

1 **This transcript has been lightly edited for clarity**

2 BEYOND LITIGATION: STUDIES, GUIDELINES AND POLICY

3 STATEMENTS

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5 SPEAKERS: ROBERT D. ATKINSON

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9 COMMISSIONER JON LEIBOWITZ

10

11 MODERATOR: MAUREEN K. OHLHAUSEN

12

13 MS. OHLHAUSEN: Will everyone please start
14 taking their seats and my panelists come up to the front
15 so we can get started on the next panel.

16 Hello, I would like to welcome you to the next
17 panel, which is "Beyond Litigation: Studies, Guidelines
18 and Policy Statements." I'm Maureen Ohlhausen, the
19 acting director of the Office of Policy Planning at the
20 Federal Trade Commission and this panel is basically
21 going to talk about nonlitigation activities of the
22 Commission in both competition and consumer protection
23 areas.

24 I have found that one unifying factor is
25 that these activities tend to generate really a lot of
26 questions. We get questions on why does the Agency

1 engage in these activities, what's the value of these
2 activities to the Commission itself, to consumers, to
3 the legal profession, to businesses and to other
4 government policy makers.

5 Questions like, is the Agency overstepping its
6 bounds? Or conversely, is it unnecessarily limiting its
7 discretion? And not forgetting the "beyond litigation"
8 part of the title, do these activities advance the goals
9 of the Commission in ways that litigation, or litigation
10 alone, cannot.

11 As the moderator, I've done the easier task,
12 which is raising a bunch of questions, and now my
13 panelists have the harder task of answering them. Their
14 biographies are in your materials, and I will just hit
15 on the highlights to give them maximum time to speak.

16 First we have Rob Atkinson; he is the vice
17 president of the Progressive Policy Institute and
18 director of its Technology and New Economy Project,
19 where he has been active in the area of barriers to
20 e-commerce, among a variety of topics.

21 Second, we have J. Howard Beales of George
22 Washington University and former director of the Bureau
23 of Consumer Protection at the FTC whose history with the
24 FTC goes, I would say, way back.

25 Third, we have Hillary Greene; she's a
26 researcher at Harvard University and formerly part of

1 the FTC's general counsel office's policy studies group.

2 Fourth, we have FTC Commissioner John Leibowitz,
3 who recently joined us from the Motion Picture
4 Association of America. Prior to that, Commissioner
5 Leibowitz was the democratic chief staff counsel and
6 staff director for the Senate Antitrust Subcommittee
7 where he focused on competition policy and
8 telecommunications matters.

9 Finally, we have Bill Baer; he's currently the
10 head of Arnold & Porter's antitrust practice. Bill also
11 has many years of FTC experience, including serving as
12 the head of the Bureau of Competition for a number of
13 years.

14 I'll just give you a few words on logistics.
15 Our first three speakers are what we call presenters and
16 they will speak on a particular topic for a few minutes,
17 and then we will have our discussants, Commissioner
18 Leibowitz and Bill Baer, who will offer their own
19 observations on the topics, and probably ask our
20 presenters and perhaps even the moderator a few
21 questions. And finally we hope we will have some time
22 left over for audience questions. We have a staff
23 member going around with cards, so if you have a
24 question, you can write it on the card and they will
25 bring it up.

26 So, let's get started. Rob?

1 MR. ATKINSON: Well, thank you, Maureen, it's
2 really nice to be here. I am pleased to speak on
3 this issue which is near and dear to my heart and
4 one that I could talk for days about, but I only
5 have 12 minutes.

6 In the new administration, the FTC started
7 taking a significant interest in the whole issue
8 of how middlemen and other intermediaries were
9 unfairly blocking e-commerce competition,
10 particularly from new incumbents.

11 Bricks and mortar middlemen were unfairly
12 trying to structure the playing field. PPI wrote
13 a report in 2001 called "The Revenge of the
14 Disintermediated: How the Middleman is Fighting
15 E-commerce and Hurting Consumers," that documented a
16 long list of cases, most of them in my view, pretty
17 egregious and pretty one-sided in terms of what the real
18 story was. And that report spurred a lot of interest.
19 I think Chairman Muris read it and got interested in it
20 and then Ted Cruz who was your predecessor.

21 MS. OHLHAUSEN: Right.

22 MR. ATKINSON: Ted was very interested it and we
23 met with Ted and as a result of that and certainly other
24 people's work, the FTC started a major initiative on
25 looking at barriers to e-commerce, where I think they
26 have played a very important role, not obviously by

1 litigation, but by, shedding the light of day on these
2 shady, and frankly, under-the-radar-screen practices.

3 One of the things they did hold I a two-day
4 workshop where they looked at a wide array of these
5 cases. The one I enjoyed the best was protectionism
6 in the casket industry, where there were a number of
7 states where funeral undertakers were passing rules
8 or laws or encouraging them to be passed where you
9 couldn't buy a casket online. Well, it turns out
10 that buying a casket online saves us a lot of money.

11 What's at stake here? What's really at stake
12 here, I would argue, is the future of the digital
13 economy. We estimated a few years ago that these
14 restrictions, and we were very, very conservative,
15 cost the economy \$15 billion a year. Since then, I
16 think those numbers have gone way up.

17 PPI wrote a subsequent report that looked at
18 this whole issue in the real estate industry, and we
19 estimated if you had E-transformation of the real estate
20 industry, consumer would save \$40 billion a year, but
21 there are all sorts of interesting protectionist barriers
22 in that industry.

23 Why is this important? Why does the FTC need to
24 play a role here? Why don't legislators and the
25 judiciaries sort of understand this issue? I think
26 there are three main reasons. One is regulatory capture

1 at the state level. The case I really love the best
2 is autos. Consumers can buy a computer from Dell, but
3 can't buy a Ford from Ford, because it's illegal in
4 all 50 states to buy a car from a manufacturer. Why
5 is that? Because car dealers have political power.
6 Well, why do they have all this power? It's because
7 they're in every single state legislative district
8 and they influence state legislators. You can't even
9 buy a car from the manufacturer in Michigan.

10 So, you have regulatory capture at the state
11 level. You also have regulatory capture in trade
12 associations and industry associations, which I think is
13 a very, very troubling prospect. Who regulates legal
14 practices? Lawyers. Who regulates the auction
15 industry? Auctioneers. Who regulates the real estate
16 industry? Real estate brokers. And they all have a
17 very clear stake in protecting their piece of the pie
18 against e-commerce competition.

19 Third, these issues are very complex, they are
20 under the radar screen, most people don't know about
21 them, and because of this, most policymakers,
22 decisionmakers,
23 legislators, members of Congress, don't really
24 understand these issues very well.

25 Therefore, I think the role of the FTC in
26 issuing reports, in doing hearings, in filing briefs, in

1 filing other sorts of documents with states play a very
2 critical role. The FTC brings objective, neutral
3 credibility based upon very good objective evidence.

4 And the other thing they bring is the clear
5 sense that they're representing consumer interest.
6 And the problem in these debates is the consumer
7 interests aren't represented, because consumers are
8 so widely diverse and don't have power.

