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FEDERAL TRADE COMMISSION

ENFORCEABLE CODES OF CONDUCT

PROTECTING CONSUMERS ACROSS BORDERS

NOVEMBER 29, 2012

Federal Trade Commission

601 New Jersey Avenue, N.W., Conference Center

Washington, DC

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1 INTRODUCTORY REMARKS

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3 MR. TRITELL: Good morning, everyone. Welcome
4 to the Federal Trade Commission for our conference on
5 enforceable codes of conduct. I'm Randy Tritell,
6 Director of the FTC's Office of International Affairs and
7 very delighted to welcome everybody to our forum today.

8 I think I can confidently and non-deceptively
9 say that this is the world's first conference devoted to
10 the consumer protection, privacy, and competition aspects
11 of enforceable codes of conduct, so you are all present
12 at history in the making.

13 And I'm excited about this conference for
14 several reasons. For one thing, it's organized by the
15 terrific staff of the Office of International Affairs,
16 including Keith Fentonmiller, Hui Ling Goh, Stacy Feuer,
17 and others of my colleagues who are here and I hope
18 you'll have a chance to talk to during the course of the
19 day. For another, it's a topic of increasing relevance
20 and importance, as you know and as we'll explore during
21 the course of our day today.

22 And I also think that hosting this conference
23 is a wonderful fit for the Federal Trade Commission
24 because it touches on all of our functions, on consumer
25 protection, on data protection, and on competition

1 aspects in an interdisciplinary way.

2 And, finally, I'm excited about the breadth and
3 quality of our speakers and our audience, which will
4 guarantee a high level of dialogue. And I know that
5 we're going to learn a lot here at the agency that will
6 help inform our work. And I'm confident that for all of
7 us this will be a day well spent.

8 But let me move on to my true function this
9 morning, which is to share with you some key enforceable
10 codes of conduct. First, anyone who goes outside the
11 building without an FTC badge will be required to go
12 through the magnetometer and x-ray machine prior to
13 reentry into the conference center.

14 Second, in the event of fire or evacuation of
15 the building, leave the building in an orderly fashion.
16 Once outside the building, you need to orient yourself to
17 New Jersey Avenue. Across from the FTC is the Georgetown
18 Law Center. Look to the right front sidewalk. That is
19 our rallying point. Everyone will rally by the force.
20 You need to check in with the person accounting for
21 everyone in the conference center. In the event it is
22 safer to remain inside, you will be told where to go
23 inside the building. If you spot suspicious activity,
24 please alert security.

25 This event may be photographed or recorded. By

1 participating in this event, you are agreeing that your
2 image and anything you say or submit may be posted
3 indefinitely at FTC.gov or in one of the Commission's
4 publicly available social media sites. So, if you're
5 looking for privacy protection here, forget about it.

6 All right, it is my true pleasure to introduce
7 our opening speaker, Commissioner Edith Ramirez.

8 Commissioner Ramirez joined the FTC in April of 2010, and
9 there's more information about Commissioner Ramirez in
10 the biographical materials, which, along with the other
11 materials, are on the table outside the room in case you
12 did not otherwise pick them up.

13 Commissioner Ramirez has taken a particular
14 interest in the FTC's international program, both on the
15 consumer and competition sides of our work, especially in
16 connection with the APEC cross-border privacy framework,
17 about which we'll be hearing more in our panel later this
18 morning. We are very honored to have Commissioner
19 Ramirez here with us to open our conference.

20 (Applause)

21 COMMISSIONER RAMIREZ: Thank you very much,
22 Randy. And, everyone, good morning and welcome. Thank
23 you for being here. Before I start, I also wanted to
24 take an opportunity to thank very much Keith
25 Fentonmiller, Hui Ling Goh, and Stacy Feuer for

1 organizing this event. It really is a pleasure to have
2 you all here with us.

3 Earlier this week, we had "Cyber Monday", the
4 21st Century online shopping extravaganza that
5 complements Black Friday. Cyber Monday is a distinctly
6 American phenomenon, but it illustrates our
7 interconnected global marketplace. On that day,
8 consumers from all over the world can and do purchase
9 goods from online American merchants. And, of course,
10 many of the goods themselves -- clothing, home
11 appliances, electronics, are often produced abroad.

