegial organization, which I think is one of the unique
18 factors about the Commission that seems to work better than
19 other organizations, at least that I have experience with.
20 It has over the years. Can it be improved? Yeah, because
21 you could better utilize, I think, your colleagues with
22 better mechanisms for doing that.

23 MR. MURIS: But how does one run an agency like
24 the FTC? I think it either runs with a strong chairman or
25 it does not run. And with a strong chairman, the

1 non-chairman commissioners and the chairmen together need to
2 have a modus operandi. Tom wrote this, which I regard as a
3 wonderful puff piece about me, and he presented a fact that
4 I had not realized, that I had served the longest with four
5 inherited commissioners.

6 CHAIRMAN KOVACIC: They are like inherited runners
7 if you are a relief pitcher.

1 MR. LEARY: And they do not have a meaningful role
2 and they do not get paid for participation in commission
3 workshops. They have no role whatever unless we, you know,
4 as we do sometimes, talk to them individually on a various
5 policy positions we may take up on the Hill and so on. I am
6 a member of the private bar now. The hell with them. I
7 hope this is not all being recorded.

8 **(Laughter).**

9 MS. BERNSTEIN: It is, Tom.

10 CHAIRMAN KOVACIC: Only the good parts.

11 **(Laughter.)**

12 MR. LEARY: They grade people on the things that
13 they are involved with. That is all. But I do not think we
14 ought to lose sight of the other importance of this stuff.

15 MS. BERNSTEIN: To some extent, the agency was
16 responsible for that. Because for years, that is what they
17 reported, the number of cases brought and which cases and
18 which ones were the most important. So, perhaps, one of the
19 things that could be done is that the agency begins to
20 educate the bar a little bit better when they issue reports
21 and what they talk about and what their speeches are and so
22 forth.

23 But I would also suggest that if the agency were
24 to use its rule-making authority, and that is something I
25 wanted to bring up, because I think it has been neglected

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1 of multiple tools. And I think that is one of the reasons
2 why it is so successful.

3 So, I think your premise is right, Bill, but, you
4 know, once you do bring cases, I do think we have advanced
5 to a world beyond where we were 20 years ago, whenever, of
6 being judged just by the cases. I think that is all to the
7 good.

8 CHAIRMAN KOVACIC: For me, one of the more
9 difficult questions is, when one observes a specific
10 problem, and this goes back to planning and strategy, is how
11 to refine our own planning and strategy process to not just
12 understand the problem insightfully, but to pick the right
13 tool or right collection of tools. And when the chapter of
14 recent experience gets written, I will suggest that one of
15 the best investments the Agency made was the joint hearings
16 with the Department of Justice and the PTO on IP issues and
17 the publication of the FTC report, To Promote Innovation.
18 That is now just coming up on five years ago that that came
19 out the door. That single policy initiative, I think, will
20 be seen as one of the best pieces of work the FTC has done
21 in its history. It will be recognized, I think, for that.

22 In a way, it is a complement to litigation, but it
23 was also a substitute. That is, if those policy
24 propositions stick, you solve a lot of stuff that
25 traditionally has shown up in the antitrust side of the

1 ledger, the enforcement side of the ledger. You do a number
2 of things.

3 I do not know that we have a good mechanism for
4 when we look at the problem to quite decide what is the
5 right sequencing and application of tools. Maybe that is
6 just too hard to do. Maybe the right answer is, we are like
7 researchers in a laboratory and we say, we do not know which
8 specific treatment to try out, we will pursue them all. But
9 I think we are better at recognizing the value of multi-
10 dimensional solutions to individual problems by coming up
11 with the right sequence of treatments and having our
12 professional staffs think, ah-ha, what are the tools we
13 could use. We can have guidelines, we can bring a case, we
14 can create rules, maybe we should have public consultations
15 to think of how to solve these is, I think, still a big
16 challenge for us.

17 MS. BERNSTEIN: We have not said much about the
18 role of outside organizations that can be a part of the
19 development of strategy and so forth. I think it is
20 probably implicit that it is absolutely essential for the
21 Commission to have, I think, ongoing consultations with
22 state agencies, with Congressional committees, staff and so
23 forth, and with consumer groups and industry groups as well.
24 I think it is implicit. It was certainly a big help to me
25 that I was able to access those organizations, so that I

1 could anticipate where controversy would erupt or were there
2 would be support or whatever.

3 CHAIRMAN KOVACIC: With a specific topic in mind
4 or more open-ended discussions?

5 MS. BERNSTEIN: More open-ended ones in general as
6 we were developing a kind of way to go about doing what we
7 did. But on specific ones, to identify the so-called
8 stakeholders ahead of time and be sure you had the ability
9 to talk with them or to, as I said, access their
10 information, was critically important for me and, I think,
11 for the Commission at the time.

12

1 about.

2 What would you put on your list of things that
3 require the most attention over that period of time?
4 Looking ahead six years, if you were us again, what are the
5 biggest needs going ahead? Tom?

6 MR. LEARY: I just briefly alluded to the fact
7 that I think the economy is evolving more and more in ways
8 where you have highly individualized products and services
9 and things offered to individuals. And that is going to
10 continue. And I do not think that we have the economic
11 tools in hand yet to really rational -- I do not know how
12 you define markets in that kind of business. And I do not
13 think we really have a way of thinking about these things in
14 a rigorous way. I think that is number one. I cannot think
15 of any agency in the world that is better equipped to do it
16 than the Federal Trade Commission, to think about these
17 things.

18 I think the second thing that I would have on my
19 list is -- and this would be dear to your heart, Bill -- is
20 we somehow or other have got to achieve some greater
21 uniformity in an international arena. There is an immense
22 proliferation of antitrust agencies. There is also,
23 obviously, explosions of economic activities in different
24 parts of the world and there are going to be increasing
25 tensions, it seems to me, in that area. Again, I cannot

1 think of any agency in the United States better equipped to
2 play a leadership role there.

3 And I guess the third thing I would put on my list
4 would be, just purely internally, I think we have to do more
5 to rationalize -- and this is related to point number two --
6 to rationalize the internal enforcement of antitrust law in
7 the United States. The overlapping authority between the
8 federal government and the states is, to me, an
9 international scandal. It certainly inhibits us when any
10 time you talk about convergence overseas, at least my
11 experience, why they would say, well, you come from a
12 country that has 52 sources of antitrust law, what are you
13 talking about? And I think we have got to do something
14 more. I think we have to engage in fruitful dialogue
15 somehow or other to rationalize state and federal authority,
16 and the private sector needs some attention, too. Those
17 would be the three things that would be tops on my list.

18 CHAIRMAN KOVACIC: Jodie?

19 MS. BERNSTEIN: I am going to assume that the
20 economy has recovered by 2014. So, the economy will have
21 recovered. The energy crisis will have been solved because
22 my son has been successful in creating hydrogen cars. He
23 works for BMW. And I know that they are going to make that
24 breakthrough. So, that crisis will be solved.

25 CHAIRMAN KOVACIC: So far so good.

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1 I think, to work together with international agencies and
2 international markets really that we do not do now and
3 probably do not have the capacity to do now.

4 CHAIRMAN KOVACIC: Tim?

5 MR. MURIS: Well, I think one of the most
6 refreshing, given what I have been doing a lot lately, one
7 of the most refreshing parts of this morning is the
8 continued bipartisan nature of this agency and its place in
9 Washington. I do think going forward that those who come in
10 the future, I hope have in their heads, if not in their
11 genes, the sense of the core mission of the agency and
12 protecting the market process, this umpire, relative
13 humility role that I have cch(continued bipartisan nature of this agen

1 so well in the last several years, will continue to be
2 important to public policy. And I think it is a real
3 challenge for the Commission, relatively small as it still
4 is, to do as well in the next several years as it has done
5 in the past and I look forward to watching I hope with
6 admiration.

7 CHAIRMAN KOVACIC: I am enormously grateful to
8 each of you for doing this. Our larger ambition here is, I
9 guess, to do two things. One is for the shorter term, for
10 the year to come, to have suggestions in place for future
11 leadership at the Commission, both as a result of our own,
12 again, internal reflections, but also from the suggestions
13 and advice that come from outsiders and to distill that with
14 respect to a wide variety of policy and operational issues
15 into what I think will be perhaps the best compilation of
16 views about the way ahead for us.

17 A second is to help develop the creation of a
18 culture where we encourage what has happened I think on an
19 individual level within our bureaus at times, but an agency-
20 wide habit of doing this on its own. I do not think an
21 agency becomes better by having outsiders periodically say
22 try this or try that. That has to be an internal organic
23 process by which it formulates its own views about looking
24 ahead.

25 And most of all, to turn attention to the

1 importance of making capital investments and investments
2 that run for the long term, Tim touched on this before. I
3 think one of the pathologies of our political process is a
4 tendency to weigh consumption very heavily and investment
5 less heavily. That is, the idea of making capital
6 investments for which there are not ribbon-cutting
7 ceremonies for the investor and related activities is a
8 grave problem of our political process. How does one go
9 about adjusting that?

10 I look back to the dialogue that Tim had with Bob
11 Pitofsky after the 90th anniversary celebration, a way to
12 distill not binding legal principles but habits, customs,
13 norms, understandings about what the agency ought to do so
14 that whoever future management would be, they could look
15 back to that text and say that is the way the agency ought
16 to behave, that is the broader set of expectations that
17 ought to carry across individual generations of leadership
18 and to contribute to building those that can only come by
19 looking back at what went well, what did not go so well.

20 And I do find a great difference between those of
21 us who were around at the FTC when the roof nearly fell in
22 in '79, '80, '81 and are still sort of picking the bits of
23 debris out of our clothing and hair from that time, and
24 those who didn't. And to draw sensible lessons from that
25 experience, but also to look carefully at what worked and

1 that process of asking difficult questions, I think, will be
2 useful I do think, from a variety of sources.

3 Again, as I mentioned before, this is the story of
4 the agency's modern history. It is a remarkable story of
5 successful public administration. I do not know of a better
6 one globally. There are other good ones. I do not know of
7 a better one. One might ask in light of that, why ask hard
8 questions about the way ahead?

9 I can remember years ago, to drift into a dreaded
10 sports analogy, Tiger Woods, after winning half a dozen
11 major championships, reformulated his swing. He went to a
12 coach and said rebuild it from the ground up. And the
13 question was posed to him, why are you doing that. You are
14 winning one championship after another. You have already
15 got a half dozen, there will be more to come. And he said
16 because I would like to win 30, not just six. I want to win
17 so many that the guy with the second largest number will not
18 need to be seen because of the curvature of the earth will
19 put him so far behind me.

20 I think that attitude of conscious self-assessment
21 and improvement is what really inspires this effort and
22 really to make investments for the long term.

23 Thanks to each of you for getting us off to a
24 great start, and by doing this, not only adding in a great
25 way to your previous tremendous contributions. May all of

1 us do as well as you did on behalf of this agency and
2 continue to.

3 Please join me in thanking our three panelists.

4 **(Applause.)**

5 CHAIRMAN KOVACIC: We have a break for 10, 15
6 minutes and Panel 2 will resume. Thank you.

7 **(Session 1 concluded.)**

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1 **SESSION 2: DEPLOYMENT OF AGENCY RESOURCES: ENFORCEMENT**

2 MS. OHLHAUSEN: If folks would begin to take their
3 seats, we are going to start in a moment with our second
4 panel that is going to look at enforcement issues. I think
5 we can get started. A few folks may filter in.

6 MR. WALES: All right, I think we are ready to go.

7 MR. HARRINGTON: Good morning. We have a very
8 fine panel that Dave and I have the privilege of moderating
9 this morning to discuss the agency's enforcement
10 capabilities, how it uses them, how they might be enhanced,
11 how we might use them in smarter ways. The panelists think
12 that this event has been organized, that we have a plan for
13 approaching it, but Dave and I were sitting together in the
14 first session and came up with some new ideas. Surprise.

15 The first is that instead of going through your
16 extensive and impressive bios, we were wondering if you
17 would each give us a sentence or two about your involvement
18 in enforcement work at the FTC. Take a moment and sort of
19 give us your, as they say on the street, your cred on
20 enforcement.

21 Darren, we will start with you because I know you
22 best.

23 MR. BOWIE: Thank you, Eileen. And thank you very
24 much to the Chairman and the Commission for inviting me to
25 participate today. I worked at the FTC for many years. I

1 of Hart-Scott-Rodino filings and horizontal merger issues to
2 do as well as working pretty hard to try and vitalize and
3 keep moving a non-merger, non-time, deadline-driven part of
4 the enforcement agenda. And in late 1999, I left the
5 Commission and went back to Arnold & Porter where I am
6 today.

7 MS. HARRINGTON: Susan?

8 MS. CREIGHTON: So, I had the privilege of being
9 here for four and a half years as deputy director and then
10 director following in some large shoes.

11 MR. BAER: Boots, large boots.

12 MS. CREIGHTON: That is right. Rich Parker only
13 informed me yesterday to bring cases, you need to wear
14 boots.

15 **(Laughter.)**

16 MR. PARKER: Those cases look better when you have
17 boots on.

18 MS. CREIGHTON: So, while I was here, we brought a
19 lot of both non-merger and merger cases on the non-merger
20 side. The Schering case was virtually ready for trial when
21 I joined. So, I had the chance to work on that, all the way
22 through Unocal. I did a lot of other pharmaceutical cases
23 like Bristol-Myers Squibb, a lot of the Noerr and state
24 action type cases that Tim made reference to like Kentucky
25 Movers, South Carolina Dentists. We brought a lot of

1 consummated merger cases, Chicago Bridge and Iron. The
2 Evanston hospital case had virtually gotten finished, but
3 not quite; the Valassis case, which was another non-merger
4 case. We also brought Hart-Scott merger challenges and did
5 not always win those, at least when we came up against
6 people like Rich Parker in the Arch Coal case. So, those
7 are the kinds of things I was involved in while I was here.

8 MS. HARRINGTON: Thank you. Rich?

9 MR. PARKER: I was here for three years and some
10 change, working first as Bill's deputy. I stood next to
11 Rick Liebeskind and tried the Drug Wholesalers case was my
12 first assignment. Bob was the Chairman at the time, and I
13 quickly discovered that Bob did not need me to advise him on
14 antitrust policy and, so, all I did was advice them whether
15 I thought he could win the case or not, and then the policy
16 was to try to do our best to win it.

17 MR. WALES: Well, great. Obviously, I think we
18 have a stellar panel. We had a stellar panel earlier today.
19 I do not know if you had a chance to watch that. But I
20 think the Chairman laid out in a succinct way kind of the
21 two basic questions we would like to explore today in the
22 broader area of enforcement and how to allocate the agency's
23 resources.