9 One example of the FTC's impact is that
10 because of the FTC hearings, it stimulated Congress
11 was encourage to have a set of hearings as well.
12 Chairman Stearns held a hearing and I was pleased to
13 testify at it. There was one member of Congress who
14 started off the hearing with the view, that he
15 didn't really think it was good to buy contact lenses
16 on the Internet, and by the end of the hearing, he had
17 completely changed his view and wanted to sign on to a
18 bill that would have allowed contact lenses to be bought
19 on the Internet. That bill was passed and signed into
20 law.

21 So, decision makers can be educated on these
22 issues and this can make a big difference.

23 Let me just briefly go over a few areas where I
24 think the FTC played other important roles. In a number
25 of states, attorneys have gotten laws or regulations
26 passed that say that when you have a real estate closing,

1 that, gee, lo and behold, the attorney has to be there.
2 As a result, it raises the cost of closing and limits
3 home ownership.

4 So, the FTC intervened and filed letters in
5 Rhode Island and in North Carolina, and were successful
6 there in preventing those anti pro-consumer laws from
7 being put on the books. They've also intervened in
8 Georgia with the Supreme Court Amicus brief (which they
9 lost) and now there is a current action in West
10 Virginia to do the same.

11 In contact lenses, the state of Connecticut was
12 considering a bill that would have made it more
13 difficult for consumers to get their prescription filled
14 on line. If you get an eyeglass prescription from your
15 doctor, there's an FTC Rule, I believe, promulgated in
16 1979, that allowed consumers to get their prescription
17 and file it anywhere. Consumers have that same
18 protection for contact lenses and as a result
19 optometrists were charging their patients much more.

20 And so the State of Connecticut was considering
21 passing protectionist legislation and they heard mostly
22 from optometrists. However, the FTC weighed in with a
23 letter and was able to win the day up there.

24 With regard to casket sales, they've intervened
25 in Oklahoma, and in that case didn't win. But when
26 Tennessee was considering similar rules on the behest

1 of the undertakers, and the FTC was able to prevail
2 there.

3 The last case, and it's the one that we'll be
4 hearing about in the next couple of months, is the
5 wine issue. Over a third of American consumers are
6 unable to buy wine over the Internet, because of state
7 restrictions. The case in the Supreme Court now
8 that's being heard addresses restrictions in the state
9 of Michigan. In Michigan, you can buy wine on the
10 Internet, as long as it's from a Michigan winery. It
11 sort of protects young people from drinking, but I
12 guess it's okay if they drink Michigan wine. But in
13 reality, with the right rule, young people can't buy
14 wine on the Internet because they have age restrictions
15 that you have to show you're 21 to get wine.

16 In any case, there's all sorts of, misleading
17 information flying around. The FTC did a very
18 careful study last year, I believe, looking at
19 Internet wine sales, and comparing them to physical
20 wine sales in stores in Virginia. That study showed
21 that consumers have more choice and on particular
22 kinds of wine actually can save significant money.

23 That study, I would argue, is going to play an
24 important role in the Supreme Court case. The Supreme
25 Court will judge these two conflicting things, underaged
26 drinking and states rights with something else, and the

1 something else has been clearly documented by the FTC,
2 which is consumer choice and consumer savings.

3 So, let me just finish up by saying, there's a
4 lot more work to be done here. I certainly praise the
5 FTC's work in the area. If it wasn't for the FTC taking
6 steps in these areas, we would be a lot farther behind
7 where we are. But so far, the industries that they've
8 looked at, and I don't mean this at all in a critical
9 way, have been minor industries. Caskets is not a huge
10 industry, for are contact lenses and wine.

11 I think the next step for the FTC is are some
12 big industries with e-commerce barriers. It's about
13 time we really started looking at them very carefully.
14 And I would put real estate as number one. This is
15 a -- as I said, I think an \$80 billion industry in
16 the real estate transaction industry, it's controlled
17 by, frankly, the inside players. Recently NAR, the
18 National Association of Realtors, through their board,
19 in controlling the MLS, the Multiple Listing Service,
20 tried to pass rules that essentially would have made it
21 very difficult for Internet discount brokers, like
22 E-realty, to compete. When consumers go to E-realty
23 or Zip or others like that, they can view the full
24 MLS, can go to the home yourself and it saves realtors
25 a lot of money. It ends up saving E-realty a lot of
26 money because they don't have to be with consumers

1 every time they look at a house. So, they wind
2 giving consumers anywhere from a two percent to three
3 percent rebate, off of six percent. So, instead of
4 paying a six percent commission, you're really paying
5 three or four. That's a huge savings when you're
6 buying a \$300,000 house.

7 When, NAR was trying to pass these rules, the
8 FTC did weigh in on that, as did DOJ, and they were able
9 to preclude those rules from being implemented that would
10 have really put a very significant damper on this
11 e-commerce realtor competition. But that case is not
12 resolved, they still could do it, and there are a whole
13 other slew of other issues in the real estate industry
14 that I think are very important to look at.

15 The second industry is cars. The whole way
16 we sell cars, everything from relevant market area rules
17 to these e-commerce restrictions, are essentially
18 designed to protect car dealers and to keep mark-ups
19 high. There's an enormous benefit that could be
20 gained by consumers by the FTC really looking at these
21 rules.

22 A third industry, which maybe would be a joint
23 SEC/FTC issue, is the securities industry. There are,
24 an enormous number of barriers in the securities
25 industry erected by securities brokers and the
26 exchanges, including NASDAQ and the New York Stock

1 Exchange, that make it hard for Internet exchanges
2 like Island and Archipelago and some of those
3 exchanges to get off the ground, and they're really
4 the same issue there. They're bricks and mortar
5 people who benefited significantly from the current
6 system, they erect rules and they keep these new
7 incumbents, these new competitors from getting off
8 the ground.

9 Finally there have
10 been significant changes in the last couple of years,
11 in e-commerce. So, I would encourage the FTC to look
12 at this again, and look at some other industries. I
13 think it's very important, and again, I commend the
14 work the FTC has done. It's been very important.
15 So, thank you very much.

16 MS. OHLHAUSEN: Thanks, Rob.

17 (Applause.)

18 MS. OHLHAUSEN: Howard?

19 MR. BEALES: Thanks, Maureen. It's a pleasure
20 to be back, even if I haven't been gone for very long.

21 Today I want to talk about the role of policy
22 statements at the FTC, and in particular the policy
23 statements addressing the Commission's unfairness
24 authority and its deception authority. They were
25 adopted within a fairly short period of time, one in
26 1980, one in 1983, and they're relatively unusual in the

1 things regulatory agencies do, because both of them
2 really narrow the Agency's options.

3 Now, usually if you think about rules versus
4 discretion, it's better to have more choices. You never
5 know what choice you might want to make at some future
6 time, and agencies are traditionally reluctant to give
7 up options that they might have. That argues for a
8 vague and expansive standard, as a legal standard, and
9 then relying on prosecutorial discretion to make sure
10 that you don't bring bad cases or pointless cases.

11 Agencies tend to see those advantages, and they
12 tend to try to preserve their options. And that's
13 especially true for a prosecutorial agency, like the FTC
14 has increasingly become. But there's a trade-off with
15 broad general standards, both externally and internally.
16 Externally, I think the trade-off is overdeterrence of
17 conduct that may seem to be illegal, but may be cases
18 that the Agency would never bring. It's very hard to
19 convey that message of, yeah, it's illegal, but we don't
20 really care. And it may lead people to not do things
21 that certainly wouldn't be harmful, and may actually be
22 helpful.

