UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

Horizontal Merger Guidelines Review Project

Tuesday, December 8, 2009

9:05 a.m. to 4:15 p.m.

NYU School of Law

Greenberg Lounge

40 Washington Square South

New York, New York

Reported and Transcribed by:

Edward Leto, CSR

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INTRODUCTION AND WELCOMING REMARKS

MR. WEISER: Let me welcome you all here to our Second Workshop Review of the Merger Guidelines. For those who are new to NYU, I can say that this is a special place for me. I went here for law school and graduated in 1994, and it launched my new career in every way, including my interest in law and economics and my intellectual curiosity for law was very well cultivated here. I've had some wonderful professors and some of them are here today.

We have to start by acknowledging Harry First and Eleanor Fox. Where is Harry, and where is Eleanor? They are truly the dynamic duo of antitrust and they bring together expertise that they could have been together on one panel where we discussed the international and state levels of enforcement.

For those who don't know about Eleanor's work, internationally, it's pioneering in every sense of the word. It's great to have her here.

On that dimension, for those who don't realize that Harry played a critical role in the New York Attorney General's Office heading up the antitrust division, working on the Microsoft case, you'll know more about it when his book comes out -- it won't be the first word, maybe it will be the last word on the Microsoft case, probably not, but it will be worth reading. It's worth reading.

Harry and Eleanor also run the program here in trade regulation and are hosts today. Nicole Arzt in the back is an organizer extraodinaire. The people from the DOJ who worked on this, also Jeanie Miekel deserves thanks and said, "Do you want me to come down to watch to make sure things are well done?" I said, "No, Nicole is here." We're going to be in great shape. So, Nicole, thank you for your great work.

So we have a very simple agenda today. We are looking to be intellectually engaged and to have people from the audience as well as those on the panel provide some thoughtful food for analysis and we are going to have a wonderful menu of sort of courses over the course of the day. For those who didn't see the background, we have 20 questions that we put up on our website. That was the starting point for analysis. We got 37 comments there on the website. Today we're going to chew over all of that with you. We had our first workshop. We got a lot of good thoughts from that experience and we're looking forward to this one.

Harry, do you want to say a few words before introducing --

MR. SHELANSKI: Well, after listening to Phil, I'm not sure if I work for the FTC or the FDA, or maybe the USDA, but I want to thank all of you for coming. I want to recognize Liz Callison, an economist from my bureau who is going to be responsible for making sure the transcripts of these proceedings are accurate and edited, so watch what you say. This will all be a matter of public record.

I really just want to thank everybody for participating. This is a joint effort of the Federal Trade Commission and the Department of Justice. Phil and I are two of the people from the respective agencies running this workshop. We had a workshop earlier -- last week in Washington, which was our kick-off. We have one in Chicago on Thursday. We have one in Palo Alto in January and we will conclude with a final workshop on January 26th in Washington.

So those of you who are interested in seeing how these questions get answered from somewhat different angles and perspectives across those different workshops, you'll be able to find a webcast of last week's conference as well as transcripts of all the other ones available for you shortly after each workshop takes place.

So without further delay, I'd like to introduce Dean Ricky Revesz from the NYU Law School. Ricky has just been a wonderful host and, also, I would say, in many respects, a mentor to many of us. Phil alluded to his time here at NYU Law School as a student. I was not a student here, although my mother was, and I had the privilege of being a visiting professor here last year. I can tell you it is a truly wonderful place and we're grateful to them for hosting this event.

Dean Revesz.

DEAN REVESZ: Thanks, Howard. I'm delighted to have been invited to give you, like, a minute of welcome, and then I will leave, and the average level of knowledge about the subject matter in the room will rise dramatically as soon as I walk out, -- this feels a little bit like a faculty workshop last year since, as Howard mentioned, both Howard and Phil were visiting professors here, and I used to see them around as colleagues. It's nice to now see them back as exhaulted government officials and the law school who thinks of them as part of the permanent academic families, extremely proud of them. We're also really proud. There won't be any law school that will have more alums as FTC Commissioner, chair of the FTC, John Lebowitz, is one of our alums, and Julie Brill, who has just been nominated by the president as an alum as well, so we feel good about that, and hopefully this close relationship will continue.

So I was delighted when Harry and Eleanor told me that the Justice Department, the FTC, had decided to do one of their workshops of this sort of five-workshop marathon around the country here at the law school, and I'm really delighted that you are here.

Harry and Eleanor are terrific colleagues. I know that our program is in great hands, and I was very pleased when I found out they were going to have this leading role in working with Howard and Phil in putting this together.

So if there's anything that any of my colleagues or I can do to make your day better and work more smoothly, let us know. Nicole can pass along the information. We really want it to be a great moment, and thank you very much for being here. It's a great honor for the law school.

Thank you, commissioner, for coming and for moderating the next panel. Have a wonderful wonderful day, and I hope great things come out of these proceedings and that our nation will be enriched by the discussion that will take place here today. Thank you so very much. And I guess, Harry, one of the organizers, is on the program to say a few words before the first panel.

MR. FIRST: Well, you all know that I'm not really an organizer of this at all. It's Howard and Phil. So I want to thank them again and, Nicole, in particular. Bruce Prager said to me that this is even nicer than the conference room at his law firm where the New York State Antitrust Section meets, so I want to welcome you to NYU and to the facilities we have here.

I did just want to put in another NYU plug in addition to having Howard and Phil, who we consider now part of the NYU community, which is great. This is -- as those of you who are here, and I see even some former students, current students, a great time for antitrust and a busy time for the law school. It is, I think, really fabulous, particularly, for NYU.

So I just want to alert you to two things coming up at the law school both of which are open. The first is "The Next Generation of Antitrust Scholarship Conference," which we're having here on January the 29th and we're cosponsoring with the Association of American Law Schools and the ABA section of antitrust. It will feature 12 papers by -- I'd like to think of them as younger scholars. They certainly are younger than I, but the future scholarship of antitrust, and there were applications, people put in papers from really all over the world. This should be a very exciting time. So 12 papers. People will be commenting on them, and you can find information about that on our website.

And then on February 19th, our Annual Survey of American Law is having an antitrust conference. This is -- in the whole time that Eleanor and I have been here, the first antitrust conference, at least that I can remember, that was put together by our students.

So something's happening out there, an interest in the area that we find really interesting, and it's going to be a fabulous and exciting conference with excellent people. I won't embarrass Laura Collins, whose sitting in the audience, and is really the prime mover, but she's over there, and has put together an extraordinary program to which again the community is invited. So you can find both of those things up on our website and I look forward to an exciting and interesting day talking about antitrust. What could be bad about that?

So, with that, I turn it over to whoever's -- how is this going from here? Who is starting the first panel?

PANEL 1: WORKING WITH INTERNATIONAL
AND STATE AUTHORITIES

MS. JONES HARBOUR: Good morning. I'm really delighted to moderate today's panel on Working with International and State Authorities.

It is a particular pleasure to share the podium with the talented group of panelists, most of whom I have known for many years and all of whom bring a tremendous amount of expertise to these joint FTC/DOJ workshops.

As you may know, prior to joining the FTC commission, I spent most of my career as antitrust and consumer protection enforcer in the Office of the New York State Attorney General. Not surprisingly, I have a very high degree of respect for the intrinsic value of State Enforcement. And, as my colleagues will attest, that whenever the Federal Trade Commission is involved in a major merger investigation or it's contemplating a possible enforcement action, I always ask them whether the States are involved and what level of cooperation is ongoing.

So perhaps my background gives me a unique appreciation for some of the complex coordination issues that arise in the international context.

As a strong believer in antitrust federalism, I have always been guided by the principle that each state is sovereign and has the right to protect its citizens as it sees fit, in addition to whatever relief the federal government might require.

And along those lines, I'm often struck by the parallels between State and International practice, especially with respect to the interrelationship with US federal enforcement. And that is why, as the FTC and DOJ contemplate the possible revisions to the Horizontal Merger Guidelines, the topic of today's panel makes perfect sense.

Therefore, without further ado, let's begin. And, in the interest of time, I am not going to read our panelists' full bios, which I believe are readily available on our website or elsewhere.

So let me just go ahead and very briefly introduce the panel and then we're going to begin our discussion. We have structured this program entirely as a Q&A, in that format, so there will be no affirmative remarks by any of the panelists.

We're going in alphabetical order beginning with Melanie Aitken. She is the Commissioner of Competition for the Competition Bureau of Canada. She was appointed to a five-year term on August 4th, 2009, having served as Interim Commissioner since January

2009 and in other leadership positions within the Competition Bureau since 2005. Melanie also has extensive experience in private practice before her government service and she certainly has earned her reputation as a rising star in the competition community.

Jim Donohue is the Chief Deputy Attorney General of the State of Pennsylvania and he's head of the state's Antitrust Section, a position that he has held since 1997. He has been with the Pennsylvania AG's office since 1985. In July of this year, Jim was named the chair of the National Association of Attorneys General Multistate Antitrust Task Force.

Eleanor Fox who we all know and love is the Walter J. Derenberg Professor of Trade Regulation here at the NYU School and we do thank NYU for graciously hosting today's session.

Eleanor is a renowned competition law scholar, especially in the area of International and Comparative Competition Law. And you will only have to look at her bio to fully appreciate the depth and breath of her experience. Eleanor is also of counsel at the law firm of Simpson, Thatcher & Bartlett here in New York.

And last, but certainly not least, is Milton Marquis, a partner at Dickstein Shapiro in Washington, DC. And he is a member of the firm's State Attorneys General practice. Milton has extensive government experience with the Department of Justice's Antitrust Division, as well as with the Virginia and Massachusetts offices of the Attorneys General.

So, now let me open our discussion with a question regarding the implications of multi-jurisdictional review. And I pose this question generally to the panel, and I'll let you jump in, but core concepts from the 1992 Guidelines have been incorporated into ICN Best Practices or have otherwise been adopted by other nations, and are now routinely applied by state enforcers as well.

So should we be more cautious about changing some of the elements of our guidelines that other jurisdictions have followed? Eleanor?

MS. FOX: Thank you very much. Thank you, Howard and Phil, very much and also thank you for agreeing to have this panel here which is really great for NYU.

My answer is no, we should not be more cautious in changing guidelines because elements are reflected in guidelines around the world. We have to do the best we can do in terms of guidance and analyzing mergers.

To me, it would be absurd to think, for

example, suppose we were back in our 1968 guidelines, and the whole world had adopted them, and we have an idea that is better than our 1968 guidelines and we say, oh, no, we had better not change because this is the standard for the world. Convergence is not an end in itself. Convergence is what happens when you have good ideas and other people see that they are good ideas and therefore adopt them too.

MS. JONES HARBOUR: Does anyone else care to comment?

MR. DONAHUE: Yeah, Pam, I would agree. Even though we rely on our guidelines and the other guidelines in our analysis. The guidelines have many principles that don't really match with the current state of the law or current economics and they should be changed to reflect that.

MS. AITKEN: I'll just chime in as, from a jurisdiction that would have been one of those converging with you in the sense that we modeled our guidelines on yours up in Canada. Obviously, I would share my colleague's view in that guidelines should not be static if we think that what they really are, they're not a rule book or something that puts predictability above all other values, but, rather, something that's an expression of what the enforcement agencies at a particular point in time believe is the best possible, you know, exercise with the discretion in terms of enforcing the law that they're charged to enforce and, in that respect, it would be foolish to do anything but try to be as iterative as possible in reflecting those guidelines, the most current and best antitrust that you can come up with, and I liked Eleanor's way of expressing it. People adopt them because they're good ideas and the currency of the debate that follows from an articulation of a new enforcement perspective can only be a good thing.

MR. MARQUIS: Well, all that needs to be said has been said. So I'm going to be unlike most lawyers, I'm not going to repeat all the wise things that have been said. I'm sure there will be opportunities for some disagreement, but this question certainly is not an area where we disagree.

MS. FOX: So we converge.

MS. JONES HARBOUR: Now, if we change the standards around which convergence has developed, will we lose any of those benefits to the convergence?

MR. DONAHUE: No, the guidelines are guidelines. The idea of the guidelines is to present to those who are lawyers and the business community what we think we would do in terms of enforcement when presented with specific instances.

The guidelines are not court decisions. They're not a legal precedent. Those things ultimately decide how you enforce a case or what you do.

So I think changing the guidelines isn't going to really influence what we do in the going forward basis.

MS. JONES HARBOUR: And do you think that coordination will become any more difficult? Should we change them, or --

MR. MARQUIS: Well, I guess the only thing that I would add is that, as one of the panelists mentioned, this is not a static process. That as the DOJ and the FTC continue with the process of evaluating possible changes, amendments to the guidelines, that I would expect, of course, I would never be so bold to speak for my colleagues in Canada, that Canadians and the state AGs and other competition enforcers would -- maybe there would be another round of convergence.

So I think that the -- from a business perspective, the bottom line is that we want the latest thinking that takes into account, if not science, certainly economics and, at the same time, maximizes transparency, so that we really understand what is it that our clients can expect as they contemplate transactions. So I'm more interested in getting things right than whether everybody is agreeing from day one.

MS. FOX: The assumption so far has been that the US guidelines are the leader in the world so, if we change, we're breaking out of a mode to which everybody is converged to us.

Maybe by changing our guidelines we might be converging with somebody else. Maybe, for example, if we include buyer power in our guidelines, we'll be converging with European Union.

MS. JONES HARBOUR: In 1992, when the current guidelines were drafted, today's level of multi-jurisdictional review might not have fully been contemplated, particularly, with respect to international aspects.

Would you recommend any particular guideline revisions that would perhaps better account for today's realities of multi-jurisdictional merger review and enforcement?

MS. FOX: I think in general that the fact of multi-jurisdictional review is not so material to the substance of how you analyze a merger. So, in general, no, that there would not be any change in the guidelines to recognize multi-national review. Unless the guidelines should branch out to include issues other than they include right now, an issue which I think we might discuss later, and I don't recommend.

The one aspect that I would mention is market definition and geographic market definition for the following reason. As we all know, a lot more markets are international or transnational today, and many jurisdictions are looking at, for example, the same merger in the international market.

The guidelines that we have now do not limit geographic markets to US shores, but I want to emphasize that it's very important not to think of limiting markets to US shores because we'll get the best picture if we have markets that are commensurate with the real market wherever it is, for example, international, and we'll also be able to talk to our colleagues in other jurisdictions better when we have analyzed the merger according to the real markets that might include these many jurisdictions.

MS. JONES HARBOUR: And with respect to market definition, to what extent would US deemphasis of the market definition step, even if only in a small subset of cases, how would that complicate, if anything, coordination and discussion of particular matters by the agencies?

MS. FOX: I don't think it will. My plea in the first instance was just recognizing reality when it crosses borders and, even if you start in a unilateral effects case, not with the market definition, you're recognizing the important facts or analyzing the merger and it should not make coordination more difficult.

Another point is, supposing that we became less insistent on market definition as a first step, in general, does that make coordination more difficult? Frankly, I don't think so, because I think all jurisdictions generally are looking for the story to see where and how a merger harms competition.

MS. JONES HARBOUR: If you were to recommend any particular guideline revisions, would the same revisions capture both state and international issues, would different revisions be called for? And I'll turn to you, Jim.

MR. DONAHUE: You know, I think there are certain areas where there is now a disconnect between the guidelines and either what the law has evolved to or what we typically do in practice. Market definition, if you look at, say, the FTC's Evanston case, there's sort of a unique market definition type of methodology that was used in that case that is going to be a little bit different than what's in the guidelines. And I think for healthcare types of transactions you have to take the Evanston case, which I think is really an excellent decision, and devise a market definition process for healthcare that's maybe a little bit different than some other areas.

I think as a pragmatic matter, you know, some of the other parts of the market definition, the SSNIP test, are very confusing to business people. You look at the HHIs, that's another area where there's a disconnect. You know, there are numbers in there that nobody brings a case with an 1,800 HHI and increase of a hundred points in the HHI.

So those are areas we have to think about, and I think at least in terms of the states in the program, we're all faced with the same precedent. We're faced with the same precedent from the Supreme Court and the Circuit Courts of Appeal, so I don't necessarily think there would ultimately be a divergence in where we come out.

MS. JONES HARBOUR: Can we turn for a moment, if the other panelists don't want to add anything on this topic, let's turn to the topic of remedies.

How does multi-jurisdictional review affect the consideration of merger remedies and, more specifically, one of the questions that the agencies put out for discussion is whether a discussion of whether remedies should be incorporated into the guidelines themselves?

MS. AITKEN: It looks like maybe it's my turn. I think -- and we had a little opportunity to discuss this earlier, and I don't want to speak for others, but there's a general reaction that that would be quite a significant departure from the sort of topic in terms of substantive analytical frameworks that we include in the current guidelines in Canada as well, and I think our general sense was that that was a departure that, for these guidelines we didn't think, or at least I guess I should speak for myself, don't think it's necessarily the right direction to go. Up in Canada we did issue distinct guidelines with respect to remedies in merger cases and, to my mind, it fits better and the discussion of the sorts of principles you want to have I think works better in a separate context from your analytical framework where you found your problem, and you're now going to talk about the type of problem, and you're going to talk about the ways that you might go about addressing a problem.

It also allows for a better place, at least from my perspective for a discussion in terms of what you would want to do by way of international coordination. In Canada, for example, you know, in appropriate circumstances, we would not defer, we obviously have our responsibility, but if there are not unique Canadian effects in a particular circumstance, the remedy that's agreed to elsewhere, usually is sufficient here. We will, you know, require less memorialization of a deal. We'll allow, for example, our colleagues at the FTC or the DOJ to vet a buyer. That sort of thing. But to my mind that fits more neatly into a separate document.

MR. DONAHUE: I think coordination of remedies is important. I think the guidelines should recognize, when you have a multi-jurisdictional case, there should be coordination remedies, and the other people who are, the other jurisdictions that are involved should be recognized.

You know, I tell the story of the case we were involved with the Department of Justice, where we're down in one of their conference rooms in DC, and the merging parties present to the Department of Justice the following, they said, we'll fix your problem in Albuquerque and Cleveland if you give up on Harrisburg and, obviously, we're not interested in having them give up on Harrisburg, because we think those citizens should be protected as well as people in other states.

The basis for that was sort of the scale of the different markets and how big they were and the important amount of commerce that's affected there -- so I think there should be some recognition that when you have a multi-jurisdictional case, that's being reviewed, there has to be coordination of the remedies.

Now, the specifics of the remedies, whether they should be structural or conduct, that's maybe a whole different set of guidelines. I don't know if they go on those guidelines, but I think there should be some recognition of the need to coordinate.

MS. JONES HARBOUR: Milton?

MR. MARQUIS: Well, just picking up, Jim, on your -- I guess this is a real example. I was going to say hypothetical. International competition authorities often are in different places, and I think your example highlights that. There may be greater concerns in certain areas than in other areas, but if you're in representing a state where your concerns are -- I guess your issues are less concern, you're still representing that state. You're not representing the State of Arizona or Texas, for example. And so there's going to be an natural tension. I don't think that the guidelines can do anything about it. I think that that's just reality of federalism, the world that we live in, the country that we live in, more specifically with respect to the states.

But, commissioner, getting back to your larger question as to whether remedies should be included in the guidelines, I guess my position is, yes. I'm sure there are all kind of reasons why number one, it hasn't been done before. Well, okay, I don't think that that should necessarily inform us today.

We're all searching for transparency. When a client comes to you and they ask you whether this deal will fly, one of the things that you're looking to would be if the government were to have concerns about it, would they, under their current enforcement philosophy, believe they could fix it? If the fix is going to be worse than the alleged problem, maybe you don't try to block the merger or you look at the consequences of not being able to remedy a merger and maybe the -- you lose all of the efficiencies that, of course, your clients will be more than happy to estimate.

So I think that it's not putting the cart before the horse to think very early on about potential remedies, and it seems to me that having the agencies consider remedies while examining the merger guidelines would be a helpful process. Now, that is not to say that there's not guidance out there. Certainly the

Department of Justice in their statement or their document where they talk about the remedies has been very helpful I think to the antitrust bar, but I think that the current thinking in the agencies is that they will start thinking about remedies pretty early. And I know that when we've had clients that have either complained about mergers, they say, well, how would you fix it? Of course the answer, oh, it can't be fixed. Then, of course, we say, well, maybe if you have this sort of licensing and these sort of divestitures, maybe you can restore competition.

So I guess my thought is that having remedies as part of the merger guidelines would increase transparency and help focus the thinking on what makes sense and what doesn't make sense.

MS. JONES HARBOUR: And would it be useful if the guidelines specifically addressed the resolution of potential conflicts among remedies imposed by different jurisdictions? And I'll turn to Eleanor to answer that question.

MS. FOX: I'll pick up where Milton left off. Milton, I think you make very good points. I conclude though that these merger guidelines are not the right place for doing what you want to be done, which ought to be done, and I would begin in the following place by saying, there are many things that are adjacent and very important to the substantive analysis of mergers, and remedies is one, and conflicts is another.

When you talk about conflicts and the guidance on conflicts, you would be talking about much more than horizontal mergers, the remedies for all mergers, and much more than mergers. So I think that it would be very important for the Justice Department and Federal Trade Commission to consider a guidance paper on that other set of issues -- now I'm talking about conflicts, the other set of issues of conflicts and coordination on substance and remedies in general and not just on mergers, and probably to get to it before there's a next revision of the guidelines on international operations, just because I think it's going to be a really long time before one gets to a revision of the guidelines on international operations.

MS. JONES HARBOUR: Let me move on to a different topic.

One perspective that we really haven't addressed yet is that of the merging parties themselves, especially where multiple authorities are asserting jurisdiction over a transaction. Inevitably this process is rather difficult to navigate, even where procedural cooperation is strong and substantive convergence is likely.

I'm going to look to Milton to spearhead the answer here, and possibly Melanie, but are there any particular guideline revisions that you believe would alleviate the burdens on merging parties?

MR. MARQUIS: Well, I think that this probably is not the type of issue that can be addressed in the merger guidelines, because I see the merger guidelines as more substantive. The issue of burdens on the party when there are several states or international competition authorities, a lot of it is around procedure.

Now, my view is that certainly with respect to the states, and the federal agencies, that convergence has largely occurred for many of the reasons that Jim mentioned that federal agencies and the states have to consider what sort of evidence they need to win. I think it's a practical matter that the states, and Jim can correct me, have pretty much adopted the federal guidelines so certainly they're informed a great deal by the federal guidelines. I think that there are difference between the state's approach and the federal guidelines on efficiencies. I think that the states are probably less willing to credit efficiency arguments than the federal guidelines.

But I think that in terms of decreasing the burden, that's mostly in the realm of process. One of the things, if I could pat myself on the back just a little bit at the Justice Department, when I was there, we, along with the FTC -- and I see Mark Whitener and other people who were there at the time, we attempted to draft a set of protocols that made it easier for the agencies to cooperate on merger matters addressing such things as confidentiality. States do not have an HSR statute and many states have very, what I call liberal, or open records acts that make it very difficult for parties to share information with the states.

We want to do so because it's usually in the party's interest to get the states and the federal agencies aligned. It's not in anyone's interest to have witnesses interviewed multiple times by different agencies. I don't think it's in the agency's interest, certainly not in the interest of our clients from a time perspective.

And so the protocol is designed to address those issues, facilitate communications. Now, I've been in situations and, through no one's fault, I'm sure, where I have either passed on to the federal agencies or to the state, an AG is working on a matter that one of the other agencies has scheduled an interview with my client. That's not good. Now that's not a merger guidelines issue. That's a process issue, that's a communications issue. What we found is that the level of communication really varies by staff within the agencies.

I mean, you have different sections within the FTC that I have observed, worked better with the states than others, and the same thing with the Justice Department. I'm not naming any names. I'm not here to do that, but that's just the reality of it all.

MS. JONES HARBOUR: May I ask you this, and perhaps Jim could comment as well? Do you think that these protocols should be referenced in any revision to the guidelines or included in the guidelines? Jim?

MR. MARQUIS: I'll let Jim answer that.

MR. DONAHUE: I think that coordination of jurisdictions should be referenced in the guidelines, whether its coordination with the states on the, you know, a merger that affects this country or coordination with the Canadian government, or the European government, if it's a more international merger where there are world wide markets that are affected.

So I certainly think that should be referenced and it should be acknowledged that there is this coordination process that that goes on. We do try to work to get on the same time schedule as the federal agencies. Sometimes there's difficulties with that, but that's one of the things we're trying to address.

MS. AITKEN: Excuse me, since you invited me, I'll just make a couple of comments. I agree completely with Milton that it's really on the procedural front when it hits the road in terms of the burdens on merging parties that are cross border. In particular, in my observations, and there's things we can do, and we've just moved to a timing process that's similar to your second request which I think is facilitating the coordination that Jim was talking about in terms of collecting information, analytical work, interviews of witnesses and the like.

I guess for what it's worth, I would think there could be some value to writing that down somewhere in terms of a protocol insofar as there would be a recognition for merging parties that that's what they could expect. I think it is the practice increasingly with the FTC and the DOJ, but there's no harm in sort of solidifying it for posterity, if you will, and future mergers.

I think some things like a common notification form, a standard waiver form. We don't technically require waivers but those sorts of things for the parties that can eat up a lot of time depending upon what could be a quite arbitrary factor that's feeding into one of the party's counsel's mind as they're trying to struggle through these issues, and I think from a practical prospective some type of just off-the-shelf might be helpful.

I think in terms of substantive, which is really what we were trying to address with this question, one, I would point to, I guess, is efficiencies. We have quite a different framework up in Canada, and I won't bore you with that, but suffice to say ours is more of an exception rather than part of the holistic analysis of anticompetitive effects and a creature of our statute.