24 One is drawing upon your experiences, what have we
25 done right and how do we replicate that and preserve it

1 going forward? But, also, just as importantly, what maybe
2 haven't we done as well or what could we improve and how do
3 we do it? I think we are very much looking for your
4 constructive thoughts and I think ultimately we would like
5 to ask that same question in 2014, really what should the
6 agency be proud of in terms of its enforcement agenda and
7 what it has been able to accomplish because that is really
8 the mind-set in which we are undertaking this exercise.

9 So, let me start off with the case generation and
10 selection topic, which I guess was previously coined as
11 fishing where the fish were or I like the hunting where the
12 ducks are analogy maybe a little better. But, obviously,
13 the agency does not have unlimited resources. It has to
14 figure out where to pick its battles. It has to consider
15 policy implications. Obviously, on the BC side, we talked a
16 little bit about some of the issues of getting credit more
17 for enforcement challenges, as opposed to policy
18 pronouncements.

19 I guess what I would like to do is have each of
20 you just comment on what tools should we use for case
21 generation, what priorities should we set, how do we figure
22 out where the ducks are, where the fish are, which ones we
23 should be going after. How did we do that and what have we
24 done well and what can we do better?

25 MS. HARRINGTON: If I can tag on, too, if you can

1 try to respond in a way that is not really mission specific.
2 One of the things that I think the Chairman was getting at
3 in the first panel is that perhaps the challenge that we
4 have that we have not fully met, is to better integrate all
5 of our best work and our best thinking. So, as you think
6 about that question, try to answer in a non-mission specific
7 way because you all know, as we have heard from your brief
8 bios, quite a lot about the whole mission at the agency.

9 MR. BOWIE: So I can start. And there was some
10 discussion of this at the first panel. But what I found
11 effective when generating cases is that everyone at the
12 agency, the Commission, the staff, the managers, understood
13 what the strategy was and why we were bringing the cases
14 that we were bringing. That does not always happen. So, I
15 think it is very important to engage everyone, first,
16 internally, the staff, managers, to think about what do we
17 think should be a priority and why this year, and even
18 beyond that.

19 And, also, it is important to engage external
20 stakeholders as well to reach out to industry, consumer
21 groups, our law enforcement partners. I think that is going
22 to become increasingly important, both at the state level,
23 our law enforcement partners at the federal level, and then
24 also internationally and bring everyone together and share
25 ideas and so everyone understands why we are bringing the

1 types of cases that we are bringing.

2 I do not think that the approach of generating
3 cases and sort of percolating them up to see which ones work
4 and which ones do not is really effective. I think the
5 agency does better when everyone understands what the
6 mission is.

7 MR. WALES: Bill?

8 MR. BAER: Just a couple thoughts. First, a quick
9 story. When I came to the Commission, John Baker, who was
10 the Director of the Bureau of Economics in '95, wanted to
11 get the economists involved more actively in case
12 generation. It was an idea of trying to break down that
13 divide between the economists who are always step back
14 analytical, and he assigned each economist an industry
15 sector and had them take a look at pricing over the past ten
16 years and see whether or not based on consumer price index
17 or manufacturing price index, there were suspicious pricing
18 behaviors that we could point to, and he came to me three
19 months in with his results and there was one that looked
20 possible and another which he thought we really ought to
21 investigate which related to the explosives industry, and he
22 went through his analysis.

23 I said, great, and I did not tell him because I
24 would break his heart that four years ago the FTC had
25 referred to the Justice Department evidence it had uncovered

1 about collusive behavior in the explosive industry and there
2 already were indictments. Anyway, he was right, I guess,
3 the best way I could say it.

4 **(Laughter.)**

5 MR. BAER: I think the point that Eileen raises
6 about looking broad-brush makes sense. And you have to
7 have, I think, in trying ts0.0000 lgudicooki-brusle iTjhaverET1.00000

1 would do that.

2 The other thing that one ought to do, it seems to
3 me in trying to pick priorities, is to try and pick areas
4 where you can leverage. Again, I think the consumer
5 protection mission in the last 10 or 12 years has done an
6 extraordinarily good job of some of these task force, state
7 and local officials basically leveraging the modeling that
8 the FTC can do, leadership modeling, and, therefore, making,
9 in fact, a whole lot more cops on the beat than the FTC can
10 put on.

11 I do not think the antitrust mission has done as
12 good a job of that. Maybe there are inherent limitations,
13 there are some tensions in the way the state AGs might view
14 antitrust enforcement. But looking to find ways that you
15 can maximize impact in these critical sectors is another
16 part of what I would try and do.

17 MR. PARKER: When I was here, it was in the middle
18 of the merger wave and we were basically one merger away
19 from sinking into the sea, as I recall in '99 and 2000. So,
20 we were not doing an awful lot of case selection. We were
21 trying to deal with the ones responsibly that were given us.
22 But I do think to the extent I was able to get involved in
23 anticompetitive practices, I remember Mike Antalics and
24 Geoff Green talking about some of the cases they brought and
25 they found them in the trade press. They would pick

1 on both sides is to try to redress when there is market
2 failure. And, so, I think that is really the overall
3 priority of the agency, is figuring out where there are
4 instances of market failure and addressing those. Sometimes
5 the best tool is not enforcement. And maybe we will get to
6 that later. I know that was the subject a bit of the panel
7 earlier this morning. But sometimes enforcement is the
8 right tool.

9 I think of there being two instances where
10 enforcement can be the right tool for instances of market
11 failure. One is where there is some kind of, in fact, legal
12 failure. Tim mentioned Noerr and state action as being a
13 for instance. There are other areas where you can look at
14 it and say the law is going in the wrong direction in terms
15 of the proper enforcement of antitrust law. This would be
16 true for consumer protection as well. Private plaintiffs
17 are going to shy away from the area because there is no
18 money in it because the standard has gotten hard. So, far
19 from being a reason not to bring a case because it is
20 harder, I think that the agency is the only thing standing
21 between sort of the permanent bad development of the law and
22 reform because nobody else is going to do it if you do not.

23 So, for me, I think as -- Tim probably mentioned
24 for me a high priority on the advocacy side was that I think
25 that the FTC should be -- nobody is going to be an advocate

1 for markets with other government agencies like this agency
2 can be. There are a whole lot of tools you use for that.
3 Noerr Pennington and state action are just a for instance of
4 where enforcement can be one among many tools.

5 Another area where you can see market failure,
6 though, and this actually -- I guess I just briefly touched
7 on it.00i0000 0.000d, but tare a lsobe one aaure,

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1 plaintiffs have gone 0-12 or 0-11 in the last few years, it
2 is an amazing record and you now have a high court who
3 follows a federal judge and not really an antitrust. It
4 would be hard not to conclude the Supreme Court is telling
5 us they do not want to see too many antitrust cases coming
6 up through the courts, if you want to make a macro
7 conclusion like that.

8 Therefore, if you weigh the risk of losing too
9 much, you are never going to bring a case because given
10 where the Supreme Court is, it is not very favorable to
11 antitrust plaintiffs, period. I get paid to argue and use
12 all these decisions I possibly can, but as a policy person,
13 it is not all that clear that all of these decisions were
14 correct. But that is where we are. And, so, you cannot
15 overreact on the risk of loss because the only thing that is
16 going to turn this around is bringing good cases.

17 I also think that the number of cases at the
18 private bar is going to pick up on -- you know, is going to
19 go down. These people are businessmen and they make
20 investments in class actions and other things. And the risk
21 of winning, I do not think Michael Hausfeld in the and the
22 Labaton Firm can be very excited about bringing cases right
23 now when they can go up and sue the cigarette companies or
24 some mass tort, that would seem to be a better investment.
25 So, I just think you are going to have to weigh in there and

1 you often do, on the other side of a possible enforcement
2 action, they are going to take, in most cases, a realistic
3 assessment of the evidence, and if they see their risks as
4 high, they are going to settle. So, a lot of the cases that
5 would be fun to bring and it would be easier to win, end up
6 settling out. And that is the way the process works. It is
7 the way it should work.

8 But the question is, are there things one can do
9 on the margin to up the chances of winning? And that is
10 really -- and how do you react to defeat? There is, I
11 think, a mind-set that I have seen at both antitrust
12 agencies in some time periods over the years of sort of
13 doubling down, you almost get desperate for that win and it
14 clouds judgment because you want to go after the next one
15 rather than trying to learn from experience.

16

1 smart, talented litigators who basically helped shape cases.
2 We had a string of success. Whether it was cause and effect
3 or correlation, you know, who the hell knows, but I think
4 really thinking about where, as the agency did in the
5 retrospective it did a couple of months ago, where the
6 problems lie and then trying to correct is part of what you
7 need to do to deal with the situation that you are always
8 going to be bringing -- almost always going to be bringing
9 cases where the facts are a little close because the easy
10 cases tend to go away.

11 MR. WALES: I think, Bill, no doubt I think we
12 would agree wins are important and obviously there are a lot
13 of reasons why. It is very effective and important to
14 devote agency resources to that. I would like to add, too,
15 for those who do not know the, Whole Foods decisions came
16 down the D.C. Circuit and we won that one. So, that is an
17 important --

18 MR. BAER: Oh, really? Today?

19 MR. WALES: Yes. I have not read it yet, but we
20 are --

21 MR. BAER: Congratulations.

22 MR. WALES: -- very excited about that on the
23 correct 13B standard in merger indications. So, that is
24 important. I do not want to downplay that --

25 MR. BAER: That is a win. That is exactly what I

1 antitrust side of things probably understated the importance
2 of prospective guidance. I think that has largely been
3 corrected and, so, it is more showing that we mean what we
4 say in terms of the guidance and update it as it goes along,
5 but then being prepared to step in and enforce and enforce
6 aggressively where someone has transgressed.

7 MR. BOWIE: I would agree that guidance is
8 obviously very important. And, in my experience, in-house
9 counsel and outside counsel who are advising companies and
10 others about how to comply really look to the Commission for
11 that. And, obviously, the Commission can do that through
12 formal guidance. But cases in litigation also play a hugely
13 important role in providing guidance to the industry,
14 particularly when the vast majority of Commission actions
15 are settlements. And, obviously, when you allege certain
16 things in a complaint, you have to be conscious of the fact
17 that you may be called upon to prove that.

18 But I think one thing the Commission has done,
19

1 have to keep in mind that 90 plus percent of what the
2 Commission puts out are these settlements and that is what
3 people have to rely on in trying to adapt their practices
4 and make them comply with the law.

5 So, I think there is still room for improvement on
6 that area. So, I do think when we think about guidance, we
7 should always keep in mind that the cases and the litigation
8 that the Commission brings also serve that function as well
9 as formal "guidance" from the agency.

10 MR. PARKER: I think enforcement is enforcement.
11 If you have a merger where the guy says he wants to do this
12 to raise prices, as Whole Foods sounded to me like it did,
13 you have to go after that. And if the judge, he or she gets
14 it wrong, and it is not exactly as neatly put together
15 doctrinally as you would like, I really do not care. The
16 point here is the harm was a bad merger and you have now
17 shut it down, period. And you, therefore, have done your
18 enforcement job.

19 I think on the forward-looking stuff and
20 perspective, it is very important. But I think the
21 Commission does a good job on that. Speeches are very
22 helpful, guidelines, participating actively in panels and
23 doing things. And, so, I do not see that as an issue. I
24 think you talk about what your analysis is, you lay it out
25 there if you can. But if you see a bad merger, you go after

1 at most dealing with bid markets. And we had thought that
2 was going to be a great opportunity for the Commission
3 really to sort of try to update the guidelines in terms of
4 here -- sort of use that case, that may not have been an
5 invitation that they thought we had done a good job on the
6 staff side of providing sort of the facts to really tackle
7 it. It may not have been a priority for them.

8 Then sort of after that went by, I thought, well,
9 maybe we can sort of slide it into the commentary to the
10 guidelines. Well, that did not really kind of work either.
11 So, in my view, when have you something like the '92
12 guidelines, which are now 16 years behind the times in terms
13 of what economists are thinking about two-sided markets,
14 auction markets and that kind of thing, trying to do it by
15 enforcement is just not the right way to go. So, I think
16 you need to be kind of thinking about what is the right
17 tool. Is this something where you really kind of need some
18 systematic approach? And in those instances, I would not
19 want to try to do it by onesies and twosies.

20 MR. WALES: Go ahead.

21 MS. HARRINGTON: Maybe we could shift to process
22 for a moment and ask some questions and invite some
23 discussion about how we are doing there. Do you think the
24 agency, in its enforcement work, is moving in a timely way?
25 Are we achieving results in a timely way? How is the process

1 of enforcement working do you think? Where can we improve?

2 MR. BAER: I have a couple matters pending and I
3 want you guys to know that I think you guys are all doing
4 fine.

5 **(Laughter).**

6 MR. BAER: How do you move on from there? Quickly,
7 I think.

8 **(Laughter).**

9 MR. BAER: There remains, I think, an issue
10 particularly in the antitrust area. I have not done enough
11 in the consumer protection area in the last couple years
12 really to be informed about this. On the investigations
13 that are not merger-related, how do you manage that process
14 were there are not statutory deadlines and how do you staff
15 it up in a way that moves it along? How do you give the
16 investigating staff the support they need? I think that
17 continues to be an issue.

18 It is an issue as well at the antitrust division,
19 the sense of a black hole. And you cannot set deadlines
20 that, after a year, if you are not to X, the investigation
21 goes away. That is irresponsible. But somehow internally
22 finding ways to more aggressively manage and reward and
23 sanction the individuals who are not managing these things
24 right, perhaps have some reporting obligation back to
25 respondents in an investigation at six-month intervals, the

1 state of play thing. There is nothing like the discipline
2 of having to report upstairs about where you are, but also
3 having to formulate some communication to the outside

1 and periodic reporting -- and maybe all this maybe in place.
2 I know there are workloads of people that do that. But the
3 agency chair could reasonably have an expectation that if we
4 are not to a process, no process decision after six months,
5 I want to know why. And it is not just getting that. It is
6 then that goes into how you are evaluating your managers and
7 how the managers are evaluating staff performance. It is
8 making it a feedback loop in which there is true
9 accountability.