12 Thanksgiving may be an American holiday, but
13 Cyber Monday, and modern commerce more broadly, is an
14 increasing global enterprise. But where there is trade,
15 there is a need for consumer protection. Consumers want
16 the goods they purchase to be safe, no matter where they
17 are produced. They want an effective remedy if a
18 merchant sends an item that does not work, whether the
19 merchant is across the street or across the globe.

20 Businesses, too, need safeguards as they seek
21 to manage relationships with a complex chain of partners
22 in far-flung places. And they want easy ways to resolve
23 disputes with foreign companies and customers. But it
24 can be a challenge for governments to regulate businesses
25 operating outside of their borders. There is no global

1 body that issues comprehensive consumer protection
2 requirements for cross-border commerce. And, of course,
3 there is no global Uniform Commercial Code.

4 The absence of any such institution or legal
5 standards can have a real impact on consumers. In 2011
6 alone, the Federal Trade Commission received over 132,000
7 cross-border fraud consumer complaints through its
8 Consumer Sentinel system. Over 45,000 complaints between
9 2009 and 2011 were submitted through econsumer.gov, a
10 multilingual portal for consumers to file cross-border
11 complaints.

12 The FTC has a robust international consumer
13 protection and privacy program, but neither the FTC nor
14 any other single agency can do all of the heavy lifting
15 when it comes to protecting consumers across borders.
16 The sheer volume of complaints, the complexity of issues,
17 as well as the legal, practical, and financial obstacles
18 are simply too great.

19 But, fortunately, there are ways to try to
20 alleviate this burden. Domestically, the FTC views
21 robust self-regulation as an important tool for consumer
22 protection that potentially can respond more quickly and
23 efficiently than government regulation. We've encouraged
24 self-regulatory efforts in areas such as national
25 advertising, food marketing, and the marketing of violent

1 entertainment to children, alcohol marketing, and
2 privacy. But our support for self-regulation is not at
3 any price. Self-regulation, to be effect, must be the
4 product of a transparent process and must impose
5 meaningful standards subject to strict enforcement. And
6 these programs must not be a pretext for barriers to
7 entry.

8 In today's program, we've moving beyond a focus
9 on the use of domestic self-regulation as a tool for
10 protecting consumers to explore the full span of
11 arrangements that governments, international
12 organizations, civil society groups, standards
13 organizations, and self-regulatory bodies are developing
14 to supplement traditional legal regimes.

15 These arrangements, which we've bundled under
16 the "cross-border codes" label, include industry codes of
17 conduct, third-party certification programs, guidelines
18 developed through multi-stakeholder processes, codes of
19 conduct that include governmental enforcement, and
20 legislative schemes that incorporate third-party
21 standards. They are being developed not only in consumer
22 protection and privacy contexts, but in other areas, such
23 as financial services, labor, environment, insurance,
24 internet governance, and even human rights.

25 Some may question the rise of such systems and

1 whether they are necessary in light of increased
2 governmental cooperation on regulatory and enforcement
3 matters. We'll start today's forum with a panel of
4 experts who will address this issue and provide other
5 insights on the rise of codes of conduct in international
6 commerce and the benefits and drawbacks for advancing
7 consumer interests.

8 Others looking at our domestic experience may
9 be concerned about whether such cross-border codes pose
10 antitrust concerns. And we're fortunate that former FTC
11 Chairman Bill Kovacic, a leading scholar and expert on
12 international competition law, will join us to share his
13 thoughts.

14 Still others may ask whether these newer types
15 of arrangements can make up for real or perceived gap in
16 government oversight of transnational commerce,
17 especially in emerging areas of the law, such as online
18 privacy. Codes of conduct that are developed and
19 implemented through a transparent, multi-stakeholder
20 process that includes industry, civil society, and
21 government, and incorporates strong monitoring and
22 enforcement provisions may take us part, if not all the
23 way, in overcoming such deficits.

24 The APEC Cross-Border Privacy Rule System is
25 the product of just such a process. The APEC system, on

1 which we'll have a panel this morning, is an attempt to
2 create a voluntary and interoperable system of meaningful
3 protection for consumer data. Despite the differences in
4 privacy and legal regimes across the vast Asia-Pacific
5 region, APEC members have developed a system that
6 reflects a consensus on what constitutes sound cross-
7 border data protection.