But I think trying to marry up the two analyses in the middle of everything else that is going on in a merger review can be challenging and it would be helpful to have more guidance in the US guidelines, and no doubt in the Canadian guidelines as well on efficiencies, although we've done what we think we can do for now.

The other area that I guess, just maybe it's a personal experience issue, and we, as well, could use some more guidance on it, but is minority interests and how those are evaluated. That's something that I, again, as counsel, and then as head of mergers, appreciated that there really isn't all that much guidance out there and I'm not sure it lends itself to safe harbors or whatever, but some analysis on the point could be helpful.

MS. JONES HARBOUR: The questions that were put out for discussion by the agencies address a number of substantive issues, Melanie touched on efficiencies, there are others as well.

Can we draw lessons from any of the other jurisdictions on any of those issues, for instance, with respect to HHIs, does it make sense to have a single threshold, or is the reality that different thresholds apply in different types of markets. Can you answer that?

MR. DONAHUE: Sure. I think that HHIs are an area where we really have to think about whether we want to make some sort of distinction among industries. If you take healthcare, for example, and take hospitals, which I have a lot of experience in, I've worked a lot with both the Federal Trade Commission and the Department of Justice on hospital mergers, there are very few markets in the country, Philadelphia is one of them, where the HHIs might be below 1,800 for hospitals. All the rest of the markets in the country, except for the very large cities, the HHIs are already 3,000 or higher. So maybe you need a different framework when you're talking about that.

There are other industries, maybe retailing, where the efficient scale is much lower and where there could be a competitive effect where there is a merger with HHIs in the 2,000 range. So, you know, I'm not sure how you do this, but I think it is something that you have to recognize, that sort of the one-size-fits-all-HHI analysis may not provide the sort of guidance the guidelines are intended to provide.

MS. JONES HARBOUR: And, Eleanor, from the EU approach, anything to add on that score?

MS. FOX: On HHIs?

MS. JONES HARBOUR: Yes.

MS. FOX: Right. In the EU guidelines, HHIs are very similar, just slightly higher than the US. I don't have any wisdom to add by looking at the EU guidelines. I agree with Jim that the HHI thresholds do very very little, and that you can see a very concentrated market when you look at it and that, to some extent, they're intended to give some comfort below the HHI levels but, as Jim said in the hospital industry, that's meaningless.

MS. JONES HARBOUR: Let me move to the issue of large, powerful buyers. Merging parties sometimes argue that the presence of power buyers will displant any ability to exercise market power and that they therefore should be an important consideration in government review.

How are large buyers handled in the international or state context? More specifically, how are buyers handled with respect to merger review by a state authority where one of the merging parties or one particular customer with a stake in the deal has significant presence in the state.

Jim, I'll turn to you for that,

MR. DONAHUE: You know, I think the sort of sarcastic response is, well, how is that working out for us? If you look at healthcare, this is one area where we have lots of power buyers. We've heard over and over again over the past several months that most markets have one or two insurance carriers that dominate. Those guys are power buyers because, if you think of health insurance, what they're really doing is they're going out and buying doctor services and hospital services at a discount and reselling them to you.

In this market, we shouldn't be having, if power buyers are so effective, we shouldn't be having an insurance crisis, or a healthcare crisis, or an affordability crisis, because these power buyers would be keeping prices down and keeping everybody operating at an efficient level.

That doesn't appear to be the case in healthcare, and I'm skeptical whether it would be the case anywhere else, because I think you end up with a sort of dueling monopolies situation where they ultimately figure out that combined, they can charge consumers more, but that's my very skeptical view of the power buyers. I should say it's my view and not the views of anybody else.

MS. JONES HARBOUR: On the international side, Eleanor, how are powerful buyers handled in a situation where a large buyer is currently or was recently a state-owned entity?

MS. FOX: I cannot answer that because I have not found such issues.

MS. JONES HARBOUR: Melanie, have you found any issues of that type?

MS. AITKEN: I can't think of anything off the top either. I guess a very practical observation is that often we see, at least in Canada, and maybe we're just less sophisticated, but we see some pretty unsophisticated submissions with respect to buyer power that really don't talk about the issues that you're looking for. They just sort of bid, bid is, of course, not entirely determinative and you need to really probe the issues as to the ability to vertically integrate, or to sponsor entry or whether you've got sort of smaller buyers who actually make up enough of the consuming public for that good such that just because a few big guys can take care of themselves that's not the full answer.

MR. MARQUIS: Well, I know that Jim was only speaking for himself, but I believe that his views reflect those of many of his colleagues, if I can be so bold as to say that.

So, I guess, what I would add is that I would suggest that the agencies consult with people like insurance commissioners who regulate insurance companies and kind of get their views because I think when you're talking about healthcare, that is a heavily regulated, state-regulated-type industry.

And so I would suggest that you seek their views and see how well -- of course, they're going to say they all do a great job because there are colleagues who aren't doing a great job in regulating this market, but I would get their views on that and really listen to what the states have to say on that issue.

MS. JONES HARBOUR: And speaking of powerful buyers, to what extent do the guidelines adequately address the issue of monopsony power?

MS. FOX: First, I want to add a little to the discussion of power buyers. I was answering your question about -- that were recently state owned, and I don't know of any recently state owned, but I do want to address the issue generally about, should buying power be in the guidelines?

And while I think -- you know, Jim makes some very good points which I agree with, which maybe I over-generalize to say, usually when parties to a merger defend that they didn't have any market power because the buyers were so big, usually the facts don't work out in that direction, that the big buyer, bigger smaller did not have enough power to counteract the negative effects of the merger. That is taken into account in the EU guidelines.

I want to say first a word about countervailing buying power as a proper element of guidelines. I think it is a proper element of guidelines. The European Union includes it and includes it in a very prominent place and says that when you do have powerful buyers that will counteract the negative effect, that that is definitely an important factor to consider because you want to know whether they'll counteract the negative effect even after the merger. It then goes on to say, there are a lot of instances in which those buyers will not counteract or will not fully counteract the effect.

For example, it may be that, before the merger, a buyer could counteract the effect, but after the merger the buyers lose an alternative and they no longer have that power. So I do recommend to the drafting teams that they look closely at the countervailing buyer power section of the EU guidelines which are on paragraph 64 through 67, and include about six or seven of the EU cases in which these issues have been raised and, in most of the issues, the buyers didn't counteract the effect.

They also have an interesting point here that power buyers could possibly counteract an effect on themselves and not for the rest of the industry. And here is where point on price discrimination comes in, and I think about the Kodak case, which was not a merger case, but it was true that there were some big buyers of these imaging machines that got a good deal even in the aftermarket, but the court said that they didn't counteract the effect on the smaller companies that were the buyers. Okay. So that's for the countervailing buyer power.

And, Pam, you've just invited me to talk about the other side of the coin which is what about mergers that create buying power? And European Union guidelines include that also in their guidelines on paragraph 61 to 63, and have a number of cases that talk about this problem.

I think that the creation of buying power that is an anticompetitive creation of buying power through a merger should be given credence, and I know the Justice Department is now interested in, for example, some problems in the agricultural markets. In all markets in which you might find such an effect, agricultural markets are one in which you might.

This is an issue which developing countries have raised because they see some very big mergers that are creating buying power against their -- it could be cocoa producers. They see big cocoa companies that are merging and creating a price squeeze in those developing countries. So I think that these issues ought to be given credence and probably should be a part of the merger guidelines.

MS. JONES HARBOUR: I'm going to move on to another topic and I also want to try to leave a few minutes for audience questions, but moving on to guidelines reform efforts in other jurisdictions.

My question is, are there any lessons that we might learn from guideline reform efforts in Canada, in the EC, the UK, or elsewhere? And, Melanie, I'll turn to you to start us off here.

MS. AITKEN: I can be quite brief in the sense that we did issue some guidelines in the merger area but they were purely procedural guidelines, consequential to significant amendments we had to our act introducing an analog to a second request two stage merger review process.

The only thing we have done is we issued a supplementary bulletin on efficiencies and merger review in 2007 to try to articulate a little more completely how we would approach an evaluation of efficiencies. We have, obviously, the same challenges that you do in terms of probing and getting any kind of substantiated sense of efficiencies at an early stage of a transaction.

So, again, I guess I'd probably come back and say that that's an area that would be helpful to have more guidance on and -- but those would be my comments.

MS. JONES HARBOUR: Let me turn to you, Jim, and I want to ask this question. You know, the NAAG merger guidelines have not been revised in quite some time now. Have the states given any thought to pursuing guideline revisions of their own?

MR. DONAHUE: Yes. We've given a bit of thought to that. I think that we have a list of priorities right now, and those priorities are first to deal with the issue of confidentiality of information in merger cases. That has been a problem that slows down our coordination with the FTC or DOJ. It's a matter of frustration for us, and it's a matter of frustration for the parties we're dealing with. So we want to deal with that.

A number of states are very interested in the agricultural workshops that are being done by the Department of Justice, so we're doing some work on that. We want to prepare some comments for this process here, the guideline process. And we want to really focus on bringing some cases.

So after we've done those things, then we're going to look down the road to revising our guidelines. And we're not sure what the revision may be. It may be that when we see what the product is of the FTC/DOJ process, we say may say, those are really great guidelines, we should adopt them. It may be that we continue to do what we've done in the past and say, they're really great guidelines but there's two or three areas where we disagree a little bit or where we had additional thinking.

I think if you look at our efficiency analysis guidelines, they're much more evidence based than what is currently in the FTC/DOJ guidelines. So I don't know how going to come out, but it's something we're going to do, but we're not going to do it tomorrow.

MS. JONES HARBOUR: Okay. Milton.

MR. MARQUIS: Well, if I could applaud the order in which you are approaching this issue. I do think it's important for NAAG after this process ends and, of course, to participate in this process which NAAG is doing to take a hard look at the NAAG guidelines. I think that there is a truth-in-government function that's served by having guidelines that people actually know and adhere to. So I applaud that I think that's the right order.

Just for some of us who are old enough, of course, Jim and I started about the same time, but not saying he's old, he's much younger than I am, that, you know, the NAAG guidelines were reaction to perceived inadequacies of some of the earlier US DOJ/FTC guidelines, but I do think it's important for NAAG to either revise, review, or rescind the guidelines because I think it's important that the government increases transparency and does what it says it's going to do.

MS. JONES HARBOUR: All right.

MS. FOX: First, a comment on the NAAG -- on the sequencing, and then a comment on Europe and US end process. On the sequencing, might it be better if NAAG has conversations on reforming guidelines now while the Department of Justice and FTC process is going on so that NAAG could possibly have a formulation that it thinks is a good formulation so it's part of the debate before the Justice Department and FTC adopt their guidelines, say it's guidelines on efficiencies and you have a different idea, and you know you have a different idea, would it be good to surface it at a point at which the Justice Department and FTC could recognize it and take it on board, maybe be influenced by it?

MR. DONAHUE: I think that's our intent. Our intent is to do comments in this process and, you know, I'm perservating here. I think Bob Pratt from Illinois, the Chicago Workshop, we are communicating with the agencies, all the time on a variety of issues, on the guidelines, but we have a number of merger cases we're doing with both agencies, both small local mergers and one or two larger ones.

MS. FOX: My point on the US EU process is, I think very helpfully, sort of in the world today, at least with these two big players, US and EU, the process of guidelines and guidelines change has been helpfully very open on both sides of the ocean, inviting people from all around the world, not just your own national constituents, but all around the world to give their inputs on it. I think that is actually one of the cross fertilizing aspects that can lead to convergence and is very useful.

And now one point on substance, as the EU revised it's merger regulation and issued guidelines, it, of course, had -- and this was done ending in 2004, it, of course, had the US material before it. And it came to a different -- to a partly semantic conclusion regarding unilaterally effects.

When it was revising it's merger analysis, it definitely wanted to include unilateral effects, but thinking about and reading all the work that had been done on it, it decided that the concept was not really unilateral effects but non-coordinated effects, and that is on the theory that where you have a unilateral effect and you have a price rise, because of the uniqueness in some way of these two firms, then the rest of the industry under a lot of circumstances has an incentive to adjust their prices upwards. So it's not just unilateral, it's market wide, and that's what non-coordinated effects are.

And I thought that the Justice Department and the FTC probably ought to consider this history and conclusion on the other side of the ocean that the unilateral effects problem is really not just unilateral, and maybe they will be merging a common terminology of non-coordinated effects.

MS. JONES HARBOUR: Let me turn for a moment to the consumer friendliness, if you will, of the guidelines. There have been some concerns expressed in the antitrust bar that the merger guidelines are overly theoretical, somewhat esoteric, and may be written in the language of highly technical merger experts.

Now, can any of the panelists speak to the idea of making the guidelines more consumer friendly, that is to say, keeping them simple and practical so that they can be understood by generalist judges and by business persons?

MR. DONAHUE: You know, I think they should be. I have an anecdote to relate, and I have been in a lot of cases with the federal agencies, and there's a SSNIP test, and somebody will invariably ask when we're interviewing business people, suppose you were faced with a small but significant non transitory price increase, say approximately five percent, what would you do? And answer to that question all the time is, "huh?" Because the business people don't think that way. That's not the language of the way businesses operate.

I guess, there's sort of a conflict between what an economist -- how an economist would describe something and how a business person would describe something, which does create some sort of confusion, especially on the business side. Obviously, the antitrust lawyers, they know what all this means, but the business community finds part of it very confusing. Now I don't know exactly what to make of that -- how to solve that problem, but I think we should work on making the guidelines -- or the guidelines should be more user friendly.

MS. JONES HARBOUR: And perhaps in the merger commentary, there could be more explanation for the lay person or the business person, that might be helpful.

Let me talk about for a moment the incipiency standard of Section 7 and Type 1 and Type 2 errors. I saw that in the AAI's comments to the agency, the institute pointed out that the merger guides give only a passing reference to the incipiency standard and basically ignore Congress' clear intent in this area, and then the comments go on to say that since Type 1 and Type 2 errors are inevitable, then the guidelines should be amended to respect Congress' wishes and that the guideline should err on the side of over-enforcement rather than under-enforcement.

So, to what extent, if any, should these error cost considerations play into the guideline revisions either in the United States or elsewhere?

MS. AITKEN: I'll make a go at that. I think in the merger context, I guess I'll speak personally, but also in my role, that I would consider that you'd want to be erring on the side of under-enforcement not over-enforcement in the merger area.

I think in guidelines obviously you're trying to strike the right balance between predictability, transparency, but also preserving a certain enforcement space, if you will. In a recent experience, not in the mergers context, but we had to issue guidelines in connection with new cartel provisions and a new agreement among competitors provisions, and given the limits of the English language we were doing our best in our guidelines to build a fence, if you will, around the cartel provision to provide comfort so that we didn't chill pro-competitive agreements among competitors, and I think we did what I believe is the right thing to do in enforcement guidelines, and that is, to the greatest extent that you can, try to think hard about what you think is the most important thing for you to achieve as an agency in terms of your enforcement discretion and, in our case, we actually explicitly took off types of agreements. Like, we took them off the table for the prospective of treating them as criminal even from an investigative perspective so that there could be greater predictability in terms of, yes, we might look at your agreement but, if we did, we'd be looking at it civilly and, therefore, providing guidance to business folks to have the confidence to try creative things, to be innovative.

So I think that's a long way of saying that I think you have to sometimes be brave and take as a matter, not of law, that's not what these are, these are enforcement guidelines, and guides tell you you can exercise your discretion, to my mind anyway, and you should take that opportunity to try to articulate where it is that you really think you need to go in and you need to enforce so as to allow for the good parts in the case of mergers or agreements when competitors are to be fostered.

MS. FOX: Going back to the comments that you were referring to of the AAI, we are so far from enforcing the intent of Congress in Section 7 of the Clayton Act that I just put that out of my mind. We're not anywhere near there.

However, there's a different set of factors that play in my view in terms of intervention, and not intervention, and when do you make the decision, and which side do you want to make the error on.

We have erred so far on -- or at least gone so far in the direction of non-enforcement for a decade, and we've gone in a direction of non-enforcement by using certain default presumptions about how markets work and how close the potential competition is that, in my view, don't reflect reality.

So I think we have to adjust to reality and, if you adjust to reality in the United States, you're doing more enforcement. And the guidelines aren't going to tell you this, and I don't know how guidelines will say this, because the real things that matter when you have a merger in an area that might be problematic are very subjective. I shouldn't say the real things, but sort of a take on how dynamic this market is, how likely is it to capture for itself the market to take care of any tendency of anticompetitive effect or not.

MS. JONES HARBOUR: And you mentioned the potential competition doctrine, and I know that this doctrine was explicitly included in the 1982 and the 1984 guidelines, and it was omitted in the 1992, and then, of course, in '97 when it was revised for efficiencies. There have been several recent mergers and cases which involve potential competition at both the FTC and the DOJ. At the FTC, it was DoubleClick, it was the Hospira Mayne Pharma case; at DOJ, potential competition investigation involved Delta Northwest, and then a number of the telecommunications mergers.

Can anyone discuss whether the guidelines should be updated to address mergers that eliminate potential competition?

MS. FOX: First, on potential competition, usually these are potential horizontal competition. It's very interesting the EU guidelines includes it in the horizontal guidelines. I think it should be included. I think one should take a look at the EU guidelines and perhaps include it in these guidelines.

Second is, if I can extend your question, conglomerate in general. We have the Comcast -- we, in a sense, the Comcast NBC merger is pending in the papers every day. There are no guidelines. There's no guidance to go to in the United States. In EU there is. Isn't this a big hole? Shouldn't there be some guidance from the agencies to suggest the kind of framework for analysis that they are doing?

I realize these hearings are about horizontal. It could include potential horizontal as EU does under horizontal. I think for another day, but another day really soon, there should be guidelines that are on conglomerate.

MS. JONES HARBOUR: And before I open it up to the floor, let me pose one more question to the panel.

How do you think other jurisdictions will react to any changes in the US guidelines?

MS. AITKEN: I think it will be positive to the extent that they're good ideas, obviously, but I think that the openness to articulating a view that is more reflective of what you're doing or is sort of the one goal in the statement from the agencies, or to simply, you know, modernize an approach to the most sophisticated antitrust thinking, that's all good. And I think we're fortunate today to have for a like, the ICN where these can be, you know, quite readily debated, communicated, adopted, if thought appropriate by other countries, so perhaps we're in a better situation than we used to be in terms of just being able to talk and debate in a pretty expeditious fashion.

MS. JONES HARBOUR: I open up the panel for questions from the floor, if anyone would like to pose any. No? Okay.

Well, let me ask you this. To what extent would introduction of any new paradigm, for example, I heard of the upper pricing pressure formulation. How would any new paradigm potentially complicate interagency analysis and discussion and would it or should it lead to specific changes in any of the foreign guidelines?

Eleanor, do you want to take that?

MS. FOX: Well, as you know, I think that any discussion that goes in the direction that we, whoever "we" is, decide is better analysis is good, I think that our counterparts in other parts of the world would accept it as that, and be very happy to engage with new concepts. I mean, for example, I think working out innovation and when a merger harms innovation, when it helps innovation, is one of the most important things that should be on the table and it would, it could change guidelines.

I think there ought to be an international community thinking about these issues and I think they'd be receptive.

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

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

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

(Applause.)

(A break was taken.)

PANEL 2: MARKET CONCENTRATION
AND STRUCTURAL PRESUMPTION

MR. SHELANSKI: If we can get started with our second panel so that we can remain more or less on time, that would be great.

The next panel is going to cover the questions of market concentration and structural presumption. We have a lot to talk about. And an extremely distinguished panel needing no introduction, but just to say, I want to thank Ilene Gotts from Wachtell Lipton; Rich Gilbert, a former professor and long-time colleague from Berkeley, thank you for coming all the way out here. Michael Salinger, former director, the Bureau of Economics at the Federal Trade Commission and a wonderful economist. Thanks for coming down from Boston to help us out. And Ron Stern from General Electric, their chief competition counsel. We're very grateful for his taking the time to be with us.

Now in talking about market concentration and structural presumptions, we are going to have an operating assumption in the background that at least some people in this room might take issue with, and that is that we actually care about market concentration and that we may want to have structural presumption.

All of this presupposes, in other words, that we are going to go through some exercise of market definition. And indeed the operating assumption of our guidelines review project is that while market definition has probably been overemphasized and led to some unfortunate outcomes in the courts, where courts have insisted on bright line market divisions where such divisions simply don't make sense. So we think they've been overemphasized and market definition needs to be re-thought.

We are not at least suggesting or supposing that we will do away with the exercise altogether or in any truly fundamental way. Now, again, there are contrary views that we will probably have a chance to have aired today, but for purposes of this panel, I think we will stick with the operating assumption that market definition is going to happen and then, once it happens, what should we draw from market concentration and what kind of presumptions should we make.

So what I would like to do is just start out by posing a question, a very basic question to the panelists, and they can really answer in any order, but maybe I will start with Ilene.

Do the HHI thresholds in the current guidelines continue to provide useful guidance to merging parties?

Have they ever? Should they be adjusted and, if so, how?

MS. KNABLE GOTTS: Thank you, Howard. I'm going to start out with disclaimers. It's not just the government who has disclaimers. The views that I'm going to express today are not the views of the antitrust section of the ABA, Wachtell Lipton, or any of my partners or my clients, they're mine alone.

So with that sort of statement, I think the HHI presumptions that are in there are totally misleading. They do not reflect what the agencies do or should do. If I had my druthers, I would get rid of them totally. Although I do think concentration does play a role and is something you look at because you have to know how the marketplace performs; you get a false sense of security when you can play with numbers and get a sense. As Eleanor said in this morning's panel, when you can get a sense of whether a market is concentrated without HHIs presumptions -- you can get a sense by looking at the market. And the market definition question I think you really do have to go through, by the way, although you didn't ask that question.

So I'm not going to get in my way. You're going to have some kind of HHIs here. I assume that there will be something in it. So then let's focus on what should be modified. It's widely accepted that the current HHI thresholds do not reflect reality. The only places where you get an enforcement action anywhere near them is in petroleum.

It would be nice to be why petroleum, especially when you look at terminals, is treated in some other way other than that Congress, every time you have a merger, will scream at you. I would hope that's not the reason why. And the fact that there also has been only one litigated case in the petroleum industry in a couple of decades or more, means that really the agency is the one who decides this.

So if they don't reflect reality, the first step is to get them to reflect reality and to recognize that one size does not fit all, which goes back to why I worry about using HHIs. Wouldn't it be better to go into the factors, that one looks into to decide whether or not a marketplace structure which includes concentration, but it might also matter how or where the two merger parties are situated in the marketplace, how close is the competition, all these other factors, wouldn't those be things you would want to at least explain? So maybe you give a range of HHIs. Maybe you figure out what sort of factors should go in there. Use some of the industries as examples pointing out that industry structure could change, so even those presumptions and suggestions might not be accurate. What might today be an unconcentrated market might become concentrated, or because of changes in technology, convergence of two marketplaces, what was looking pretty ugly might become less ugly, or regulation might be replaced by competition, like you've seen in the FCC sort of area. There might be a lot of other factors why taking that snapshot today might be totally different tomorrow.

I think also one other problem I have is the way the HHI's read today. It basically has these thresholds that are unrealistic and then it says, and, if you go above that, there's a presumption of being challenged. If we were to flip it around instead, there should be a presumption of a safe harbor, if you're below certain numbers, and what those numbers should be as a screening to say if you're in these other numbers, then that suggests maybe this warrants further investigation.

And the burdens of proof, because this is, again, when we go to court, it might be appropriate to have sliding scales and having shifting burdens when you look at the case law, I'm not going to fight 30 years of case law, but when you're in an agency, you're trying to make the right decision on whether to bring a case, and to start shifting presumptions once you kind of make one thing and say, okay, now parties, you have this overwhelming presumption to show us that there's going to be positive effects from this deal and countervailing factors, that's not what it should be about. It should be a dialogue so that you get to the right outcome.

So anything that suggests some kind of legal presumptions and tipping of the scales to me causes some real concerns, so that's kind of where I would start out.

MR. SHELANSKI: Ron, if I could ask you from the corporate perspective to give your reaction to Ilene's words, but also your answer to the question from the inside, what kind of guidance do the current thresholds give you and how do you see them as in need of revision?

MR. STERN: Thank you. I would basically say that the current guidelines -- I agree with a lot of what Ilene said. The current guidelines would be misleading to people on the inside who are not knowledgeable about practice under the guidelines. And, therefore, it would be helpful to revise the guidelines so they weren't misleading and they did reflect the practice.

It seems to me it's important to revise them in two ways. It seems to me the most important thing to do is to eliminate the numerical presumptions, as Ilene mentioned, that a merger with an HHI of greater than X, and an increase of greater than Y, is likely to create or enhance market power.

I don't think that this process should simply lead to the numbers going from 1,800 to, hypothetically, 2,500, and from 100 to, hypothetically, 300. I think the presumptions, based on the numbers should go away. The numbers should be a starting point, as Ilene mentioned, and I think that's really the reality and basically the consensus.

There are a whole number of places where that's been recognized. There was a 1994 Defense Science Board Report that Bob Pitofsky who was the chairman of the FTC, would chair, and Carl Shapiro was on that group, and I participated, and even back in 1994, the theory was, the numbers are just a starting point. The commentary says that. That I think is the strong gist of the 2008/2009 International Competition Network Recommended Practices that the Department of Justice had an important hand in.