10 One of the things that always troubled me about
11 the agency in terms of personnel management was managers did
12 not take seriously the personnel ratings. It had become a
13 default excellent or outstanding, whatever the thing was,
14 and why have it if when I came to the Commission in '95, 74
15 percent of the people who were getting the top rating, they
16 clearly did not deserve it. In any organization, it is more
17 stratified than that. If it is not going to be that -- if
18 you are not going to make that a non-meaningful process,
19 okay, but there ought to be a meaningful process that
20 basically holds people accountable in a very positive sense.
21 Rewards good performance and encourages people whose
22 performance is sub-excellent.

23 MR. PARKER: It seems to me what if you simply
24 said that you have to have an up or down recommendation one
25 year from getting processed.

1 One factor, I think the Commissioners have an
2 important role to play here in keeping things moving. I
3 know when I was working on a matter in which a particular
4 Commissioner took an interest and would call down or have
5 their advisers call down from time to time and actually call
6 the staff and say, what is going on with this case, what is
7 going on with that case, it really helped you move along.

8 And I think the Chairman and the Commissioners, I
9 think, really do have a role to play both on a positive
10 level -- I remember being at Commission meetings where the
11 Commissioners would compliment the staff because they could
12 tell from the memo or they knew that it took the staff three
13 months, six months to work up this case and congratulations.
14 And that, I think, is a positive reinforcement mechanism.

15 Then on the stick approach of just kind of
16 monitoring and following up and making sure things are
17 moving along and that they do not languish. So, again, I
18 think that is a role the Commissioners can play.

19 I also think, in addition to process, it is
20 important when identifying cases and deciding how to plead a
21 case that the staff and the Commission streamline
22 complaints. Very often, and I am sure this falls under both
23 bureaus, there are all sorts of allegations you can bring.
24 And I think we have seen cases where the complaint was
25 probably loaded up a little too much and that led to delay

1 because staff felt they had to pursue sort of every angle
2 and over-investigate every possible claim. That leads to
3 delay. It makes the case stale. It also does not lead
4 necessarily to great success in litigation. The case gets
5 sort of confusing, judges do not like it. They end up sort
6 of pushing it off.

7 So, I think continuing to try to streamline the
8 complaints that the Commission brings, to really focus on
9 the core conduct that is causing the consumer harm and
10 learning to sort of let go the more ancillary issues in the
11 case also will help continue to improve speed.

12 MS. CREIGHTON: Let me just mention I guess a
13 statement against interest. This would not be in any cases
14 I have ever been on, but just by sort of hearsay, two areas
15 where the Commission I think could continue to improve. I
16 would guess it is true for both bureaus.

17 One is still the volume of documents that you
18 collect and the over-breadth of the subpoenas or the CIDs.
19 And then also even just on little things like do you
20 duplicate a document, that kind of thing. Before the
21 antitrust division, recently we had a case where they
22 actually -- we pulled several million documents and if we
23 were going to de-dupe it, it would take it down to just a
24 couple hundred thousand, and they agreed to let us do it.
25 They were actually delighted with the result.

1 But that's a structural problem that I think is one that
2 there is no easy solution to.

3 But the Commission should always be trying to keep
4 in mind that there are process ways of accelerating that so
5 that you do not end up with this perceived additional length
6 of time that on the outside then does not reflect well on
7 the Commission.

8 MR. WALES: I guess in terms of that, kind of like
9 the pre-complaint timing that we have at the Commission,
10 let's assume that it is administrative complaint that is
11 filed, then either BC or around the BCP side of the house.
12 I guess what is your sense of the timing there. Obviously,
13 there has been some criticism of the length of time it has
14 taken the Commission and the ALJs and then the Commission to
15 kind of render a decision. What is your take? Is that
16 legitimate criticism?

17 I know in Western Giant we were a little tweaked
18 when the judge called it glacial, which you know when a
19 federal court judge characterizes it that way that is
20 probably a negative. I guess I would be interested in your
21 perspective on, one, is it a problem and, two, what do we do
22 about it.

23 MS. CREIGHTON: Well, I guess I would say -- like
24 in a Hart-Scott matter, I think it puts the Commission in a
25 tough spot to -- if you have been investigating a deal for a

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1 time to get things tried before an ALJ, it is the time to
2 get the Commission to reach a decision with an appeal after
3 that. It, nevertheless, I think, still can work and be
4 meaningful in the non-merger side because you are really
5 establishing a precedent, whether it be American Medical
6 Association, Hospital Corporation of America, Indiana

7

1 of the problem. And the agency, I know, has tried to make
2 Part III more relevant in merger review. I am not sure I
3 agree it is the right way to go. I think it is hard to tell
4 a company that has prevailed in a preliminary injunction
5 proceeding that has then closed on the transaction, that
6 whatever expedited process you put in place, that they are
7 still in limbo, at risk of having an order of dissolution
8 come out two to three years later. And even under the most
9 optimistic scenarios for an expedited Part III, that is what
10 you are looking at. In this economy, is that really the
11 right use of Part III? Is it, at the end of the day,
12 helpful?

13 I also have some issues, and Dave and I have
14 talked about this, about whether the work around involving
15 the ALJs and that is putting a Commissioner in as an ALJ is
16 the right way to go. And that is not because the
17 Commissioners who could and would be ALJs are not talented.
18 I mean, pound for pound, this Commission has more antitrust
19 depth and more consumer protection experience than probably
20 any Commission in history. It goes back to when Deb was on
21 and when Tim was chair, too.

22 But there is, I think, a cost to the agency in
23 terms of external perception when, on day one, you have a
24 Commissioner who was involved in a reason-to-believe
25 determination is on day two installed as a would-be neutral

1 finder of fact. You can do it under the Administrative
2 Procedure Act, you can do it under the FTC rules. But I
3 think the perception that this is a huge tilt to a playing
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1 more neutral to the facts before the Commission and I think
2 there is more credibility that is likely to attach to that
3 decision.

4 I do think the combination of expediting Part III
5 in the merger process and installing a Commissioner as
6 finder of fact, at the end of the day, runs some risk of
7 causing eyebrows to be raised in the Courts of Appeals,
8 which is the last thing we want to do. One reason to make
9 Part III relevant is to get merger decisions in a position
10 that the Court of Appeals would find the Commission has
11 acted reasonably, appropriately and give deference to its
12 historical expertise.

13 If there is an appearance that the process itself
14 was a bit tilted, I think there is then a cost to that
15 km(0000 0.0000 TD())Tj(I do think the combination of expediting Part II

1 see who wins. Then if the parties lose, then they are
2 probably going to abandon the deal. But I wouldn't mess
3 around with a Part III proceeding that is going to take very
4 long because I do not think it is realistic. I mean, I
5 really do not.

6 And I do not think it prejudices the Commission.
7 The Commission wins a lot of cases in Federal Court. I
8 mean, that string of opinions from Staples and all, in
9 Swedish Match and all these other cases that has been good
10 for the law and I think the parties were treated fairly in
11 my opinion. And then there are other cases that the parties
12 won. But I would not use Part III for that reason. I would
13 use it for mergers. I would use it for handling the tough
14 issues and getting them up in the Court of Appeals, packaged
15 correctly and decided with the kind of sophistication only
16 this Commission can bring.

17 MR. BOWIE: On the consumer protection side, I
18 have a little different perspective. As you all know, Part
19 III is rarely used now in consumer protection and it has
20 been that way for a number of years, mainly because the
21 thinking was that Federal Court was more expeditious and
22 that the remedies are stronger and that is largely proven to
23 be true. But I think as the Commission has brought more and
24 more consumer protection cases in Federal Court and has
25 moved beyond traditional fraud cases and brought deceptive

1 ahead and close, rather than being able to sort of force the
2 Commission to have to run in and get a PI, I think it can be
3 appropriate for that.

4 I do share Bill and Rich's concern about using it
5 for Hart-Scott reportable deals. I think when Bill
6 mentioned there is a cost perception at the agency. I think
7 it would be incorrect -- that perception even holds true in
8 non-merger cases. I can remember trying to explain when I
9 was on the other side of a case in Visx from Bill, trying to
10 explain to a client so these people who are bringing the
11 complaint are, also, if I get through this administrative
12 law procedure and then it is appealed, they are going to be
13 the ones deciding the case and I do not get to a real court
14 for four years. That is a hard procedure to explain to
15 somebody.

16 I think in Kentucky Movers at the oral argument in
17 front of the Commission, the counsel just basically came
18 right out and said, well, I know you guys are never going to
19 decide -- it was kind of amusing. But there is that
20 perception and you kind of double down, I think, in Hart-
21 Scott cases if you are then in a deal where often parties do
22 not have any ability to get any resource, they cannot hold a
23 deal together for a year to sort of -- I do not think the
24 European Commission model is one on which there is a lot of
25 sort of buy-in just in terms sort of the American ways of

1 doing things. I think most people would think that it would
2 not be sort of the case that there was an expectation that
3 the Commission would have the final say yay or nay without
4 any judicial review of whether a merger should be able to go
5 forward. So, I do think that is something to keep in mind.

6 MR. WALES: I think, Susan, just to switch topics
7 a little bit, you had mentioned I guess the burden imposed
8 in terms of at least Hart-Scot investigations. I guess I
9 would just kind of bring it back a little bit broader to
10 both the BC and BCP sides of the house. Obviously, the
11 Commission struggles with making sure that they get the
12 information they feel like they need to make an informed
13 decision. Oftentimes, you may feel like you have increased
14 standards with the courts in term of ultimately winning and,
15 so, you may feel more pressure to get more information or
16 increase the burden a bit to make sure you are not missing
17 anything, particularly where you are pushing the envelope in
18 certain ways whether it be merger or non-merger or BCP type
19 actions.

20 But you have to kind of balance that against,
21 obviously, the burden imposed on parties, on private actors.
22 Obviously, the Commission does not want to go beyond what is
23 necessary or reasonably necessary to achieve its mandate.
24 Do you think the Commission has done a good job in terms of
25 trying to strike that balance, and if not, how could they

1 improve it?

2 MS. CREIGHTON: I guess on the non-merger side,
3 there is a dynamic -- Bill mentioned earlier and maybe Rich
4 as well, sort of the desire to make sure you cannot lose can
5 become almost paralyzing. You keep needing to investigate
6 because you have not sort of closed all that last loophole,
7 you need these additional documents. So, it actually
8 becomes self-defeating almost, sort of that if you pitch the
9 bar too high in terms of your need to win. There can be a
10 dynamic here, I think, to be perfectly honest that if you
11 have five decision makers coming at you, if you looked at
12 this, if you looked at that, you end up feeling like you
13 have to answer five times as many questions about I have
14 looked at this, make sure you do not have any holes in your
15 case.

16 So, it is perfectly understandable. But it is a
17 bad thing, I think, that staff get to the point where by the
18 time a complaint has issued, they are so exhausted that they
19 have lost all their energy to be able to litigate a case.
20 And I think that part of that does -- I think we need to
21 have done better than certainly when I was here than I did
22 in terms of trying to figure out a way to reconcile those
23 demands, try to accelerate the process and not ask the
24 parties for everything and not feel like you have to depose
25 every person, maybe go a little more with what Rich was

1 saying. This is bad, this is our gut because, clearly, we
2 need to bring the case and then we will do some discovery
3 after we file the complaint.

4 MR. BOWIE: I entirely agree and I made similar
5 comments earlier that it is not only the burden on the
6 parties and possible respondents or defendants, but as Susan
7 mentioned, it is a burden on the staff and, ultimately, the
8 Commission if too much time is spent sort of pursuing sort
9 of ancillary claims or ancillary issues that are not
10 critical to the core of the case. The case drags on, it
11 gets stale, it makes it much less a compelling case to bring
12 in litigation. Judges wonder why did it take the Commission
13 so long to bring this case. It gives the defendants and
14 respondents a very easy opportunity to complain about how
15 long this has gone on, and the staff is exhausted.

16 It is almost like, you mean I have to litigate
17 this case now, now that it is actually voted out and I have
18 to prove all these things. Sometimes staff is not prepared
19 for that. So, I think it is important obviously to focus on
20 the burden on parties and to, again, try to streamline the
21 investigations in the complaints, but it also serves the
22 Commission's and the staff's interest as well.

23 MR. PARKER: I think the agency is doing better on
24 the amount of documents you have to produce. There is
25 always room to improve. But I think, you know, in private

1 litigation if you are up against, I will just blurt it out
2 of -- David Boies, you will produce fewer documents and have
3 fewer extraneous issues than if you are up against an
4 inexperienced lawyer. That is just the way it is. Somebody
5 with the experience has the confidence to make choices.
6 They have the confidence to give up on things and not pursue
7 things. So, I think it is a matter of experience and
8 training at the Commission and I think the same is true
9 here.

10 I would also say in explaining it to a client, I
11 would say, you do not want to have to produce all these
12 documents, but you could be over in Europe where you are not
13 producing many documents. But guess what? At the end of
14 the day, it is one of these things and nobody has got to
15 stand up and say, ready, Your Honor. And I would much
16 rather have that situation than no document final review by
17 a government person.

18 MS. HARRINGTON: Are there any ways do you think
19 that the reason-to-believe decision-making process could be
20 better aligned with burden of proof considerations? Should
21 those be quite distinct steps or could there be better
22 alignment that would perhaps achieve greater speed and
23 efficiency?

24 MR. PARKER: I always assumed they were the same
25 in my view. That if there was reason to believe, then there

1 was a prima facie case. I had never considered the
2 possibility that they were different. So, maybe I am
3 missing the point here.

4 MR. WALES: I am probably not the most, you know,
5 FTC history person to talk to, but my sense is that in the
6 past, in BC cases, there was more of a separation of the two
7 standards and so that you were more inclined to put
8 something into Part III, what would be on a lower standard,
9 a reason-to-believe standard that may be short of the
10 ultimate standard to prevail before the ALJ.
11 And that if you, in the course of continuing to investigate
12 -- I guess there was more discovery that was done post-
13 complaint than maybe there is today. But that if you then
14 investigated further and determined that you were not going
15 to be able to meet the higher standard, you would then pull
16 the matter from Part III.

17 MS. CREIGHTON: Maybe one way to reconcile the two
18 and I think one is what is the quanta of proof and the other
19 is what is the standard of proof. So, I would be quite
20 concerned if the agency decided that there is only a 33
21 percent chance it was right, that the reason-to-believe
22 meant that is good enough as opposed to thinking it was
23 right and this is a problem and it should be stopped.

24 I have tended to think of reason-to-believe more
25 along the lines of what we were talking about, Dave, that

1 based on the facts as you know them, there is a reason to
2 believe this is bad and it should be stopped. Now, because
3 it is not exhaustive and you have not completed all your
4 discovery and there has not been a trial, it may be that
5 other facts come out that cause you to reassess. But it is
6 more than sort of was it the right thing to do.