8 This approach of agreeing on common rules to
9 which companies can pledge their adherence that are then
10 enforceable across jurisdictions has immense potential.
11 The APEC model holds great promise and may be
12 transferable to other areas. One purpose of this forum
13 is to examine what those areas might be and what form
14 those systems should take. And to this end, this forum
15 will also look at the operation of codes, guidelines, and
16 standards in areas that the FTC does not traditionally
17 regulate, such as corporate social responsibility and toy
18 and food safety.

19 The government, business, and civil society
20 experts in these areas have much to teach the FTC and
21 other government agencies about the potential rewards and
22 down sides of an oversight system developed and overseen
23 by multiple stakeholders.

24 As a result of today's program, we'd like to
25 have a better sense of the range of code and standards-

1 based systems and an appreciation for what works well and
2 what does not. Our goal is to articulate a set of best
3 practices and metrics to judge these systems. Some have
4 already begun this task, notably the final panelists, who
5 will look at the core indicators of legitimacy and
6 effectiveness, as well as how to measure and compare
7 code-based systems.

8 The FTC is well-suited to synthesize the
9 knowledge being developed around the world on cross-
10 border codes of conduct. We have broad expertise in and
11 authority over a wide range of consumer protection issues
12 in the United States. With this expertise, as well as
13 the extensive networks in which our Office of
14 International Affairs participates, I believe the FTC is
15 well positioned to take a leadership role in exploring
16 transnational enforceable codes of conduct and promoting
17 the best practices that I hope will emerge from today's
18 program.

19 And then just to conclude, I'd like to turn
20 back to the shopping frenzy that occurred just a few days
21 ago. Wherever consumers happen to be, economic activity
22 should be marked by secure transactions instead of
23 vulnerabilities; clarity instead of misrepresentations;
24 and especially on occasions like Cyber Monday, deals
25 instead of scams. I'm confident that today's discussion

1 of cross-border codes will help us bring us closer to
2 that goal. And thank you all for joining us in this
3 endeavor.

4 (Applause)

5 MS. FEUER: Thank you very much, Commissioner
6 Ramirez. I'm Stacy Feuer, Assistant Director for
7 International Consumer Protection in the Office of
8 International Affairs. I'd like to ask the panelists for
9 the first panel to come up and we'll get started right
10 away and delve into these issues that Commissioner
11 Ramirez has so wonderfully set out for us.

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PANEL

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THE RISE OF CROSS-BORDER CODES OF CONDUCT

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MS. FEUER: Great. Well, good morning and
4 welcome, everyone. A few more people are getting seated,
5 and we'll give our panelists time to pour themselves some
6 water. We don't have coffee, but we do have water.

7

So, let me just state a few words. Although
8 there have been cross-border arrangements dating from the
9 *lex mercatoria*, or merchant law, of medieval Europe,
10 which stretched, my understanding is, from Western Europe
11 all the way to the shores of the Mediterranean and
12 beyond, in recent years we've seen a proliferation of a
13 wide variety of what we're lumping under the title of
14 cross-border codes in a variety of sort of
15 public/private/quasi-private/multi-stakeholder formats
16 that really seem to be outside of the traditional
17 government-to-government relationships that have
18 traditionally been a function of public international
19 law. So, at the FTC, we're curious: What accounts for
20 this? Why the rise of these cross-border codes now?

21

So, here to explain to us, we have our first
22 panel, and I should say that they are a really nice,
23 diverse, and interesting bunch. Mary Engle from the
24 FTC's Division of Advertising Practices, Professor Cho
25 from Chicago-Kent Law School, Joe Mariano from the Direct

1 Selling Association, Robin Simpson from Consumers
2 International, based in London, and Professor David
3 Zaring from the University of Pennsylvania. Their bios
4 are in the bio materials, so I won't say anything more
5 about them, and I will ask Mary to kick it off.

6 MS. ENGLE: Good morning, everybody. For those
7 of you who looked at an earlier version of the agenda,
8 you may have seen that David Vladeck, the Director of the
9 Bureau of Consumer Protection, was supposed to be here
10 this morning, and so I hope it's not false advertising
11 that you're getting me instead. But when David had a
12 conflict and I was asked to sub in for him today, and as
13 Director of the FTC's Division of Advertising Practices,
14 I was happy to do so because we do have a lot of
15 experience with private codes of conduct and self-
16 regulation in the advertising area.

17 I think it's one of the areas of commerce that
18 has a long tradition of success with private codes of
19 conduct. And it's something that, you know, as has been
20 referred to as sales and commerce moves internationally
21 it has become more and more important. And we've seen it
22 both, you know, for the FTC in areas of national
23 advertising, where private self-regulation is a
24 complement to law enforcement, not a substitute, but a
25 complement that enables us to do our job better.