And then I think the second issue is, should there be a safe harbor, should there be a higher HHI number for the safe harbor? I think that would be helpful. I think that would be realistic. I understand the issue that the agencies would face in not wanting to set the safe harbor too high and worry about a soft safe harbor, but I think it would be helpful to move it up significantly while noting that a number -- that it's just the starting point. So that there's no presumption clearly if you're outside the safe harbor.

MR. SHELANSKI: Rich Gilbert is easily found in Berkeley because he may be the only person in the United States whose license plate reads, "HHI 1,800."

So, he's a safe driver. So, Rich, do you need to change your license plate?

MR. GILBERT: I have a vested interest. I have a vested interest in the merger guidelines threshold, so I would have to change my license plate.

Well, certainly, I think both Ilene and Ron make some very good points. The real action in merger analysis is in Section 2 of the guidelines, it's not in market definition. That's been my experience at the Department of Justice. It's been my experience working as a consultant for the Department of Justice, and working with private parties.

I think it's a noteworthy fact that even within the agencies, they care about competitive effects and market definition is something that interests them, but is not the main part of the analysis.

Now I will point out that we are talking as if the market is something that's an objective fact. And if we talk about an HHI of 1,800, well an HHI of 1,800 and what? Or 2000 and what? The point of this is guidance. The point -- I think the merger guidelines provide a very important role in helping private parties understand what's going on at the agencies to some extent; and an important role in guiding what goes on within the agencies. But, in giving that guidance, you obviously have to be concerned about shackling your own enforcement and limiting what you can do. So I think the kind of guidance you can give has to be limited.

I'm all for safe harbors, but I don't think we can give a safe harbor of an HHI of 3,000, and a delta of a thousand. That's not going to work for many reasons. But I think some kind of safe harbor would be advisable, if you're going to use a structural presumption at all.

A structural presumption in the other direction, of course, has the problem that we know that market statistics, market shares, market concentration is not a sufficient statistic for market power and, at least from an economic perspective, we're concerned about mergers that will enhance market power.

MR. SHELANSKI: Michael.

MR. SALINGER: Well, I agree with much of what's been said. The word presumption is a loaded term, and I'm not sure what the better term is. But I still think it's useful to have thresholds and that in thinking about the threshold, you should ask two questions. One is, where, as an enforcer, do I start to get nervous?

So everyone agrees that -- almost everyone agrees that two to one is something that we're really nervous. And that even three to two virtually everyone agrees I think people get really nervous, and you'll have some people say, well, sort of four to three is the typical threshold of getting really nervous, which would mean that you would choose 3,000 or 3,500 as your concentrated market. I'd be surprised if the agencies were really willing to go quite that far.

So I would pick 2,500 as the upper range, right now, the thousand number is completely useless and provides no information. But what you do want is, well, are there are there some markets that are different like petroleum? And, yes, I mean it is true that petroleum is different because Congress screams very loud and it's very unpleasant when they scream, but it's also true that the demand for petroleum products is highly elastic, so the risk of the potential harm from the exercise of market power is greater in petroleum.

And so I would -- I would pick 1,500 and if you ask me to defend 1,500 versus 1,550 versus 1,450, I can't do that, but it's just guidelines and I think that those numbers would provide useful guidance to the parties.

MR. SHELANSKI: Thank you. It's extremely helpful to put some numbers to that. Obviously on the 2,500, you're in good company with what the EU has done. I think that's a very interesting suggestion on the lower threshold of the 1,500 threshold. Thank you.

MR. SALINGER: Can I just say one more --

MR. SHELANSKI: Sure.

MR. SALINGER: The numbers that are completely worthless are the 1,500 and that has to be either eliminated altogether or changed substantially.

MR. SHELANSKI: Do you want to say a little bit more about that because that's a very interesting point? Where would you go with that? Would you eliminate them, or would you change them, and, if you would change them, where would you go,

MR. SALINGER: I haven't thought it through as carefully as I should have given that I was going to be on this panel, but my inclination would be to eliminate them.

MR. SHELANSKI: Yes.

MR. GILBERT: A comment on that. I do think that one of the most useful principles that we have in economic analysis of competition policy is the notion of the market share screen, and that is, if you see a conduct or a merger involving parties with very very small market shares, you can confidently predict that that's not going to be a problem. And I think sending that message, even if it's a small number, is a useful message to send, but the number has to be small enough so that you don't wind up making, you know, whether it's Type 1, Type 2 errors. I always forget which one of those, and putting yourself in a position where you can't actually enforce an action you would like to, in fact, restrict.

Now you can always do that with these great guidelines, words like absent special circumstances or unlikely or whatever, but some kind of guidance like that would be useful.

MR. STERN: Just a quick follow-up on Michael's comment, if I understood, and 1,500 and the 2,500.

It seems to me the agencies have an important responsibility to look at the track record and do something that's credible in light of the track record and, as I noted in my first comment, understand the concern, and Rich mentioned it also about not setting a safe harbor too high.

But if you look back at the FTC's numbers that were put together going over kind of more than 10 years, you'll find that when you get into the other markets, you get out of oil and groceries and the like. There was one challenge below 2,400 and only 10 percent of the cases below 3,000 were enforced.

So it seems to me that moving from 1,000 to 1,500 doesn't really do you any good and really wouldn't be very credible. And it seems to me that it's probably better to come up with a more realistic safe harbor number if it will be credible consistent with prior practice and maybe make it soft, if you're going to keep numbers, and, above it, I wouldn't have a presumption. I would have a starting point for jumping into the guts of the analysis, the competitive effects analysis and not have a presumption.

MS. KNABLE GOTTS: I want to add on. Even there, Ron, when you're talking about the statistics, we're talking about decisions in which enforcement actions were taken. We don't really know for a fact that that's where problems really existed because there don't tend to be many challenges and we haven't had much in the way of retrospectives.

I'm not sure how I come out on retrospectives. I know most clients would hate it because it's a cost and their deals have gone through, and then to find that the deals that were allowed to happen caused problems. You know, they're going to hate me.

But maybe we need to be looking a little bit more at what the evidence really shows and understand a little bit better under what sort of market characteristics do we really have problems beyond just a head count of the four to three or the five to four.

MR. STERN: I guess my point was that if, not even half of the cases between 2,500 and 3,000 were enforced, wholly apart from whether there was an underlying problem. It's difficult to square that with have a presumption if there is a problem.

MS. KNABLE GOTTS: Exactly.

MR. SHELANSKI: I would like to turn to a slightly different question and I'm going to ask Rich Gilbert to start off answering this question. When

Rich was Deputy Assistant Attorney General for economics in the mid '90s, he did some classic and groundbreaking work on innovation and the treatment of innovation in merger analysis.

So my question to have Rich start us off on is, how should market concentration be measured and interpreted in technologically dynamic markets? Should the guidelines try to say more than they do currently about structural presumptions and technological innovation?

MR. GILBERT: Well, Howard, I think your questions raises at least three separate issues. One is, can we even define a market in a dynamic industry? Does it make sense, for example, to define a second generation mobile telephony market? Or is it the case that the third and fourth generations are going to happen so quickly, that it's just meaningless to define a market like that? Maybe the market should be high speed mobile telephony or something like that. So that's one issue.

A second issue relates to entry. Many people looking at dynamic markets say that entry is so unpredictable, can happen so quickly, the consequences can be so catastrophic with Shumpeterian creative destruction and all of that that we don't even have to worry about market power because it's going to be undone.

And a third issue relates to, is there a relationship between market structure and innovation. So let me touch on these questions a little bit.

The first point about stability of the market, I think that demands that you look at what the relevant consumer choices what are the relevant consumer choices in the telephony case, as it's high speed not second generation.

With respect to entry, I have a difficult time with the concept that, because there may be catastrophic entry, that we shouldn't be concerned about conduct or mergers that create market power in the present. It's certainly the case that the possibility of drastic entry can make the adverse consequences of a merger much less durable, but that doesn't mean we shouldn't care about it at all.

So I don't think that that requires any fundamental change in the way we presently think about mergers. We already think about entry. I think sometimes we even talk about potential competition, at least in the entry context, and so I don't see a need for rethinking of the approach to merger analysis due to entry.

The third question, obviously, is one that intrigues me a lot. Can we say more about the effects of mergers on the likelihood of innovation? I think we can. The issue is, can we say anything about structure and innovation? It's obviously a complex and unsettled issue, but there are some conclusions that have held up quite well, both in theory and in empirical validation, and that is that, when a merger involves companies in a market for which there is a high degree of appropriation, either through intellectual property rights or first-mover advantages, or whatever things protect your innovations from competition, then there are reasons to be concerned about structural impacts from a merger. It depends upon a lot of things. There are a lot of issues that have to be addressed, but there are concerns in that instance.

On the other hand, when a merger does not -- well, when a merger may actually enhance appropriability, in that case innovation can have an efficiency effect from a merger. So that should be considered as a possible efficiency defense.

It's not right to simply, as we have sometimes seen, challenge a merger because it is likely to raise prices and then just add a boiler plate addendum and say -- and also harm competition. That does not follow.

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

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

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

And I think in many cases, as long as there are enough other companies out there getting larger global scale, for example, to have a better opportunity to get a return on your innovation, that all of that -- that mergers can stimulate innovation. And I think Rich's comment that it depends is really true.

So I don't think that there should be market concentration or market structure presumptions or guidance. I think it really is individual and case by case and looking at the factors.

So I'm going to continue to beat my drum that it's not the structure or the numbers, it's going to look at the individual facts of the individual marketplace and understand what the competitive effects are going to be.

MR. SHELANSKI: Thank you. Ilene.

MS. KNABLE GOTTS: I think part of it is when you look at the merger guidelines you get the static approach. And what we're talking about here are dynamic markets. So I think of what you were saying, Rich, in the example of the mobile phones and goes back to the all the Telecom deals that I did over the last couple of decades, market definition, if you read the guidelines, literally became a problem, because they didn't really reflect looking forward, only looking in the back mirror of how markets were converging and where competition was going to come from. So that's one thing that you have to take into account.

Building a little bit upon what Ron had said here about looking at not just the number of players that are there but understanding a little bit about what's happening. Mergers can really be disruptive. They can be totally game changing transformational situations where, as a result, you now have, due to efficiencies and just putting together the different components of the companies, technology or whatever, you might actually have a leap frog in the technology that everyone else has to run to catch up on. So although there might be one less player; it's not one size fits all.

Again, when you're looking at this, I think the guidelines would really benefit from explaining how, in rapidly changing markets, because of technology, because of convergence, I would even add situations where the market might instead be dying, it would be nice to at least explain how those factors go into such things as market definition, looking at concentration, looking at whether there will be mavericks created, whether they'll be disruptive, whether they'll be a creation of market power, whether on the other hand there might be the creation and entrenchment of a dominant firm, whether there might be network effects, or lock in, to actually talk about those factors so that people who don't live and die this stuff, actually know what to ask their clients so they can come in informed.

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

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

MR. SHELANSKI: Michael, before I turn to you, let me actually turn to you with a somewhat more generally-phrased version of the question because what has come up so far is some very interesting thoughts, that you've got questions of disruptive entry by innovative players, Shumpeterian kind of creative destruction, if you will. You've got the possibility, something came up in the last panel and that we've heard some echos of today, in conventional markets of potential competitors coming in in differentiated product markets. You have the possibility of product repositioning in response to price increases by a rival. So this leads me to think more generally about the question and, let me rephrase it to you in this way.

Should the antitrust agencies be considering additional or alternative measures of market concentration in these kinds of markets, differentiated product markets, technologically dynamic markets or any settings in which current market shares may be less indicative of market power than they might be in the static model of competition?

MR. SALINGER: There's not much use in trying to adapt the framework of defining a market and defining concentration of the market and the changing concentration with respect to innovation. There are good reasons -- there can be good reasons to block a merger because of concerns about reduction of innovative competition and, what would cause you to do that would be that you look at how the companies made their decisions about how much to spend on innovation and who they were concerned about, and so the classic case would be that you have two companies and they're the only two companies that are trying to develop a particular technology and each of them is trying to beat the other and you know that, and so then you would block -- absent some reason to believe that they were going to do it better in a joint effort, which, you know, which happened with the Genzyme Novazyme merger. Then you'd block it for innovation reasons but there would be no reason to say, well, this is going to create a 10,000 herf in the innovation market and the change in the herf of 5,000.

It's really more from the direct evidence of head-to-head competition. And, in a way, it's an approach, it's a little bit like the upward pricing pressure approach that the guidelines -- the approach of defining a market and looking at concentration and the changing concentration can be useful in some cases, but there are other cases where really the best evidence for the competitive effect of the merger is that you have evidence that these companies view each other as strong direct competitors and that that's going to change if they merge.

MR. SHELANSKI: If I can just follow up on that, that prompts a couple of questions.

I'm inclined to agree with you and I think that

that's a very important point about how we would look at a merger when we're considering its effects on innovation.

Do you see the roots of the problem as being in the difficulty of drawing presumptions about the effects of market structure on innovation, or are the roots of the problem in identifying the universe of competing innovators or is it a combination of the two?

What leads you to the more fact base case-by-case approach when it comes to innovation effects and, what I read in your remarks, an abandonment, if you will, of this sort of standard structural presumptions in hat area?

MR. SALINGER: Well, probably the reason lies in a lot of the points that Rich was making which is that as imperfect as the structure performance model is for handling price effects, it's even harder in innovation and so it's already a controversial tool with the standard price and output decision, so that when you then make the tool even more imperfect it ceases to be useful.

MR. SHELANSKI: Rich.

MR. GILBERT: And if I could just add to that. I agree with what Michael said, but obviously when we look at innovation we often look at R&D effort and, of course, R&D effort is an input not an output to innovation, and we're concerned about the output of innovation and not the input of R&D. So you could have a situation where two firms merge. It's clear that one firm is going to drop an R&D project. It may not be a bad thing to do. It depends. And you have to consider what else is going to happen in that event. And so it's not something that lends itself easily to a structural analysis. It has to be an effects-based analysis as is often the case for price competition as well.

MS. KNABLE GOTTS: I think that's right because that focus is -- looking at the counter-factual, would you have had two firms out there and, also, part of this has got to be, what will be the response of others in the marketplace. Even though these two firms might have been going head to head, is there someone else who can keep the competition up afterwards, might be a relevant --

MR. STERN: Let me just jump in. It seems to me to kind of make this simple. I don't think that market share numbers are really going to help you at all. If you use Michael's example of two firms that are the only two firms that are pursuing a certain product characteristic that might be important and they merge together, and the other firms in the industry, let's say there are four firms, they each have 25 percent share of however you define the market, but these two firms may be innovating in some important way and competing with each other. If they go together, there may be barriers, patents, or other things to keep the other two players from pushing them on price or on innovation.

If you just change the hypothetical around and find out that one firm is pursuing this, it's not one of the merging firms, the two merging firms see this as an opportunity and are willing to invest money, but they either lack IP that they would get through the merger or capabilities or scale to make the investment work, then you can turn a merger with the same market structure from being one you would be very worried about to one where you'd say that the merger really presented a lot of benefits because it was likely to stimulate innovation and create competition for the one firm that was already well in the lead in doing the innovation in this particular product characteristic, which is, again, why I think you don't look at structure, you don't look at numbers, you look at the facts and the particular market context.

MR. GILBERT: May I just add one thing? Except for the safe harbor. Because we already do have a safe harbor if we look at the IP guidelines. Of course, it's not directly merger related. Then there's also the competitive collaborative guidelines that have an innovation related safe harbor and, for good reasons, because you would not expect innovation effects to develop where you have, you know, multiple players that can, in fact, do the same sorts of things.

MR. SHELANSKI: Okay. So what I would like to do next, starting with Ron and working our way down the row to Ilene, I would like each of you to take a couple of minutes to summarize your recommendations and, if you will, articulate your wish list to the agencies on the question of concentration structural presumptions.

What are the two or three things you think we should do? And summarize your views on that.

MR. STERN: I'll go down my laundry list quickly. Before I do that, I'd refer you to the comments that Mike Whitener and I filed that cover areas more broadly than market structure. Mark is here with me today as a former Deputy Director of the Bureau of Competition and my colleague at GE.

The first thing I would do is remove the current HHI presumption, which I mentioned several times, and I wouldn't replace it with a higher number.

I would have the structural approach just be a starting point. I'd revise the guidelines to increase the safe harbor at which no further analysis is required. But I don't think that's as important as removing the presumption based on numbers.

I would focus on competitive effects as the core of merger analysis. I think that's quite important. And I'd also avoid replacing the HHI structural presumptions with any other structural presumptions based on numbers or formulas.

We've talked briefly -- it was mentioned about upward pricing pressure. I think that could be well part of the analysis of unilateral effects, but I think and, as we've pointed out in our comments, that if you look at the numbers taking lots of industries including industries that my company is involved in that have high variable margins, you end up with presumptions under what I understand the UPP analysis to be, that are presumptions we've all rejected based on the HHIs, seven to six mergers become potential problems, and I think that the agencies ought to be very cautious before they adopt presumptions of any kind that don't reflect historical practice and aren't well accepted.

And then finally to touch on a point that came up in the first panel, I do think that it is very important for the Department of Justice and the Federal Trade Commission at this stage to understand the impact of any revision of the merger guidelines in the world that we live in with globalized markets and a hundred agencies approaching that number anyway that have merger review, some very new to the process.

I think a lot of progress has been made on working towards a consensus in which we don't rely on numbers and presumptions and mechanical approaches. We rely on competitive effects analysis. I think a lot of progress was made led by the Department of Justice and the merger task force that Phil Weiser now heads in getting the recommended practices approved, and I think it is important for the US to build on those and to build towards international consensus.

Yes, all the good ideas ought to be built in, but we ought to realize we're not operating in a vacuum, and we ought to think about the messages we're sending internationally.

MR. SHELANSKI: Thanks very much Ron. Michael.

MR. SALINGER: I would -- forgetting my wish list, I would just echo the point of how influential these things are across the world. I was always struck at how many countries had followed the US lead in having tying be a per se violation of the law. So these can be powerful for bad and for good and so you have to be very careful.

The essential dilemma of merger policy is that we want merger review to be forward looking and we want merger review to be based on facts. And the problem is we don't have facts about the future, and that means that there are mistakes that are going to be made. And so I believe that, I mean, putting aside whether presumption is the right word, some sort of structural guidelines are necessary and I would use the 1,500 and 2,500, and I recognize the point that the reality might be a little bit north of that now, but I would have a bigger role for efficiency analysis, so that the reason for having a somewhat low number for the threshold is to say, okay, well beyond that, this is where we start to get nervous, and so this is where we would expect to see some credible information about the efficiencies to make us less nervous.

In our discussion about innovation, a lot of the discussions, well, you put two R&D shops together, you might get efficiencies from it and that's true, and that should be taken very seriously.

But it strikes me as being a big problem that the efficiency analysis, there's this chicken and egg problem that people believe the agencies aren't going to take efficiency analysis seriously, so they come in and provide efficiency analysis that the agency shouldn't take seriously.

So I would stick with the structural guidelines, have a bigger role for analysis.

And then, finally, on one of the issues giving rise to these proceedings, you have to say, well, sometimes there's going to be a decision to block a merger based on the structural analysis, but there will be other cases where we have direct effects -- direct evidence of anticompetitive harm that's coming through with a different analytical approach and so, when we have that, we're going to rely on the direct evidence of anticompetitive harm, and we're not going to have to rely as much on the structural tool.

MR. SHELANSKI: Thank you. Rich.

MR. GILBERT: It's not an easy job to write guidelines, I can tell you from some experience. What some people want is plain and simple language. You know, two to one is bad, really bad; three to two is not so good either. And end it at that. But the merger guidelines in many respects have come to represent really the collective wisdom that we have when it comes to analyzing competitive effects from mergers and acquisitions. And, in many ways, it's the bible of competition policy. I do think that we have learned a great deal since the fundamental principles were laid out in the guidelines in the '80s, and our knowledge has pointed us in new directions, and that would be helpful to communicate those new directions both to, well, to practitioners, to the public, and to the people in the agencies who do this. It provides a useful function for all three of those constituents.

When it comes to structural presumptions, they're useful as safe harbors, but it will be faced with the criticism that it's irrelevant because nobody actually brings mergers that fall in those -- close to those safe harbors anyway. So we could make the HHIs a little bigger, maybe the deltas a little bigger, change the language to say instead of a presumption of harm, we will say that if it's below this level, it's unlikely that there would be harm from this merger. It would be useful, I'm not sure it would make that much of a difference. I would urge the agencies to communicate the more integrative view of merger analysis that is consistent with what they presently do, which is to really think about the second section of the guidelines about the competitive effects and to analyze transactions in that context.

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

With regard to dynamic industries, I don't see a need to change fundamentally the approach due to entry. I believe that firm repositioning, and that sort of thing, are well handled in the guidelines today. But the guidelines could provide some commentary about innovation incentives and there -- while I don't support a structural presumption for the same reasons that I wouldn't support one for price effects, there's ample reason to provide a safe harbor and to focus on the principle that we're going to be concerned about innovation effects in mergers only if the merger doesn't enhance appropriability or maybe a better way to put it would be to say, a necessary condition to be concerned about innovation effects in a merger would be in a market where there is a lot of appropriability.

MR. SHELANSKI: Thank you.

MS. KNABLE GOTTS: I'm not going to repeat what everyone said. We're out of time pretty much, but I pretty much agree with what Rob has said about the HHIs, so one thing Rich I would state a little bit differently, I think on the entry question in dynamic industries, we should do more. It goes back to Michael's question, when you look at the two firms, do they really look at each other as really competitors in innovation and looking at what timeframe that really influences them. And that's going to vary from industry to industry. Some industries you start making your decisions 10 years in advance because responding to what's out there. So I think there needs to some recognition of that.

The only other thing I want to point out is, there are times -- well, two more things. One, when you want to look bidders' models. When looking at market structure and market shares, again, you get this false sense of some kind of impact and where, because of the responses of customers and firms, it's really -- and capacity that might be out there, a one over n might be a more appropriate way to measure it.

And the other aspect is to kind of focus on what the guidelines are for. They are more the bible. They're not the Talmudic Readings or the latest flavor of the month or whatever. So I worry about trying to do everything and, in there, perhaps putting in the UPP test, for instance, even if the agencies are today really testing that and trying to see how that works. Put that in a speech. So that is something we are today looking at kind of like the European Union has the economists talking about the sort of the evidence that they look at, you can put that in there, but I don't think it's tried and true enough of a test that putting it into guidelines today and accepting that in some elevated status as how we're going to decide whether something has competitive effects is the right thing to do. So that -- was that quick enough?

MR. SHELANSKI: That was great. Thank you very much.

We have time for a couple of questions, if there are any. Louis Kaplow.

MR. KAPLOW: (Technical difficulty.)-- and to talk about two that I think that the discussion doesn't fit very well. So one is the traditional coordinated effects which we talk about almost not at all. Number one, when there's actually coordinated effects going on, the price elevations are often much much larger than the things that we're talking about in the unilateral effects analysis, if it actually ever happens.

Number two, if we look at, say, prosecuted price fixing cases over the last couple of decades in the US, Europe, or elsewhere, we see again evidence of much much larger elevation than anything being talked about in merger analysis, and we often see that there were five to eight firms, meaning industries that would be in the safe harbor range of what's being talked about.

So this raises a question, you know, three, so why is it we can ignore this? We've got two sub-categories, A, we have, say, express price fixing. If we think we can adequately catch it, deter it, and sanction it, we're fine. I think there's a lot of evidence suggesting we're not there yet which may be cause for revisions elsewhere, but it's to keep in mind.

B, if we're talking about tacit coordination which we maybe think isn't even illegal so we're not going to hope or even try to deter it, then we're going giving up on it.

So that then leaves a fourth point which I don't have an answer to, which is, how can we look at mergers and figure out when they're going to significantly raise the likelihood of coordinated effects? Much can be said about it, but not very sharp. But it seems to me that implicit in the discussion of the numbers, is we're giving up on that pretty much entirely, we're going to call all of those really safe harbor cases that we don't even get worried about.

And then the second one which Rich was talking about in some of his latter remarks is we have the highly differentiated product merger. There's 15 firms an two that are close that are merging. It seems that either the market share is 100 percent or well under the safe harbor. And Rich would say, and I would agree, and others would agree, that we need to do the competitive effects analysis, see if price will go up a lot and then we're done. But if that's a real answer, then what was the safe harbor?

The safe harbor, if we just did a conventional market definition which would be broad, let's say we're not even allowed to get to that step because they're in the safe harbor, but if we always ignore the safe harbor and do all of the analysis and then go back and define the market definition from which we can then figure out whether we were in the safe harbor, how is it a safe harbor, and how does it give any guidance? I guess that had a question mark at the end.

MR. SHELANSKI: Does somebody want to react quickly to listening to that remark?

MR. GILBERT: Yes, Louis, two excellent points. The problem with the structural presumptions, whether the presumption of harm or presumption of safe harbor, they're built on shifting sands. So it's fine if we know what the market is, but we don't know what the market is, so I'm not sure it creates all that that much value, if it represents all that much value to begin with.

And that's particularly the case with differentiated products. And many many markets have differentiated products so is the market, you know, all cars, or is it just luxury cars, or is it just small cars or compact cars, and so this problem comes up time and time again.

With respect to coordination, I mean that's a fascinating issue as well. I think the Clayton Act talks about transactions that are likely to harm competition and -- so what do you do with a market that is already -- where the parties are already doing a good job of coordinating, so they've already imitated a concentrated outcome. So, how do we apply the Clayton Act there?

I do think that the approach should be, let's look at, what is the potential to increase coordinated activity. It is my view, but it's just my view, that that is much more likely when we're in the highly -- significantly more concentrated domain, assuming the market is properly defined.