7 MR. BAER: I agree with that. If it is a
8 preponderance of the evidence standard, at the time of a
9 reason-to-believe finding is made, you have to feel pretty
10 good that the preponderance of the evidence supports the
11 allegations. You know though, and that is why they call it
12 reason-to-believe, is that that is only partway through the
13 process and it has not been fully joined in an adversarial
14 sense and presented and, so, what you are basically saying
15 is, I think, it leans in favor or is on the side of
16 enforcement, but I have to see a full record or I will see a
17 full record later on, which will enable me to decide
18 whether, in fact, all of the evidence supports the
19 preliminary determination one needed to make at that step of
20 the process.

21 MR. BOWIE: I would agree with that. And I think
22 the point about, you know, the amount of evidence is key and
23 I think the staff and the Commission have to keep in mind
24 that you do not have to fully prove the case as if you were
25 proving it at trial. You do not have to have the amount of

1 evidence. Again, I think that contributes sometimes to the
2 sort of delay when things are over-investigated. Obviously,
3 at Commission meetings they can be as intense as any
4 proceeding before a judge. So, I understand why the staff
5 feels that way.

6 But, again, it is important to keep the big
7 picture in mind and that there will be opportunity for
8 further discovery and you do not need to do all of that up
9 front.

10 MS. HARRINGTON: Before we go into a last round of
11 questions here, does anyone here have a question they are
12 dying to have asked about enforcement? We are not the only
13 wisdom. Or maybe we are. Hold that thought. If you have
14 any burning question, just raise your hand.

15 I think last we want to take a look at how we
16 align enforcement work with policy objectives and ask our
17 panelists to give a moment to whether we are doing a good
18 job on that or are there things that the agency could do
19 better in articulating broad policy goals and supporting
20 those with enforcement work.

21 MR. BOWIE: I can start. Obviously, the
22 Commission's policy role is very important, the guidance it
23 provides to industry, we have discussed that at length. The
24 Commission's role in encouraging self-regulation is also
25 critically important. I do think, though, that the

1 conduct might be a good example of how much do you do
2 enforcement, how much do you do guidelines.

3 I think one of the -- and I am a big believer in
4 not jumping before you think. So, I am one of those people
5 who has to be tagged with having urged the Supreme Court not
6 to take LePages because I did not think we had any idea
7 really how to deal with bundling or what the right standard
8 should be. I guess I think, in retrospect, that was the
9 right decision because in the meantime, the Antitrust
10 Modernization Commission has done its study. The Peacehill
11 case has come out. Now, I think if the Supreme Court took
12 one of those cases, they probably would have a fuller
13 academic record on which to reflect.

14 So, there can be a time for everything. And, yet,
15 in the unilateral conduct because the United States does not
16 speak with one voice, it can be hard -- it may be that we do
17 not really know the answers to everything yet. Nonetheless,
18 you could argue that with 100 plus antitrust agencies out
19 there, the United States has lost intellectual leadership in
20 terms of what is the right way to look at unilateral conduct
21 because we do not have any guidelines, because we do not
22 have any sort of systematic way of addressing these issues.
23 I do not think an enforcement case is going to get to there.

24

25 When you know that there are areas where you do

1 not know that the law is clear, thinking about is this best
2 dealt with in enforcement, is there intellectual capital
3 research of the type the Chairman was talking about earlier
4 this morning where maybe the Commission could have done what
5 the Antitrust Modernization Commission did on bundling in
6 some other areas of unilateral conduct. Maybe not take on
7 the whole thing. Then once you have done that intellectual
8 development, then you are in a better place to issue
9 guidelines.

10 Maybe because enforcement is an area where you are
11 conscious of where the law is lacking it can be at least an
12 input into areas that need sort of systematic address by the
13 Commission even if enforcement is not necessarily the only
14 tool or the right tool for that issue.

15 MR. PARKER: I think enforcement is kind of blunt
16 because it depends on what comes up. I am going to ask Bill
17 a question. I always thought that the patent settlement
18 cases were important. I did not like what the parties were
19 doing there. I do not think it is good. I thought it was a
20 bad thing. The first couple of cases were brought when I
21 was there, but Bill headed up all the work. I am going to
22 ask you, Bill, did you think of that as a policy and go
23 after it or did somebody just bring that to you and you
24 said, hey, this is bad stuff?

25 MR. BAER: Sort of halfway in between. These

1 patterns began to emerge and you saw that it was a pattern
2 and said, we have to take a look. Once we took a look, it
3 looked like some of the settlements were clearly over the
4 line. So, we said, let's put some resources into it.

5 MR. PARKER: That is a good example where there
6 was a policy and then some enforcement cases that put meat
7 on the bones. Schering did not go the right way, but I hope
8 there is another case that does go the right way. But still
9 it depends on what comes up. You think unilateral conduct
10 is important if you were going to be a new chair here, but
11 the right case might not come along to make that. So, as
12 Susan said, you have to think of guidelines or something
13 else. When somebody finds in the trade press some new
14 variation of the patent settlement case, that may be the
15 enforcement policy you end up with going after those cases
16 simply because that is the misconduct that people were
17 engaging in.

18 MR. BAER: Just to add on to that. The Schering
19 case also stands for the notion, you can do a lot of good
20 and lose the case. Even though the standard adopted by the
21 Commission was rejected by the Eleventh Circuit, the Supreme
22 Court refused to grant cert, the fact of the matter is
23 settlements now are scrutinized more carefully by the
24 parties to figure out is this defensible from a competitive
25 point of view by light years over the way they were 10 years

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(Applause.)

MS. HARRINGTON: We will reconvene at 1:30.

(Session 2 concluded.)

1 shop that would do policy research and hold hearings and
2 workshops, get feedback from the public and end up writing
3 significant reports. Where he wanted to start with that was
4 with hearings on global and high-tech competition. They
5 were done on both the competition side and the consumer
6 protection side.

7 I have to say that the competition people, we were
8 very jealous because consumer protection people did things
9 like bring in Time Warner to show what it was going to look
10 like when your TV and computer would be the same thing and
11 various things that actually have not panned out. But there
12 was a lot of attention for those and lots of attendance, but
13 not so much on the competition side. But we did end up
14 writing a report out of that that addressed some of the
15 issues that had been longstanding in terms of are we doing
16 geographic market definition right, et cetera.

17 Basically, most of what we did for the next five
18 years came out as a result of those hearings. We began with
19 guidelines on joint ventures, which people had said the law
20 is a mess. We need some guidelines on joint ventures. I
21 suspect that the law continues to be a mess and, so, I do
22 not know that at the end of the day the joint venture
23 guidelines took us a long way down the path, but hopefully
24 they made a contribution.

25 We took a diversion to do business-to-business

1 electronic marketplaces in 2000 when these business-to-
2 business electronic marketplaces were springing up all over
3 the place and so were all these articles in Business Week
4 and other periodicals saying, oh, these are not going to be
5 okay under the antitrust laws. These are definitely going
6 to have problems under the antitrust laws. It seemed to
7 people at the Commission that that did not seem very likely,
8 so we probably ought to hold some workshops, find out some
9 more about them, write a report. So, between April and
10 October, we did that, and those articles went away.

11 After that, we worked on a big patent report.
12 This was in the context of cases that had come along that
13 seemed to raise questions about whether the patent was
14 standing in the way of competition or the patent that was
15 clearly most significant in an area involving a merger was
16 really a quality patent and what was going on with patents.
17 This did not seem like a ripe area for antitrust enforcement
18 because we do not want to get in the middle of assessing
19 patents when we do not have to. But we did end up holding
20 hearings on the patent competition interface and patent law
21 and what was happening in patent law and writing a big
22 report on that.

23 That had also come out of the initial hearings,
24 which identified intellectual property issues that we ought
25 to be paying attention to. This was in the context of 1996.

1 For a long time in my office, I had a Business Week article
2 that made the point that in many industries now patents are
3 as valuable assets or more valuable assets than factories
4 and other types of things. This was a very smooth
5 transition from Chairman Pitofsky to Chairman Muris, who was
6 equally interested in the patent issues.

7 Then we continued with Chairman Muris'
8 initiatives, which were multiple and very fast-paced, and we
9 did a healthcare report. We finished up a generic drug
10 report, which I suspect I will talk about again later. We
11 started off the Authorized Generic Report, which Michael and
12 I can speak to that, which has not happened yet, but will.
13 So, these were all initiatives that were, in some way,
14 related to pharmaceuticals, patents, healthcare, revolving
15 around areas of the Commission's enforcement, but not
16 involving issues that it would be appropriate to take
17 enforcement action on. So, I will stop there.

18 MS. OHLHAUSEN: Joe?

19 MR. KATTAN: My report will be briefer because my
20 experience is a little bit less exciting. I ran the Office
21 of Policy and Evaluation in the Bureau of Competition. I
22 think it probably has some other name today. We had two
23 primary missions. One was evaluating the cases that came up
24 through the Bureau of Competition. And I believe that it
25 was the case back then and remains today that the most

1 important way in which the Commission makes policy in the
2 competition area is through consent orders, through the
3 enforcement decisions that it makes.

4 Very few cases are litigated anymore today. As
5 many of you know, there was an important decision in a
6 merger case, but important decisions in merger cases are few
7 and far between relative to the numerous consent orders that
8 come through the Commission. And the consent orders, people
9 study them, and the complaints and the analyses state public
10 comments very carefully because this is how the Commission
11 broadcasts to the world what its enforcement priorities are.

12

13 So, long before there was a Rambus case, there was
14 a Dell case. And while Rambus was litigated and not only do
15 we have a D.C. Circuit decision, but now we have a petition
16 for re-hearing en banc. There was a Dell case which was a
17 consent order, but which the Commission laid out a policy
18 regarding patent ambush. So, that remains an important
19 function for the Commission.

20 The other function that the Office fulfilled was
21 in the competition advocacy area. This is an area in which

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1 regulatory policies. Back then, at least, the typical
2 scenario was state legislatures imposing restrictions on
3 entry into various markets to protect incumbent interests.
4 So, it was a fairly simple thing to articulate a sound
5 position on behalf of the Commission.

6 I think the one thing that we did not do and I
7 think to this day remains a little bit of a blackhole to me
8 is assess the efficacy of what we were doing. Did it make a
9 difference? Did we submit things in a context in which
10 there was a receptive air? We were never sure about that.
11 That is something that I think is probably worth thinking
12 about in allocating resources, but I would say that this is
13 one of the more important things that the Commission does.
14 So, I think I will stop right there.

15 MS. OHLHAUSEN: Michael?

16 MR. BAYE: Well, I had two times at the
17 Commission. One was many more years ago than I care to
18 admit, as a staff economist. But, more recently, I was the
19 BE Bureau Director for two years. From the standpoint of
20 thinking about policy R&D, it is a fascinating position
21 because you come in, there are all these fascinating issues
22 and you ask the question, well, how do we think about this
23 issue, how do we think about what are the standards for due
24 care and protecting personally identifiable information or
25 what do we view as being the relative role of market

1 definition and effects analysis.

2 So, it is a fun position because you just get to
3 ask questions and expect people to give you answers. But it
4 certainly reveals what the hard issues are.

5 On top of that, the Bureau of Economics has 70
6 Ph.D. economists. All of them, by professional training,
7 are capable of doing research, which if you look at a large
8 university department, it probably has 30 or 35 economists
9 in it. So, you have two big university departments, all of
10 them specializing in the area of economics that are relevant
11 to the agency's mission. So, it feels like you have a huge
12 amount of resources that are available to you. But what you
13 recognize very quickly is that almost all of those resources
14 are working on cases. You have some resources available to
15 do research, but you have to be very selective about what
16 would be most helpful.

17 And, so, during the years that I was here, there
18 were a whole variety of things done. There were workshops,
19 there were studies, there was conference participation and
20 so on. So, I think I will stop there.

21 MS. OHLHAUSEN: So, hearing everybody speak on
22 this panel and drawing on some of the earlier panels, it is
23 clear that there are a lot of different ways to go about
24 setting policy. A chairman might come in and say, these are
25 my policy goals and sort of say, go implement them, go

1 issue out there. We brought it to the chairman and
2 commissioners and they said, yes, that is a great idea,
3 let's do it.

4 So, I think the point is that you have to have
5 enough openness and channels of communication so that you
6 can get in the ideas that are out there and you can
7 encourage that more than we probably have done in the past.
8 So, I would be in favor of that.

9 I will say there was a time when we tried to do a
10 series of luncheons, policy people going over to talk with
11 people who are in the real world doing cases, saying what is
12 happening, what are the interesting issues. And they really
13 thought we were a pain in the neck because they were very
14 busy on their cases and they really did not want to have
15 lunch with us. They just wanted to go back to their cases.
16 So, it has to be more of an -- we are open, if you have
17

1 job is left to the Chairman's office. That is the only
2 place, the Chairman's office and the other Commissioners, to
3 the extent that they are following it.

4 But in terms of setting priorities and being
5 responsible for saying, okay, here is how many people you
6 are using for this, here is how many people you are using
7 for that and knowing whether we -- in terms of knowing
8 whether we are using the resources effectively, I do not
9 know that there is anybody who is responsible for making
10 sure that that information is pulled together and presented
11 and organized in a way that the Chairman and the
12 Commissioners can make some decisions about priorities like
13 that.

14 Frankly, I love it. I think the Commission has
15 been doing fabulous things and it has really been operating
16 on a premise of let all flowers bloom, of which I am very
17 much in favor of. But if you are going to ask the kinds of
18 hard questions that you have presented to us to think about,
19 then I think you need more organizational structure to pull
20 everything together and think about it. So, that is one way
21 of thinking about it is in order to know whether you are
22 using your resources effectively, somebody, some unit needs
23 to be responsible for organizing the information about what
24 is happening.

25 The other part of it is, I found that there could

1 be things going on in BE that I would be very interested in
2 knowing about and might want to do something complementary
3 to that, but I do not know what BE are doing. BE does not
4 necessarily know everything that we are doing. I do think
5 there needs to be more -- and the same is true for BCP. I
6 think there are many more connections between competition
7 and consumer protection policy issues than we have ever
8 thought about before. So, I would be in favor of melding
9 more of the organizations, the policy organizations, which I
10 recognize has just as many cultural issues as any merger
11 between corporations.

12 But I think that in terms of increasing the
13 effectiveness, that is what it would take to pull things
14 together, have people germinate ideas with each other, have
15 the Chairman and Commissioners set the priorities and then
16 go forward, and then, in addition, be open along the way for
17 the good idea that is going to pop into somebody's head and
18 somebody will take it up and run with it.