23 I think the more serious consequence, though, is
24 internal, and that's a lack of focus on the part of the
25 Agency staff. The legal standard doesn't just tell the
26 private sector what's going on, it also directs the

1 staff as to what kind of conduct they should be looking
2 for, and tells them what questions need to be addressed
3 in the course of an investigation. Questions that don't
4 have to be answered in order to address the legality of
5 the conduct may be questions that are never seriously
6 considered.

7 They may be important questions, but the legal
8 standard, if the legal standard doesn't make people
9 address those questions, they can easily get overlooked.
10 And if the law permits anything, it's much harder to
11 rule out bad ideas and it's much harder to direct
12 resources to the problems that the Agency really should
13 be addressing.

14 I think both policy statements were quite
15 successful in addressing those trade-offs. There's
16 really two precursors to the policy statements that I
17 think it's important to put them in context. One is the
18 rise of rule-making. In the 1970s, the Commission
19 launched a number of inquiries for rule-making proposals
20 in a wide variety of industries. Some of them were
21 sound and sensible, some of them were broad efforts to
22 restructure entire industries. And what those
23 rule-making proposals did externally was to raise the
24 cost of mistakes.

25 There's a lot of further options to reconsider a
26 decision in any individual case, if you get it wrong and

1 are proceeding on a case-by-case basis, it's much more
2 difficult to do that in the context of rule-making. And
3 what happened in the course of the rules was they gave
4 rise to a political response to the rule proposals, and
5 I'll talk more about that in a minute, but especially
6 those based on fairness.

7 Internally, I think what rule-making
8 demonstrated was the cost of a lack of focus. A lot of
9 the rules were started without being very clear about
10 what the legal theory of the rule was. And as a result,
11 it wasn't clear what was important in the rule-making
12 inquiry. Anything could matter. There was no clear
13 sense of what questions really had to be answered, and
14 so not only were they very broad proposals, but they
15 were very broad inquiries in which nothing could be
16 ruled out or ruled in as stuff that absolutely had to be
17 addressed.

18 Partly as a result of that and for other reasons
19 as well, rule-making proved to be incredibly resource
20 intensive, in terms of the Agency's efforts. The second
21 precursor was the rise of economic analysis. In the
22 late 1970s -- and particularly economic analysis on the
23 consumer protection side -- in the late 1970s, partly
24 prompted by the significance of some of the ongoing
25 rule-making proposals, economists really started getting
26 seriously involved in consumer protection issues for the

1 first time. And what that brings is a different set of
2 questions. The economist core questions, what are the
3 costs and benefits of proposed rules or proposed cases,
4 were issues that lawyers were likely to consider as
5 questions of prosecutorial discretion, if they were
6 willing to consider them at all. And there were some
7 who were at the time not willing to consider them at
8 all.

9 But those two precursors, I think, laid the
10 groundwork for okay, let's rethink the standards and
11 develop some clearer articulation of what's legal and
12 what's not.

13 Let me turn first to unfairness. Early
14 unfairness doctrine was not very often used as a
15 distinct concept, and there were really no very clear
16 criteria for unfairness until the Cigarette Rule in
17 1964. That standard was quite broad. It asked whether
18 there was substantial injury, whether a practice
19 violated public policy, whether it was immoral,
20 unscrupulous or unethical, and it was never very clear
21 whether you had to answer all three of those questions
22 or whether any one would do. And that certainly
23 contributed to the breadth of the standard.

24 Those standards were seemingly endorsed by the
25 Supreme Court in the footnote, in dicta, in the 1972
26 case of Spherion/Hutchison, and the Agency took that

1 endorsement and ran. And where it ran was in
2 rule-making. Rule-making proposals made clear the
3 enormous potential breadth of the concept of unfairness,
4 and also the lack of clarity about what criteria were
5 essential to a finding of unfairness.

6 The straw that I think broke the Camel's back
7 was children's advertising, and the proposal to ban all
8 advertising on children's television. That proposal,
9 joined with others, provoked a tremendous political
10 outcry. The Agency was shut down for lack of funding
11 for a period of several days. When it was funded, its
12 ability to use unfairness as a basis for rule-making was
13 restricted.

14 The Commission was faced with the very real
15 possibility of losing it's unfairness authority
16 entirely, and in response to that, and to forestall
17 that, a unanimous commission adopted a policy statement
18 in December of 1980. It emphasized that consumer injury
19 was the key element of unfairness, and it elaborated
20 that analysis into the three-part test that we know
21 today. Whether the injury is substantial, whether
22 there's offsetting benefits to consumers or competition,
23 and whether it's an injury that consumers cannot
24 reasonably avoid.

25 The policy statement limited the use of public
26 policy, but didn't rule it out entirely. It did abandon

1 entirely the immoral, unscrupulous and unethical. Now,
2 the three-part injury test was incorporated into a
3 statutory definition in 1994, as something that the
4 Commission had originally recommended in 1982. It's
5 something that since then has been used very sparingly,
6 and that in the last few years we had tried to
7 revitalize unfairness, based on the policy statement on
8 the statute and make it into a workable legal tool that
9 the policy statement really made possible.

10 Let me turn then to the deception statement. It
11 had a very different genesis, as it was much more
12 internal than external. When Jim Miller arrived as
13 chairman of the FTC, he not only proposed a statutory
14 definition of unfairness, he proposed a statutory
15 definition of deception as well. That was based on the
16 numerous examples of the past use of deception that
17 really just don't make sense. Based largely on extreme
18 interpretations of advertising, in a rule that became
19 known as the fool's test.

20 Everybody has their favorite examples. The
21 Clairol case where the Commission said that hair dye
22 wasn't permanent unless it would color hair that hadn't
23 grown out yet. Columbia Desktop Encyclopedia, which the
24 Commission solemnly found did not contain everything you
25 ever wanted to know about every conceivable subject.
26 The claim for yogurt that it was nature's perfect food

1 that science made better, that the Commission thought
2 meant that you could live on a diet of yogurt alone. Or
3 my personal favorite, the automatic sewing machine guide
4 where the Commission reasoned that people knew about
5 automatic washers, you put the clothes in, you turn it
6 on, they came out clean, automatic sewing machines
7 should work the same way, you put the cloth in, you turn
8 it on, you go away, the clothes come out. Not very
9 reasonable standards.

10 The deception policy statement didn't explicitly
11 disavow those statements, but it tried to articulate the
12 legal standard in a different way where it would be much
13 more difficult to bring those kinds of cases. What the
14 statement said was that a practice is deceptive if it's
15 likely to mislead consumers acting reasonably in the
16 circumstances to their detriment, whereas it was later
17 phrased about a material issue.

18 It was adopted by a three to two vote, a highly
19 controversial three to two vote. It was subsequently
20 adopted and litigated in Commission cases, and has been
21 cited in numerous of our district court cases since
22 then.

23 It's worth looking a little bit at the
24 controversy, because there was no real disagreement that
25 many of the silly old cases were not appropriate
26 subjects for FTC action. And as I said, the policy

1 statement only disavowed those cases by implication, it
2 simply didn't cite them. It cited and relied on
3 different cases with much more reasonable articulations
4 of what the legal standard was than the cases that
5 articulated it as the fool's test.