MR. SHELANSKI: Michael.

MR. SALINGER: I'm glad you raised the

coordination issue because I think that's really the main reason why we still need structural guidelines. If you ask the question, "do we ever know that a merger is more likely than not to increase the risk coordination?" The plain answer to that is no. We don't -- you know, what we know is there's a mutual incentive to coordinate and we know that if firms are coordinating, there's a private incentive to cheat and when one wins out and the other wins out, we just don't know.

So, if the legal standard is more likely than not, then we should just get rid of coordinated effects as part of the law altogether because we're never going to know it.

On the other hand, as you pointed out, we know that coordination occurs, because we see all the price-fixing cases, and we know that the congressional intent in passing these laws had to do with preventing coordinated behavior. So that's why I think you need some structural guidance.

MR. SHELANSKI: Very quickly, Ronald.

MR. STERN: Very quickly. I really do think that there are two different categories in there need to be treated differently. If there's an actual cartel agreement, I don't believe the fact that they occur in industries with eight players or 10 players would be below the guidelines is any reason to change merger analysis. It's a reason to reinvigorate anti-cartel enforcement.

If you're dealing with tacit collusion which is legal, and you have an industry in which you have well functioning tacit collusion, then you need a lot of the criteria for why it is you shouldn't allow an additional concentration to reinforce it because the factors that are well established in the guidelines for dealing with coordinated effects are there, and you're likely to find a problem.

So I would put these in two very different buckets, and I think it is a red herring and dangerous to say that because we have cartels in industries that are not highly concentrated, somehow we ought to be knocking down mergers because we don't know if that would facilitate a cartel.

MR. SHELANSKI: We have time for one final question. Eleanor.

MS. FOX: Yes. I wanted to ask a question about the law and particularly about Philadelphia National Bank, and also particularly about litigation presumptions.

What does the panel think about, should the

Justice Department, FTC abandon the Philadelphia National Bank presumption which is basically a correlate with the presumption in the guidelines, if it is not abandoned, could it be retained with the statement in the guidelines to say this is a presumption that arises from law? Of course, I'm assuming you know what your market is or that there will be a market defined which is often quicksand, but, if it isn't, anyway, so is there any thought of saying in the guidelines there is a presumption that arises under the following situation, and we're going to define the situation as this much concentration, this much increase in concentration. It is not necessarily a logical inference. It shifts the burden of going forward.

Actually, whether it shifts the burden of going forward or burden of proof, I think judges are often not sure, and this would give some certainty that is only shifting burden of going forward, and now it's just the firm's chance to speak and say why this is isn't anticompetitive.

MR. SHELANSKI: Ilene, do you want to take a --

MS. KNABLE GOTTS: Well, actually, that was something, Eleanor, I said in the beginning of what I commented on. I think the guidelines should give an indication of where the agency, as a matter of prosecutorial discretion, how they're going to go about analyzing cases, and not in any way try to impact how courts today or may in the future based on judicial precedent decide to do it.

We're not going to do away with the fact that courts do put in certain burden shifting and presumptions, the balancing act, which is why in the antitrust section comments that were filed in this proceeding, we did drop a footnote recognizing that that presumption does exist today in the law without suggesting that necessarily the guidelines need to take the exact same approach.

MR. SHELANSKI: Ron.

MR. STERN: Just a very quick comment. I would certainly hope that the Department of Justice and the Federal Trade Commission don't turn the merger guidelines into a statement of, you know, what their presumed enforcement policy would be but not guidelines akin to other statements that have been issued recently not in a merger context.

And I do think that if we have outdated case law that isn't reflective of where the guidelines are, a whole discussion of presumptions and HHIs and statistics are such that I would hope that if it in fact is a good idea not to have the same kind of level of presumption as the Philadelphia National Bank, and that that's established and is a consensus, that we wouldn't have litigating positions that are inconsistent with the merger guidelines.

MR. SHELANSKI: Okay. With that, I would like to thank our panelists. That was extremely helpful. We're going to take a break until 11:30 and then we'll come back with our next panel. Thank you.

(Applause.)

(A break was taken.)

PANEL 3: MINORITY INTERESTS
AND FAILING FIRM DEFENSE

MR. SHELANSKI: Okay. We're going to get started with our next panel so we don't get too far into the lunch break that we have.

This next panel is going to be on Minority Interests and Failing Firm Defense.

We're very lucky to have a wonderful group of panelists, we want to thank everybody for their willingness to take time out of their day for this.

MR. JACOBSON: I'm going to kick off the discussion on that. A couple of things. Obviously partial ownership is not discussed extensively in the guidelines. I think one can read them backwards, forwards and sideways and not find a word. And I actually think there is a reason for that. The question that was posed is, "When should partial ownership be treated as a merger?" And the correct answer I think is never, because partial ownership does not have the efficiencies that distinguish mergers from other types of transactions.

Price fixing is illegal per se because it eliminates price competition but mergers are viewed under a rule of reason because they're associated with efficiencies.

And partial stock acquisitions, unless they involve some integration which then, it really is a merger, are not properly viewed as mergers. But partial stock acquisitions can cause competitive problems in four different areas, and I would commend to you the ABA comments which address most of these issues, but let me just tick them off and then we can talk about them later in more detail.

The first is, you can get de facto control even without an integration of resources through a minority stock acquisition. I think Carl Icahn minority investments up to a certain percentage can give you effective control of a board of directors if you have 42 percent, and the largest, the second largest owner has one percent, you can have effective control of the company, a lot of it has to do with the voting rights associated with your stock as opposed to the others, but you can get de facto control of a company with less than 50 percent.

Second, and we're going to talk about this in response to another of Howard's questions. There are unilateral effects consequences from passive stock ownership even without any voting control and we'll leave further discussion of that later, but this is the analysis that Steve Salop popularized and creates some interesting issues.

Third is access to information, a right of stock ownership is access to information. This usually runs in one direction so it's not an exchange of information, but there are competitive consequences for a competitor having access to confidential information of its rival.

And the fourth, which is rarely discussed out in the open, but those of you who represent clients I'm sure have had this discussion which is one rival buying a minority stock interest in another company can present a obstacle to the next largest competitor's attempt to acquire that company, and that can have competitive consequences as well. I don't think anyone has heard of a legal challenge to that. It would have to be by the agencies because the courts have established the private parties pretty much never have standing in that context. But that can be that if an acquisition by B of C would be procompetitive, and A buys a minority interest in C to prevent that result, that can have anticompetitive consequences.

The guidelines address none of these issues. I do think we need some guidance particularly on the passive ownership, but why don't we leave that until later discussion.

MR. SHELANSKI: Hit your button. Say that again.

MS. OVERTON: Hi. I think I've got it here. It's very nice to be up here in New York for this. And even though I'm no longer with the government, I'll give a disclaimer that my views don't necessarily represent those of the firm or any given client. For the reasons that Jonathan laid out, there are going to be considerations, analytical considerations, when you're looking at a partial ownership transaction, that are just going to be different than when you are looking at a merger. If you've got companies that are still competitors in the marketplace, for example, you're going to have this concern about competitive information sharing but, to the extent that you are proceeding under Section 7 rather than Section 1, it just goes back to the basic question here in terms of, is this transaction substantially likely to lessen competition.

Now, again, there may be reasons that a partial ownership transaction is less likely than a full merger would be or perhaps more likely. But I think that's going to be a factual inquiry.

MS. FORREST: Well, I guess -- I wanted to start off by saying that -- if I think I heard you right, Jon, you said, when should a partial acquisition be considered to be a merger, and I think you said never. Is that right?

MR. JACOBSON: Yes, I always like to --

MS. FORREST: It's like Ilene Gotts saying take the HHIs out of the merger guidelines, you know, starting off her panel that way.

I actually would disagree with that, and I would say that there are certainly circumstances when you have got real financial control and/or you've got effective control as you have mentioned of the decision making of the firm where you effectively really have control of that firm which is control in the sense of a merger.

And while the guidelines don't address this front ways, backwards, sideways, or in any other way, I do think that it's appropriate that partial acquisitions which result in a form of control should be appropriately analyzed as a type of merger.

I think the questions become who is making the acquisition and how much are they, in fact, acquiring. And the who and the how much I don't think are, in fact, amenable to numerical tests in any way. I think they are highly fact and circumstances driven, sort of a reverse Copperweld analysis, if you want to think of it like that.

But I think that depending upon the who, if it's a competitor acquiring a partial interest in another competitor that obviously could lead to some interesting issues. Even a competitor who is not acquiring a necessarily controlling interest in another competitor would obviously have interesting issues.

A competitor that is acquiring in the context of an otherwise fragmented ownership structure may raise interesting issues. If you've got, let's just say you've got a 39 percent acquisition. Not necessarily even in the high 40s, but 39 percent, but let's say the remainder of the ownership structure is, in fact, fragmented, highly fragmented, and the competitor is acquiring that interest in either possibly in another competitor that can raise some issues.

Even in a situation where there is not necessarily a competitor acquiring a horizontal interest, but a vertical interest you might have some interesting issues if it's highly fragmented enough.

And the how much then I think becomes an issue as to both, whether or not you can achieve effective control through financial control, or whether or not what you've done is you've achieved control through governance means. And if you achieve it through governance means, sometimes you can acquire a much lower level of financial interest, but still through governance means it might be simply veto rights over certain kinds of transactions, or it might be a board seat which provides you with certain kinds of either super majority voting control or other things. Those all I think need to be taken into consideration.

So when I think about partial acquisitions and mergers, I think that there are certainly circumstances where they should be considered to be mergers. However, I think that if the merger guidelines are going to take these into account, and I encourage them to because I think they're increasing numbers now of significant partial acquisitions, and a real paucity of guidance, and the merger guidelines after all are supposed to be about guidance.

So if they take it into consideration, I think that what they need to do is to provide examples of what are some of the structural issues that can raise concerns, what are some of the financial triggers that may or may not raise concerns, and it's almost as if what you want to do is add examples into the guidelines for this purpose.

So that's my -- and one last point.

Efficiencies. I do think that partial acquisitions can result in efficiencies, and I think this is what Steve Salop's paper in part addressed, which is, you can have capital efficiencies, you can have a scarcity of resources that bring efficiencies, even through a partial acquisition. So while they're not a typical kind of a merger efficiency that you might see in another context, they certainly exist, and should also, if the merger guidelines deal with them, be taken into consideration.

MR. NEILL: I wasn't going to talk much about minority ownerships but, I guess, in general, my view is that most of these things, unless you get to very high percentages, can be dealt with pretty easily through conduct restrictions on governance and whatnot, and probably the next part of this is going to be the incentive effects theories which I personally think are highly tenuous and really shouldn't be much of a concern and probably don't need to be addressed.

To me, it's so improbable that the acquirer is going to alter its business, especially if it has conduct restrictions with, vis-a-vis, the target on the theory that it's going to somehow derive a benefit -- it's going to lessen its own competitive vigor in the hope of recouping some of that, you know, from the target. That just seems highly tenuous to me.

MS. OVERTON: Oh, I was just going to clarify that I think that there needs to be some guidance in the horizontal merger guidelines if you all are going about the process of updating them.

MR. SHELANSKI: Well, before I return to that issue, because I think it's helpful, I want to go back to a point that was echoed in Kathy's remarks, David's remarks, pretty much all of you, about the different kinds of partial ownership interest we might see. And you talked about the difference between pure financial ownership and actual governance.

So let's talk about passive ownership interest. Under what conditions do you think, and I want to start with you on this, Kathy, because I think you addressed the point most directly, under what conditions do we think partial ownership interests will ever raise concerns, and when you say we should give guidance in the guidelines, is there a safe harbor you would propose, is there a set of factors that you would propose that we're looking at to determine whether concerns should be triggered? And speaking specifically about passive ownership interest.

MS. FORREST: Passive?

MR. SHELANSKI: Passive.

MS. FORREST: And not partial?

MR. SHELANSKI: Well, passive partial.

MS. FORREST: Right. Passive partial. Well, with passive interests I think that the question is, how passive really is passive. I think that you can have a couple of different situations that are hard, apart from the HSR rules and regulations where you've got an investment-only exception, okay, putting that aside for a moment, that's a very helpful thing to have out there. But putting that aside, you can have a situation where you've got a passive ownership of one competitor and another competitor.

Then I would suggest to you that that's not truly investment only and could not really be investment only. It's going to affect incentives. And it might lead to potential misalignment of incentives.

So I don't think that you can have an equity cutoff, purely equity cutoff, that would lead to a safe harbor. You can also though have a different situation where you've got multiple competitors who are at the same time, let's assume for the moment that hypothetically they're going to trigger the HSR thresholds for filing, multiple competitors who are all going to make equity investments in a third party. And that's also very hard to deal with in terms of a safe harbor.

Now, I agree with David that you could have some behavioral conditions put around that, that's typically how it would be dealt with, where you would try to prevent other kinds of potentially Section 1 type of behavior leaking into your board room. But that is the kind of thing where with, you know, that would be a passive investment perhaps if -- well, with the board room, you wouldn't be passive, okay, let's just say it's an equity interest, but even some types of passivity you might not take governance rights and call that passive, but I have seen situations where people have attempted to take a veto right and call that passive.

And they have said, well, we're not governing, we're not actively involved, we don't have operational control, but we have got a particular kind of veto right.

So what is passive? So what I would suggest is that the conditions of passivity are the conditions of investment only, and it's truly got to meet the kind of investment-only criteria that you otherwise have in the HSR rules and regulations for just a filing. And that's the kind of passivity I think that we're talking about for being able to remove it from a true merger review. And, with competitors, I think, you know, almost from the beginning I think it's very hard to think of a competitor acquiring a passive interest in another competitor, and I would add potential competitors doing the same thing and having that be truly passive in a way that you'd be comfortable having some sort of number safe harbor threshold to eliminate review. So I guess I don't see a safe harbor, but I'm probably an outlier here on this panel and that one.

MS. OVERTON: Assuming that you can have a good definition of passive that is truly passive and doesn't have -- doesn't have governance rights, doesn't have competitively sensitive information access those types of things, I think it's worth considering whether you can get to a safe harbor for a small enough percentage where you wouldn't have even really the theoretical concern that Salop and others talk about in terms of the unilateral incentives even in a passive context for the acquiring firm to raise its prices.

So I think that it is a fruitful exercise to explore a safe harbor.

MR. JACOBSON: Yeah, I would echo that. Let me go back to another point. Kathleen, I don't think you and I really disagree except on semantics on the first point because, what I was talking about, the reason I would not treat partial stock deals as mergers is that there's no integration of resources. So there may be some capital efficiencies, but those are not the sort of things that I would suggest involve the type of analysis that we see in the merger guidelines.

On acquisitions of partial ownership of a direct competitor, with absolutely no voting control, totally passive interest, the agencies have been active. There's been the Univision case, DOJ case in 2003 requiring a 30 percent interest be divested down to 10 percent within six years. There's the Clear Channel AM/FM deal in 2000 requiring total divestiture of the 29 percent interest in AM/FM.

There's the discussion in the Sixth Circuit decision in the Dairy Farmer's case. There's Continental Northwest where the interest had to go down to seven percent as a result of the settlement. It started at 50 percent.

I agree with David that the Salop -- I wouldn't go quite as far as you do, that the analysis of, gee whiz, if I raise my price by $30, I'm going to get four of those back because I own X percent of my rival, probably doesn't explain a lot of real world behavior.

So, for that reason, I would suggest that there ought to be some cutoff point below which you just don't worry about this and you can advise clients, it's just okay to do the deal.

Now, if there are two firms in the industry and they're buying some stock in each other, you begin to worry that maybe something is going on beyond passive stock investment, but in the general run of the mill case, I would have a cutoff at 10 or 15 percent as a general presumptive safe harbor for these cases, and I think that's consistent with what the agencies have done in actual practice.

MS. OVERTON: I would agree that the number is probably somewhere around there because I think that, as Jonathan pointed out, if you get much higher, then you do start to wonder, well, what are these investments really about? Are they really about just investment, or is something else going on? And, you know, I think that even Salop would probably agree that even with his theory of harm with something as low as 10 percent or even maybe 15 percent, you're probably not going to have that incentive.

And I think that when dealing with passive interests like this, it is important for the agencies to take into account these real world considerations. And I'm not saying that the real world considerations mean that it's not ever worth it or appropriate for the agencies to explore these because we do have theories that suggest consumers could be harmed here. But it is important to think about, are there other factors whether it is for whatever reason the acquirer is not agnostic as between a dollar earned in its own firm versus money earned from sharing in the profits of the acquired firm. And there could be again other shareholders and just all sorts of other reasons that the theory does not play out in the real world.

So I think it would be useful for the guidelines if they could to reflect some of those real world considerations.

MS. FORREST: Can I just throw out a question? I'm just sort of curious -- Leslie, what your view is on this? What if we had a situation where, again, assuming thresholds are met, and assuming no governance rights, you've got a scenario where you have several different competitors acquiring a passive interest in another company, and the question really ends up being, do you have a safe harbor where you remove it from review of the agencies where it's otherwise, you know, where you're going to file, but, essentially, it'll be passed over fairly quickly? Or do you want the agencies or do you expect or is it appropriate for the agencies to look into whatever structural governance protections there are there to protect against sort of Section 1 issues?

So, I guess my question is, let's take passive to more than one player and you've got more than one player whose exercising their ability to acquire a passive interest at the same time and they're competitors, does that change your view?

MS. OVERTON: We're still assuming that there are no governance rights, and so it is purely a capital investment.

MS. FORREST: And I guess the question is, do you think that the government should be able to look at whether or not there are any governance rights or whether or not there are any veto issues, things that provide some quasi control.

MR. JACOBSON: I would say always. And if rivals are jointly or sequentially purchasing interests in another competitor, I'd want to know why, and I'd want to know, you know, what else is going on.

I can think of some benign reasons the rival may be faltering, we'll get to that later, and may have some IP that no one wants to be appropriated, so there's an actual agreement that, you know, the companies will prop up the competitors so that no one gets the IP competitive advantage. But, generally, I would be very suspicious of that behavior.

MS. OVERTON: And in terms of how a safe harbor would work, I'm not thinking that it would be an exemption where you wouldn't have to file, it would still get filed because it's not within the passive investment exemption, because it's a competitor, so you'd still file, and I agree it's still appropriate, very much so, for the agencies to look and see, is this something that could harm consumers?

But if the agencies can quickly, I would imagine, be assured that there aren't the governance rights, there aren't those types of veto rights or anything that could raise a possibility of consumer harm that, at this level, the unilateral concerns about the unilateral effects concerns about passive interest in the Salop article and elsewhere would not be in play at these low levels.

MR. NEILL: Yeah, and I just want to clarify -- and I would agree also that definitely government should be able to look at governance and conduct restrictions. That was the premise of my initial comment. The assumption in my mind is that, if such prohibitions are in place, it would be very difficult for the acquiring firm to cause the target to give it dividends or otherwise for the acquiring firm to recoup the profits that it supposedly is diverting toward the target through these incentive effects and that's why, to me, if you do have actual passivity, the incentive effects are so tenuous so as to be not -- just unlikely and not really worth worrying about, frankly.

MR. SHELANSKI: Thank you. There are many follow-up questions that suggest themselves, and maybe at the end I may circle around to a couple of them.

In the interest of time, I'd like to shift gears a little bit and move to some of the failing flailing firm questions that we have.

I'd like to start with a question that I would ask David Neill to address first, which is -- and this can be addressed in the context of a specific industry or more generally but, under what conditions, if any, should a firm in crisis be considered sufficiently flailing that it's acquisition entails reduced antitrust concerns or would warrant reduced antitrust scrutiny?

MR. NEILL: Sure. I've had some experience with this lately, at least in the banking world. In general, I don't think that determining when a firm is failing or flailing is all that difficult or even controversial. I think the real issue -- well, just to address things separately, in the merger guidelines themselves, and in Section 5.1 I think the real thing I would take issue with are the third and fourth prongs of the failing firm defense. The third one being that you have to show there's no less restrictive alternative, and the fourth one being that you have to show that the assets will exit the market, but for this merger.

And I think it's the certainty, first of all, of the asset exit test which -- and the way in which it's phrased, which is really contrary to the predictive probabilistic nature of the merger guidelines in general which is, you know, in Section 7, generally, which is a predictive exercise. It imposes a level of certainty in proof that, you know, really is inconsistent I think with the general tenure of the guidelines and Section 7 analysis. And I think the least restrictive alternative test is also overbearing in that regard and, in fact, doesn't even mirror the equivalent language in the competitor collaboration guidelines, and I think that's one thing at least that language should mirror the joint venture guidelines language in terms of being a more pragmatic test of showing that there's not substantially less restrictive alternatives.

The other thing about that, the third prong, is

I think it's subject to gaming by badly-motivated competitors who may be favored by one agency or another and this, in fact, happened in a deal last year in the Land America deal, it was a title insurance company that was in bankruptcy court, and it had a merger agreement with its leading competitor.

It was a failing company for sure. And a smaller competitor that was favored by the FTC came in and suggested, we'll make this offer. It was costless for that third party to propose this, and it was really a way of gaming the failing firm defense.

Fortunately, I think the FTC stood back, observed in the court, and let the judge cross-examine the nature of that offer, the third-party offer, and determine it really wasn't bona fide. I think even the Nebraska Insurance Commissioner agreed. So they dismissed it and the FTC did not issue a second request. Had it done so in the alternative, Land America would have gone into liquidation and run off and that would have not served anybody's purposes.

So I think in terms of the merger guidelines, those would be my two major criticisms of it. And knowing that it probably reflects the state of the law the common law, but I think as a matter of prosecutorial discretion, it probably should be amended in that respect.

The other aspect -- and I would recommend here, there's an article from the spring 2009 Antitrust Magazine by Ramsey Shahata and two of my partners, Joe Larson and Ilene Gotts, I don't mean to needlessly plug them, but I think it is a very good article in terms of showing other considerations with respect to failing and flailing firms, namely, that you really should account for the partial exit that occurs with assets in these situations just through depreciation.

Even if the company is not completely failed, it turns out, as we have seen in the past year, that equity markets, capital markets are not at all perfect, and completely froze up. This was especially true in the banking world, and the inability to solve these liquidity crises leads to underinvestment in products and probably to partial exits while the investigation is going on.

So I think the point is, investigation of this defense, if it's prolonged and costly, is not costless at the end of the day, and I think that should be explicitly accounted for. In the banking world, and it's really not part of the merger guidelines, per se, because there are a separate set of interagency guidelines that apply just to bank mergers. They've been entered into between the Justice Department and the banking agencies, and it's a different world, really, and it's sort of an odd result because, here, the Federal Reserve Board, for instance, doesn't give any consideration to anything short of a failing firm defense, and they have no consideration of or, at least, explicit consideration of a weakened competitor defense.

The DOJ, on the other hand, actually employs in its section of those bank merger guidelines from 1995 some consideration of General Dynamics types of factors in evaluating a weakened competitor in the banking world. Though it turned out that in the actual practice of this last year, the Wells Fargo Wachovia and PNC National City deals, neither agency really gave much explicit recognition of these factors in which I disagreed and, actually, the DOJ obtained more divestitures than did the Fed at the end of the day, at least in the PNC transaction, which was kind of an odd role reversal given their stated positions.

And I do think when you have frozen capital markets and the high cost of capital, that flailing banks in particular face because their deposit mix changes, they can't reach the securitization markets, they're basically shut down. They can't lend because they don't have the cost of funds capable of doing so, that those factors really need to be taken into explicit account by the agencies and I have recommendations which we could deal with at the end, but I do think these are criticisms and considerations that really need to be addressed.

MR. SHELANSKI: Thank you very much, David. There was a lot there. That was very helpful.

Leslie, you look like you're ready to jump in.

MS. OVERTON: Sure. I think that there have certainly been suggestions that aspects of the failing firm defense need to be changed, whether it's removing no possibility of reorganization requirement or what have you.

I'm not of the view that change is necessary so much as I share the view of David that we should question why the burden of proof is so high in terms of the certainty required that the assets will exit the market and that there's not a competitively preferable alternative.

Because I think that there are a number of situations where you could have, say, a 70 percent chance that the assets are going to exit the market, and it would be worth potentially applying the failing firm defense, depending on what is causing that 30 percent uncertainty.

If it's a situation where there is a possible capital infusion separate from this merger and that, if that comes through, then the firm will remain competitive, then you wouldn't want to necessarily go with the failing firm defense. But if it's a situation where absent the firm's assets exiting the market, they're going to be in but limp along so badly that they're really competitively insignificant, then I think that that is something worth considering.

Now some might say, well, we already do that in terms of the General Dynamics, a flailing firm consideration is part of the competitive effects analysis, and that may be the case in certain situations, but I think more guidance on flailing firm analysis would be useful, first of all. But I think also when you have a little more skepticism sometimes I think that comes into play of the firm's claims that really were flailing, and this deal should go through.

You know, certainly, a healthy level of skepticism on behalf of the agencies is good and good for the consumers, but I think that more guidance on the flailing issue particularly if there is no change in the burden of proof standards would be useful.

And, again, I guess I'm not totally clear, I don't think that the burden of proof as currently stated is necessary to protect consumers because, if it's a situation again in many cases where the firm really is very close to meeting these standards or it's highly likely, then in the absence of the merger happening, chances are in the number of cases, the firm is going to be so impaired as to not be competitively significant.

So, again, very fact-based analysis as always in the merger context, but I think that burden is out of place with the rest of the guidelines.

MS. FORREST: Yeah, let me just sort of echo a couple of these points. One is that I think with flailing firms, which are not dealt with in the guidelines, they certainly could be added to the guidelines, and, in any event, the guidelines requirement that you've got to demonstrate that you cannot successfully emerge from Chapter 11 is a very very difficult burden to meet.