19 Just one more thing, let me just give you an
20 example. The generic drug study basically came out of an
21 idea that Chairman Pitofsky got reading a magazine article
22 while he was coming back from Europe. And he had a meeting
23 and a bunch of people went to the meeting and said that is a
24 great idea, that is a terrific idea, we should really do
25 that.

1 And only one person came out of that meeting and
2 said, you know what, in order to show that there is really a
3 reasonable possibility of doing this study and we can get
4 the information that we need and there might be something
5 interesting here, we need to get some information from the
6 FDA, and that person was Michael Wroblewski, who actually
7 went to the trouble for about nine or ten months working out
8 agreements with the FDA to get the relevant information,
9 organized it, and then we went back to the Chairman and
10 said, okay, here is why we think this would be a good study
11 to do. Now, we have enough facts to believe this would be a
12 good study to do, at which point we could go to the other
13 commissioners and say this is more than pie in the sky, we
14 have some idea about what we are going to do.

15

1 best and brightest. If they really need someone to write
2 dynamite testimony for the Chairman to give to whatever
3 Committee on the Hill, they will come in and get that person
4 and get that person writing testimony. That comes in all
5 the time.

6 So, what you find is there is really not a focus
7 on making sure the policy projects get done. Now, the
8 policy projects should not be unrelated to the enforcement.
9 But you do need sort of a dedicated core of people. I am
10 not saying anything about what the right number is in
11 relation to enforcement resources or whatever, but you need
12 people who are just responsible for that, who will be
13 evaluated on that basis. Now, I will try to be quiet.

14 MS. OHLHAUSEN: Joe or Michael, did you want to
15 respond?

16 MR. KATTAN: Sure. I think in an ideal world,
17 there would be more of a top-down approach than there is,
18 which is not to say that good ideas do not come from
19 everywhere, they do. But they need to be filtered into a
20 coherent policy. I think one of the big differences, for
21 example, between the FTC and the Antitrust Division is most
22 people who deal with both agencies will tell you, Antitrust
23 Division is more predictable, more disciplined than the
24 Federal Trade Commission.

25 Now, having said that, what does top-down mean?

1 You can come in and set enforcement priorities and say, I
2 want to bring this kind of case or that kind of case. That
3 does not work very well because the cases are either out
4 there or they are not out there, and when you try to create
5 a case in order to advance an enforcement priority,
6 sometimes you wind up bringing some really bad cases simply
7 because you wanted to make a point and establish a precedent
8 and, also, sometimes you just wind up spinning a lot of
9 wheels looking for cases that do not exist.

10 On the other hand, I would bet you that a year
11 before these reverse payment cases started presenting
12 themselves, nobody would have come in and said I want to
13 bring these reverse payment cases because nobody knew about
14 them. But there was a point in time when nobody knew about
15 them and then they became, obviously, a very, very high
16 enforcement priority.

17 I think one of the things that this agency can do
18 is link its policy activities outside the enforcement arena
19 more closely to what it does in its day-to-day job on the
20 enforcement side. A good example of that would be a few
21 years ago, about I guess eight or nine years ago, there was
22 a study of merger divestitures. People were saying, okay,
23 we have all these merger remedies, are they working or are
24 they not working, and they looked into that and issued a
25 report. That actually led to a change in policy -- I am not

1 here to debate whether it was a good change in policy or
2 not. But there was an attempt to craft policy around
3 empirical evidence.

4 I think there ought to be more of that. One of
5 the things I would love to see is additional attempts to do
6 merger retrospectives, for example. Look at cases that were
7 brought or cases that were not brought and say was that the
8 right decision, was that not the right decision, what
9 happened in the market after we did whatever we did.

10 Because, typically, that does not happen. There was kind of
11 an attempt to do that about 15 years ago when I was here,
12 but it never really got off the ground. Merger policy, by
13 nature, is predictive so the agency is predicting the
14 future. It would be nice, at some point, to look back and
15 say did we predict it correctly.

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1 standpoint of the Bureau of Economics and dealing with the
2 rest of the Commission is the plethora of the policy shops.
3 With the Office of Policy Planning, there was very close
4 collaboration while I was here between BE and that office
5 and there was involvement by the Bureau in virtually
6 everything they did. But there are a lot of policy shops
7 out there, and I guess having come here from the outside and
8 spent my brief time here and left, that remains one of the
9 many puzzling features about the internal organization of
10 the Commission.

11 I agree with Joe both in the importance of
12 continuing to study divestitures and of doing
13 retrospectives. The question is, how do you get that to
14 happen? You have to come back to the fundamental problem of
15 even though you have what looks like a lot of resources,
16 really when you get down to it, there is so much to do and
17 so few resources to do it with. So, as with a lot of what
18 the Commission, as a small agency, does, it has to figure
19 out how to leverage what resources it has. So, really it
20 seems to me that the policy R&D trek is not so much what
21 should we do internally, but how do we get -- I shouldn't
22 say we -- how does the Commission get people outside the
23 Commission to do the assessments that it needs to have done.

24
25 There are two main kinds of assessments that you

1 need to have done. One is there are new hard problems
2 coming up. The handling of personally identifiable
3 information is a new problem. There are cases out there
4 that certainly there were companies that were careless with
5 the information, but exactly -- strict liability is not the
6 right thing, but what exactly is the standard. That is a
7 hard problem, it is a new problem. How do you think through
8 that? So, you want to get help on that.

9 And then you want to do the sort of stuff that
10 Chairman Kovacic has been pushing for, which is more
11 retrospective analysis. One of the challenges is,
12 particularly if you are looking to the economics profession
13 to do a lot of this analysis, because a lot of it has to be
14 done by economists in my view, the academic wing of the
15 profession is not all that interested in the policy issues
16 that the agency faces. So, there has to be an effort to get
17 scholars to focus on FTC problems.

18 So, I would have an annual retrospective
19 conference where you decide that there is a process where
20 you say, okay, a year from now, we are going to have a
21 conference, these are the five cases that were close calls,
22 where we tried to block it and the court did not let us or
23 we thought about blocking it, but we did not. And let's get
24 someone outside the Commission to gather what evidence there
25 is about what happened in the market afterwards.

1 One of the problems in getting the research done,
2 getting people outside the Commission to do the research is
3 if what you are trying to do is get published, you cannot go
4 out, look at the available evidence and say, well, here is
5 what happened, but it is very hard to draw definitive
6 conclusion about what the effect of the FTC action or
7 inaction was. But the FTC needs that kind of fact gathering
8 and analysis to be done. But I think you could find
9 professors out there, and I would not limit it just to
10 economists, I would rely more on business historians than we
11 historically have.

12 But you could find people who, if they could say
13 to their dean, the FTC has asked me to do this retrospective
14 and it is going to be at an FTC conference and the
15 proceedings will be up on the web site, you can get people
16 to do that kind of work for you and I think it would be
17 quite instructive.

18 MR. BAYE: If I could just follow up just for a
19 second with a follow-up question. When we use the word
20 "research," there are many different types of research.
21 Some research programs have very short term pay-offs, some
22 have longer-term payoffs. Some are more educational than
23 others. Some involve tool development on the parts of
24 either the attorneys or the economists involved that might
25 bear fruit in further litigation and so forth.

1 because if you did a workshop, you just hear everyone's
2 opinion. But what the Commission really needed was the
3 facts.

4 It seemed to me that that was an issue where you
5 had to have the analysis done internally. This was not
6 something that you could farm out to a conference or
7 something or just some outside academics. It had to be done
8 internally because you had to use the Commission's authority
9 to go get proprietary data. It was the sort of problem
10 where it was clear that the answers to the questions resided
11 within information that the companies had that, in my view
12 at least, it was not that complicated for the companies to
13 produce the information. The analysis you would have to do
14 with the information was not that complicated. So, I think
15 that was right for that particular problem.

16 Workshops have a completely different objective.
17 You have to think through the match.

18 MR. KATTAN: I would like to see more linkage
19 between the research and the Commission's enforcement
20 mission. There are lots and lots of good economics
21 departments out there and I do not think that the function
22 of economics is to produce scholarly research simply for the
23 sake of enriching the literature. It is for, I think,
24 advancing the mission of the Commission.

25 Now, within the confines of that, there is a lot

1 of very interesting work that can be done and the generics
2 study would be one example of something like that,
3 particularly when you are getting into company data that is
4 not something that people on the outside can do. It is
5 definitely something that informs the policy judgments of
6 the Commission. So, it does advance that mission and, for
7 that reason, it is important.

8 In terms of retrospectives, I think you may run
9 into an issue that you may need data that would not be
10 available to somebody on the outside that somebody on the
11 outside could not then even publish. So, the incentive is
12 going to be all skewed. You may just need to decide that
13 these are important issues where we really need to take
14 stock of what we have done and whether what we have done has
15 been effective. And that the only way to do that is to look
16 at past enforcement judgments and issue a report card, to
17 the best of our ability, without unduly burdening the
18 companies involved, which having gone through one
19 investigation, you do not really want to subject them to yet
20 another full probe, obviously.

21 MS. DeSANTI: Yeah, and let me add, I do think
22 that the issues that Joe is raising about the
23 confidentiality of the data that you are going to need in
24 order to do the assessment are important issues. Also, the
25 length of time and the resources that can be necessary to do

1 those merger retrospectives. I think if merger
2 retrospectives were easy, the Commission would do them a lot
3 more often. My recollection is that we had almost one full
4 shop devoted to doing hospital merger retrospectives for a
5 year and a half or two years.

6 Now, I am not arguing that that was an
7 inappropriate judgment, but you always have to look at,
8 okay, what is the opportunity cost of doing that, what could
9 you have been doing with those resources otherwise and are
10 you making the right decision. So, merger retrospectives
11 are certainly important.

12 I think that we have -- here I am just like to
13 Michael -- the FTC has a hard time knowing exactly which
14 ones to do when because it is a big commitment to do that.

15 MR. SALINGER: Right. So, one of the big
16 questions is when you do the retrospective, do you have to
17 come up with the definitive answer? If that is the
18 standard, it is almost never going to occur. So, the
19 Commission can pick a case to do a retrospective on and
20 spend six years doing it, and even then it is rare that you
21 really get the definitive answer because we might be able to
22 observe what happened after the merger, but it is not like
23 the movie Groundhog Day where you get to replay the world
24 several times with different policy actions.

25 It is true, within the economics profession and

1 perhaps it was also true within the Commission, that there
2 was a reluctance to go out and get what facts were
3 relatively easily available and lay out the facts,
4 recognizing that there might be a variety of
5 interpretations, that you might get the facts. But to have
6 a process in place where you would do a quicker look at a
7 larger number of cases than the Commission has been doing.

8 MS. DeSANTI: And then the question is when the
9 Commission puts that out there, what is the reaction going
10 to be from the Commission's public, really the antitrust
11 bar, the economists who follow these things? If the
12 Commission puts it out and it is not definitive, it is sort
13 of a rough understanding, does it get credibility? I do not
14 know the answer to that. I know there are great lawyers
15 like Joe Kattan around who can tear those kinds of things
16 apart. So, I think there is a tension.

17 I agree with you. I think it would be much more
18 useful to do more often something that is much farther from
19 perfection. But I think given the high standards for the
20 economics that people like you, Michael Salinger, have
21 helped the Commission to adopt, it is hard to get the
22 Commission to a point where it says, well, that is okay, it
23 is probably right.

24 MR. SALINGER: But what I am suggesting is it
25 would not be the Commission putting it out there. You would

1 it to death. You want to choose a set of cases where policy
2 judgments were made and see whether those policy judgments
3 were correct. Is the received wisdom about rate of
4 technological change, for example, is that a good thing or
5 is that something that requires recalibration?

6 I can cite a case that the Commission brought
7 about ten years ago against a monopolist in workstations.
8 That company three years later was kind of a nobody in
9 workstations. Why was that judgment made that the company

10

1 we hope will be following that guidance?

2 MR. KATTAN: I think you cannot. There are too
3 many other forces in the world, of which the FTC is only
4 one. So, suppose the FTC issues a guideline that says, the
5 following conduct is acceptable. Well, there are lots of
6 private plaintiffs out there who can sue in over 100
7 judicial districts. I have not counted them recently. If
8 it is a multi-national company, they can complain to the
9 foreign antitrust enforcement agencies.

10 So, guidelines that say this is good, this is not
11 so good, I am not terribly enthusiastic about those because
12 I do not think that unless they can influence policy outside
13 the FTC in a profound way -- and that is a very difficult
14 thing to do -- it strikes me as an exercise in futility.
15 Maybe that is a bit too harsh. I am being very blunt.

16 MR. BAYE: We lack market power. Is that what you
17 are asserting there?

18 MR. KATTAN: That is clear.

19 MS. DeSANTI: Basically, yes. Well, that is a
20 relief. I agree with Joe in that I am not a big fan of
21 guidelines. Having been through the guideline writing
22 process too many times, I think too many times they end up
23 being bland and relatively uninformative. No matter what
24 people's intentions were at the beginning to actually
25 clarify things, inevitably disagreements arise and you go

1 towards the middle rather than actually make progress in
2 clarifying things.

3 I will say there are some exceptions and I think
4 the guidelines for intellectual property licensing would be
5 an exception. They came along at a time where the case law
6 was older case law, did not include the new thinking that
7 had taken place and those guidelines came out and they were
8 very significant. If you are in that kind of situation --
9 and, certainly, that is true with the merger guidelines.
10 You have to have merger guidelines because the case law from
11 the Supreme Court is from 1974. So, you really need to have
12 merger guidelines that will give people information about
13 how the agency does its analysis.

14 Now, are they exactly where they should be, blah,
15 blah, blah? I do not know. But there are some guidelines
16 you have to have. But, in general, I do not see guidelines
17 as a particularly useful way to go.

18 I think it is easier. I agree with Joe, I think
19 that the statements that have come out about cases that are
20 not being brought are very useful. I think that you can do
21 some of the guidance implicitly in reports. When we did the
22 business-to-business electronic marketplaces, we had a whole
23 section on exclusive dealing and exclusivity and blah, blah,
24 blah. It did give people insight into how the agency was
25 thinking about those issues. They were not guidelines that

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1 from staff. They are viewed by the Chairman's office, but
2 they do not go to the Commission for review. Some of these
3 other reports really do go to the Commission for review and
4 they come out as Commission reports. So, to that extent,
5 they contain words that the then extant Commissioners have
6 blessed. So, whether they will suffice for the next
7 commissioner who comes in, who knows.