6 The disagreement was really over the wisdom of
7 articulating the standard differently than it had been
8 articulated in the past, and fear that the statement's
9 emphasis on extrinsic evidence on the meaning of
10 communications to consumers would pose insurmountable
11 hurdles in litigation.

12 I look back at the dissenting statements when
13 the policy statement was issued and they're interesting.
14 Let me read you a few excerpts. The policy statement
15 was totally inadequate and indeed embarrassing. It made
16 new law that is destined to confuse and confound its
17 readers. It could substantially narrow the Commission's
18 authority to prosecute a wide range of dishonest and
19 deceptive conduct, and that was from the Republican.

20 The other dissent said the statement promises to
21 foster a great deal of mischief until it can be
22 corrected by some future commission. It said there's a
23 marginal segment of American commercial life, promoters
24 of instant weight loss, bust creams, baldness remedies,
25 purveyors of quick fortunes in land speculation and
26 pyramid screens, sellers of miracle cancer cures which

1 exist only because they're unsophisticated consumers.
2 It worried that the introduction of reasonableness in
3 the policy statement was deregulation at its most
4 reckless and pointless form.

5 I don't think any of that has happened. The
6 policy statement has instead been the basis of a very
7 strong bipartisan consensus about what kinds of cases
8 the FTC should be bringing. It certainly hasn't ruled
9 out explicit, false, fraudulent claims that are the
10 mainstay of BCP actions. It was really the beginning of
11 a clear recognition that the real test of meanings is
12 consumers themselves, and they're often the best
13 evidence to determine that meaning is copy testing.

14 Cases that require that, and a lot of cases
15 obviously can be and are brought without copy testing,
16 even under the deception policy statement, but the cases
17 where it's harder to tell what the meaning is are more
18 resource intensive. We ought to be asking is this case
19 really worth it in a harder way. They're simply less
20 attractive a target.

21 In conclusion, I think the policy statements
22 were very useful ways to revisit areas where the law was
23 vague or the law was overly broad, compared to the kind
24 of cases that the Commission should be bringing, and the
25 Commission thought it should be bringing, and was in
26 fact bringing.

1 Deception has been very heavily used, and was
2 very successful in achieving the internal focus on the
3 appropriate kinds of cases. Unfairness has been less
4 used so far, but I think it provides a firm foundation
5 for revitalizing the doctrine, and making it a useful
6 legal tool going forward. So, thank you.

7 (Applause.)

8 MS. OHLHAUSEN: Thank you very much, Howard. I
9 promised you that we would do both BCP and BC and
10 Hillary Greene will now address the merger guidelines.

11 MS. GREENE: First of all, it's an absolute
12 pleasure to be back. I look out and see all my old
13 colleagues and it's great to be back here and it's a
14 real honor. I won't say anymore, because I don't have
15 enough time for that, Maureen.

16 MS. OHLHAUSEN: Sorry.

17 MS. GREENE: But it's so good to be able to do
18 that as a participant rather than having to listen to
19 people complain.

20 My topic is obviously guidelines, and what I am
21 going to do is briefly focus on two related dynamics,
22 how the distinctive nature of the FTC as an institution
23 influenced the nature of the antitrust guidelines it
24 promulgated and the second is the role of the antitrust
25 guidelines, the role they have played in the growth and
26 development of antitrust law. And I have flagged a

1 current working paper of mine that focuses particularly
2 on the second of these two issues, if anybody is
3 interested in a 12-hour rather than 12-minute summary.

4 And with that, what exactly is a guideline?
5 It's a, as you all know, it's a description of an
6 enforcement policy which serves to guide and educate as
7 well as editorialize. Bill Kovacic, among others, have
8 discussed extensively how antitrust is open textured,
9 which is to say it's got a broad statutory base and
10 relies heavily on common law development.

11 And these guidelines, these public statements of
12 enforcement policy that are articulating how and why the
13 agencies navigate the legal discretion available to them
14 really provide a degree of direction to the Agency
15 staff, as well as a degree of predictability to the
16 public, given that environment.

17 And because the law is invariably unclear, or in
18 conflict, some of the topics that the guidelines address
19 will necessarily be unsettled, and therefore the
20 guidelines cannot help but be sort of implicit
21 commentary on the state of the law itself.

22 Now, obviously the interesting thing about all
23 of this is that the guidelines, which we know have had a
24 tremendous effect, are technically nonbinding. They're
25 certainly not binding on the courts, and they are as a
26 matter of law not binding on the agencies themselves.

1 Obviously there's a little slight of hand in there and
2 they, in fact, do exercise a lot of power through
3 persuasion, among other ways.

4 One thing that I did not mention about the
5 definition of guidelines was how they have to be
6 promulgated or what they should include in terms of
7 their content. And that's because guidelines are an
8 amazingly flexible policy device, and as you can see,
9 the FTC's initial reliance on guidelines was decidedly
10 industry-specific.

11 And Commissioner Philip Elman, for whom Judge
12 Posner was an attorney advisor, was one of the key
13 architects of the FTC's early guidelines. And his
14 quotation on the slide really explains this particular
15 focus. Namely, how the FTC entered into a process of
16 educating itself regarding an industry so that it could
17 educate the industry regarding its enforcement policy.

18 Now, the other thing that's readily apparent
19 when you look at the early efforts is that they are also
20 merger specific. If you consider that the guidelines
21 are meant to bring increased predictability, and the
22 fact that merger law in the 1960s was not, shall we say,
23 at its most consistent, it seems quite fitting that the
24 focus of merger law would be the focus of the early
25 guideline efforts.

26 The Elman quotation from the prior slide

1 actually came from a 1964 Commission ruling in re:
2 Permanente, which is a cement case, and I am going to
3 very briefly spend a minute on the cement industry
4 guidelines, because they were essentially the first
5 guidelines, antitrust guidelines issued.

6 In the 1960s, there was a merger wave in the
7 cement industry which led to a large number of cases.
8 The FTC responded with an industry investigation, a
9 staff report, followed by hearings, which culminated in
10 the enforcement policy. And these guidelines themselves
11 were intensely factually specific, and a couple of
12 examples are listed on the slide.

13 In fact, the guidelines were so specific, so
14 tied to the industry, so into the facts, that some
15 argued that they said too much, and so what that
16 resulted in was a challenge based on prejudgment, and
17 that is to say that the guidelines included a number of
18 factual determinations. The challenge ultimately
19 failed, and the Commission was able to proceed, and I
20 just love Elman's quote there with respondents are
21 entitled to have their cases adjudicated by
22 commissioners with open minds, not empty ones.

23 (Laughter.)

24 MS. GREENE: Now, almost concurrently, but after
25 the FTC, I will add, DOJ issued their own merger
26 guidelines. In terms of basic information, all of this

1 is an incredibly well-known part of history, Don Turner
2 was the author of the guidelines, and they covered all
3 manner of mergers.

4 Now, I don't want to lead everybody to believe
5 that just because the antitrust agencies were adopting
6 the guideline policies concurrently, that the phenomenon
7 was without critics, and such criticism is suggested,
8 obviously, by this New York Times article. And, you
9 know, without going into the specifics of who the aids
10 were and that type of thing, my point is merely to
11 underscore that the litigation approach to policy
12 formulation was very well entrenched, and as discussed
13 yesterday and earlier, litigation is the type of thing
14 that it's really easy to keep score. It's really easy
15 to track how the Agency is doing.