I would suggest that there is, for flailing firms, that there is a level that is far short of that -- which is also echoed by what Leslie and what David have said -- which is, you've got a situation often where a competitor is no longer really viable as a competitive restraint on anyone else.

So you've got someone who meets the definition of being a horizontal competitor in a marketplace, they may want to have a horizontal merger with someone else within that marketplace. Together, let's just assume for the moment that there are four participants in this particular hypothetical. Let's assume that the market share for one of them is over 60 percent, and that the remaining three sort of split up the 40 percent that's remaining, and let's just say that one of the three, not the two merging parties, let's just say that they've got 20 percent of the share.

So if you ran your HHIs, your famous HHIs, you're going to come up with an extraordinarily high concentration, increase in concentration, possibly, in the overall marketplace, but you're going to run into a situation where the analysis there, if you've got one of those four competitors, and I can see that Howard is actually running the HHIs in his head and is wondering whether I'm right, but whether or not -- if two of those four competitors, or one of those four competitors is not really a viable competitive constraint any longer because they are unable to invest, they're unable to really compete, they can't be a competitive constraint. They're flailing along, but they're not going to die. For whatever reason they're going to just hobble a long, I think as Leslie said, they're going to hobble along for a period of time and flail along but not die, that, I think, ought to come out in a merger analysis as not resulting in a kind of competitive -- anticompetitive effect, so maybe we'd come to the right result anyway, but certainly guidance could exist within the guidelines themselves about situations where you've got the behemoth and the non-viable competitor who is flailing along, unable to invest adequately as a competitor, but not going to die. And there are examples I think that you could usefully include in the guidelines to deal with that situation.

MS. OVERTON: And just one more point. I will also flag the Gotts Shahata article, and I'm not a partner of Ilene's, but I also would point to the Sheldon Kimmel and Ken Heyer EAG working paper on financial distress, because I think those are legitimate considerations and it would be useful to have some transparency about -- and for parties and the agencies to be on at least roughly the same page as to what needs to be shown, what types of considerations are relevant.

But I think that Ken and Sheldon just also make the good point that in a merger of a company that's flailing or failing, it's important to look at, what are the efficiencies that come from that? Is it a situation where there's going to be an investment of capital and the like? And, so, looking at the efficiencies to see whether it would indeed benefit consumers.

MR. JACOBSON: So part of the problem here is a case that has nothing to do with a failing company but it's Ralph Winter's decision in Waste Management which basically says everything in the guidelines can and will be held against you, and so the guidelines on failing companies say basically "over my dead body," and whenever you have a discussion with a client, they go, well, you know, I had a bad quarter and, you know, can't we use the failing company defense?

This is an argument that you are constantly pressured by your clients to rely on, and it's always a comfort to me to go back and say, well, you know, here are the guidelines and they say "over my dead body."

The question then is, really, "is this a problem in the real world?" I think the agencies really get General Dynamics. I think they apply the failing company defense pretty flexibly. If there are some adjustments to the guidelines, I wouldn't object a lot, but I would not do any wholesale overhaul here because I think it can cause more problems than it solves.

MR. NEILL: I do actually believe that the agency practice probably is more lenient than the portrayal in the guidelines. I'm just saying that I do think the language in the guidelines doesn't meet either agency practice or the general tenor of the rest of the guidelines in terms of the kind of predictive nature.

And one other point about the Chapter 11 point which someone mentioned. It is very difficult to really prove that, or even to really often times to predict, that the company will or will not emerge from Chapter 11 successfully. That happened repeatedly over the past year. A number of retailers, for instance, entered Chapter 11 thinking they would successfully reorganize and then capital markets completely shut down and they couldn't get debtor and possession financing and they all ended up liquidating.

So it's actually very hard to know whether something, especially in capital markets like the ones that have existed for the past year, what might happen in a Chapter 11 situation.

MS. OVERTON: I was just going to say, I think that's a good point by David, but I think, again, going to a softening of the burden of proof, and so we probably wouldn't be able to emerge as opposed to we definitely couldn't.

MR. SHELANSKI: I mean, that's a very helpful suggestion. Certainly the case of the agencies do not always apply the current very high barrier, which is to say sometimes the defense is recognized.

On the other hand, it's extremely useful for us to have that high barrier given the number of cases in which these kinds of issues are raised. I mean, it's become almost pro-forma now in hospital mergers and a variety of other cases to hear about financial distress. I know there's at least one person in this room who thinks we don't get it right all the time and apply too high a standard, and it can be very difficult when you've got a fragile innovative company that is on the borderline. And there's no question that this is an area in which a lot of thought is going to have to be given.

So when you talk about "softening the burden," this isn't probably the right forum to do it, but it would be interesting to know more specifically how we can do that and still preserve the ability to turn around and say, as Jon can do to his clients, over my dead body, you don't want to try this here, and we want to say that to probably the majority -- the vast majority of cases in which the defense comes to us.

MS. OVERTON: Right. And, Howard, I think that's a fair point. I don't want to have a loophole. I don't think anybody wants a loophole on this panel at least, that would lead to anticompetitive transactions going through.

I'm just saying, like I said, it's worth considering, maybe there's something in between the standard in the rest of the guidelines, and that standard that might be appropriate here.

MR. SHELANSKI: That's an excellent point and I don't think we would disagree. We don't have terribly much time left. It's been a great discussion.

I would like to offer each of you, as I did on the last panel, to summarize your recommendations/wish lists on these topics and to give us sort of a summary -- just a summary of your views.

I'll start with Jon and we'll just move down to our left here.

MR. JACOBSON: So I do think a discussion of the competitive implications of partial stock ownerships would be a valuable addition to the guidelines. There is nothing in there now.

I think there should be a discussion of what is the sort of de facto control, or what are the control or voting right issues that we would be concerned about. When are we going to apply the unilateral effects analysis to purely passive stock acquisitions? Are we going to have a safe harbor? As I indicated, I think there should be one. There should be some discussion of access to information. When can that be a competitive problem?

And this is more difficult, but when can prevention of a more competitive merger be viewed as an anticompetitive effect? The law may be an obstacle on that, but it's worth at least some discussion.

Then on failing company, I might add something on just incorporating the General Dynamics considerations, although I think those are fairly reflected in the guidelines in any event. And I wouldn't change too much of the text of the failing company defense for the reasons I laid out.

MR. NEILL: As to the merger guidelines, flailing firm defense, I think the standard of proof in probably the second and the fourth prongs should be modified to at least inject some likelihood language or something to make it more comparable to the other aspects of the guidelines.

I think in prong four, you might want to consider some explicit recognition that partial exit of assets does occur through depreciation in industries that can't get access to capital, and that should be a consideration.

And as to prong three, I don't see any reason why that language shouldn't mirror what's in the competitor collaboration guidelines in terms of what a less restrictive alternative inquiry should be. And I think that might be enough to address the gaming issue that I referred to, but I'm not sure. I mean, that does and has occurred and it occurred just recently.

And in terms of the bank merger guidelines, obviously this isn't necessarily an issue with the FTC, but it is with the DOJ. If they could reach some interagency agreement to modify the existing guidelines with the bank regulators, I think it would be helpful to keep up and have some consensus among the bank regulatory agencies in terms of agreeing with what's the DOJ's current statement regarding the consideration of General Dynamics effects and factors in that analysis.

It may well be useful to reflect what essentially is current agency practice anyway that would create a safe harbor, a higher numerical HHI threshold, or whatever it may be, 2,200, 250, for bank mergers where the target is already a clear bright line if the target's already operating under a memorandum of understanding, or a cease and desist order with a bank regulatory agency, that would seem pretty easy. Or if there's some, perhaps even a rule of thumb to discount the market's -- target's market share because the invariable problem is that the data is so lagged and these crises hit so fast that there's no way to really know what reality is in these situations.

But that's not for these guidelines but the parallel set that the Justice Department definitely is involved with.

MR. SHELANSKI: Thank you.

MS. OVERTON: I just want to thank the agencies again for even considering updating the guidelines, they are important. And like anything else important, maintenance is good.

So I would consider adding something short about partial acquisitions, as we've talked about, providing some explanation regarding which theories the agency might rely on, some of the types of evidence they would consider regarding control, influence, and incentives.

Again, I think that a safe harbor is something fruitful to explore but, as we talked about, it would not be a safe harbor that would prevent the agency from getting the information it needed to be confident that there weren't lurking governance issues and that passivity wasn't really passive.

Just a quick issue that we didn't really get into, but in terms of remedies for dealing with the competitively sensitive information sharing issue, the guidelines may not be the place to deal with that, but there currently seems to be at least a facial disconnect between the DOJ and the FTC when you look at the DOJ's remedies guide, and its statements on fire walls and its preference for structural remedies and the like.

So I think it would be useful, if not in the guidelines, for at least the DOJ to clarify in its remedies manual that fire walls can be an appropriate way to deal with these information sharing concerns.

And then on failing firm, I made my point before about the standards and exploring whether there is a little lower standard that's closer to what you have in the rest of the guidelines but could still protect consumers.

MS. FORREST: I think there have been so many good points raised, I don't have a lot to add. Let me just say that I do think that starting from the failing flailing firm prospective, I do think it would be useful to make the General Dynamics factors more explicit in the guidelines.

If that is prevailing practice, it's always useful to have it in there so that you've got people who are able to give guidance to their clients. And I think that that does not mean that you're going to be giving them a huge hole through which you can drive a truck of hope that their bad quarter will necessarily result in being able to take advantage of this flailing firm, but it does give them some guidance as to what the criteria are that you might be applying.

I also think that in terms of your concern what is it that you can do with the Chapter 11 piece in order to solve that without going too far, I think that, frankly, if a firm has entered Chapter 11, in a way the presumption ought to shift, because the requirement currently is you've got to have a successful emergence from Chapter 11. Most companies don't want to go into Chapter 11. They're not going to do it just for you, and so the fact that they've gone into it, I think should be a presumption in favor that they are at least flailing, okay? Which means that they're not really a viable competitor for some period of time in a short term horizon. So that's a possibility, at least something to be thinking about in terms of the wording.

In terms of partial ownership and passive ownership, I think that that could be dealt with, as Leslie said in a short section, I think they can be dealt with together. I think that in my mind, this is amenable to examples, and it ought to be something where you've got a series of examples where you can talk about the kinds of times when partial ownership may or may not result in a merger-like review, and you can have a working definition of passivity.

What is the agency's working definition of passivity for people to have, for entities to have as guidance? I think that would be very useful. I don't think it's impossible to come up with this. I think you can come up with it in broad language, which is sort of the specialty of the merger guidelines. Broad enough language that it gives you some guidance but yet doesn't give you so much specificity that you folks don't have the maneuvering room that you need.

So I would make changes both to the failing flailing firm but it wouldn't be more than double its current length, and I would add a section on partial acquisitions and passive ownership.

MR. SHELANSKI: Thank you very much for all of those. Those were very helpful recommendations. Needless to say, they're going to give us an awful lot to think about, and we may be coming back to some of you for follow up in the months that lie ahead of us when we're actually going to be revising perhaps. Perhaps. We have a time for a couple of questions.

MS. CHOI: Hi. I'm Joyce Choi from Wilson Sonsini. Regarding the safe harbors that Jon and Leslie mentioned for partial ownership, I was wondering whether to the extent that the concern is maybe unilateral effects, whether you would suggest incorporating some analysis of the diversion ratio between the two firms rather than just focusing on the amount of the acquisition?

MR. JACOBSON: That's too smart a question for me.

MS. OVERTON: I think that -- again, certainly I think that the agencies should look at this safe harbor issue and try to find the right level but, hopefully, the goal would be that you wouldn't have to get into something as complicated in terms of analysis as diversion ratios. I think it's a pretty straightforward thing for the agency to figure out, well, what are the governance rights and do we really have true passivity? But I think if you start to get into diversions and the like that would take away the benefits you would get from the safe harbor. So I think you probably need to set the safe harbor low enough so that you're comfortable that it really is safe.

MR. JACOBSON: Yeah, I actually completely agree with that. So I may need to know the margins and all sorts of information. The whole point of the safe harbor is to be able to tell the client, you know, you can do 10 percent, maybe 15 percent, 16 percent you're going to get reviewed, and I think the diversion ratio is once the review begins.

MR. SHELANSKI: For our last question is Janusz Ordover.

MR. ORDOVER: So perhaps there is this problem of failing or flailing firm that can be seen through the eyes of a maverick strikes me that if we are serious about your coordinated effects and if we try to discombobulate the industry, that may appear to be not functioning as well as it ought to, for tacit and collusive reasons, then the removal of failing or flailing firm could be a way of stabilizing the industry that otherwise can be discombobulated.

So perhaps it would be desirable if the guidelines could indicate whether or not that concern should or should not be taken into account when considering those kinds of transactions, and I have heard it said to me, and I have told that to people who came to see me at my old job that there may be some benefit to the marketplace from letting the firm bleed itself to death as long as the assets are not leaving the industry, which is why the condition number four in that section, to me, is the really the critical one.

Anyway, so some guidance on that issue may be desirable as well.

MS. FORREST: Can I just comment on that for one second? Which is, I think that sometimes there is a phrase used of assets leaving the industry or leaving the marketplace, and I want to suggest, and I think that this is implicit in our comments that we've had here today, that you can have a negative consumer welfare effect when you have a partial set of assets leaving the industry.

So you don't have to have all the assets leave in order to have a problem or have a negative consumer effect. You can actually only have a few. So you can have sort of reduction in capacity and reduction of output that can leave some consumers with negative effects.

So, in that sense, if you fixed the flailing firm or you allow the flailing firm to no longer flail, you can increase consumer welfare.

MS. OVERTON: And, in my experience, Janusz, the agencies are currently taking those types of considerations into account in terms of, is it a benefit to consumers to -- are consumers benefitting from this firm flailing around?

Then we get to the questions of, is its flailing competitively significant? Because you can have a firm that's flailing and having an impact, but with the flailing because it's discounting so heavily and the like, or it's flailing because it hasn't invested in the assets, or they've lost so many assets. They're flailing but nobody really wants it at any price. So I think that goes to the competitive effects analysis.

MR. NEILL: I would think that -- in the situations that we've been describing, and almost the assumption is that flailing occurs because there are costs, their capital costs are rising in a way because they don't have access to fundings, such that it's probably unlikely -- it's most likely the case that the opposite is occurring, far from being a maverick that's disciplining the industry, these companies, at least in banking, they're not disciplining anybody, and they're just circling the dream pretty much. Even short of the absolute failure. So I guess that would be my response.

MR. SHELANSKI: With that image, I would like to thank our panelists and say that we'll reconvene for the afternoon panels here at 2:00 sharp.

Thank you very much.

(Applause.)

(Whereupon, at 12:35, a lunch recess was taken.)

AFTERNOON SESSION

2:00 P.M.

PANEL 4: MERGER REMEDIES

MR. WEISER: Thank you all for coming back after the lunch break. The morning discussions I thought were extraordinarily interesting and I will have to add, some of the interchange with the questions from the audience that came were really great.

This audience, we know, a number of you could have been on the panels, and for those of you who are students, we welcome your intellectual curiosity, so I'll try to leave some time for that.

Let me introduce our group here, not that many of them need an introduction. Kevin Arquit was at the FTC during the 1992 guidelines process. He was general counsel there, head of the Bureau of Competition. He's now at Simpson Thatcher and is one of the deans of the antitrust bar, I would have to say.

Next to him is Bruce Prager who is, I think, by all accounts, one of New York City's finest antitrust lawyers. Has been involved in the bar here and is at Latham & Watkins.

Next over is Debbie Feinstein. Did you come from DC, by the way, are you a DC person? I thought so. So, like myself, coming up here for the day to New

York. She's with Arnold & Porter and part of their very deep bench is in antitrust. She has also served in the government at the FTC with Dennis Yao, I guess overlapping with Kevin, back in that era. I guess you got out before the '92 guidelines, but you knew they were in the offing --

MS. FEINSTEIN: I was there for the sausage making, but not for the --

MR. WEISER: All right. There you go. And then finally, Art Burke, who is at David Polk here in New York is, among other things, a good friend of Howard Shelanski's, and a very well accomplished, truth be told, that his qualification of, and he's also a very thoughtful practitioner.

So remedies is our topic for today. I should add that Art and myself were at a conference that Howard put on about -- I think it was convergence and remedies with the EU and with the US.

One interesting question about convergence and remedies that came up really nicely in our first panel is, we don't have guidelines that talk about remedies, we have a policy guide at the DOJ. The FTC has done some studies. The EU has a thoughtful statement on remedies. The threshold question is should remedies and so some maybe high level principles be in the guidelines or, as some people argued this morning, is it more appropriate for some other document to handle remedies?

Kevin, what do you think on that?

MR. ARQUIT: Well, I guess at first glance they would seem to be more suited for policy than guidelines because the guidelines are really kind of the application of micro-economic principles to corporate combinations, whereas, remedies are a little bit messier. They're really the practical implications that flow from a transaction the government has concluded is problematic. But I actually at the end of the day think there should be guidelines, and my reason for it is really one that comes from my perspective as an outside practitioner. I presumably would not have thought this way when I was at the FTC, but when it comes to remedies, unlike the substance of a transaction, the parties are completely at the whim and behest of the staff.

There is no way if you want to recommend a remedy and the staff doesn't like it, to get your issue before the commission, unlike the substance of a transaction. And, in particular, in situations where you want to engage in a remedy so you don't have to go through the expense of complying with a second request, even Hart Scott Radino clock doesn't start to run until you've complied with the second request.

So you go to the staff with a proposed remedy. No, we don't like it. Well, what do you like? Well, I don' know what we like, we just know we don't like this. Well, can you give us some guidance? And it just goes on and on. And, if you haven't complied with the second request, there's absolutely no -- you're pushing against a string. There's no leverage for the staff to really engage you on it, and because the policies of the Bureau of Competition, and pretty much the same with the Justice Department to get your issue before the commission, or before the front office, you have to have a signed consent agreement. In other words, you have to have reached agreement with the staff on the remedy before the front office ever looks at it.

And, so, since you have a situation with remedy, and because it is so important, it's a less analytic area where there really isn't a way to get to the front office on it. I think the guidelines that had some benchmarks would impose some discipline on the process. I think that these benchmarks would be such that there would be at least some increased ability for practitioners to be able to go to the staff and perhaps even then to people beyond the staff, if the staff doesn't want to accept any remedy, so you can get some engagement on the issues the way you can on the substance of the transaction.

MR. WEISER: Bruce?

MR. PRAGER: It may be that my difference with Kevin is more semantic than substantive because I certainly agree with all of his assertions about the difficulties of the process, but come to the opposite conclusion, which is that -- I don't think that the guidelines are the appropriate place to be dealing with remedies for a couple of reasons.

One, I think that the guidelines should be and have shown themselves to be enduring over a very extended period of time, whereas I think that the practices with respect to remedies are somewhat more transitory and perhaps ebb and flow more freely than do the principles that underlie the guidelines.

However, that's not to say that I don't believe that there should be clearly articulated practices and policies. Both the FTC and the antitrust division, the antitrust division has their policy guide to merger remedies and the FTC has their statement of the Bureau of Competition on negotiating merger remedies.

I think it's a mistake that we have two

separate sets of policies and practices. I think that the FTC and the Justice Department should engage in a process that is similar to this and should come up with a single set of practices and policies.

I think that we have enough of a sort of Hobson's choice with the fact that we have two separate agencies that we've got to deal with that have different procedural practices without there being separate policies. Those of us who have dealt with both agencies in terms of negotiating settlements know that they don't take the same view, that the FTC's perspective on fix-it-first is not the same as the DOJ's, that the DOJ's perspective on conduct remedies is not the same as the FTC's, and I think that convergence within our own government on important issues of that sort is essential, and I think would achieve the benefits that Kevin is looking for, but I think that if we tried to do it in the context of this guideline revision, we'll be still working on new guidelines as we enter 2020 instead of 2010.

MR. WEISER: Debbie.

MS. FEINSTEIN: I guess the question is always, what's the purpose of it? I think the documents that are out there right now, the DOJ policy statement, and the FTC statement of the Bureau of Competition, and the frequently-asked questions do a really good job of explaining exactly what both the agencies do. You know, reading through them, unlike the merger guidelines where you can come up with lots of things where you think, well, that's not how they implement it, or they don't talk about this issue.

I think for the most part, those documents really do explain what each of the agencies does. There are differences around the margins. You know, we'd all edit them differently if we had a crack at them, but they're basically right. So then the question is, would it be nice to have convergence? You know, maybe. I'm not sure how important it is, as long as they're at least telling you what it is that they're doing, and I think they're pretty good at that.

If the convergence meant that the FTC would accept fix-it-first occasionally, but that DOJ would almost inevitably require buyers up front, I don't know how much we've gained. We've all gotten used to how it is to deal with two of the agencies.

I think the tougher issue is that what's lost in sort of documents that are meant to be enduring is the kind of regular updates about things. You know, the FTC document mentions that supermarket mergers of the sort and retail mergers of the sort, where it's almost always important to have a buyer up front because of their bad experiences. Well, that document was written in 2002. They were saying this privately in the mid '90s.

But you didn't know that unless you had a deal before them, or sort of been around people who were mentioning this. There was no sort of commentary on this. There aren't a lot statements explaining why they came to the view that they did with respect to particular divestitures.

What I find would be much more useful than a particular merger guideline section on divestitures is sort of regular reporting about change positions, why it is that they decided that a buyer up front was important here in this case and not in that case, and I would be more interested in something like that.

MR. BURKE: I mean, I agree with the points that Bruce made about why convergence within our own government are desirable, and it's one of the most frustrating and complicated things to do to explain to a client that we don't know which agency's going to review a transaction and that it may be significant as to which the outcome of a review is going to be depending on the choice of an agency.

So I think this is one manifestation of that, and if there could be greater convergence, I think that would be a good thing, and if we could resolve perhaps the differences on the buyer up front issue and the fix-it-first issue, that's desirable.

So then the question turns to, is this the right vehicle to accomplish that, and I guess maybe I differ from Bruce a little bit on that question. I mean, we do have this effort underway. There's a lot of people who are putting a lot of effort and thought into this, and this is a golden opportunity to, I think, encourage the agencies to confront these issues and try to resolve these disputes, or differences of emphasis, perhaps, is the better point.

So I'd say let's take advantage of this opportunity to try and address this issue as part of the overall revisions of the merger guidelines.

The other argument I would make for considering addressing this now is that there is obviously an interrelationship between the merits of merger review and the remedies issue. And so to sort of separate those things out is to suit two separate projects.

While it probably could be done and might be done at some point in the next decade, there is perhaps some benefit to confronting those two sets of issues simultaneously. I recognize that that does add a lot more work to the agencies who are confronting a major task already, but I would encourage them to consider doing it.

At the very outset, it was mentioned that there are a set of merger remedy guidelines that have been adopted by the European commission which, you know, basically surveyed a few of my colleagues who practiced in Europe and I think the general reaction was that those are very helpful and useful practical things, and so it would be I think useful in the US to have a uniform set of guidelines as well.

MR. WEISER: So let me follow up, and for those who are not inside baseball, we have three concepts that have been thrown out; buyer up front, which means you want to do a deal, you got to come to us with a buyer as part of the realm divestiture.

Second is regulatory relief conduct remedies versus structural relief, do you want some ongoing supervision versus, you know, it's done; and, finally, are you open to the so called fix-it-first strategy where you take care of the overlap up front or you have a consent decree that has some ongoing supervisory role.

Those are often the top three issues that presumably if there was a remedies part of the guidelines, would be dealt with at some at least level of principle, maybe leaving some room, you know, that would happen, but it at least it would provide some structure so people wouldn't be in the situation Art noted that's awkward that you can't actually advise a client without knowing which agency has the merger.

So, Art, let me start with you, if you had to do what Debbie said she's not sure she wants to see happen, which is to have a single choice convergence on each of those, which way should the convergence go?

MR. BURKE: Maybe I'll just take a few examples and not do all three because I think we can take up -- I don't want to steal time from all the other folks.

Maybe I'll just single out fix-it-first because I think that's an example of something that I've had some experience at both agencies dealing with. You know, perhaps, needless to say, coming from the private practice side of the bar, I would encourage the commission to be more open to that as a way of resolving problems. I think, logically speaking, if you engage in some kind of transaction that eliminates the competitive harm or the threat to competitive harm, that that should be a sufficient way to resolve the competitive concerns, either through divesting some asset or also entering into contracts with customers.

I think that's another way that I've seen the Department of Justice get comfortable with the competitive threat that a transaction might cause to certain customers, is to have the parties enter into a long-term contracts with those customers that effectively eliminate any risk of a problem for a long period of time into the future.

The down side to that is lack of transparency. And I think that's a fair criticism that when you use fix-it-first to get rid of a problem, there is an absence of transparency to the outside world. But I think that is a cost that's worth bearing if it's a way of eliminating competitive harms and competitive threats in an efficient way that allows mergers to proceed in a timely fashion.

So I'll just give that answer on one and leave some of the other folks time to comment on the others.

MS. FEINSTEIN: Well, I don't think there should have to be a choice, and I think anybody who has practiced before the agencies would say is that the key to making divestitures work in a way that actually can save efficiencies of transactions is to have some flexibility.

I think the agencies sometimes get too set in their ways and sometimes I think they're very very flexible on remedies. I think of some of the things that we propose that I thought, I wonder how they'll react, and they've reacted extremely well to it because it really did make sense for that particular case.