8 MR. SALINGER: I am not sure that distinction --
9 it is appreciated by the people in the room, but I am not
10 sure it is really appreciated on the outside.

11 MS. DeSANTI: And the advisory opinion letters,
12 for example, in healthcare on clinical integration, what is
13 considered clinical integration? It would be great if the
14 Commission would decide to take on an advisory opinion
15 letter, for example, and say what it believes would
16 constitute clinical integration. At the moment, I think
17 what is well known and what people operate on, the basis of,
18 is what the healthcare staff says is clinical integration.

19 I know we just had that workshop at the end of
20 May. So, stay tuned I am sure is the message.

21 MR. SALINGER: You said "we" again.

22 MS. DeSANTI: But it seems to me, in the absence
23 of the Commission deciding that it wants to differ from
24 staff in a particular area, then people are going to be
25 using those advisory opinion letters as though they came

1 down from the mountain.

2 MR. BAYE: Can we talk a little bit maybe about
3 the research and development that would go into a process
4 whereby staff would be in a position to make a
5 recommendation either to the Chairman in the case of an
6 advisory letter or to the Commission, because obviously a
7 lot of people have different views on retrospectives. I
8 think Joe was suggesting there may be some value in doing
9 retrospectives, so to speak, on advocacy letters to find out
10 what the --

11 MR. KATTAN: Oh, no, I do not think I was saying
12 that. What I was saying is it would be useful to have
13 better information as to the efficacy of the Commission's
14 efforts. Are you just throwing something into a bottomless
15 sea where it just disappears or are you actually influencing
16 policy? I do not think any of us knew that and maybe things
17

1 from evaluating how well we did. I guess what I would like
2 us to focus on, if we might, is how we ensure that the staff
3 at the Commission is in a position to provide the best
4 possible economic or legal advice to the Commissioners or
5 the Chairman who ultimately are going to make
6 recommendations. Because that is an important piece
7 potentially of a research agenda to ensure that those
8 resources are in place, ready to be deployed either for the
9 short-term horizons that we have to file a comment on
10 something, on the one hand, or maybe the longer-term studies
11 that we do at the request of Congress.

12 So, if you could each say a little bit about how
13 the agency could be structured to better facilitate that,
14 that would be very helpful.

15 MR. KATTAN: To me, the best example of that kind
16 of thing being done very effectively is -- and it goes back
17 a long way, but just kind of reflects how long I have been
18 away from this institution -- is the Commission's effort in
19 the area of prescription glasses where it did the studies
20 that supported the policy of loosening entry requirements
21 into the business of dispensing prescription glasses. I
22 think it did a
23 pretty effective job advocating that policy. I think
24 it can take a fair amount of credit for the fact that there
25 are these one-hour glasses places all over the place that

1 really did not exist when the Commission started its efforts
2 because the states, very jealously, regulated entry into the
3 business at the behest of the incumbents.

4 MS. DeSANTI: I think Maureen's shop gives us
5 several examples of focused efforts that really make a
6 difference in the advocacy area. I think that because your
7 advocacy letters do not tend to be spread out all over the
8 place, but rather they are focused and targeted, there is a
9 better chance that you are actually having an impact and
10 states are talking with each other and there is a better
11 chance that they understand the issues that you are raising,
12 especially when you do it in conjunction with workshops and
13 the reports that then come out of the workshops. So, I
14 think that advocacy is in a better place than where it was
15 because of your more focused report.

16 I think it is still very hard if you are
17 advocating something that the car dealers are all against.
18 The car dealers have lots of lobbyists in state capitals and
19 you are probably not going to have a significant impact
20 there. So, you still have to make some kinds of
21 assessments.

22 And I guess in response to your question, Michael,
23 I would say, again, I do think there are reasons for every
24 single policy shop that exists. Every single policy shop
25 that exists does slightly different things. How this came

1 was not the person who proposed the bill, we also queried
2 them.

3 But it is kind of interesting -- it is public and
4 I would be happy to share it with folks -- but one of the
5 things that we ran into was the fact that we had to go
6 through the OMB Paperwork Reduction Act process to do this.
7 So, that just brings up the question of what hurdles and
8 constraints are there on research and data gathering, and if
9 you had your druthers, what would you get rid of in that
10 collection of stumbling blocks? Any thoughts?

11 MS. DeSANTI: I can speak to the OMB Paperwork
12 Reduction Act having had much experience with it, more than
13 I would like. Although I have to say, at the end of the
14 day, I think that the OMB Paperwork Reduction Act actually
15 does accomplish what it set out to do, which is it makes the
16 agency think through very carefully what are you actually
17 going to ask for and what is the reason that you are asking
18 for this from ten or more entities? It is a very 5dmw1.00000 0.0000 0

1 questions and responds to comments to the extent that the
2 agency thinks that is appropriate. Actually answers
3 comments that you are not responding to and explain why you
4 kept the questions the way you did. And then finally going
5 through OMB review. That really forced us, on the generics
6 drug study, to think very carefully exactly what we were
7 asking, how we could make it less burdensome. And at the
8 end of the day, once we got that approval, there were no
9 motions to quash those subpoenas.

10 So, I think at the end of the day, by the time
11 those subpoenas were -- the Section 6B CIDs or civil
12 investigative demands or whatever it is that they are called
13 precisely, by the time those go out to companies, there has
14 been plenty of press discussion about this. Companies have
15 actually looked at the questions and thought about whether
16 they are going to be able to be responsive without breaking
17 the bank at the company and you have really gone through,
18 ahead of time, that whole process. So, once you get the
19 approval, then you can go along more expeditiously.

20 So, despite the fact that the OMB Paperwork
21 Reduction Act is a total pain in the neck, at the end of the
22 day, I tend to support it. We have all complained about it
23 from time to time.

24 MR. SALINGER: Well, it is not the Commission's
25 position to support it or not support it. But it is a

1 that Maureen mentioned. Another constraint that sometimes
2 impacts the ability to do research is the differing
3 objectives that we have within the agency. On the one hand,
4 we are commissioned to educate. Our history going back to
5 Bureau of Corporations involves us doing fundamental
6 research. But research kind of implies that you do not know
7 what the answer is before you are going to get the result.
8 When you are in the midst of litigation, hypothetically, and
9 you are doing retrospectives, hypothetically, there is some
10 risk that fulfilling the one mission might impede the
11 progress of people that have invested a lot of resources on
12 another mission. How does one balance that off? Is it
13 appropriate to make some trade-offs there or not?
14

1 whether the Commission's approach to grocery store mergers
2 historically had been the right approach. In that
3 conference, I think we asked a lot of hard questions and we
4 were willing to take the risk.

5 The issue comes up with the oil industry stuff.
6 On the one hand, the Commission has taken a policy position
7 that by and large the markets are competitive and that it is
8 important that the government not interfere with the proper
9 functioning of those markets. But every time the Commission
10 issues a report talking about how competitive the markets
11 are, the next time the Commission tries to block an oil

12 ~~merge because the Commission is not a party to the merger~~

1 and the merger guidelines are exceptions to that, although
2 when was the last time anybody looked at the guidelines and
3 saw the number 1800 and did not get a chuckle. But that
4 aside, that is one of the reasons you do not get very good
5 guidelines because people think about every last possible
6 contingency of what might come up with a case and they need
7 to move that comma or strike that clause because who knows,
8 five years from now there might be a case where somebody
9 might cite that against me.

10 In the context of retrospectives, which you are
11 going to be looking at the number of cases and generalizing
12 from one case that was looked at a few years ago and saying,
13 well, it turns out that it was not that hard to enter that
14 industry or whatever, I think is less likely to raise that
15 kind of tension, although it can, absolutely can, than
16 guidelines which, by their nature, tend to be more sweeping.

17
18 But, again, to the extent that there is a tension,
19 I would go back to what I said at the beginning. The
20 function of the agency is to enforce the law soundly, not to
21 win cases for the sake of winning them.

22 MS. DeSANTI: The only other thing I would add is
23 if you use Michael's idea of going outside the agency and
24 using business historians more than we have to do analyses
25 that could even be focused on critical issues like entry, if

1 that was the critical issue, then there is going to be less
2 of a concern that it is taken from the mouths of agency
3 officials.

4 MS. OHLHAUSEN: Some of you have already touched
5 on some of the Congressionally mandated studies that we have
6 been required to do. Susan, I think you suggested that for
7 the Authorized Generics Study, that it was something where
8 we maybe kind of signaled to Congress we might be interested
9 in doing or maybe not.

10 MR. KATTAN: Did you signal that?

11 MS. DeSANTI: I did not signal that.

12 MS. OHLHAUSEN: Okay, I am sorry.

13 MS. DeSANTI: I would not say anything about
14 anybody who might have signaled that, but it certainly was
15 not me. I have no Congressional connections.

16 MS. OHLHAUSEN: But, occasionally, some of the
17 studies we have been required to do seem to be when the
18 legislative process has reached a deadlock and they cannot
19 decide on balance what is the right answer, so they kind of
20 toss it over to us. I just wanted to get folks' opinion on
21 is this a good use of our resources, is this something we
22 should sort of tacitly encourage or should we sort of say,
23 wow, we would rather pick our own slate, not that we could
24 go say that to Congress. I am not that -- Anne is laughing
25 at me.

1 really does not make any difference, who look at competition
2 in terms of whether things are fair or not and do not really
3 see the value of competition in terms of growing the
4 economy, lowering prices, producing innovation, increasing
5 quality.

6 I think the one thing that the consumer protection
7 side of the FTC has really stepped out on and made its mark
8 on is consumer education. I think it would be worthwhile
9 for the FTC to think about how could we get across more to
10 all of our constituencies the value of competition. I do
11 not have any instant answers about how one would do that.
12 But it is a problem that I see, in general, in terms of
13 getting an understanding of why what is done on the
14 competition side is important.

15 Bob Pitofsky used to say that in his Congressional
16 visits people only wanted to talk about the consumer
17 protection issues and they could have cared less about any
18 merger that was going on unless it involved a foreign
19 national and then there might be some interest.

20 MR. KATTAN: Or a video company.

21

1 kids. Let's try to generate materials within the Commission
2 that professors could use to kind of make this point to
3 their students. And I wrote Greg Mankiw, who is the author
4 of the leading principles text book, and he was all for the
5 idea and was anxious to get materials from the Commission.

6 But there are people out there who make a living
7 communicating economics to college students. As talented as
8 the staff at the Bureau of Economics is, its comparative
9 advantage is not in writing materials for college students.
10 So, I think you really need to have an effort where the
11 broader profession is enlisted to help generate these
12 materials. One of the values of the workshops, of some of
13 the workshops we do, is it brings professors into the
14 Commission and gives them some exposure to the problems.

15 One of the best workshops that was run when I was
16 here was the behavioral economics workshop. On the way back
17 to Boston that night, I ran into one of the workshop

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1 trying to educate the public about the value of competition
2 is that it becomes viewed as being ideological. It is a big
3 problem with the gasoline pricing stuff, that the critics of
4 the Commission will say that it is no longer an honest
5 broker, that it is defending its past actions and that it
6 has this religious belief in free markets. That is not
7 right, but when the Commission takes on this mission of
8 trying to educate the public, it has to be mindful of that
9 risk.

10 MR. KATTAN: This all strikes me as a Herculean
11 task. It is one thing in the consumer protection area to
12 publish a brochure that says here are the ten things you
13 should worry about before you sign a piece of paper that
14 gives all your money away or whatever it is that they do. I
15 do not mean to caricature it, I am just not as familiar.
16 But they can give very practical bits of advice to consumers
17 that can be useful. What to do when you sign up for a
18 credit card, how to identify a contractor -- what to learn
19 about a contractor before you sign a contract.

20 Educating 300 million people about the value of
21 competition, boy, that is a tall order. I do not think the
22 Commission should even try to take it on. It is too big
23 even for this Commission.

24 MS. OHLHAUSEN: One of the things that we see in
25 the advocacy area is everyone is for competition in general

1 --

2 MS. DeSANTI: Exactly.

3 MS. OHLHAUSEN: But if it is hurting their
4 business or their constituents or whatever, then, well, wait
5 a minute, that is not really what we meant. So, I think the
6 ability to actually have evidence that this does benefit
7 consumers on balance is sort of a good way to overcome just
8 saying it as an ideological belief. Actually, if you
9 restrict the supply of X, the price will go up or
10 availability whatever, you know, that kind of thing. But I
11 do understand sort of the -- oh, it is great in general, but
12 in particular.

13 MS. DeSANTI: Yes.

14 MS. OHLHAUSEN: Mike, did you have something else?

15 MR. BAYE: I was wondering if Joe and Michael
16 would kind of comment. Susan kind of had a model where I
17 think she suggested having -- not to put words in your mouth
18 -- kind of one big pot where all of the research is being
19 coordinated and so forth. I just was curious whether each
20 of you shared that view or if you had an alternative model
21 that might be worth our considering.

22 MR. KATTAN: I would favor a system in which there
23 is more coordination. Good ideas can come from anywhere,
24 but there needs to be a filtering mechanism to evaluate
25 ideas not only in terms of are these good ideas, is this

1 worthwhile research, but is this also consistent with our
2 priorities and something that we ought to be doing in light
3 of our resource constraints. So, I would favor more
4 centralization of the decision-making, and as I mentioned at
5 the beginning earlier on, tighter coordination between the
6 enforcement functions and the policies so that the policy
7 activities are directed at advancing the enforcement
8 function, not necessarily advancing it in the sense of
9 leading to more cases. It could be quite the opposite and,
10 in many cases, I would think that it would be that.

11 MR. SALINGER: The balkanization of the research
12 shops is a problem. So, I think I would have a single
13 research shop except the economists.

14 **(Laughter.)**

15 MR. BAYE: So, who does the quantitative work in
16 the other shops?

17 MS. DeSANTI: Competition is good except for me.

18 **(Laughter.)**

19 MR. SALINGER: Well, look, there are economists in
20 the Office of Policy Planning which I think is a completely
21 appropriate thing. And there would be close coordination
22 between the research shop within the Bureau of Economics and
23 the Office of Policy Planning, that shop. The reasons to
24 have a group of economists together -- and there are other
25 activities, even something as apparently trivial as the

1 seminar series, which is sort of a bureau-wide thing is
2 actually quite important to the way the bureau operates, the
3 way it interacts with the profession, and I would not want
4 to compromise that by pulling the policy people entirely out
5 of BE.