16 Guidelines, by necessity, owing to their
17 nonbinding nature, among other things, are very hard to
18 keep track of in terms of their impact. And but that
19 doesn't mean their impact is not as great or potentially
20 greater.

21 Now, as I say, the cement policy and the merger
22 guidelines were issued within one year of one another,
23 and the FTC's policy was preceded by the report and
24 hearings, not so with the merger guidelines. As a
25 caveat, let me just say that the FTC does not always
26 have reports and hearings prior to issuing guidelines,

1 and likewise the antitrust division has conducted
2 broader inquiries and drafted comments, and more
3 recently they have taken increasingly to joining the FTC
4 in the conduct of hearings and issuing reports.

5 But what's most striking about the cement
6 guidelines versus the merger guidelines is that the
7 different approach really does translate into radically
8 different target audiences for the guidelines and
9 contents of the guidelines. And if you think back to
10 the cement guidelines that we just saw, there's nothing
11 even remotely approaching that in the '68 merger
12 guidelines. You don't have a fact in sight. Certainly
13 not a discussion of how many, you know, pounds of cement
14 you buy per year puts you in a certain category which
15 triggers certain results.

16 So, the guidance in the cement industry was more
17 concrete, and that pun was intended.

18 (Laughter.)

19 MS. GREENE: Now, I will say that Commissioner
20 Elman, who obviously played a key role in all of this,
21 he appears to have considered and rejected a path that
22 was closer to that taken by the Department of Justice,
23 and he said the following: "To be most useful and
24 meaningful, merger enforcement guidelines must be
25 specific, concrete, and related to particular markets
26 and industries. If they merely indicate in a general

1 way areas of concern to the prosecuting agency,
2 individual businessmen will be in the dark as to whether
3 they will lawfully undertake mergers."

4 Now, I've changed the slide and we've moved
5 forward 15 years, and the next wave of guidelines
6 obviously came in '82 on the same day when the FTC
7 issued its statement regarding horizontal mergers and
8 DOJ issued their '82 merger guidelines.

9 And I also wanted to mention in passing that
10 NAAG also issued guidelines during this general time
11 frame. The NAAG guidelines differed substantially from
12 FTC and DOJ guidelines, which in turn differed somewhat
13 from one another.

14 Now, I know somebody said this, and I don't know
15 which scholar it was, so if you're in the room, claim
16 credit, because I'm trying to search for your name, but
17 it really is important, because what this quote suggests
18 is the state attorney generals needed to gain
19 legitimacy, they needed to get back in the game, and the
20 way in which they did so was they promulgated their own
21 guidelines. That was showing that the guidelines were
22 increasingly framing the terms of the debate.

23 Whether the guidelines were used or not, they
24 weren't heavily relied on, shall we say, is not as
25 important as the impulse that they felt to promulgate
26 them.

1 In terms of the 1980s merger policies, it's
2 pretty clear that a different level of comparison is
3 warranted in the 1980s. If you go to the 1980s merger
4 policies, there is obviously a different type of
5 comparison you need to do in terms of the '82 merger
6 statement and the '82 merger guidelines.

7 If you think back to what we were discussing in
8 the 1960s, those were very different animals, the cement
9 guidelines and the '68 guidelines. The merger statement
10 and the merger guidelines were more like distant
11 cousins. And what we see is that, among other things,
12 one of their key features was that they shared a key
13 economic framework, and that was really important,
14 because one of the -- now I'm lost. Sorry about this.

15 What the two different sets of policies shared
16 was a shared economic framework. Let me add that they
17 still had radically different approaches to implementation.
18 One of the more obvious examples would be with
19 concentration. Prior to 1982, concentration ratios were
20 typically "CR-4". That was how opinions were written
21 and arguments were made.

22 In the guidelines, however, the Department of
23 Justice endorsed HHIs, the Herfindahl index. But what
24 they did, they not only endorsed the index, but they also
25 set up very specific thresholds. Now, when they did that,
26 the FTC sort of hung back. They merely acknowledged the

1 need to further refine how we approach concentration. They
2 mention the HHI as one possibility, and as a consequence
3 they did not advance any additional standards.

4 Very briefly, institutional contexts. The FTC
5 may have had more abstract guidelines, because it has
6 this joint prosecutorial and adjudicatory role. As Tom
7 Campbell has said, "Judges are not inclined to state in
8 advance what they will consider important," one
9 must learn that by a case-by-case basis. Also, the FTC
10 is a multi-member body, you've got to get everybody
11 together. When you look at the merger statement,
12 you will see that there are instances (in the footnotes)
13 where some of the Commissioners, actually the Chairman,
14 sort of dissents a little from the text of the
15 guideline. So, that would also account for them being
16 more vague. And finally, joint agency jurisdiction.

17 Now, closing thoughts. Owing both to the FTC,
18 DOJ and the court's increasing reliance on
19 DOJ's more specific framework -- which is to say the
20 merger guidelines -- and because predictability requires
21 the agencies separate actions to also sort of make sense
22 together, you have the next phenomenon, where I will
23 conclude, which is that of joint guidelines.

24 In ten words or less, one of the things that's
25 interesting about the health care guidelines is that in a
26 very attenuated way, they represent a sort of harkening

1 back to the industry guidelines that we saw in the '60s.
2 They cover lots of areas other than mergers and they were
3 promulgated during a very intensely political environment.
4 But they are industry-specific with all of the attendant
5 pluses and minuses.

6 And then finally, the Competitor Collaborations
7 Guidelines. These actually harkens back even more
8 strongly. Because what we saw there was we had under
9 Pitofsky an interest in globalization and innovation.
10 He sponsored hearings, and as a result of the hearings,
11 there was a recognition of the need for increased
12 guidance with regard to collaborations, and from that,
13 you had the guidelines promulgated.

14 And so that sort of demonstrates how the FTC has
15 an important role to play in terms of our approach to
16 educating the public about what our enforcement policies
17 are. Thank you.

18 (Applause.)

19 MS. OHLHAUSEN: Thank you very much, Hillary.

20 We now turn to our first discussant, which is
21 Commissioner John Leibowitz.

22 COMMISSIONER LEIBOWITZ: Thanks, Maureen.

23 I suppose it's ironic, and hopefully humorously
24 ironic, that I've been at the Commission about nine
25 working days, and here I am musing about 90 years of FTC
26 history. But the truth is, I followed the Commission

1 closely for many years, I have an enormously high regard
2 for its work, including its studies, its reports, its
3 guidelines and its advocacy.

4 Rob has talked about the importance of our
5 e-commerce work, Hillary the merger guidelines, Howard
6 the unfairness and the deception statements. I think
7 all of those have resonated with policy makers, with the
8 public, and with I guess what I would call FTC
9 constituencies.

10 But for me, when I think about the Commission's
11 leadership role in policy matters, it's the Commission's
12 reports on the marketing of violent entertainment to
13 children that jump to mind.