I think there are situations in which fix-it-first absolutely, it's incredibly easy, it can be done quickly, and it can be transparent. I can remember doing a fix-it-first with the Department of Justice where they issued a press release bragging about it and we were completely comfortable with that.

They had told the world that they were willing to let a particular transaction go because all that needed to happen to fix the problem was for the manufacturer to set up another entity as an authorized repair shop, to give them the standard book, to give them the standard license.

There was no black box. There was no magic. All they had to do was give them the stamp of approval and hand them the manual, and they could say they were an authorized servicer and that is what was necessary to get a new entrant in that case. Very easy, very quick.

At the commission we would have spent three months getting through drafting the consent decree, going through the bureau, going through the commissioner and losing all the efficiencies of the deal. So I think fix-it-first can be very useful.

I can understand why the agencies want in some cases a buyer up front, and I'm not going to argue that it's never the right thing to do because sometimes I think it is the right thing to do and, frankly, sometimes it's easier to find the buyer than to enter into a consent decree that would deal with all the eventualities if you had to write them down about what happens to be divested, but I would hate to see a loss of flexibility if the agencies felt like for them to agree on one document, that fix-it-first would go out the wayside, which is frankly my biggest fear.

MR. WEISER: So, if I can follow Debbie on that, the risk is, if you make a pre-commitment, you may later regret it, there may be a sequestration issue could do it. We had the discussion earlier that you can use weasel language like absent extraordinary circumstance or something of the like, which gives you a little room.

The question that I had in the case you mentioned is, was there a concern that the support provided would be subject to a breach without ongoing oversight, because the FTC model is premised on, you can't ever trust parties to follow through with their stated fix-it-first commitments and, in terms of a DOJ experience that I was involved in that gives some support to that, people may be familiar with the MCI World-Com deal where Inter MCI was spun off to cable and wireless, and what cable and wireless ended up getting was a breach contract lawsuit which they actually did settle for a substantial amount of money suggesting that there was probably some cause for concern there.

So how is that concern dealt with in the case you mentioned, as well as more generally in the fix-it-first context?

MS. FEINSTEIN: In the case that I mentioned, it really was, one thing happened, and we could show that the thing that happened was a one-time event. Once the -- literally, it was a manual that was transferred and it was allowing somebody to say, I am an authorized blank service repair shop. That was what was necessary to restore the competitive problem.

So we could show that once we had turned it over, there was no ongoing relationship. There was nothing to do there. Now, that may be in a minority of cases, but it's not in a trivial minority of cases that, once you've completed the act required, whether it be a divestiture or some other authorizing act, that you're done, and there really doesn't need to be oversight.

I think it's become too easy to say, well, we'll just slap a monitor or it, or we'll make sure that there are compliance reports when 99 times out of a hundred nothing happens. And it's not because there's government oversight. It's because it really is so easy to implement the remedy, that there's really nothing to do that's ongoing once it's done and, therefore, in this case, the Justice Department made sure that it saw that what we were required to do had been done before they cleared off and the deal that was really that easy, but didn't make us go through the whole consent decree process, the Tanyak (phonetic) process. And I think there are cases where that's really enough and you don't need ongoing 10 years worth of oversight on a divestiture where it's just really not needed.

MR. PRAGER: I totally agree with Debbie. I think that flexibility is the key, to borrow her word. And that the FTC has been unreasonably intransigent in terms of its view on fix-it-first.

I may have had the misfortune of litigating the penultimate, or the ultimate example of that in the Libby case where, had we been able to negotiate fix-it-first with the FTC, perhaps the merger that ultimately is blocked by the court might have been able to go forward, but the unwillingness of staff to even discuss a fix-it-first -- and I know that that's a long ago case for some of you, but the offending assets were being left behind with the seller, and the commission went so far as to vote out a new complaint when the judge questioned whether there was even a controversy before him, reflecting the fix. So it's just one example.

And on the other side, I've had instances with the Justice Department where it took nothing more than a letter agreement saying that we would divest the offending assets before the closing occurred. Everybody was happy and it made a lot less work for lawyers. No judges. No ongoing 10 years, as Debbie said.

But on the other side, the Justice Department tends to be rather rigid in terms of conduct-related decrees. They're not very receptive to fire walls or other fixes of that sort, which the FTC has routinely accepted over the years, particularly in vertical cases.

So I think that flexibility and a willingness to examine under the facts and circumstances of the individual merger is really critical and, while it may be slightly afield from the specific question that Phil posed, I do also think that that same requirement of flexibility needs to extend to the terms of decrees.

I can't tell you how many times I bang my head against the wall in dealing with staff where they're insisting on provisions because it's part of the standard decree, and it may be totally irrelevant, even counterproductive to the particular transaction that you're dealing with.

In one instance, where there was going to be a completed transaction in an FCC approved procedure, they insisted that the seller be a Defendant on the decree and it almost killed the deal, because the seller was going to have nothing to do with it, the divestiture was not going to take place for some period of time because of the need for FCC approval, and the Justice Department insisted because its directives say so that both parties had to be defendants on the decree.

MR. ARQUIT: Well, I don't want to repeat what others have said since Phil said that my time at the FTC, referred to it as an era, and called me a dean, and I guess maybe that hopefully gives me a little bit of opportunity to provide some historic perspective to the fix-it-first and the FTC.

Because when I was there, which was 20 some years ago, this was a huge policy debate because the Justice Department allowed it and parties were coming in and, frankly, some of the staff people were interested in allowing merging parties to do it.

It's interesting when you hear all this theory today about the doctrinal reasons for the difference and so on. It had nothing to do with that at all. What it had to do with was human nature.

There's always some tension that exists between a chairman and commissioners in a multi-person agency. The chairman is always going to know a little bit more, chairwoman, than the other commissioners, the staff. The senior staff's handpicked by the chair. And the other commissioners are concerned about their prerogatives and they're concerned about decisions being made that are essentially agency decisions that they don't have any input into.

At this point in time there was more there one commissioner that said, if there's fix-it-first, I don't have any say in this. I'm a presidential appointee, and if there's a fix-it-first, it means that the staff has decided, A, there was a competitive problem, and, B, that this was a sufficient fix to it, and it never came before me. I didn't get a chance to look at it. And that was the reason.

And, believe me, the staff was beat over the head very hard by commissioners when they tried to show any independence in that regard. And, frankly, you know, Bruce, I agree with you. Of course, some of this the boiler plate stuff is nonsense to put in here, but I think it's some of that same concern on the part of staff. I mean their bosses are the commissioners at the FTC, and if they depart from boiler plate, they're departing from something that the commission has previously said was acceptable, and they take some personal risks when they do that, that they'll be told that if they're not insubordinate, at least they're not being responsive to the commission.

So I think it should be -- fix-it-first should be accepted at the FTC and I don't think people should worry about doctrinal reasons because, to my view, there weren't any.

On the buyer up-front issue, again, here, I think some of this when you're on the outside looking in you have a different perspective than when you're on the inside, but from the outside, you look at buyer up front and you say, the deck is stacked fully in favor of the government. Because, first of all, what they'll say in the guidelines is, if the buyer of the divested assets is itself a competitor, that ain't gonna work because you may be creating market power in a different arena.

On the other hand, if it's not a competitor, and it's somebody new to the market, well, they don't have the experience to buy these assets so, whose left? Okay. Often nobody or very few. Combine that with the fact that the buyer up front, once one of these very narrow entities is selected, they have to get their deal closed before the bigger deal can close. The merging parties are desperate to get this other deal closed.

Think, in today's world, where credit -- your financing doesn't often exist beyond six months, in fact, that's pretty generous these days. Your drop-dead dates are six months down the road. You've got to find a buyer. You've got to find one of these small people who agrees and their deal closes before yours does.

This buyer of the assets knows they've got you completely over the barrel and, what happens is, the assets are sold at a fire sale, and even beyond that, the commission or the Justice Department staff sits on the side of the buyer of the assets essentially saying, well, don't you want this? Don't you want that? Because, you can imagine, their incentives are to make sure that the buyer of these divested assets is one that's going to be viable and able to compete. So they always will err on the side of adding assets to the transaction.

So, to my mind, this buyer up front things is something where it's developed in a way that makes it very unfair to the merging parties, and I think that from the government's perspective, they openly admit that, and no one will argue that sometimes you're not taken for a ride, but they say, look, our focus is on restoring competition to a market and, if you want to get your larger deal done, that's the price you have to pay.

So there's two sides to the coin, but obviously the one that I'm more sympathetic to is the one that I hear from the clients a lot, which is that you're basically just writing off the assets you have to divest, that you're not getting anywhere near the value for them.

MR. PRAGER: Phil, can I just add something?

MR. WEISER: Please.

MR. PRAGER: A follow on to Kevin's point. There's even one additional catch 22 which, if the price goes down too far, then the agencies say that the buyer doesn't have enough skin in the game, they can't be assured that the buyer will stay in it for the long haul and actually make a competitive go because they don't have much of an investment. They've essentially gotten the assets for free.

MR. WEISER: So I've got one more doctrinal issue, to use Kevin's terms, and then I want to turn to a couple of institutional questions.

The doctrinal issue is one that Debbie raised, so I'll let her go first. To what extent is it important that the remedy address the competitive harm?

And just to give people a flavor of this issue, let's say you've got a merger involving two markets, and they could be either product markets or geographic markets. And let's say that you have divestitures that are -- the harm is in market A, you've got divestitures in market B, the deal may be such that they're linked together, and you get more competitive benefits by divestitures in B than you had harm in A.

In the efficiencies world, it's commonly suggested that that is sound enforcement practice because, if you get a lot of efficiencies in the deal, even if there's some harm in different markets, many would say the -- deal's overall procompetitive, you got to let it go through.

Should you apply that reasoning to remedies if one said flexibility was the touchstone? That would seem to be a flexible standard for remedies, but others say it might be not fully lawful in the sense that you're not faithful to the core competitive concerns.

So, Debbie, how do you think through that?

MS. FEINSTEIN: Well, I think there aren't many cases that really put the issue as starkly as that, but we certainly have seen the very large deal that raises virtually no issues, that's incredibly procompetitive, huge amounts efficiency, there's a good for reason for it to get done and to get done quickly, and everybody knows the deal will be done, and yet you find staff looking to see if they can find some little problem in some tiny little market which accounts for single digit millions dollars in revenue, and then holds a transaction up for a really long time. I think that's an unfortunate situation that shouldn't happen.

If there's real competitive harm, it's going to become clear quickly. If there's, on the margin, possibly some competitive harm to a small number of customers who, in these big situations, are often the same customers but different purchasing departments, as are getting all of the benefits of the deal, I think there ought to be some prosecutorial discretion and there's not today.

I would not argue, because I don't think that it would be defensible under the law and I think it would be tough, is to say I have a really big problem over here, but I have a really good solution or really good efficiencies over in this market, so I get to completely divorce the two in a situation where the customers are completely different, but I think in a lot of situations, there really are, you know, tiny little tails of wagging dogs here and I think that's something that I think that is fair and the government should look at more carefully.

MR. WEISER: Kevin, how do you see that issue?

MR. ARQUIT: Well, I largely agree with Debbie on this one, except that I do think -- maybe I take a stronger view on the legal point. This is a place where my position is exactly the same as it was when I was in the government, and that is that Section 7 refers to any line of commerce, and what that means is, that if there's a problem in a line of commerce, meaning a product market, then you either stop the transaction or you get relief that addresses that.

Because of that, we're the only product at issue in the transaction, the government presumably wouldn't have any problem in challenging it and demanding relief in that market. Why should it be different because it's part of a multi-product merger? And so I really think that that -- once you deviate from that, you really have some serious issues.

The point I hadn't really thought about until Debbie just mentioned it was where you got the same purchaser largely for the multi-products of the merging companies. And if it's just different purchasing departments within the same entity -- I guess the way you'd look at that is even if believe in things in consumer welfare, there your consumer is the purchaser.

I'm thinking a lot in the pharmaceutical industry that this might have application, that you're selling to a GPO or something like that. I guess there's more reason to accept it because, at the end of the day, there's not net harm to that buyer.

But even there, that buyer is an intermediary, it's not the final consumer. And if you assume that some level of cost or anticompetitive effect flows through to the end consumer, I think that there still could be some problems with it.

But I also agree with Debbie. I don't think that this situation comes up that often.

MR. WEISER: Art? And, Art, I should add that

I know you practiced some before the FCC, which has a different philosophy here, and if you want to bring that into your answer as well.

MR. BURKE: I don't know that I would call it a philosophy, but -- I think I agree with Kevin doctrinally that it is a line of commerce so, as a purely legal matter, if you've got a very large transaction that is largely okay, but you've got one market where it's having an adverse effect, that is a legal basis to challenge the transaction.

I think as a matter of prosecutorial discretion, one might take that into account in evaluating, A, whether to, in fact, challenge the transaction, and in B, whether it's an appropriate -- what sort of standard to apply in evaluating a remedy to address that -- maybe that small concern in a relatively remote part of the transaction. So I do think it's fair to take that into account.

The question ultimately would then come is, how would one ever incorporate that kind of thought into guidelines? And I think this is where guidelines probably do breakdown, and it really does become a question of the good judgment of the people running the agencies.

I'm not sure how one would articulate what I've just said in a way that is actually useful in a guideline, and I think that does go to a problem with guidelines in the context of remedies, because they are so -- there is this prosecutorial discretion element to them. There is a lot of informality to them. There is a lot of, you know, case by case elements to them.

So it's just going to be hard to capture all the nuances of these kinds of issues in the context of an -- in the context of guidelines.

Now the interesting contrast, as you say, is the FCC which does tend to impose, you know, very very detailed conditions in connection with the approvals of transactions and, you know, it's not a situation that's typically reviewable by a court.

So I think what one has seen very frequently is lots of things get sort of piled on to those kinds of remedies that may not really have a very close relationship to the merger-specific concerns. Fortunately I don't think we've seen that with respect to the antitrust agencies and we certainly discourage it.

MR. WEISER: Bruce?

MR. PRAGER: I don't buck the trend on this one. I pretty much agree with everything that my colleagues have said. In my experience, generally what you find is not the kind of dichotomy, Phil, that you pose which obviously presents some more interesting doctrinal questions, but more frequently you've got some markets, whether they be product or geographic where the violation is clearer, and some that are viewed as more marginal, and so it becomes a horse training process, rather than one of truly balancing efficiencies as against competitive harm.

At the end of the day, you know, one supposes or establishes the transaction as a whole is efficient, and then there are determinations made under the sort of constraints of resources and trying to achieve a result of getting the big deal done, that you agree to give up things. There are some that are marginal that you may hold on to and, at the end of the day, the process tends to be one of negotiation rather than one of analysis.

MR. WEISER: So I'm going to go to the last, what I'll call doctrinal issue before we get into a few institutional ones, which is, the common law, if you will, of divestitures.

In the buyer up-front discussion, we had some key points that were noted as possible criteria, and Kevin very nicely explained how they are at war with one another. Just to recap. That was -- you need to have someone who pays enough money to have skin in the game, but if you require buyer up front, that may actually be at war with that idea.

You need to have someone who is knowledgeable about the industry, i.e., not a novice, but you also don't want someone who is a competitor and whose purchase creates its own market power problems.

Another dimension, I don't know if this also has an internal contradiction or tension, but there may be some requirement that there be an auction so it's the highest bid, but the agency may also want to reserve the right to be able to pick or at least approve the buyer. I guess my question to you is a couple fold.

One is, are there useful criteria to think about how to manage divestiture remedies in the context of mergers? What have we learned, generally, from efforts like the FTC study and one in Europe? And how would you advise, if you were trying to come up with some codification of principles to provide some guidance and some hopefully best practice as a way to go about doing this?

Kevin, do you want to start with this one?

MR. ARQUIT: That's a lot. I think here that both the European guidelines and the US ones have it right directionally, which is that divestitures are clearly going to do a better job structuring relief than will conduct remedies because they're clean.

If they're not clean, that's one of the things that should be put into guidelines as to when it's allowed to be something less than clean and, by that I mean, one, where there's a continuing supply agreement, or there's some continued linkage providing a license under intellectual property, transitional services, that type of thing because those frankly do lead to real dangers of not just anticompetitive collusive exchanges, but a lack of cooperation on the part of the seller, because, after all, it's counterintuitive.

If you're going to end up wanting to destroy this company in the marketplace, why do you want to give them an extra inch beyond what the government says that you need to give to them?

But I guess looking at the study that the Bureau of Competition did that talked about the problems that were inherent with divestitures, I don't know where that leaves you, because if you have admitted that divestitures are better than conduct because of the lack of need to monitor, and the divestiture issue isn't taking you where you need to go, what's left?

And I think there that I saw some aspects of that study that I would think suggest it may be flawed and therefore, that that study shouldn't necessarily be taken at face value.

First of all, the concept in that report that talked about the fact that many times buyers overpay for assets. Well, who are the Bureau of Competition at the Federal Trade Commission, the Department of Justice to make that determination? Don't you think that somebody whose putting their own money up and their financiers for that have a much better handle on what's an appropriate price than folks that have never worked in the industry?

But are there -- and looking at it from perspective as enforcers and, even if it is in some nominal sense too much, that doesn't really affect competition unless there's a cash flow problem and a need for heavy investment that's taken away because of the fact that the money has to be used to pay down the debt.

But I guess the other thing, the failure of a divested -- and here's what I think is the real problem. The failure of a divested entity to ultimately make it in the market does not necessarily mean that the remedy failed. I mean, we're all about competition and in competition you have failure. There's supposed to be failure. No one's guaranteed a place in the marketplace.

So if a divested entity gets off to a fair and even start, the fact that they ultimately don't do well, well, the reason for the merger in the first place may have been because one of the parties didn't think that it could achieve sufficient scale without the merger.

So, the fact that that was a problem that existed before the merger, and the divestiture is only meant to restore the competition that was lost as a result of the merger, and the other entity that's been created is presumably more efficient, is there any surprise that some of these divested entities don't make it even though the divestiture itself could have been done completely properly, and I'd suggest that doesn't show a failure of the system of divestiture, it's simply an economic reality.

So I think that, yes, divestiture is probably, and structural remedies, if they've got it right, to say that is the preferred mechanism. And so I think that both the -- all three sets, the Europeans, the DOJ, and then the Bureau of Competition policy pretty much handled that the way you'd want them to.

MR. WEISER: Art, what do you think?

MR. BURKE: I'm not sure that I have a lot to add to what Kevin was just saying. As we sort of said from the outset here, greater transparency is a helpful thing with respect to all of these kinds of principles, and, you know, my greatest concern is really what I said at the outset, which is, to the extent that there is divergence between the agencies, that really is something that we should be concerned about, and this is a golden opportunity to try to address it.

But with respect to the written versions that actually have been put out there, I also agree with what Debbie said. There are actually some very helpful guidelines out there that have been put out by the European Commission and, obviously, by both of the agencies in the United States.

The Q&A format that's used by the FTC is perhaps a little less useful in terms of getting a sort of overarching view of their approach, but if you go through it you can sort of generally discern what the views are, but, again, from my perspective I would prefer if there was greater predictability by having a common set of views on that.

MR. WEISER: Debbie.

MS. FEINSTEIN: Thank you. I think the buyer up front, for the most part, actually works pretty well, but it depends a lot on convergence, at least at the FTC, and that's convergence between staff, and the compliance division.

Sometimes you get it in spades and sometimes you don't. When it works incredibly well, you can literally send an e-mail saying, here's our proposed buyers, I do a lot of retail transactions, and there you're going to have dozens and dozens of markets, and so you really need real time reactions and, when it's working well, I think it's great. You can get real-time reactions to, is this buyer acceptable or not because there are some times where it's on the margin.

Where it doesn't work well, and I don't think guidelines can do anything about this, is where it becomes a guessing game. Where you go down a path and you think you have things worked out and somebody says, the buyer paid too much, the buyer paid too little, even though the multiple may be the exact same multiple that your client just paid for for the overall transaction and somebody is buying a divestiture portion at the same multiple, why is that suddenly too much? There is nothing tethered to it, and those sorts of things can be frustrating and, unless there's some rigor and economics between why somebody thinks that's not appropriate, I think there's a problem.

So unless you can articulate it in guidelines, staff shouldn't be doing it, and I think that's the real -- the real trick to a lot of this is, there are a lot things that if you were to interview individual staff people, individual compliance people, they would say a lot of, well, this is just the way it is, or we never accept, or we always insist, and I'm not sure that the people down the street in the commissioner offices or the bureau offices or the front office of DOJ have any idea that staff is saying as many "always" and "nevers" as they are.

So, you know, in that respect, if there were guidelines that might keep people a little more tethered to whether it's really the case that paying too much or too little is a problem and why that might be a helpful thing.

MR. PRAGER: Just a few. I think that Kevin really got it right in his overview which was an excellent summary.

Then just following up on some of Debbie's comments. I think that even more than in any other part of the merger process, we, and even more so, our clients get frustrated with staff in the divestiture process where staff all too often seems to want to substitute its own judgement for that of the people who are in the business.

As to what the package should look like, what's necessary, who is a good buyer, who is going to be an effective competitor and who isn't, I think the dichotomies, Phil, that you posed in your question are genuine dichotomies but ones that staff is often ill prepared to address and, given the normal skepticism of the process, not terribly willing to hear what the parties have to say as to the way weighing or the outcomes of those inconsistencies.

Just to throw out another one, buyers often want protections from the seller in a divestiture, and it's a general proposition I think at both agencies that things like non-competes are frowned upon because the whole idea is to have them compete and, yet, there may be some sense in which you're actually disadvantaging the divestiture buyer by refusing to allow them the kinds of protections, that in a normal arm's length business transaction, they would otherwise receive.

Similarly, sellers are often hamstrung, and I understand why, but by the limitations on seller involvement once the divestiture has occurred.

You know, by refusing to allow supply

agreements in some instances, by refusing to allow earn-outs, by refusing to allow royalty payments over time, these are all things that disadvantage the seller in the process.

And so the divestiture process is, by it's very nature, one of compromise and one of trying to get the best out of a difficult situation.

I'd add one final observation on this point which is that the clearest thing I think is that when approving divestiture buyers, the role of the government, whether you refer to staff or to the agency management, it is not to be one of social engineering. It's not to choose who they would like to see as the buyer, and do what they can to favor that particular firm. I think it really should be a thumbs up, thumbs down. These three buyers are qualified. Go do your deal with any of those three, and not a situation where there's a thumb on the scale.

MR. WEISER: So had you not answered the first question the way you did, Bruce, I would have thought that was an impassioned plea to adopt some guidelines on remedies.

Can you remind me to come back to that? Because Kevin made such an impassioned plea, and then I thought you disagreed with him, but it sounds like many in the maybe in the course of the panel you've come around to Kevin's way of thinking a little bit.

MR. PRAGER: No, no, no. I said from the very outset that I thought that there should be a written statement and it should be --

MR. WEISER: It just shouldn't be in guidelines.

MR. PRAGER: I think it's impractical for it to be part of this revision of the guidelines, both from a time perspective, because I'm hoping that these revisions will come out sometime in the next 18 months to two years.

MR. WEISER: You and me both.

MR. PRAGER: And I really --

MR. WEISER: If we do it, if it doesn't come out in that time period, hopefully we'll say, we're not doing it, and we decided not to do it for whatever reason, so --

MR. PRAGER: And I think that having a written document, whether you call them guidelines or not, is an absolutely brilliant concept that there ought to be one such document.

I was just taking from the outset what I thought to be a relatively pragmatic approach that said it's going to be hard to do it in this context. There is nothing on this side of the Atlantic that has ever purported to be remedy guidelines, and I just think it's biting off more than the agencies can chew in a meaningful time period.

MR. WEISER: And Art's retort is, effectively, Howard's not afraid to work hard, so that it'll be fine.

So my last question is an institutional one. It goes like this. If you have a concern that Kevin articulated of some, either conduct remedies that require oversight or ancillary contractual obligations pursuant to a divestiture, how do you deal with what new institutional economics, and Oliver Williamson just won the noble prize, formerly of the antitrust division, we're very proud of him -- Calls this the trading hostages solution, which is some hammer that ensures that when two people have to deal with one another, you can have a level of assurance.

So one way the FTC is fond of in this regard is the so called Crown Jewel Provision which means, if you violate some of the terms of the decree, we're going to take or keep this Crown Jewel that you have somehow kept available to us, and maybe you have to divest that as well, or for purposes of the new institutional economics perspective, you can just destroy it, and that would actually ensure it never had to be done, the thing about it as a death penalty threat.

The other one, which somewhat confuses, we're going to appoint a monitor whose going to play a role of overseeing the conduct and have some authority to recommend or impose some sort of sanction.

So thoughts on that, Debbie? You posed this. What do you think about this institutional concern about the need for oversight and, if so, how to manage it?

MS. FEINSTEIN: Look, I think there are some cases where it does make sense, where you've talked the government into something where there's going to be an ongoing relationship with the parties, and it may not be straightforward and they want to make sure something happens.

I mean, the first thing is, the parties do have to put in compliance reports and, you know, the agencies do look behind those. I mean, the FTC will call with questions on a quite regular basis, and the mere act of having to put in those compliance reports means you think hard about behavior and what you're going to say about it. You know the other side can pick up the phone and complain.

But I think what has become too easy lately is just to write in a monitor. And I actually happen to think that most of the people I deal with at the FTC Bureau of Competition Compliance Division are a heck of a lot better at figuring out what's going than most of the monitors we get assigned. Yes, we can choose them, but sometimes you don't have a monitor that the commission thinks is right, so you basically have to hire one of these professional monitors because that's who the commission will accept. And I've had monitors who, frankly, even after getting the set of consent decrees and after multiple meetings, really don't understand the problem that was being solved.