6 MR. BAYE: Should we open it up to any questions
7 the audience has?

8 MS. JUDY: Hi, I am Nancy Judy.

9 MR. BAYE: You should go to the microphone, Nancy,
10 I think.

11 MS. OHLHAUSEN: That way it will get picked up on
12 the transcript.

13 MS. JUDY: Hi, I am Nancy Judy. You all talked a
14 little bit about doing education on the benefits to
15 consumers and to the American public on competition. One of
16 the things that we have wondered is whether or not we should
17 be working with DOJ to do that and with other competition
18 authorities around the globe. So, I wonder what your
19 thoughts are, first of all, about U.S. competition and about
20 a worldwide effort to do a competition matters campaign?

21 MR. SALINGER: Well, Dennis Carlton and I had
22 definitely had conversations where we said, boy, wouldn't it
23 be a great idea if we did this in collaboration and it did
24 not happen. The reason for it is what I was talking about
25 before, which is I am not convinced that it is the best use

1 of the agency resources. Both agencies should be working
2 with the broader profession to help make that case.

3 MS. DeSANTI: I would agree with that. Although I
4 obviously feel more strongly than Michael does that I do
5 think it is an appropriate mission for the agency. Just
6 because you start trying to do something does not mean you
7 are really trying all at once to educate 300 million U.S.
8 citizens. I think to the extent that you could coordinate
9 with DOJ that would be great. I think it is much harder to
10 coordinate beyond that because in different societies there
11 are different values. So, competition does not always
12 translate to mean the same thing.

13 I would just suggest starting in the U.S. and
14 trying to figure out what might be helpful rather than
15 trying to take such a large bite at once.

16 MR. SWIRE: Hi, I am Peter Swire. I am a law
17 professor and a fellow at the Center for American Progress.
18 This is a question about research in a world of Web 2.0.
19 So, there is a world of wikis, of getting lots of wisdom of
20 crowds, of getting input from faraway people who might know
21 little tidbits that are useful. That will not work when it
22 is proprietary data for generic drugs. But are there any
23 places you see going forward with research with a staff of
24 economists and other researchers where the FTC might be able
25 to leverage all the smart people out there in the rest of

1 the world and improve the research process for the
2 Commission?

3 MR. SALINGER: I think it is important for the
4 Commission to know what the problems are that it
5 wrestles with and that should be done in a modern way. But
6 exactly what that effort would look like, I do not pretend
7 to know.

8 MR. BAYE: Any other questions?

19 ~~No response.)~~

20 MS. OHLHAUSEN: It would be nice in

10

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1 **SESSION 4: THE AGENCY'S EXTERNAL RELATIONSHIPS**

2 MS. OHLHAUSEN: If everyone would take your seats,

1 titles. And co-chairs the State Federal Cooperation
2 Committee.

3 Ari Schwartz is the Vice President and Chief
4 Operating Officer for the Center for Democracy and
5 Technology and he leads the Anti Spyware Coalition, a group
6 of anti spyware software companies, academics and public
7 interest groups dedicated to defeating spyware. He serves
8 as a member of the Department of Commerce National Institute
9 of Standards and Technology Information Security and Privacy
10 Advisory Board. Boy, you guys have long titles. And the
11 State of Ohio Chief Privacy Officer Advisory Committee.

12 Anna Davis, in the pink, is the Executive Director
13 of Government Relations at the National Board for
14 Professional Teaching Standards. She previously worked in
15 the Office of Congressional Relations and in Public Affairs
16 at the FTC for no less than five chairmen, including Jim
17 Miller, Dan Oliver, Terry Calvani, Tim Muris and Debbie
18 Majoras. So, thank you all for being here.

19 Jeanne is going to start us off with the first
20 question.

21 MS. BUMPUS: I thought before we got into
22

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1 public and Congressional perception of consumer protection
2 and competition, and that is a perfect example. There is a
3 whole lot of alignment on the consumer protection side. But
4 on the competition, there is huge misunderstanding and
5 disconnect.

6 One of the favorite calls I ever took when I was
7 in the Congressional Relations Office was a staff person
8 called up and said, I heard from a constituent and he is
9 very upset about gas prices. And I said, yes, ma'am, I know
10 there is a lot of that going around. And she said, well, he
11 is complaining because he has to drive around all over the
12 place, all of the gas stations in his city have different
13 prices and he has to drive around to find the lowest. Can't
14 you make them all the same?

15 **(Laughter.)**

16 MS. DAVIS: So, it was sort of hard to know how to
17 answer that and sound respectful. But that is a piece of
18

1 MS. DAVIS: And that is an exceedingly good
2 question because usually when I give a lot of deference to
3 Congress, I am talking about the entity as a whole. You
4 have a house that is made up of 435 members and 100
5 senators, but most importantly you are looking at the
6 authorizing and, to maybe a secondary level, the
7 appropriating committees. It is generally their guidance
8 that the agencies will look to. For the Federal Trade
9 Commission, that is the Commerce Committees. But I will
10 also legislate the whole Commerce to

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1 tension there between the way that the consumer groups just
 2 feel as though the lack of responsiveness is partly the
 3 fault of the Commission itself.

4 My view on it sort of changed when I first sat
 5 down with Chairman Muris and Howard Beales when they said,
 6 you know, you have to give us cases. That is the way we are
 7 going to be able to respond to the problems that you raise.
 8 One thing that we had been pushing up to that point was the
 9 idea when something that was truly invasive of privacy was
 10 buried in an end user license agreement that was supposed to
 11 be part of a contract with a consumer. We were pushing the
 12 idea that that was unfair. There were saying, well, you
 13 need to show us some actual cases.

14 Spyware cases came around and we were able to show
 15 that. But that process took about five years to get to the
 16 point from where we were able to find the right case, lay
 17 out all the details. It took us months to lay out the
 18 details and then turn it over to the FTC. It took them
 19 eight months to bring a case like that and then another five
 20 months to bring a case like that and then another five

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1 Chairman Muris, but Chairman Muris would actually call us
2 proactively and say, come in in this period of time and try
3 and work out a date with us that would fit with his
4 schedule. So, I think it is two different kinds of
5 attitudes there.

6 Chairman Kovacic has already had a meeting where
7 he brought in consumer groups and had us sit down and talk
8 to him. So, we are going back and forth now on kind of how
9 do we go about having this kind of communication with
10 consumer groups. I think that is confusing to consumer
11 groups. We hear the companies say, oh, they go and meet
12 with every commissioner and then when speaking with the
13 commissioners some of them like us going in, the consumer
14 groups coming in and meeting with every commissioner because
15 they feel left out of the discussion.

16 If you go and meet with the staff, that is a
17 pretty big investment of time to try and even set up all of
18 these meetings and get staff in there. It is one thing if
19 you have a PR firm that runs it the way that most companies
20 do. Consumer groups do not have that luxury. So, it is not
21 really set up in a way that is friendly to be able to do the
22 kind of vetting of issues the way that industry does from a
23 consumer group perspective. So, I think we have been
24 successful at it at CDT, but I hear other groups that feel
25 as though they are not being heard in the process because

1 they do not understand the subtleties and the changes over
2 time and they just cannot designate resources to keep up
3 with how it has changed.

4 MS. JUDY: If you do not mind, I am going to probe
5 just a little further.

6 MR. SCHWARTZ: Sure.

7 MS. JUDY: Are there other government
8 organizations that do it better than we do that you could
9 point to? For instance, I wonder in some organizations they
10 have industry liaison offices where the consumer groups and
11 others have an office that directly represents them within
12 the organization, or are there other examples that you know
13 of that might guide us if we think --

14 MR. SCHWARTZ: That is a really good question. I
15 hear the same groups complain probably even more bitterly
16 about the FCC in terms of the lack of transparency there.
17 But I think you would have to ask different groups that work
18 with a lot of different agencies. Personally, I do not work
19 with as many -- I only work with three or four agencies and
20 only a few of them have a law enforcement arm to them. So,
21 it is sort of a different situation when you are talking
22 about NIST or about some of the other agencies that we work
23 with, like DHS, for example.

24 I think that some of those agencies have had
25 workshops in the way that the FTC does and have advisory

1 not need any more. And I understand the political reasons
2 for that. But I think being honest and direct about it,
3 that there are a lot of different priorities in the
4 government and, of course, you could use more resources,
5 would have been a better route than saying, oh, we are doing
6 fine with what we have even though we cannot bring the
7 number of cases that we want to bring in the number of areas
8 we want to bring them.

9 So, I think that that cut down on the FTC's
10 credibility for a lot of the consumer groups and a lot of
11 the people on the Hill that listened from that perspective.

12 MS. BUMPUS: You raised a point and I wanted to
13 pose this to the whole panel. You said that consumer groups
14 were unaware of the limitations on the FTC's ability to
15 adopt rules and were frustrated by the case-by-case
16 approach. It sounds like they are frustrated with our
17 enforcement methodology and would like to see us be more of
18 a regulator in the mold of the FCC or some other agencies.
19 How do the other panelists feel about that? Do you think
20 that a case-by-case approach is the best way to accomplish
21 our mission? I know that there are proposals in Congress
22 right now that would expand our rule-making ability and
23 allow us to do APA rule-making on any topic. What are your
24 thoughts on that?

25 MS. FENTON: I do not think there is a

1 making brought by one or two members of Congress in a
2 disproportionate way where their colleagues are not as
3 inclined to step up and defend the agency and point out that
4 this may not be in the public good. Also, members step up
5 and try to shut down when they think something is going
6

1 When the Commission deals with Congress, as I said
2 at the beginning, the Commission owes its existence to the
3 Hill. They could decide tomorrow we were ineffective,
4 redundant, antiquated and get rid of us. Not likely to
5 happen at all, but that possibility exists. But on the
6 other hand, you want to take cues from them, but maintain
7 your autonomy and independence and do what you believe is
8 right. Part of that is maintaining good relationships and
9 communications so that when you are challenged, you have
10 support enough to be able to overcome it.

11 MS. JUDY: Kathy, let's talk for a minute about
12 the Antitrust Section. There are a couple of different ways
13 we can go at it. The first way that I wanted to pose to you
14 was it seems like the Antitrust Section is a really great
15 example of communication of service to the members and
16 getting information out there. There seems to be somewhat
17 of a vacuum, though, in the consumer protection area and I
18 know that the Antitrust Section is sort of stepping in. If
19 you want to address that a little bit and then I will follow
20 up with a question.

21 MS. FENTON: Certainly. In part because of our
22 historical focus on the FTC and its dual role in the
23 antitrust and consumer protection area, the Antitrust
24 Section has tried to step into a bit of a vacuum with
25 respect to the ABA as a whole. There really is no logical

1 clearly a whole host of other things we could be doing, but
2 we are discovering a limiting factor is that many of the
3 people that we would like to meet, that we would like to be
4 interacting with, are not ABA members. Quite frankly, we
5 think it is because they never saw a value or a use to that
6 membership and it is the historic chicken and egg problem.

7 Until you get the critical mass, you are not going
8 to find people who focus in either industry associations or
9 other types of private organizations that focus much more
10 directly on their areas to participate through the ABA.

11 MS. JUDY: Is there more that the FTC can do to
12 support that or to support the Section in general?

13 MS. FENTON: Well, we have benefitted enormously
14 by contributions from people within the Bureau of Consumer
15 Protection over the years. They have been willing to
16 participate in our programs. We sometimes feel we are going
17 to the well too many times by demanding support from folks
18 like Leslie Fair, among others.

19 But the ability to convince the sort of broader
20 FTC staff of the benefits of participating in these kind of
21 private bar activities is something that we would obviously
22 be interested in exploring going forward. What can we do to
23 make it easier for folks to participate and we hope that
24 some of the modern adoption of technology, things like
25 telephonic conferences that allow people to participate by

1 just listening in over the lunch hour instead of actually
2 going in person to a meeting and those meetings tended to be
3 New York or Washington, which cuts out large swaths of the
4 country, will allow us to do that.

5 MS. FISHER: Before I make any other comments, I
6 need to make my disclaimer that these are my opinions and
7 not that of my attorney general. I also need to make this
8 disclaimer that I have been in antitrust for almost 20 years
9 and know very little about the consumer side. Today has
10 really made me think harder about trying to integrate our
11 offices. We actually used to be the one division and still
12 were not integrated. So, as the FTC is struggling with
13 that, we need to struggle with that.

14 I thought it was interesting earlier when Tim
15 Muris was talking about the fact that your agency is much
16 more consumer protection and resources and people and that
17 kind of thing and in the public eye, but in the legal
18 community it is the antitrust that gets more of the focus.
19 I think that is certainly true from the state's perspective
20 as well. The NAAG group is much more, I think, cohesive and

1 I also think it is true that out in the public,
2 the public knows the FTC deals with consumer protection, and
3 as we have been going out lately and doing Antitrust 101 to
4 our public purchaser agencies, to the public purchasers in
5 our public agencies and we give them a throwaway line, DOJ
6 and FTC also do antitrust enforcement. I have gotten
7 several comments that people did not know that FTC was in
8 antitrust. They are not the general public, but I did think
9 that was interesting and probably fairly accurate based on

10

1 Karen Berg is our liaison and she is wonderful.
2 If we have a question about who is doing what case, who is

1 there anyone in the Bureau of Consumer Protection that you
2 talk to?

3 MS. FISHER: I do not know.

4 MS. JUDY: That is something for us to think
5 about.

6 MS. BUMPUS: I think Rebecca works on competition
7 issues.

8 MS. JUDY: Well, yes, but still, but still.

9 MS. FISHER: I have no idea.

10 MS. DAVIS: I would give the FTC high grades for
11 its ability to try to communicate with Congress. The
12 operative word is try. Congress is a difficult constituency
13 in this respect, and I say that with great fondness and
14 affection. But they are very, very busy. They are driven
15 by what is on their schedule for the day. So, you hear from
16 them when they want to talk to you and they do not always
17 have a lot of time for you in any other circumstance.

18 Going back to the example, the Clearance
19 Agreement, it was shocking to them that the FTC and DOJ had
20 worked out this informal agreement that was not really set
21 in stone anywhere, but that FTC would always do the oil
22 mergers and they would do the steel mergers, and this was
23 just stunning to them. Yet, arguably, the Commission
24 perhaps could have done a better job educating, but it was
25 not anything that you would have been able to get on their

1 any one agency had it all, but it was not something new to
2 us. It still was a very involved process, and part of it is
3 just because of the way they are structured, it is hard to
4 really get their attention. But I would expect that
5 Congressional staff would give the agency high marks,
6 particularly relatively, that the agency's Office of
7 Congressional Relations and the Commissioners make a strong
8 effort to communicate. A lot of this is done through the
9 Public Affairs. Technology has made it much easier to keep
10 track of what is going on.