14 As some of you may know, I joined the Commission
15 from the Motion Picture Association, but when the
16 Commission's first marketing report came out in
17 September 2000, I was still working in the Senate. That
18 report shocked a lot of people, including me, as the
19 then parent of two young girls. I am still the parent
20 of two young girls.

21 (Laughter.)

22 COMMISSIONER LEIBOWITZ: Many companies have
23 been actively targeting violent entertainment to kids,
24 something that's not only wrong, but absolutely
25 unacceptable, and if you take the film industry as an
26 example, and by the way, it wasn't the worst offender by

1 any means, a majority of violent R-rated movies sampled
2 by the Commission were marketed to children who were
3 under 17. And ads for the movies didn't include rating
4 reasons.

5 So, for parents who were concerned about
6 violence but not profanity or sex, or sex but not
7 profanity or violence, it was sort of hard to tell why a
8 movie was rated R, or for that matter why a movie was
9 rated PG-13.

10 Well, that report and the attendant publicity
11 got the industry's attention and the studios made a
12 commitment, I think, to change the way they had been
13 doing business, or they were doing business. A series
14 of follow-up reports ensued, all showing some progress,
15 at least as to the film industry, and the most recent
16 follow-up, which was released just this past summer,
17 found that none of the studios targeted advertising for
18 violent films to kids and that rating reasons are
19 routinely disclosed in ads.

20 So, the Commission's study, it seems to me, and
21 its reports, helped keep these issues on the front
22 burner and to my mind have provided a real and tangible
23 benefit to parents.

24 Now, when then Chairman Pitofsky first announced
25 that the Commission would conduct a marketing study
26 under some pressure from Congress, people like Senators

1 Kohl and Lieberman, and Brownback, and from the White
2 House, and I think Chairman Pitofsky alluded to that
3 yesterday in his lunch talk, a few people raised
4 questions. I mean, why is a law enforcement agency
5 doing a study like this? Isn't this sort of a
6 frolic and detour for the FTC?

7 But the truth is, you can trace the Commission's
8 study and advocacy role back to the earliest days of the
9 Agency. These are by no means frolics and detours.
10 Looking now back at the Commission's first annual
11 report, in 1916, which my staff and I did after getting
12 a suggestion or a hint from Judy Bailey, it's funny just
13 how little things have changed.

14 Even back then, the Senate was calling on the
15 Commission to investigate the petroleum industry, and
16 the FTC conducted literally a massive study of the price
17 of oil in Oklahoma and how it compared to the price
18 nationally. The study consumed over 10 percent of the
19 Commission's annual budget and it took three years to
20 finish.

21 The 1916 report notes, and I'm just going to
22 read a little excerpt, that an extraordinarily rapid
23 advance occurred in the price of gasoline, and many
24 complaints were made to the Commission concerning
25 discriminations in the price of gasoline in different
26 localities. This advance in gasoline prices was a

1 matter of wide public concern.

2 Now, all of this sounds very familiar,
3 especially to those of us who are still undergoing the
4 confirmation process.

5 (Laughter.)

6 COMMISSIONER LEIBOWITZ: Coming back to the
7 present, though, it is remarkable how many FTC studies,
8 reports and guidelines have created either good public
9 policy or at the very least provoked critical or crucial
10 debate when so many government studies and agency
11 studies and reports seem to sort of just disappear up
12 into the ether. And I suppose as the new commissioner
13 on the block, I would like to try to understand from the
14 panelists and maybe from some people in the audience how
15 the Commission has been so effective in translating its
16 studies in advocacy into action and how we can maintain
17 that reasonably good success rate.

18 But before I ask any questions, I want to hear
19 what the eminent and distinguished veteran of the FTC --
20 young and eminent and distinguished veteran Bill Baer
21 has to say.

22 MR. BAER: Thank you, John. For those of you
23 who are not used to Commissioner Leibowitz's careful use
24 of the English language, eminent, distinguished and
25 veteran can be translated as old guy at end of table.

26 (Laughter.)

1 MR. BAER: That's me. This is a fascinating
2 panel, because it gets to some of the issues which
3 threatened the future of the Commission in the late
4 '70s, as Howard was saying. I was, as many of you
5 know, at the Agency between '75 and '80 and had the
6 privilege of directing the congressional liaison
7 when we were in the firestorm. I was there when
8 the bubble -- the energy that came out of the first
9 Kirkpatrick report, the Nader report, rule-making
10 got going, lots of activity, both on the consumer
11 protection and competition side -- actually burst.

12 We, ran into a buzz saw up on the Hill. Most
13 of the criticism was directed, as Howard indicated
14 earlier, at rule-making, but a fair part of the
15 criticism was directed at the advocacy program, the
16 non-law enforcement efforts of the Agency. Congressmen
17 were infuriated by a study that had been done by the
18 Bureau of Consumer Protection about life insurance
19 policies, suggesting that, indeed, whole life insurance
20 policies might actually benefit the issuer more than
21 the insured.

22 There was a little nondescript Bureau of
23 Economics study going on into agricultural cooperatives
24 which allegedly threatened the farming industry and
25 brought great pressure on the Hill. That criticism of
26 the advocacy efforts of the Agency spilled over into

1 the '80s. There was a lot of congressional furor over
2 allegedly unsolicited advice to state legislatures,
3 local governments. I remember taxi cabs was one of the
4 big issues.

5 Even I was a critic at one point, indicating
6 that I thought advocacy had overshadowed the
7 Commission's law enforcement mission. I read something
8 this morning that I had written about 15 years ago in
9 which I made the somewhat uncharitable comment that at
10 times it seems like the cop on the economic regulatory
11 beat has been replaced by a little man on a park bench
12 dispensing free advice to anyone who will listen.

13 (Laughter.)

14 MR. BAER: That was a bit over the top then and
15 now --

16 (Laughter.)

17 MR. BAER: But so atypical of me. A question I
18 think that would be interesting to hear the panel
19 talk about a little bit, is how do we get from that
20 point in the '70s and '80s when the advocacy efforts
21 of the Agency, the nonenforcement law enforcement
22 activities of the Agency got it into such trouble, and
23 how you get from that point to today where the use of
24 industry guidance, competition and consumer protection
25 advocacy, hearings, reports, is widely applauded.

26 Obviously, individual reports create

1 controversies, but there is a measure of respect and
2 credibility and legitimacy today that really didn't
3 exist when I was here in the late '70s, and in the early
4 part of the '80s.

5 Part of how I would answer my own question is
6 that the effort to articulate limits, to provide
7 guidance as to how the Commission's Section 5 mandate
8 would be used, helped give some legitimacy to
9 enforcement efforts, and study efforts. That is really
10 Howard's point, the unfairness and deception statements
11 actually did cabin in a little bit the Agency's broad
12 and potentially unlimited jurisdiction.

13 Another, answer is that the increased use of
14 hearings, which began about ten years ago, or the return
15 of hearings as a mechanism to develop policy and to
16 provide guidance, actually provided an opportunity for
17 stakeholders to buy into the process, to get their views
18 heard. It was a less threatening way of helping to
19 develop public policy, and I think that was a laudable
20 approach as well.

21 But as I say, the question, I think, for the
22 panel that I would ask is, how do we avoid the problems
23 that we encountered in the '70s or '80s. Are there
24 limits? As Rob has talked and forcefully argued that
25 some of the big areas, the big industries, it's really
26 Internet stuff, hasn't yet been taken on to his

1 satisfaction, but are there limits to what an agency
2 like the FTC can and should be doing?