Why the consent is written the way it is, why the divestiture agreement between the parties is what it is, and actually creates problems rather than helping them.

It becomes an incredible administrative burden. Their job, their incentives are to make money and their incentive, therefore, is to foment dissent between the two companies which is exactly the opposite of what it is that the parties want. It's exactly the opposite of what the commission wants.

I've had some lucky experiences with some monitors that we found who are very good, only to have those monitors rejected in the next situation because they don't know the industry where I think knowledge of the industry is typically less important than simply being a good sounding board and understanding how do businesses work, how do companies think about firewall issues, and that sort of thing.

So I really think people need to rethink the monitor issue pretty dramatically, because I think in a lot of cases it can do more harm than good.

MR. PRAGER: I guess I'll comment on the Crown Jewel point just because Debbie did. I don't think there's anything wrong with the concept of Crown Jewel. I mean, it is a motivator and, where I've seen it, it's generally not been totally arbitrary. It's not just saying, if you don't live up to your obligation we're going to stomp on your head and break it. I think it's where there are two sets of assets that could be divested, one of which is more desirable more or more complete, and where the agency isn't quite sure whether the lesser one will work. This is generally not a buyer upfront situation, where you're going to be finding a buyer over a six or nine-month period, and the concept is, that if nobody steps up to buy the first set of assets, that is proof then that they weren't sufficiently desirable or were not sufficiently complete and that, therefore, you go back to plan A, which is, you got to put out the more complete, the more desirable set, and, yes, there's a punitive nature to it in the sense that it was what the buyer wanted to keep in the transaction, but I think it's really both a motivator and an assurance that you get a good and effective divestiture at the end of the day.

MR. ARQUIT: I agree completely with Bruce on the Crown Jewel, and I don't think that its best use is when it's intended to be punitive. And I think the way the European Commission has written this up in their guidelines really articulates that the best way which is, as I understand it, is that you're willing to accept a little more uncertainty with respect to the primary remedy, if you know you got a backup that exists out there, and so you get a little more wiggle room to the parties, but what it means is that the Crown Jewel is the one that has to be pretty much air tight, and that gives the regulatory authorities the guarantee they're going to restore competition, but it also gives merging parties some flexibility. So I think Crown Jewel works and I think that's the way to articulate it.

On the monitor, I was particularly interested in hearing Debbie's views as to how incompetent they are since I've served in that position twice, so --

and, actually, the point that Debbie makes, because these days monitors are pretty much industry experts.

At the time I was named in both of those. I couldn't have been hired as the industry expert, so I had to be something having to do with some knowledge of antitrust law. But that's moved more to the industry experts. I think there is a challenge either way, if you're an industry expert, you don't understand the antitrust aspects, and what firewalls really mean, and if you're an antitrust person, you don't necessarily know -- you don't, in fact, know about how the business is run.

So you have to rely heavily, I did, on some senior people in the assets that were going to be divested. Now they have mixed motives. They may want to be part of the company that's spun off, but you don't even know who the buyer is. They may also hope they're ultimately hired back by the seller. So you don't know how objective the advice you're getting is.

So it really does have issues. And I think the way, you know, the last thing I'd like to see is see more bureaucracy, but I think that it's probably a job that requires more than one person because no one person has both sets of expertise.

If you're going to have this be effective, it has to be somebody that does understand the industry so that they can see when -- if collusion occurring or assets are being degraded, but you also need to have someone they can go to for antitrust advice.

And, frankly, yes, you can go to the FTC compliance people and they are very very good and they understand this, but you know when you go there you may not want to up the ante that much because you're trying to find out the answer to a question and you don't necessarily want to unload the whole compliance group with some accusation of a violation.

So I think probably that some of the industry experts don't go back and ask the agency in situations where they should if they were allowed to have an antitrust advisor of sorts, that they could go to an attorney/client relationship, that might be somewhat of a fix for it.

And the only reason I think -- I agree with everything Debbie said about the problem with monitors. The problem is, if you don't buy into the monitor situation, then you're pretty much back to the buyer up front, and I've already indicated what I think can be real problems with that.

MS. FEINSTEIN: If I can just respond to Kevin. You were talking a little bit about a divestiture monitor, which I think is very different than what I was talking about which is really a compliance monitor. Compliance monitor is after the divestiture has occurred. So the seller knows what the seller wants.

The business people at the seller have only one incentive which is to do well by the seller's company, and, in that situation, I agree with you, your situation you've got kind of more of the mixed motive. I'm talking about once the deal is done and there's somebody looking over it for two, three, five years to see if things are working, those are the situations where I found it really isn't all that effective and can ferment the kinds of problems that are unhelpful.

MR. ARQUIT: And just one observation. I don't want to monopolize this, but it's something I took away from the experience. Right now the agencies are pretty much indifferent as to whether you can divest the buyer's assets or the seller's assets. They just want to see a package. That's a stand-alone business.

And I think, in some circumstances, when you allow it to be the buyer's assets that is the subject of the divestiture, that you got an unnatural situation because, particularly, the buyer has some links with these assets it's going to divest. Meanwhile, it's bought some other assets out there that it's going to bring in, and, yet, the assets that it held often, in this case, in the same building, are ones it has to divest.

This outfit's going to be divested is compromised of their friends that they have lunch with in the cafeteria every day. That's supposed to be the entity they're competing with even though they've known these people for 20 years, and the company that they're buying is the one that's off distant, that I think that there really can be more compliance issues when it's the buyer's assets that are the subject of the divestiture.

MR. WEISER: Although, Kevin, you have a particular idea in mind. You can have a company who has different divisions who aren't in the same building who may not even feel like they're part of the same company. Technically, they can still be the buyer, but you're talking about where there really is an integrated company, it's a much trickier --

MR. ARQUIT: Where's the linkage?

MR. WEISER: Where's the linkage, yeah.

MR. BURKE: I'm not sure if we have much time left, but just one last comment, and I think I'll answer a different question than the one you asked, which is, one can make arguments about individual cases about whether the Crown Jewels are appropriate or not, whether it's appropriate to have a monitor or not.

My guess is, that if you were to actually write a set of guidelines, they would not really provide much concrete guidance for those, except to say they're sometimes appropriate and sometimes not appropriate, and here are a few factors that you might consider in addressing it.

So I think the comments that have been made are actually very valid ones, but they probably are not ones that really go to the guidelines question. We're not going to rule these out and we're not going to rule them in categorically.

One last point I would make though is, I think there is, in going to the some of the questions and complaints, frankly, that have come up here, a lot of it does go to some institutional issues as well. That a lot people that are responsible for negotiating and enforcing these various consent decrees, particularly at the commission, are in a very different group within the commission. That's just the way it's set up. They're the compliance division. And they are somewhat disconnected sometimes from the case itself, and frequently don't seem to understand necessarily what the actual other enforcement staff were interested in or what their concerns were.

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

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

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

MR. WEISER: Any thoughts on that? If you have a fix-it-first situation, should you have a disposition, say the larger business, can you make that sort of principle to argument?

MR. PRAGER: I don't see any reason to. I don't think that you need to have a rule, even if it's not a hard and fast rule that says that it should generally be preferred that the larger group of assets -- it may be that in some instances it will be easier to find buyers for a somewhat smaller more manageable business, and, you know, that business may be more nimble. It may have better technology.

There could be lots of reasons why selling the smaller business would be useful. It may not be as tightly integrated from either a production or distribution perspective with other of the assets of buyer or seller, and all of those that are factors that go into the decision of which group of facilities or which business to sell.

MR. WEISER: Let me put one other question on the table which we'll then pick up on the next panel. So 30 seconds on what I will call "Unconventional Remedies." Here's three. In a world where the thresholds are higher, a requirement to report future unreportable transactions, this is assuming of course that either you're willing to agree to it or a court would find appropriate, what do you think of that sort of remedy?

Number two, a requirement to report pricing behavior after the merger is consummated, either as a safeguard, I'll brandish sunlight is the best disinfectant, or is an opportunity for more data analysis by the agencies.

Number three, increasing use of IP licensing as a competitive constraint that would satisfy competitive concerns. Thoughts on those or maybe other unconventional remedies that aren't part of the mainstream discourse we've talked about. Kevin.

MR. ARQUIT: Well, on the pricing line, and maybe this reflects again my time back in the government, since you have to file compliance reports anyway -- and if it's a manageable product line, I don't see that big a problem with reporting prices after the merger. I realize companies are not going to like it, but you look at the one case that I'm aware of where a court allowed merging parties to give a price promise as the solution, the North Shore Hospital case in Long Island let two large hospitals merge because they promised not to raise prices for two years. As soon as the two years were over, they raised the prices.

So there really -- I think that the reporting part of it isn't the problem, there just needs to also be an understanding on the part of agencies that markets can change and, if the entire demand curve shifts, as opposed to moving along the demand curve, there can be a circumstance where it's perfectly competitive for prices to rise.

MR. WEISER: Debbie.

MS. FEINSTEIN: I guess I would want to understand the purpose of that because the notion in accepting divestiture remedy and -- you know, I haven't seen a pricing solution in years and years and years, so most of the time it would be a divestiture remedy, and if the notion is going to be whether we're going to test whether or not the divestiture worked by look at pricing, I think that there are a hundred other factors.

I think that the notion --

MR. WEISER: This could be in lieu of -- this could be, in a sense, the parties say, trust us, there's no harm, you could just say, okay, we do trust you, but we're going to require you to actually report on your prices so we can do some analysis.

MS. FEINSTEIN: Well, I think that's an intriguing idea. That goes to the question of whether that enables us to do regular merger retrospectives. I've actually talked about that as a possibility. I think the problem is more a legal one. If you don't have reason to believe that there's violation for remedy, how can you impose a requirement that people turn over pricing data? So I'm in the sure how it works in practice, but if it's the price of getting a deal done, sure. I think a lot of people would do -- turn over the pricing data.

I'm reacting to the notion that you would have to do a divestiture and then prove that the divestiture accepted by the government, in fact, worked by giving your pricing data and, to me, that's too much to ask of people.

MR. PRAGER: My clients always want the North Shore deal where all they have to do is agree they won't raise prices. And they'd take the oversight too. They just don't want the divestiture.

I think the IP licensing is becoming a more and more common remedy. I think it's one that should not be viewed with any skepticism. I think that the biggest issues are reasonable royalties. One of the concerns that the agencies always have with anything that involves ongoing payment is that the divesting party, if you will, is getting information about a competitor. That's a tough one. Because if it's a fully-paid license, sometimes that's a big nut that you're asking the recipient of the license to pay up front.

There may also be a real disconnect between the licensor being forced to make a divestiture, and the licensee believe are the likely benefits in terms of impact on sales and the like.

So I think that there's a little bit of a nut to swallow there in terms of accepting a royalty as part of that remedy.

MR. BURKE: But I would say of the three, that seems the least unconventional to me and the one that's the most interesting and the one that should -- perhaps, if there is guidelines, the most intentioned because it is -- especially in technology industries that is often the way to resolve an issue.

If it's a software product or, you know, some other piece of intellectual property, divesting or giving a license so that effectively should be able to address the competitive concerns, or at least, you know, that the circumstances under which that would be an acceptable remedy are very important. And they're laid out to some extent already in the materials that the DOJ and the FTC have put out.

So I guess I would say, the other two are pretty unusual, but that one is very common and will probably become more common.

MR. WEISER: I want to thank the panel for a great discussion.

(Applause.)

We'll take sort of five minutes to stretch your legs, and then have the final panel come up.

(A break was taken.)

PANEL 5: GENERAL DISCUSSION AND ROUNDTABLE

MR. WEISER: Folks can sit down. This panel, of all the panels that we're having in this series of five workshops, this may well be the only one with three academics on it and only one person from practice.

That said, so the practitioner, Joe Krauss, he is, along with Ilene Gotts, who you heard from this morning, the mastermind of the ABA's comments. He's been very involved in their work, and we are so appreciative of the ABA's work. The ABA's transition report, which this time last year that's what I was working on, the FTC transition was valuable reading and guidance to us. Still is. In that, they actually suggested that merger guidelines and merger retrospectives were things we needed to be thinking about. We'll talk about both of those in this panel, and so we're really happy to have you here.

Now I said three academics. But these three academics, each of which have a lot that they bring to the table. Janusz Ordover is here at NYU. He is also a former deputy assistant attorney general for economics. He was also there at the creation of 1992 guidelines. We will have had Bobby Willig at our first one, he was working with Janusz, and Paul Dennis who will be at the one this Thursday. They were at the Justice Department. Kevin Arquit who we just had has at the FTC.

Harry First is, as I introduced earlier, is a critical figure here in the antitrust community in New York. He had been the head of the New York AG's office antitrust section, head of the NYU program on trade regulation. It's an asset to have him here.

Finally, Lou Kaplow, who I have a special affinity with because one of his mentors in economics is also one of mine, F.M. Scherer. What Mike Scherer would have brought to this panel, he doesn't like to travel much these days, is an important question that we might start off with is, many mergers don't actually end up providing the benefits that may purport to offer, and there is -- I think appropriate surplus on efficiencies, and so one has an existential question about how to think about mergers and where to push your emphasis.

Let me start with that very very high level question about mergers and how to put the emphasis on it. The government is often taking on to itself, and some have said the courts have put on us a high burden to stop a merger with a need to show actual competitive effects. Sometimes a need to show a market that is proven with a real rigor.

Is there, to some higher level, sort of a better way to be thinking about this enterprise? Then the sort of stepwise process that the guidelines lay out, or the high level of rigor that may be expected?

If you just had to start from scratch, Janusz, what's the right sort of touchstone to think about merger review?

MR. ORDOVER: That is quite a question. Thank you. Let me start with a little anecdote. What we finished was the horizontal merger guidelines, I said to Jim Rill, who was my boss at that time, "Why don't we start looking at the vertical issues?"

He said, "You do that, I'm getting out of here." So he got out of there very quickly and, of course, never looked at the vertical merger guidelines or the vertical issues in any great detail. They fell into complete disuse. If I were to start, I don't know where I would start. I think we have an excellent document. I cannot be expected to criticize it too heavily, first, because Bobby Willig, my dear friend, I, and others have worked very hard on it, and I think it is a great document that guides a lot of important work that the government undertakes in this arena.

I always thought of the merger guidelines as really fairly a document that's quite alive. That it's open enough to bring in a new set of analytical tools, new set of empirical evidence, new sets of experience with enforcement.

It is not something that is a dead letter, I guess a dead letter of the law, I never understood what that means. But it is a, I believe, even though it's guidelines, but they are being lived with on a daily basis both at the FTC and at the DOJ.

So I believe that the process that is happening right now of looking at where we are some 20 years later, and the process of understanding what is missing, and what perhaps has to be adjusted in light of experience, is the right way to proceed.

As I said, I look at the guidelines as cadence of questions and answers, as very dynamic in that sense. Perhaps it starts at the place that some people think is ridiculous, like market definition, we'll perhaps talk about it and I'll explain why I still think it's not a terribly bad place to start, as a useful place to start.

So I think if I were to start, I would tell you the guidelines as we have them, and I will devote a fair amount of time thinking about where we can strengthen them, and where we can give more clarity to the parties, as well as ensure, and I think that's very important, that the political super structure that's overseeing the FTC and the DOJ is actually not terribly displeased with the way things are turning out. Because I cannot imagine a worse outcome than to have our elected representatives begin to mess around with what we have in front of us.

So there is that issue, and I believe it's very important, and I believe that one has to look to that part of the process as well. It's not only law, it's not only economics, but it's also much more that is often totally uninformed.

MR. WEISER: So, Lou, what's your take in thinking about the (inaudible) enterprise and what should be driving it out?

MR. KAPLOW: Well, I think I will jump in in a midstream place that you might have partially predicted.

So one thing you said in the first formulation is about the guidelines providing rigor and the courts demanding rigor, and how we should go about doing that.

I think that it's a good thing that there's an insistence on rigor because anything goes is a pretty bad way of proceeding things. It doesn't give guidance. I think one thing that has been talked about only a little bit, maybe more in one or two of this morning's sessions, is I think the guidelines actually guide the courts a lot, and I think part of why they've been successful is because of the dimensions of soundness.

But I think part of why they've been sensible is that most federal district judges don't want to make it all up from scratch on their own and would like something to lean on, and that the guidelines serve that function.

So revisions in the guidelines will have that function going forward, and this is also part of why the guidelines, even though they don't purport to tie the hands of the agencies do so, because the district judge being asked to make up something new on the spot that differs from what the government actually said in it's own guidelines, I think is very difficult situation to be in. So I think that's sort of at a very high level of reality.

But punching into one in particular, and I know one place where there's been a lot of play, especially in the last decade or two, are the questions of how one proves competitive effect, it relates to the structural presumption panel this morning, the use of market definition and the like.

I think that there is some amount of misconception, perhaps reinforced by the guidelines in their current form, about the connection between the market definition, market share, market power, competitive effects inference route, and the idea of rigor.

And I guess my views are a bit outside from the mainstream on this, but the more moderate version of them would be that I think it would be good if the guidelines said more, not -- just to say all the steps relate could be said and might be useful but I don't think really says much. But, particularly, competitive effects in the structural approach with market definition, there's a question of the interrelationship there.

It's often imagined, and I use the word "imagined" carefully, it is often imagined that one can do step one before one can do step two. I'm pretty imaginative, one might say, an absurdly imaginative character on certain dimensions. I haven't yet figured out how to imagine that.

Let me just say two very precise things and then I'll probably stop. It's assumed that if we've defined a market properly, setting aside a moment what that means, we now know how to figure out the competitive effects from the market that we've defined. Well, how does one do that?

Well, if one has the kind of evidence of maybe a natural experiment like in the Staples case or a merger simulation, or if one has data or impressionistic estimates and information from customers about who they turn to, under what circumstances, one then can do a lot by way of interpreting.

But that sort of stuff are also direct means of answering the competitive effects question. So when it comes to, given a market definition, how do we say what the market share means? If one opens up economics textbooks or economics journal articles, there is no real answer to that question short of direct inquiries into competitive effects -- the agencies more and more, and courts occasionally in cases more, and more are acknowledging this. Many courts have said, we understand it's a means to an end, but I think making that more explicit, whether in a general way or also with specifics would be clarifying.

But, secondly, when one goes to the whole enterprise really of defining markets, and an example came up this morning, and many of you were here then, and my comment from the floor coming off Rich Gilbert's comment when you have, say, differentiated product merger, can you define the market without first doing competitive effects? You know, is there really any way of doing it?

If the competitive effects are significant and adverse, could one sanely pick a market definition other than one that ratifies that conclusion? And if competitive effects are plainly nonexistent, one should either book pick a broad enough market definition to ratify that, or just skip that step and go home because you've already concluded that there aren't adverse competitive effects, so why does one care about the answer to step one?

So the combination of these points suggests that various means of trying to determine competitive effects really are when we try to get more concrete and say, how can we do what's often called step one? We really have to do competitive effects if we're doing step one rigorously.

So the notion that the failure to do step one first, or somehow separately, is a lack of rigor, I think really is a confused idea, and not ultimately one that is defensible. And they say, when I talk to people in the agencies and read about different things that they do, I think that is more and more what's happening in the guidelines in some way should say that. I don't have a strong sense on what's the best way to do so.

MR. WEISER: Harry?

MR. FIRST: Okay. So I want to answer your question, follow-up on Lou, follow up on Janusz, and then say something completely different.

So, first, the headline, the top point of your question was Mike Scherer's notion of, you know, merge or succeed. Now, Mike obviously looked at today's paper, Wall Street Journal, which says, "Looking Back on 10 Years and 316,657 Transactions." So this is a story about mega mergers and it's the data, and it says, "It's like walking through tombstones on a battlefield, all the hope left in ruins." And then, a study by some economist which say, "Not every mega merger is bad, but most are."

So, now, I don't offer this as sort of enshrining this in the first paragraph of the guidelines, but -- and this is, in some sense, outside the guidelines, but also raises the question, and I think is raised by both people and by you which is, what are the guidelines for?

The easier thing for enforcers to do mostly is to not bring the cases because few people complain about that. The harder thing is bringing the cases. So it does lead to some risk averseness. And there is -- has been the concern about -- and I'm glad that Rich Gilbert couldn't remember which was Type 1 and which was Type 2. So false positives and false negatives. And the concern that any enforcer has. You bring a case and you make a mistake, you're out there, and this is not good. And the concern for false positives.

But these data say, maybe we've tipped the scale a little wrong. I think, frankly, you know, the world has changed a little bit in enforcement agencies, or at least some people think that it has. And the question is, how do we tip the scale back the other way? Maybe we don't need to be so concerned about the false positives and should be a little more concerned about the false negatives, at least on the theory that if the idea is enforcers should do no harm, maybe they don't won't do any harm, because most of these mergers aren't any good anyway. That's a little beyond sort of the pay grade of merger enforcement. But, it may give a little sense that, as enforcement discretion, we want to move the balance a little bit.

Now, the second part of that is, so what are you doing in the guidelines? And if you could rethink this, how would you do it?

So my first answer to that is, partly Janusz' maybe -- out of Janusz's observation is -- actually, the agencies don't have the power to rethink it, because the agencies are acting in effect as delegates of congress, which passed a statute which says, whether we like it or not, in any line of commerce in any section of the country, the effect may be substantially less than competition.

So, to the extent the agencies have power to articulate their views of what merger policy should be, it's within that delegation, right, and we might not like the democratic process that produced that. And, mostly, we who operate in antitrust don't really like legislatures meddling with our deal, but, in fact, that is the statute.

So, it does, to some extent, structure the way we have to think the agencies have to think about it as faithful agents of congress in effect, the way courts are going to think about it. The trick then is sort of how to create the document that will convince the courts that it's both within that delegation and properly done. So there's some faithfulness to that structure while still setting out something that's that convincing.

Now, to do this, you may still have to talk about market definition and, you know, you might say, well, we can't -- the real important thing is, we're concerned about competitive effects, and then we'll back out the market definition. But competitive effects, of course, presupposes you've identified the competitors as well. So, to that extent, these two things end up going together.

So, I would say in terms of thinking about the guidelines process, and Lou said at the beginning of his remarks, there's probably been too little attention and discussion about the most -- what I think is the most important audience for the guidelines, and I think the most important audience, and it's the one, frankly, that the agencies have had a lot of trouble with, is the courts.

The guidelines process started out by saying, well, the down turn is that we should really let the antitrust community know what we're doing. It's to tell them sort of the transparency thing. And I think probably that's how it did start out. Remember, those were the days before websites, and all that information, you know, everything is available all the time.

But as it's developed over time, the audiences are much more complex and, in a sense, let's be transparent, may be the least of the audience part. We heard a number of audiences discuss what the guidelines are important for, but I think the really critical part, which may explain why the guidelines are written the way they are, or how they should be written, are the judges who have to be convinced that the agencies who are applying these have applied them with proper thought and principles, and that they make sense so that they do it in a way that the agencies think is right.

MR. WEISER: So, Joe, I'm very curious to hear you react to Louis' suggestion because in the earlier comments, you did suggest that the market definition and market concentration presumption approach wasn't optimal. Louis says, forget it, go right to competitive effects because that's ultimately what the agencies are mostly doing and ultimately what matters the most.

I don't know if your guidelines are articulated at that point as precisely as what Louis said, is that one that you'd agree with?

MR. KRAUSS: First off, I'm humbled being on this table with all these academics. No one has ever accused me of being an academic. I'm a practitioner.

I think I've come full circle in thinking about this over the last several months because when this was first thought about, and when the new administration arrived, everyone anticipated that perhaps an effort would be made to revise the guidelines and I, quite honestly, I was of the mind at that point that, yes, maybe we should rewrite these because you look at practice in the agency and, you know, in my 25 years both being inside the agency and outside the agency, trying to compare how staff actually analyzes a merger compared to what the guidelines say, there's a lot of disconnect between the two on the surface. It appears on the surface at least a lot of disconnect.

So I started this process thinking that we should revamp it and perhaps, as Lou suggested, because there is an effort to identify the competitive effects. And I kind of refer to these as perhaps shorthand methods that we have developed over the years to try to identify mergers which are problematic in the most efficient way. So one easy way to do it is to look at competitive effects, and try to see head to head competition, where is some actual price effects, ah-ha, we've got a merger that's problematic. So we should adopt that and, is that something that our guidelines should say?

That's when I started to have some problem with perhaps redeveloping the guidelines to suggest that type of approach because, when I look at the guidelines, as Janusz says, I have a hard time finding problems with the theoretical basis for the guidelines, and no one I don't think has been able to point me to errors that are in the guidelines.

Yes, you know, the elephant in the room perhaps may be what has been touched on. The response of the courts to government challenges and, yes, the response of the courts has not been favorable. Is that a problem of the guidelines? Is that a problem of the court's not understanding the guidelines? Is that a problem of the cases that were brought? I think that's a debate for another day, perhaps.

But when I look at the guidelines themselves, is there a problem inherent in the guidelines as they are written? I still have not heard someone articulate where that problem is with the theoretical basis for those guidelines.

MR. WEISER: So let me try to -- one of them is channeling your comments, and then I'll let Janusz, who I know started off saying essentially what you said, maybe have a response. Mike Salinger said earlier in the day that basically the presumption or level of nervousness, was the terminology he used, but I think the two are essentially saying a similar idea, is a four to three merger, presumably four to three with very limited opportunity for entry. That's what he said. Others might say, no, it's two on one. Others may say it's three two. But I don't know if anyone other than Rich Gilbert's old license plates say HHI 1,800.