11 Also, when I was in the office, we set up a
12 Congressional outreach and we would go out proactively to
13 Congressional offices and say, would you want to link to us
14

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1 Council. They participate actively in those meetings. We
2 get updates four times a year in terms of what the agency is
3 doing. That is enormously valuable and I would like to
4 think it is something of a two-way street.

5 Because as a member of the leadership, that means
6 that the FTC Chairman and the Assistant Attorney General for
7 Antitrust also get communicated -- and it may be a burden
8 from their perspective, but I think there is also a benefit
9 -- on all of the leadership traffic, the email, the
10 circulations, et cetera. That, I would think, gives us you
11 a pretty good insight into what is the focus of attention
12 from the antitrust section both on consumer protection and
13 antitrust issues. Are we thinking of filing comments? Is
14 there an Amicus brief proposal? What type of initiatives in
15 the programming area are we thinking of?

16 And it is not at all uncommon, as a result of a
17 draft proposal being circulated, to get a very friendly and
18 discreet telephone call from one of the agency heads saying
19 that if you are thinking of this program, you definitely
20 want to talk to X or Y or Z in my agency who would be able
21 to help you with ideas for speakers and the like. So, that
22 kind of formalized relationship role or maybe to go so far
23 as even to suggest imbedding people in various private
24 sector organizations, I think provides a reciprocal benefit
25 both to the organization and the agency and I suspect there

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1 I think cases like CAN-SPAM where it has been clearly
2 spelled out write rules in these areas, I am sure the agency
3 does not want to go through 20 rule-makings for every new
4 law that passes, but I think in that case they did a very
5 good job. You guys really did it quickly, a lot of
6 different details. I hear very little complaints in general
7 from either the industry or consumer groups about the
8 decisions that were made. Either people did not like CAN-
9 SPAM or liked CAN-SPAM, but there were very little
10 complaints about how the rules came out.

11 But I do think that in new and emerging areas it
12 has become a lot more confusing recently. I think that it
13 was better back in the Pitofsky FTC. I think Jodie, who is
14 here, gave a clearer sense of what was illegal and what was
15 legal and what the FTC wanted to do. Today, we have sort of
16 -- I will give the example of the draft self-regulatory
17 guidelines for behavioral advertising. As an example, you
18 have a regulatory agency writing draft self-regulatory
19 guidelines in a new space where there have been some cases
20 that have been brought implying there may be other cases
21 that might be brought in these areas, but maybe not because
22 it is self-regulatory.

23 I think that is a very confusing message to give
24 to the industry. But, yet, there is also this question of
25 what if industry does not do it and you do not bring cases?

1 Are you going to ask for legislation and regulation? No one
2 is saying that right now. So, I think it was much clearer
3 when Jodie Bernstein ran the Consumer Protection Bureau
4 about what is legal, what is illegal and what we want in the
5 future. I think that that led to a greater push for
6 industry to do the right thing in the self-regulatory space.
7 And then that faded when that push went away. Now, maybe
8 you have some steps in the right direction, but it seems a
9 little more confusing to me now than in the past.

10 MS. BUMPUS: Other than Jodie's clear talent --

11 **(Laughter.)**

12 MS. BUMPUS: -- what do you think allowed for
13 greater clarity back then and why is there less clarity
14 today?

15 MR. SCHWARTZ: There are a lot of things where the
16 Commission has sort of decided to change the name of things.
17 So, we do not have workshops anymore, we have town hall
18 meetings and this is a roundtable. What does that mean?
19 What is the difference between -- does that mean we are not
20 going to have a report that comes out of it or does that
21 mean -- I mean, I think people are confused -- at least
22 consumer groups that I speak to are confused about what
23 these changes mean. It is okay to make changes. There is
24 nothing wrong -- you know, change is fine. But what does
25 the change mean? I do not think that that is being clearly

1 spelled out.

2 I have a better sense because I have been calling
3 and asking questions. And to the staff's credit, they will
4 come out and explain anything, any time to anyone if you
5 called them and asked them a lot of detailed questions. But
6 I think just the public sense and the way reporters report
7 on it and the way that industry asks questions of us when we
8 are talking about some of these changes, I think there is
9 confusion out there about what these changes mean and how
10 this process is happening, whereas before there was a clear
11 process.

12 You had a workshop, they put out a report, the
13 report spelled out what is currently legal and what is
14 illegal and where they might want to see changes in the law,
15 and then either Congress acted on that or they did not or
16 you brought cases in the area where you felt that it was
17 illegal or not and pushed the edges of what was legal and
18 what was not legal, whereas today there is sort of a lot
19 more gray area on the edges there.

20 MS. FISHER: I wanted to just follow up on the
21 education part, too. In the last panel they talked about
22 needing to educate 300 million of us on the value of
23 competition. The reality is 300 million of us do not need
24 to know the value of competition. The people that need to
25 know it is a much smaller group. It is the counsel for the

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1 audio type of way. I sort of nod knowingly when I hear all
2 of these words. I have no idea how this is going to work
3 and what the benefit is going to be. But I think it is
4 indicative of the fact that the old means of delivering
5 content and delivery communication in a two-way fashion has
6 changed so dramatically that if you are not thinking about
7 these, you are clearly going to be talking to a dwindling
8 audience going forward.

9 MS. JUDY: Do you want to add anything, Ari? You
10 guys are probably --

11 MR. SCHWARTZ: No, we have a blog.

12 MS. JUDY: I am sure you do.

13 MR. SCHWARTZ: We allow comments. We had a big
14 discussion, should we allow comments, shouldn't we allow
15 comments. Are there going to be extremist groups that are
16 going to write nasty stuff on our blog and do we care about
17 that. We just decided if people write nasty stuff on the
18 blog, I mean, if it is harmful, we will delete it. If it is
19 something that raises a lot of concern, we will delete it.
20 But if it is -- and if it is ad hominem. But for the most
21 part, people write -- the answer to speech is more speech.
22 People write something, they hang themselves by writing
23 something that is too extreme and people will see that.
24 That is the way we have decided to go about doing it.

1 and circle it and get the article pulled and read the
2 article. I would say that those are basically the two main
3 sources for things that are not going to be in The
4 Washington Post or in The New York Times and I would like to
5 have them.

6 MS. DAVIS: I think for the Congressional audience
7 it is generally pretty easy for them to find. They are
8 going kind of for the bread and butter issues. A lot of
9 times, it is going to be one of the little icons on the
10 side. So, I think that that is fairly simple. I also note
11 that when I wanted to find something I mentioned to Nancy I
12 couldn't, I just put it in the search term and it popped up.
13 I think it is something that you have to constantly evolve.
14 As Kathy said, it is hard to keep up with technology. So,
15 it will be out of date in six months and you will have to
16 change it again.

17 MR. SCHWARTZ: I do have one complaint which is it
18 still does not work right with the Safari browser. But that
19 is a different issue.

20 MS. FENTON: And there is no Web site design issue
21 that a good search function will not cure.

22 MS. JUDY: I cannot resist not telling you that we
23 are about to implement a new search engine tool on our Web
24 site. We are working very hard on that. So, we hope to
25 make it better.

1 MS. FISHER: Just in terms of how I get my
2 information on FTC, I utilize the Web site and have not had
3 any particular problems. It is not as easy as some others,
4 but I have ultimately been able to find everything. But,
5 again, as part of our ongoing conversations with DOJ and
6 FTC, we now have it where every press release is released to
7 somebody at NAAG, at the NAAG office here in D.C., and she
8 does an email broadcast. So, we get all the press releases
9 essentially realtime. So, that is very helpful. If it is
10 something we are trying to work on, we can quickly get to
11 it.

12 MS. DAVIS: If I can jump back to an earlier
13 question on communications. I was thinking, and I had not
14 really thought about it before, of an important role that
15 the Commission sometimes serves, vis-a-vis, Congress and
16 that is as of the scapegoat. You all may be privy to the
17 fact that occasionally members of Congress are known to
18 grandstand and to take positions on issues that they may not
19 at their heart believe to be true, but know that it is
20 politically expedient at the time.

21 An example might be in gas prices. There have
22 been times that I wanted desperately to look in the eyes of
23 a particular senator or Congressman and say, okay, we will
24 try that and see how it works when they are pushing an idea
25 that they know really has no grounding whatsoever in

1 competition policy or rational behavior. But they are
2 promoting it because -- you know, they are saying, do
3 something, do something, do something, and yet, in their
4 heart they know probably there is nothing that can or should
5 be done that the market will not ultimately take care of.

6 But you can send out a press release, make a one-
7 minute speech, send off an irate letter to the Commission
8 and look like you are doing something when really you do not
9 want what you are articulating to actually happen. So, in
10 my cynical world, that is not necessarily a bad thing, but
11 it means that the Commission needs to have a thick skin and
12 ignore what they know is worth ignoring.

13 MS. JUDY: I think we have covered this point, but
14 just in case some of you prepared something very specific
15 that you want to share, let me ask the question. To what
16 extent do positive relationships with other federal, state,
17 international, consumer groups, other entities advance the
18 FTC's mission?

19 MS. FISHER: Again, I will go first. I do not
20 suppose it would surprise anybody to know that I do not
21 agree with Commissioner Leary that dual enforcement is an
22 international scandal. I think state and federal
23 enforcement can be very helpful and I think state
24 enforcement can be very useful to the FTC in advancing its
25 mission.

1 We can come to cases adding resources. We can
2 come to cases adding local knowledge, especially in mergers.
3 We have talked about this time and time again within our own
4 group and with the FTC and DOJ. We come with different
5 perspectives and different mandates. We come with the
6 ability to get different remedies. All of these things can
7 add to the benefits of enforcement and, quite frankly, I am
8 not one of those who thinks that there is too much antitrust
9 enforcement out there right now.

10 So, I think all of these things add to the FTC's
11 mission. It obviously helps the Attorneys General as well
12 if we can collaborate and utilize. The FTC may not have a
13 lot of resources, but relative to most AGs offices, you look
14 great to us. And especially on the economic side, we have
15 been able to utilize the economists on various cases. Even
16 when the FTC is not going to go forward, they have allowed
17 us to utilize their economists to help us get some baseline
18 information to help us go forward in a more rational way.
19 That has being exceptionally helpful. DOJ has done the same
20 kind of things.

21 And we have been able to provide some information
22 -- Karen for example, recently had an e-mail sent out, I
23 guess you were doing some rule-making or I am not sure
24 exactly in what context it was, but for some anti-
25 manipulation, pricing manipulation and false reporting

1 statutes. So, she sent an email out to all of the states,

1 show that to the community as well and get feedback so that
2 there is kind of a back-and-forth in that role. I do not
3 know how that would work and whether that fits in with what
4 the international folks do, but I think that that is useful
5 both from a way of interacting and having people learn about
6 and getting feedback and also from a general public
7 relations standpoint, too.

8 MS. FENTON: And the Antitrust Section has
9 benefitted enormously from the assistance of FTC attorneys,

10

1 assessments or your retrospectives, this is something again
2 that the Attorneys General just do not have the resources to
3 do and it is something that has always kind of stuck in my
4 gut that we needed to have more of that. Again, we do not
5 have the economic resources, but we just do not have the
6 personnel generally. I think if the FTC could do it,
7 especially in the merger area, especially in regional or
8 smaller mergers, and maybe it cannot be done because we do
9 not have enough data points to make it worthwhile, but I
10 think it would be really helpful if we could get some ideas
11 about how these things really are working post-merger and
12 post-decision and see if either we or the courts -- if we
13 have lost in the courts, have they done it right.

14 MR. SCHWARTZ: I was just thinking about maybe at
15 the beginning of the year, we usually have this kind of --
16 when they are having consumer group briefings doing it sort
17 of in the summer, but may be coming in with consumer groups
18 and companies at the beginning of the year when you put up
19 the Consumer Sentinel data for the year, talking about here
20 are the complaints that we have seen over the past year,
21 here is what we have done to try and address them the way
22 you do in the press conference for that data.

23 But instead trying to do it as a working session
24 with consumer groups and industry so that you show that you
25 are addressing the areas that they want to see and they can

1 see you actually do work off of that data. You use the data
2 to help make decisions. Then, if they want -- they have to
3 help drive the complaints that prove the case that there is
4 harm in the areas where they think that there is harm. That
5 is how the FTC makes -- one of the ways that the FTC makes
6 its decisions. So, I think that is one idea to throw out
7 there to try and incorporate outside groups into the
8 understanding of how the FTC makes its decisions.

9 MS. FENTON: And the appetite of the private bar
10 for guidance, guidelines is inexhaustible. You may think
11 that you have plumbed all of the conceivable depths, but I
12 know you could talk to any antitrust lawyer and they will
13 probably give you a list of two or three things that could
14 benefit from further clarification ideally from both
15 antitrust agencies.

16 But my all-time personal favorite, just given the
17 number of times I have had confusing conversations with
18 clients, is to explain why the only guidance on benchmarking
19 is available in the healthcare policy statements. As you
20 are dealing with someone who is involved in sort of a very
21 traditional heavy metal rust belt industry, you spend the
22 first five minutes explaining, yes, I know you are not
23 involved in healthcare, but the principles relating to
24 collection of information and exchanges between competitors
25 are found in the healthcare policy statements. That seems

1 like a sort of an easy target of opportunity.

2 Another one on my own personal list is Section 8
3 Interlocking Directorates. I realize it has not been a
4 burning issue for enforcement in the recent past, but you
5 would be amazed at the efforts that are devoted to this at
6 the corporate level trying to make sure that the
7 appointments to boards are compliant with the Section 8
8 guidelines, and there are a number of very live and
9 contentious issues that both agencies seem to be cheerfully
10 ducking at the moment. It would be very useful to know that
11 it is going to be a formal policy position or it simply is
12 the crazy uncle in the closet that no one is going to refer
13 to going forward.

14 So, there could be a much longer list if you did
15 any kind of informal survey, but I would certainly encourage
16 some effort at looking for those other soft targets of
17 opportunity on guidelines.

18 MS. BUMPUS: Should we open up to questions?

19 **(No response).**

20 MS. BUMPUS: Well, thank you very much. We
21 greatly appreciate your candor and your thoughts on this.

22 **(Applause.)**

23 MS. OHLHAUSEN: We want to remind everyone that
24 there is a second day tomorrow. We start at 9:00 tomorrow
25 morning. Thank you all for coming.

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(Session 4 concluded.)
(At 4:28 p.m., Day 1 concluded.)