3 A second briefer observation I would make before
4 I turn it back to Maureen, relates to Hillary's
5 remarks about the value of guidelines. What has
6 evolved, particularly on the competition side, in my
7 experience in the Agency and as a counselor, is that
8 guidelines that have some substance to them, something
9 of an analytical framework, particularly the merger
10 guidelines, have been an extraordinarily important tools,
11 both externally in allowing counselors in the business
12 community to provide guidance as to what the Agency's
13 reaction is to a particular transaction is likely to be.
14 But they also -- and this is elaborating on a point
15 Howard made -- really provide an analytical framework
16 which causes the staff and their supervisors to focus
17 on a common set of questions, to make sure we are asking
18 the right questions, looking at it transaction by
19 transaction in a way that is more systematic, more routine.

20 It also has the added value of creating common
21 language, a common framework that the outside groups,
22 the merging parties, the third parties that are
23 complaining about a merger, and the Agency can sit
24 around a table and talk about where policy should go or
25 how policy should be applied in the context of a
26 particular transaction.

1 So, I think one of the great achievements out of
2 the Department of Justice and the FTC in the last 20
3 years is developing a series of guidelines, starting
4 with mergers and in the other areas Hillary has
5 mentioned. And it bodes well for the future because
6 I think it's providing enhanced predictability and
7 consistency of Agency enforcement.

8 Maureen?

9 MS. OHLHAUSEN: Thanks, Bill.

10 I will just take a stab at one of your questions
11 as a person who is working on the FTC's advocacy these
12 days. One of the requirements that we have is if there
13 is a bill in the legislature that we are concerned about,
14 we don't come in unless we've been invited by one of the
15 legislators to make a comment. Sometimes we file comments
16 in front of other federal agencies, but that's when they've
17 been put out for public comment, so that there's been a
18 general request to come in and to give comments. We are
19 sensitive that we don't want to be overbearing in
20 certain areas.

21 As for how we pick the subject matter, I think
22 that our enforcement capabilities on both the BCP and
23 BC side, really give us a lot of areas of expertise and
24 we try to use those and also rely on good empirical
25 evidence -- I haven't given the plug for BE yet -- that
26 BE can provide to us. But I will turn it over to the

1 other panelists to get their comments.

2 MR. BEALES: I want to address briefly, I think
3 the credibility question, Bill, because I think it's
4 very important. I think you're quite right, the policy
5 statement has been sort of defining limits, the
6 Commission defining limits is an important part of what
7 it takes to preserve that credibility. And I think the
8 way that works is they make possible the strong
9 enforcement program that really let us, particularly on
10 the consumer protection side, be seen as the voice of
11 consumers, caring about consumers, interested in
12 consumers, and not protecting some other vested
13 interest. And I think that enforcement is a key part of
14 it.

15 I think there's probably inherently some greater
16 risk. I don't know that it's a limit, but there's
17 inherently greater risk in studies even, in places where
18 we don't have jurisdiction, where there's clearly
19 nothing we could do. They are, which is not say to we
20 should never do that, but I think there's more risk in
21 those kinds of things. I think it's a risk that is
22 highlighted and was highlighted in the '80s by the
23 perception for other reasons that we were overreaching.
24 You know, the agricultural cooperatives and life
25 insurance weren't seen as just information, I think,
26 they were seen as threats. And threats of some more

1 formal, more structured kind of action. And that's a
2 credibility issue that comes from the enforcement
3 program and how well grounded it is.

4 I think the third thing that's important, and I
5 think you're quite right about hearings, is that
6 building the public perception that the Commission knows
7 what it's talking about. That it's acquired
8 information, preferably information that's related to
9 its enforcement efforts, and I think what's maybe one of
10 the clearest examples of that is the Spam workshop, and
11 Spam enforcement where we were able to have, the
12 Commission was able to have a significant influence --
13 I'm like Tim, I have to stop saying we -- on the public
14 policy process, because it built the public image that
15 it knew what it was talking about.

16 We proceeded on the security cases the same sort
17 of way, workshops built some understanding on the
18 staff's part and some perception of the public and then
19 cases, and then started laying the groundwork for that
20 with our FID. Where maybe there's an enforcement role,
21 maybe not. We're not clear yet.

22 But I think whenever the Commission starts down
23 one of these roads, it needs to think about what
24 credibility does it have, how can it get more
25 credibility, and what are the risks in this particular
26 area? Because there's a lot of other stuff at stake as

1 well.

2 MR. BALTO: Let me ask you this, Howard,
3 following up on what Rob mentioned before as sort of the
4 next series of issues for the FTC to look at, Rob had
5 mentioned real estate and cars and the securities
6 industry. Isn't it one of the lessons, and Bill you
7 said this, too, of the 1970s that you really need to
8 pick and choose your battles?

9 MR. BEALES: Well, I think it is. I think you
10 can take on even very difficult targets successfully,
11 but you need a strategy for how you're going to do that.
12 You can't jump in with both feet and say here we are.
13 And I'm not -- you know, some of them, and I thought the
14 auto dealers is maybe the clearest example. I mean,
15 there's federal legislation protecting auto dealers that
16 dates back to the '50s. There are strong political
17 reasons for that, you know, it is an area where I think
18 you're exactly right on the policy and the economics,
19 whether it's an issue for the FTC to take on, I think is
20 more problematic. And maybe more difficult.

21 MR. ATKINSON: Let me respond. Howard talked
22 about some internal changes, which I'm not familiar
23 with, but let me say there are two external factors which
24 make it a much more amenable climate for the FTC to take
25 on these issues than maybe was true 30 years ago.

26 One is that certainly in the e-commerce world,

1 taking on these issues, even taking on big issues, I
2 think, the playing field is tilted towards the FTC in
3 being successful. I would argue because people just have
4 a default position that e-commerce is good, and anything
5 that promotes e-commerce should be done.

6 It's sort of equivalent to, I don't think the
7 FTC intervened in the '20s, but if they did, then the
8 case I like the best was the American Horse Owners
9 Association combined with the Grain Dealers Association,
10 the Stable Association and the Horse Shoer's
11 Association, were able to pass laws making it illegal to
12 park cars on the street. I'm not making this up.

13 (Laughter.)

14 MR. ATKINSON: Now, obviously the car industry
15 was small, the horse industry was huge, if the FTC went
16 after the horse industry, everyone would have praised
17 them because everybody knew cars were the future. And
18 so that's where I think this issue is headed. Everyone
19 knows e-commerce is the future, it's easy to see these
20 interests are holding it back.

21 The second point I would make is this the politics
22 has changed significantly in terms of what we see as the
23 core interest. There's a colleague of mine at UCLA,
24 Michael Storper, who is an economist, who has written
25 very eloquently about the shift to a politics that's
26 centered around consumer interest. That's partly why he

1 is arguing about why trade is really accepted by most
2 people because we look at it and we look at the world
3 through consumer lenses and not through worker producer
4 lenses. And I think in the old economy there was
5 producer lenses and in the new economy we look through
6 consumer lenses. Because this change just opens up the
7 FTC possibilities significantly, because it is the
8 consumer agency, and therefore if it puts things in
9 those terms. That makes the politics easier to do now
10 than they were 20 or 30 years ago.