You said in your -- I think comments that the guidelines should be revised to indicate that there's no magic number, no presumption at all. I think you did say it might be valuable to have the market shares versus at safe harbor?

MR. KRAUSS: Right. That's the kind of the tension that we tried to show, is that you need some safe harbors, you need some HHI, and I think our section's comments concluded with that determination, that we need those HHIs. But it's the presumption that's attached to it, that's where the disconnect with practice is, and it's an important disconnect because I think the analytical framework of the guidelines of having the integrated analysis and going to Lou's comment about looking at competitive effects I think the presumption doesn't play in this world as relevant as it may have 20 years ago.

MR. WEISER: So I'll come back to that, but I will say to rephrase I guess the challenge to, you know, what you said other people have said is, don't mess with the guidelines I think Bobby Willig, who is a little more of a proud author than what Janusz -- Janusz was proud, but Bobby said, the guidelines were born the same year as my daughter, don't mess with my daughter. Something like that.

So I think the two reasons that you might want to mess them with them, so to speak, is one is the disconnect between the actual practice and what they say is potentially uncomfortable, and the second point is what Lou has said, which is, well, one of those disconnects is not merely this HHI market definition numbers game, it's also what's really the driver of the analysis which is, you know, a more direct evidence means of assessing competitive effects.

So, Janusz, you started out with some prior authorship. Do either of those two critiques suggest to you there are some changes that are warranted?

MR. ORDOVER: Well, I think, of course, there's always something to be changed after 20 years of living was a document, but let me address this market definition issue. It seemed to have percolated through a lot of the conversation throughout the day, which is very interesting.

I really think that one should not look to the market definition step as a step that is anything other than a way of organizing one's industry knowledge other than a way of looking to the documents, and trying to re-read through them to form sound views as to what is the scope of direct competition, what do the industry participants think about the alternative products, which they don't manufacture, what is it they think about the consumers' responses. There's a huge amount of marvelous data in documents that are made available and independent research and research that the economists performed during the review process.

I really don't think of the market definition step as something that one has to do or die around. It is a way of getting into the merger assessment. It is a way -- I disagree with Lou, but I will not disagree with him on tax issues, but I would disagree with him on the antitrust issues.

I do not believe that one can just, out of nowhere, jump into the deal and infer out of this thin air these competitive effects. No. Please don't do that. Take your time. Even though, of course, the parties would like to get it done as quickly as possible and we are trying to help them get it done, but please try to think about what it is all about. It is about competitive effects, but how am I going to get to that point? I need to learn the microstructure of the industry. I don't learn it from reading The Economist. I don't learn it from reading the New York Times, the reports on these irrelevant findings.

I don't learn that always by listening to the industry people. I have to have some analytical tools that focus on such things as analytical tools, diversion ratios, these kinds of things are tools for one purpose and one purpose only which is to answer the ultimate question.

And if you don't have a structure through which to look at the data, you're just going to get a mess. I don't like mess because economics does not live well with mess, which is why we have rejected behavioral economics, we have rejected all kinds of stuff because that gives you messes as opposed to neat answers. And I think one can get too far but I'd like to have you think about the market definition step as really as entry point. No more than that.

MR. WEISER: Before I let Lou go, I want to go to Harry and I want to frame the question. What's amazing about Janusz' answers, what he didn't say, SSNIP. What I think part of Louis' criticism is, and I'm sorry if I'm stealing your thunder here, Lou, is that sometimes the market definition exercise is not framed the way you just framed it right now, which is a set of tools to understand actual market dynamics, it's framed as a more, some would say, formulaic exercise around this SSNIP market algorithm.

Harry, any thoughts on whether or not -- because some could say, what Janusz said is actually in the guidelines. It's really much in the commentary that came out in 2006, but yet this SSNIP concept has taken on an almost mystical role.

Is that a concern? Is that something we should be -- how should we be thinking about it as we think about what to do?

MR. FIRST: Well, I don't know. The SSNIP test has its function. Part of it is to organize the analysis, and that is one way -- I think the problem may be that it's just not the only way of trying to figure out what the set of effective competitors are that might discipline the parties post merger, and that's the question you're trying to answer in, you know, in drawing up a market.

It's occurred to me, I must say I think it's a benefit of the discussion from the day. It's occurred to me, something which I haven't thought about before and maybe the problem is not starting with market definition, per se, the problem may actually be in these thresholds that we've been living with and not examining. And I mean on both the upper bound and the lower bound actually.

So people will complain about the 1,800, because no cases are brought at 1,800 or 2,000 or, you know, in the low ranges of the HHI, and so why have the 1,800? That doesn't answer whether cases should be brought, but assuming that the right cases are being brought.

People may -- I don't know why they would complain about the thousand except they want it higher for the safe harbor. But, as you think about it, the reason why it becomes so important to define the market is that people want to know, and you have to know where you fall within these thresholds. Because that becomes very important and it certainly becomes important in presenting the case to the court.

So I think about the Whole Foods merger case. Why didn't the FTC define a market of supermarkets? That is what they had done for every supermarket merger case, and the answer it seems to me, it must be fairly clear, it falls in the wrong spot on the thresholds. And the delta was too low, so you can't have that one.

Now, if we didn't have the thresholds and we didn't have the delta, you could say it's supermarkets, and now let's look at competitive effects between these two parties and you'd be fine. But you couldn't present the case this way because of the safe harbor part actually of the threshold.

So maybe it's time to reconsider whether -- not so much whether this is good guidance or not in terms of what the agencies do, but maybe it's directing the analysis in a way that ends up being unproductive or counterproductive because it's a tool for cutting off competitive-effects analysis, where it should be a tool for asking who the effective set of competitors are.

MR. WEISER: Lou, you want to respond?

MR. KAPLOW: I will say a couple of things. I do think, and you did partly steal my thunder on that. The first one step one in the guidelines doesn't say organize your data and look at the list things that Janusz mentioned. In fact, none of them are listed. What's listed is a formula that says the agency's do, and then the courts do and, if the courts can't do it, they think a case hasn't been made sometimes, or they might even when competitive effects have powerfully been shown.

So if step one said, we should organize thinking about the industry, here are seven kinds of sources and data that should be routinely consulted and many others might well be consulted under the circumstances, and no one should run a regression, do a simulation or do any various other things until these things have been done, that would be just a very different step one from what I think we have.

Various things you mentioned, analytical tools, looking at diversion ratios, those don't actually have market definition in them. And, as I said in my original remark, one goes to economic text surveys, things that you've written, it's hard to find in the economics things that any economist has written this animal because it really doesn't exist.

So the idea that it's viewed as rigor when, within the actual field, I mean if -- think about Daubert, an expert. How can an economist expert under Daubert say that in the field this is the rigorous way of doing it when the concept doesn't even really exist in the field? So this is I think a rather large conceptual gap.

So it seems -- and I could say more about the SSNIP test. The SSNIP test is a hypothetical monopolist test. Why do we do a hypothetical monopolist test to analyze a merger? It's not that it might not help us think about some aspects of it, but why would the first question you ask about a merger between two parties between what would a hypothetical monopolist involving other parties if they were all one company do? It's not irrelevant to some aspects of a merger analysis, but it's hardly the core thing.

Now, the one last thing I'd like to say, which I neglected to mention in my first remarks, unfortunately, and I really mean unfortunately, because I think it's a problem, when one goes more to direct effects, it's harder to see how one establishes presumptions and for confused courts that might be a problem.

The legislative history says incipiency, the statute says, may tend to lessen. We're worried about Type 1 and Type 2 errors. The main reason I can keep these straight, since I hate the terms, is I'm running some separate work on burdens of proof and the like, so now there are re-burns in my brain for at least a decade, but then I'll forget them again.

But it's not only if you go more to direct effects you don't have as much of a template for presumptions to challenge mergers that ought to be challenged.

It is also unfortunately really deeply corrosive of safe harbors. Because if everyone agrees the safe harbor is -- if the HHI is under A or the Delta is under B, we're done, well, that's only after you've defined the market. And if you can't really properly define the market, as I was saying before without doing the competitive effects analysis, then how can you say, advise a client this one is just one not to worry about?

Now, I think in fact you can. It's just they you can't use the numbers as a crutch. So, if it's fairly plain that any way of getting it competitive effects whether involving an elaborate econometric techniques or talking to the sophisticated buyers and see what they know, would lead everyone to the obvious conclusion that there's nothing there. Well, then one can say that there's nothing there. And it's just in those cases that we can all readily agree on a market, or say this one's good enough and we're below the threshold, but that's because in the back of our mind we've already really figured out that there's no plausible way an anticompetitive effect can emerge. So we're back to where Janusz started.

What might a theory of anticompetitive effects be? That theory then structures and organizes your thinking and collecting of data. And if at that point there really isn't a plausible story that gets you much past square one, you are done. But I'm not sure a safe harbor threshold or the SSNIP test or whatever has gotten you there and, actually, to do the SSNIP test, you really have to have done almost all of the analysis. Not necessarily the analysis of efficiencies or entry, but you have to do the more direct step to competitive effects analysis anyhow.

MR. WEISER: So let me transition to a topic that is both a ghost of merger review past and something that we can't avoid despite the fact it wasn't on your list of questions which is coordinated effects. I think that came up briefly in response to Louis' question, but hasn't been in a lot of the dialogue today.

Getting back to Mike Salinger's point, there was a time, maybe before you redid the '92 guidelines which said, if you can show it's a four to three merger with limited likelihood of entry, you win on coordinated effects. I think that at one point was pretty much the view, and I think if you go back to the Posner Hospital case from the '80s, you know. There's some factors there that I think that even the '84 guidelines had about coordinated effects, transparent pricing, homogenous product. So that was at one point the view of the law.

I'll start with you, Joe, you said get rid of any form of a presumption. I think it might be fair to say that the presumption was rooted out of that tradition, in addition to the statutory language that Louis mentioned.

Is your view, which I think, for example, Dennis Carlton has said it's his view, we shouldn't have a coordinated effects concern in reviewing mergers. That, in effect, the whole world should be based on unilateral effects analysis and we shouldn't worry about coordinated effects and, thus, there's no need to take this presumptive approach or even maybe worry about under what circumstances coordinated effects can exist.

Is that something you are inclined towards or how would you suggest we think about the issue?

MR. KRAUSS: No, I wouldn't agree with Dennis. Although I think his position may have been the product of the '92 guidelines, and let me explain what I mean.

I was still a staff attorney when the '92 guidelines were issued. And I remember, you know, when it was issued, we -- staff attorneys, we went around and collected copies of it, and went back to our offices to read this, because is what we had to apply, so we had to learn this.

After a few hours, I think all of us -- many of us came out of our office and said, well, coordinated effects is out the window. We don't have any coordinated effects cases anymore because, when you look at the guidelines, the steps, the analysis and the burden that the agency would be under to show a coordinated effects case was suddenly so high, that we were never going to be able to prove a case.

Then you see it in practice since '92 with the emphasis on unilateral effects cases, and the very few coordinated effects cases that have been brought since then. I don't know if it was a self-fulfilling prophecy by a staff at the agencies that that is what happened, but that is, in fact, what happened and that was the read that many of us took from the '92 guidelines.

Now, I think there's still a place for coordinated effects analysis, and I think it would be wrong for us to eliminate that from any new version of the guidelines. I think the problem with the current set of guidelines is in -- some of the panelists talked about it this morning is, trying to show under what circumstances and what evidence is needed to show a change in those -- in those factors that is caused by the merger. And that seems to be really what is missing when you go back and read those elements in the '92 guidelines, is what is the agency going to rely upon to show that change?

MR. WEISER: Janusz, did you mean for the '92 guidelines to get rid of coordinated effects? In any event, what's your view of coordinated effects and whether it's something that the guidelines should be concerned about?

MR. ORDOVER: Well, certainly, you cannot say that we meant to get the role of any type of competitive effects that mergers can engender. Certainly, I am of the view that coordination is an issue and I have lived through several investigations of coordinated effects in transactions. So I don't understand this, why people are all of a sudden so concerned. I thought that what we tried to do, and I think we should revisit that part of the guidelines very intensively, is to put a little bit more structure on that analysis.

We tried to come up with some organization of the factors that are either conducive to coordination or impede coordination, and, clearly, at least I thought we were relatively clear on the proposition that -- two things to worry about. One, is this industry conducive or not, and, second, what is the change that arises out of the merger?

And I believe that one of the most valuable pieces of that part of the guidelines is the focus on the mavericks or firms that have the strong incentive to, as I said it this morning, discombobulate the industry dynamics, or to refuse to go along with efforts by others to raise prices after the transaction.

Since the 1992 guidelines, I think way too much intellectual brain power was devoted to third order questions about unilateral effects, such as, whether the demand that looks like this, or looks like that (indicating), should affect our decision of whether this is a good merger or a bad merger. Trust me, it does, in simulations, okay?

So there is a huge amount of mathematics and a huge amount of analytics that went into refining the unilateral effects work, but almost no merger-oriented work that went to refining the coordinated effects.

MR. WEISER: How do you explain that, Janusz?

MR. ORDOVER: I explained it very simply that there are at least two ways of thinking about it. One, is that economists love tools, and coordinated effects analysis does not give you nice little tools that can be put into a machine that will spit out the answer at the end. So you really have to figure out how to go about that analysis.

Whereas, when you do unilateral effects, it's not easy, but at least we know what the right economic models are and we know how to estimate them, and we know how to make the sausage come out at the other end, but we don't know how to do that in the context of coordinated effects.

Secondly, it seemed in a way much easier to establish the unilateral outcome. We know -- sorry to speak economics, but we do know in a simple Bertrand differentiated product model, any merger that does not improve efficiencies of the variable cost kind is going to raise price. So we are almost done before we even gotten anywhere.

The real exciting part comes to how to undo it, and we have some techniques for undoing it, but they are very under-studied themselves. So I really believe that both the love of tools, both the love of precise answers of merger effects being predicted to the 17th decimal point, which you is can actually do that. I mean, there's nothing stopping the computer to spit out the answer to the 17th decimal point, that led to a huge amount of intellectual capital being devoted to pursuing very deeply these kinds of questions.

Nobody was quite interested in the question of coordination, tacit collusion, and so on and so forth. There is a separate line of work, a lot of brilliant people have been undertaking, without almost touching the antitrust field.

So I think that the time has come to leave unilateral effects alone for a while and try to focus on coordinated effects to see whether there's something even to be done. If the answer is, there's nothing to be done, may as well get it over with as Dennis said, but I believe there is still plenty to be done, and I believe there is still plenty of beautiful economics that can begin to illuminate this issue.

MR. KAPLOW: I think I agree with everything that Janusz just said. But I think that, as I said this morning, at some level, this relates to the merger retrospective question as well, and Ilene mentioned a comment on one of this morning's panels and I think it's not been hit hard enough.

Ultimately we want to be driven by empirical evidence and facts about where the problems really are, and we can't just not do anything when we don't know all of them, but that, at the end of the day, is what matters.

I think a parallel development to the technical developments that Janusz was describing is that IO economists sort of lost interest about 25 years ago in measuring price elevation in the economy and trying to figure out what it was correlated with caused by and everything else, which both give us a better measure of the magnitude of the problem and of also what we might want to look for in guiding us, since it's not going to be a simple simulation model, but it's going to be a lot softer.

So the fact that we need more work on the academic side in order to fuel a better sense of both the magnitude of the problems I think where it is important, as I suggested this morning, because coordinated effects, you know, we do all the work and then government declares victory in the Staples case on an effect of a few percentage points.

Coordinated effects can be 10s of percentage points and, in some prosecuted cartel cases, we have 80 percentage points. You know, even missing a handful of those here and there in terms of the amount of harm being left on the table is very large, and this goes back to what's the criteria, the Type 1, Type 2 error question and so forth, and I think a sharp way to put it which is really agreeing with what others have been saying, but one way of focusing it is with unilateral effects. We may get very much higher probability estimates with narrower, tighter ranges with less room for error on effects that are often but not always fairly small.

We get lower probabilities with coordinated effects on effects that are potentially very large. And the statute doesn't erect a uniform probability standard without regard to effect. It has this vague, may tend to lessen competition, and on an expected basis, the expected harm in the coordinated case that's iffy, but it does have some real foundation.

It's not just made up or imagined, but where you've actually looked at whether the conditions seem conducive and what is it about this merger, is it a maverick or is it the case that there's certain asymmetries that are key, or that the numbers are a little too high, but a couple of more mergers like this, and now they'll be small enough that even if someone's speculative, a word that one could never use when bringing a case, the expected harm may be every bit as high or higher than in cases with unilateral effects one would go after.

It seems that, you know, as a matter of policy, that's the way to think about it, and I do think the challenge which the guidelines maybe can't do much about other than maybe offer encouragements, and maybe just by devoting a little bit more space that would have a focal effect and leading folks. But we do need more analysis and more empirical basis to really know what a more detailed guideline would say or what cases would look like.

MR. WEISER: Just one quick clarification. I assume you're assuming that efficiencies and entry are held constant --

MR. KAPLOW: Absolutely. And it's interesting because we know that entry has countervailing effects in all these situations. It's also the case that if you have really high price elevation, you will get more entry as a consequence. That additional entry will, by the way, typically be an additional inefficiency. I mean, it will tend to mitigate price elevation but the entry itself in that setting will be a further source of inefficiency rather than efficiency.

So it's not like the fact that, you know, now another couple billion will be wasted investing in this industry to help cut things down is a complete consolation. So the analysis of entry is with very high priced elevations.

Then with low-priced elevations, I don't know that we believe price elevations of a few percentage points in unilateral effects cases won't do totals of entry anyhow. Maybe some do, but I'm skeptical.

MR. WEISER: Harry, you've been a close observer over this time period. How do you explain the sea-change in the enforcement touchtone and, in some sense, conventional wisdom, and do you advocate a sort of rethinking along the lines of Louis Ed, or how do we approach where we are and where we should be thinking about going?

MR. FIRST: Well, first of all, I agree with everyone on the panel, I don't know, that coordinated effects needs to be looked at further, and the effort, because there seems to be a lot of payoff and sureness was put into unilateral effects, and okay.

I think, you know, if you're thinking of explanatory factors, I think it goes into the -- sort of the intellectual view of the structured conduct performance paradigm which supported a naive view of coordinated effects every time you had, you know, a merger that produced more concentrated market that you would have, somehow we don't need to say how, coordination. And I think that as that -- as that view lost power, at the same time, there was a view that cartels were rarely formed. And, when formed, instantly broke apart.

So whatever one thinks about the loss of belief in the link between structure, conduct, and performance, the notion that cartels are rarely formed and fall apart and don't harm things seems to clearly have been shown to be wrong.

So the question is, I think, what can we pull out of the cartel experience and cartel enforcement experience to help inform a notion of coordinated effects where, after all, we're assuming that it's not overt collusion but some tacit game that the people in the industry are playing.

So it may be that some of the empirics actually lies in the division which has prosecuted these cartels, and maybe one of the things is to start thinking about whether there are some sort of -- I don't want to say guidelines, but structural aspects that can be pulled out to move away from the notion that coordinated effects is, I'll tell one story, you'll tell another.

I'll tell you how easy it is to agree, and the defendants will tell you how absolutely impossible it is. Then, what's a judge to do?

So you need some better way of predicting when these games are going to work out. I had one other thing which actually I don't think we've -- in a sense we've talked about when we talk about innovation. The unilateral effects focus, you know, like a laser on price, and price is obviously important, but it's not the only thing.

One of the good things about thinking about coordinated effects is that there may be other aspects of the bargain that parties agree on and it may have other harms. One of the harms might be innovation, might be product quality. There might be all sorts of things that we just, you know, don't think about when the focus is so much on unilateral price raising effects. So I think there's a lot of payoff there how you all get this into the guidelines, well, that's --

MR. WEISER: One quick question and then I'm going to see if anyone from the audience has any.

A number of you on this panel and others have mentioned some form of retrospective. Harry just mentioned one. Looking back at cartels as a former retrospective into understanding the circumstances you can have coordinated effects. Louis mentioned this point as well.

How important is retrospectives and how should the government go about thinking about that undertaking? Joe, do you want to start off with something which the ABA transition report, as I mentioned, did suggest should happen?

MR. KRAUSS: Right. And I guess with that situation, still have in mind that there has been a lot written about the deficiencies that are in retrospectives, and the potential problems that are there in terms of data gathering and the litany of problems that have been identified.

But I think, you know, you look at the retrospectives that the agencies have done. Yes, it takes a lot of time, takes a lot of data, but usually some good comes out of it. I guess that's what you've got to think about in terms of going into it retrospective, what is it that you're trying to get out?

Are you trying to, you know, identify cases which were cleared and -- but had a competitive problem so you can go back and try to fix those? Or are you trying to find, you know, examples of cases where, you know, the efficiencies did or didn't work out?

You really need to frame up what the intent is from the retrospective and really cabin that so that the end product that you get means something and can be implemented by the agency. Otherwise, you know, I think -- and when I was at the agency, much thought was given to it in the '90s about doing this.

I think without cabining that framework, you end up with results which go back to Janusz' can be a mess, and the agencies really spend a lot time and a lot of money doing something that they really can't do anything with.

MR. WEISER: Louis, any thoughts on this?

MR. KAPLOW: Well, I am inclined to think that even monkey case studies that are subject to multiple interpretations, it's better to look than to rely entirely on what we imagine to be true, because at least it allows the possibility we might want another rise. We can look at effects on price. We can look at entry. We can look at expected efficiencies and a lot of other things.

I think a lot of the work, you know, the agencies can only help instigate it, but really can't do it, really falls on empirical industrial organization economists, and going back to doing more things like industry studies, trying to look at prices, doing things in large samples where, you know, basically mergers do involve prediction, so a merger that was let through where prices did go up, even if it was causal to the merger, that doesn't really quite prove it was a mistake given what could have plausibly been known at the time and vice versa.

Whereas, one is operating on probabilities, well, that often calls for larger samples. And I think it's an important thing to have in mind.

So I do think that the empirical evidence really is big there, and I think the empirical evidence, you know, price effects are essential, but on efficiency effects also because, at the end of the day, we're trading off false positives, false negatives, there's a cost for the different kinds of errors.

So knowing what we think in general -- so whether it's reading from the newspaper or various studies that have been done of efficiencies of mergers, looking 10 years later, whatever else, having a sense of what those look like and how they vary by various determinants to give us -- I mean, you still will, in the case, look at the submitted efficiency studies, but having some sense about what kinds of things have actually happened on average, you know, what's the baseline when you approach? Are you baseline highly skeptical?

Well, the data shows that if the gains often happen, you shouldn't be nearly so skeptical, and what kind should you be skeptical of?

So I think we need priors to bring into the particular cases and that often has to come from wider study.

MR. WEISER: Harry?

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

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

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

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

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

MR. WEISER: Well, there was a paper several years ago that Bob Krandall I think wrote that that said antitrust unbalance was bad and Roger Noll's response is, only someone who didn't like college football could make that claim. For those who aren't in the know, the NCAA Civil 8 case pretty much increased by five times, the amount of college football on TV, so that was Roger Noll whose also a big sports -- his retort to that paper, but the truth is you're right, Harry, there's a lot out there that we don't know.

MR. FIRST: So this is why I have so much football and I hate -- well, anyway. Consumer welfare is a funny thing. So, I mean, in general, we really know very little about the effect of antitrust enforcement and mergers is part of it.

The second aspect is -- I mean, it's sort of alluded to, I think in what you said. All the institutional incentives are bad on this. In terms of an enforcement agency whose mission it is to actually enforce and bring cases, to spend a lot of resources to look backwards is maybe asking too much.

So I think it's an effort that you want to say you should try to do in some way, but somehow recognize the institutional limits that you're necessarily going to be up against.

Now, maybe part of it is, there may be things to which you have access that outside researchers, academic researchers simply do not, for various reasons, and to the extent that the division or the FTC can make use of this, that could be a real plus.

So these have to be very carefully thought about or else you're just wasting money that actually could go into doing what I would hope would be good enforcement.

MR. WEISER: Janusz, any thoughts on any retrospectives?

MR. ORDOVER: Of course, I think it's always good to look back and try to understand what is the course between the predicted outcomes and the actual outcomes. What have we missed in assessing these transactions?

I am very unimpressed by the idea of price reporting unless absolutely necessary. In part because, as we already talked about, the issue, prices evolve over time, in response to the huge number of economic factors. When there are market conditions, such as changing balance of supply and demand; there are changes in quality of the products. Cars are cars, but are cars cars?

There are all kinds of factors that drive prices in the marketplace. And to get a report on prices when you don't know what it is that those prices stand for, I believe would be a total waste of time of scarce agency resources.

I believe that no economist worth her salt would even attempt to write the Ph.D. dissertation on this particular topic, unless that person actually had access to the kind of data that are not likely to be available, i.e., the supply and demand shifters that are used intensively in merger simulation.

But when we do merger simulation, we can actually go into the companies involved and ask them for their cost, for their predictors of demand, all kinds of things that are put into that sausage making machine.

But somebody wakes up two years later and says, oh, my God, prices went up. What are you going to infer from that? Nothing other than the fact that some prices may have gone up, maybe they haven't because the higher price is correlated with higher quality and then what?

So to the extent that you can do anything retrospectively or prospectively, just leave prices alone.

MR. WEISER: Well, we have come to our closing time. This panel has wrapped things up in grand fashion. Thank you all so much for a great discussion.

(Applause.)

(Whereupon, at 4:15, the hearing was adjourned.)

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: P092900

CASE TITLE: HORIZONTAL MERGER GUIDELINES
REVIEW PROJECT

DATE: DECEMBER 8, 2009

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: DECEMBER 22, 2009

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EDWARD LETO, CSR

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation, and format.

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