11 MS. GREENE: I wanted to jump in on the question
12 of what are some of the limitations of the various
13 policy tools, and I think that somewhat ironically one
14 of the limitations that seems to be splitting up
15 potentially, hopefully not, with regard to guidelines is
16 that we might become a victim of our own success.

17 By that I mean, you know, the guidelines, their
18 evolution over time has been very cumulative. When
19 they started out in the '60s, the judges, among others,
20 when the guidelines were mentioned to the, say like,
21 what am I supposed to do with that, and you had these
22 transcripts that are absolutely hysterical where the
23 judge is like, so, what does this mean to me and why do
24 I care what the FTC thinks? Et cetera.

25 And that's pretty fascinating, because if you
26 fast forward now you'll actually find judicial opinions

1 where guidelines are cited as authority. I personally
2 find the latter to be disturbing. The guidelines are
3 not a restatement of the law, they may coincide with the
4 law, but I think in order for them to be really
5 effective for the Agency and for society, we have to
6 sort of always keep in mind that they are the Agency's
7 enforcement policy, and that the agencies need to keep
8 that in mind when they think about how they're advising
9 them, and people say, well, you can't think about this,
10 you can't think about that, the law is not settled.

11 Well, that might be true, but if it's an
12 enforcement policy, maybe you can stick your toes into
13 those issues. And then the sort of flip side is that
14 the courts need to constantly bear in mind that the
15 guidelines are an enforcement policy and not treat them
16 as authority.

17 I think that the tremendous success of the
18 guidelines over time is a positive thing, but it's
19 something that we have to be aware of and not let it
20 change our appreciation of what the guidelines are.

21 COMMISSIONER LEIBOWITZ: Let me ask you a
22 question, sort of following up on what you said, which
23 is that if the guidelines are clearly about trading off
24 differences between rules and discretion. And yesterday
25 I was sort of struck by listening to former Chairman
26 Pitofsky who said that the guidelines in vertical

1 mergers are hopelessly outdated and that he routinely
2 ignored them. And former Chairman Muris has emphasized
3 in speeches that staff should apply its considerable
4 expertise in deciding whether to allow a proposed
5 merger, even if the merger guidelines tell us that a
6 merger may be a problem.

7 So, partly I want to ask do the rules sort of
8 box us in a bit, and how should we treat our own
9 guidelines here at the FTC?

10 MS. GREENE: Well, that's just it. That's
11 exactly what I was going for. We should not allow our
12 rules to box us in. And what that means is we have to
13 back up and we have to recognize that they're an
14 enforcement policy, and maybe that means on occasion
15 candidly admitting that we're diverging from them and
16 then articulating the basis of the divergence.

17 I think that the whole idea of having the
18 enforcement policy articulated is to give us a sense of
19 where we are. The agencies should be able to diverge
20 from them, and they do, but there also should be a
21 candidness in sort of telling folks that we're diverging
22 in the following way, and then I think the guidelines
23 are accomplishing exactly what they want, they're sort
24 of promoting discussions about what the rationales are.

25 MR. BAER: At what point, if I can stick with
26 the guidance point, at what point does the Agency have

1 an obligation to updates its guidance? On the merger
2 side, you look at the terrific statistical data that the
3 Agency put out I think last December showing what levels
4 of concentration it was enforcing and not enforcing.
5 And there's a huge divergence between the standards set
6 forth in the 1992 merger guidelines and the current
7 enforcement policy, that is we are enforcing a lot less
8 systematically than would have been predicted.

9 MS. GREENE: I think they do have an obligation
10 to do so, and without discussing those specifics, I
11 think that by far and large the Agency undertakes a lot
12 of efforts to do so. We had the health care hearings
13 where there was a revisiting of some of the guidelines
14 issues. In the intellectual property hearings that we
15 just had, some of the panels dealt with how are the
16 licensing guidelines working? Does it always work, no.
17 Are there areas where we should keep it better up to
18 date? I think the answer is absolutely.

19 I think we should for one reason which does
20 not actually have to do with Agency enforcement:
21 when a guideline is out there and once the Agency
22 puts it out, they lose control. And so what you
23 find is Agency guidelines find their way into private
24 litigation and they get presented to the courts in ways
25 that are, you know, would probably appall the agencies,
26 but the fact of the matter is they're out there, they're

1 not contradicted, and so we need to be aware of these
2 sort of secondary effects.

3 And then the other thing that I'll just flag
4 before I turn it over to my colleagues, is that I think
5 that what you're hitting on is one of the real
6 challenges of factually specific guidelines. And I
7 think that was a real challenge with the sort of slew of
8 industry-specific guidelines that I mentioned early on.
9 Those were so intensely factually specific, that once
10 you had a change in the industry's structure, the sort
11 of value of them disappeared and it would actually start
12 to become a disturbance if they were applied.

13 MR. BEALES: I think for the consumer protection
14 guidelines, there's been pretty consistently applied a
15 very good program of reviewing those guidelines and
16 assessing what kinds of changes are appropriate and
17 getting rid of lots of them. There is no longer a rule
18 about the aerosol frosting spray for a cocktail dress as
19 a result of that process and many other wonderful and
20 obsolete rules.

21 But I think the use in private litigation and in
22 other areas in some ways cuts both ways, and I think
23 probably the deceptive pricing guides are a good example
24 of that. They may spur enforcement in some cases where
25 it wouldn't otherwise occur, but they may also deter
26 enforcement of standards that would be far worse.

1 I mean, there's a Canadian case, for example,
2 where the argument, the heart of the argument was you
3 have to sell at least half the goods at the high price.
4 You have to sell more at high prices than you do at low
5 prices, and the economists will tell you that is not
6 going to happen. You cannot meet that standard.

7 And, you know, the guides may serve a purpose
8 even if they're not the current enforcement posture in
9 some circumstances.

10 MS. OHLHAUSEN: At this point, I want to mention
11 that as I heard all our panelists speak today, it reminded
12 me that yesterday our general counsel Bill Kovacic gave a
13 speech about the factors that go into making an agency
14 a success. What makes a successful public agency?

15 Some of the things he talked about are how you
16 have to have a plan to direct the Agency's resources and
17 that you really need to provide transparency for the
18 Agency's thinking, and that you also need to engage in
19 what he likes to call competition R&D where you're
20 increasing the Agency's knowledge base.

21 As I've listened to all the presentations and
22 the discussion today, it became clear to me that the
23 studies and the guidelines and the policy statements
24 are those kind of activities that Bill recommended that
25 a successful agency do. And so, I hope that these
26 activities helped make the success of the FTC that

1 we've been celebrating over the past two days.

2 I want to thank our panelists and our
3 discussants and thank you very much for attending.

4 (Applause.)

5 MS. BAILEY: Two items before we break for
6 lunch. First of all, I would like to thank Alan Fisher
7 for our constant supply of fresh dahlias to decorate our
8 symposium. Thank you, Alan.

9 And secondly, we have boxed lunches, we said
10 yesterday, they're all pre-ordered and they're listed
11 with your name on them. And we'll start again at 12:00
12 to hear our distinguished panel of economists.

13 (Whereupon, at 11:45 a.m., a lunch recess was
14 taken.)

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