1 But, also, there are areas in advertising where
2 in the United States in particular with First Amendment
3 protections for commercial speech it isn't always
4 possible for the government to take action. There are
5 areas where self-regulation and private codes of conduct
6 can affect advertising in ways that the government
7 cannot. And at the FTC, we often say that self-
8 regulation is one of the tools in the consumer protection
9 toolbox that complements enforcement as well as consumer
10 and business education.

11 So, but that doesn't mean that's, you know,
12 even where areas where self-regulatory codes of conduct
13 come into play that there's no role for the government,
14 and I'd like to mention just a few areas where we feel
15 that government oversight and reports have been helpful
16 and have really shown success.

17 Commissioner Ramirez mentioned several of those
18 areas this morning: food marketing to children in
19 connection with concerns about childhood obesity;
20 marketing of violent entertainment media like video games
21 and movies to children; and alcohol marketing. And in
22 all of those areas, the FTC has done studies and issued
23 reports. And we think of it as -- I think it was Justice
24 Brandeis who said that sunlight is the best disinfectant,
25 and shining some sunlight onto some of the practices in

1 the industry can really help make sure that things are --
2 that the progress is being made and point to improvements
3 that could be made as well.

4 So, for example, in the area of marketing of
5 violent entertainment to kids, it's an area that the
6 Commission has studied for over 10 years now. And when
7 we first were looking at it, one of the things we saw was
8 that violent video games, for example, that are rated M
9 for Mature, it's a self-regulatory labeling process, but
10 under that self-regulatory code of conduct, M-rated games
11 shouldn't be sold to kids under the age of 17.

12 And when we first looked at it, we saw that --
13 we did an undercover shopper survey where we sent kids
14 under 17 in to try to make these purchases at retail.
15 And at the time back -- I think it was in 2000 that our
16 first survey was done, 80 percent of the time these
17 younger kids were able to buy M-rated video games.

18 We did a subsequent series of studies and
19 reports on our findings, and the last time we did an
20 undercover shopper survey, that had switched to only 20
21 percent. So, it fully reversed. Only 20 percent of the
22 time kids were able to buy these violent M-rated video
23 games. And that's purely a self-regulatory code of
24 conduct that the industry itself put into place and has
25 taken seriously.

1 Also in the alcohol industry, we saw all three
2 areas of beer, wine, and spirits have implemented self-
3 regulatory codes of conduct limiting their -- to make
4 sure that their advertising is not seen by an audience
5 that is predominantly children. So, we feel that, you
6 know, there are certainly lessons to be learned here, and
7 we think can apply transnationally.

8 Another area is children's online privacy,
9 where there is a Federal statute that incorporates both
10 regulatory and self-regulatory aspects. In the U.S., the
11 statute is called COPPA, Children's Online Privacy
12 Protection Act. And it actually incorporates a self-
13 regulatory feature where private entities can apply to
14 the FTC for self-regulatory -- safe harbor status. And
15 in that program then companies can participate. They can
16 ensure compliance with the statute, and then they are
17 protected to some degree from enforcement action by the
18 FTC because they're participating in that safe harbor
19 program.

20 So, we see that as a nice example of both
21 regulation and self-regulation, and we're really, you
22 know, interested in the possibilities for expanding that
23 in other areas. And I see my time is up, so I'll stop
24 and look forward to the discussion.

25 MS. FEUER: Great, well, thank you, Mary. And

1 I think that really helps articulate some of why the FTC
2 is very interested in this topic.

3 I'm going to turn now to Professor Zaring and
4 sort of, as he knows, sort of throw out this first
5 question, is, you know, so why are we seeing this, not
6 only in the areas that the FTC is involved in, but why
7 are we seeing codes of conduct in the cross-border
8 context in a variety of disciplines.

9 MR. ZARING: Great. Well, thanks, and that's a
10 question I hope to answer. It's a pleasure to be here.
11 And what I'll do when I talk about, you know, the answer
12 to why is there such a rise in this sort of cross-border
13 code of conduct style of regulation is salt my sort of
14 discussion with examples from the financial sector, which
15 is the sector I know best and where I think global
16 regulatory cooperation has really developed at warp
17 speed.

18 The three reasons why I think that there's a
19 real rise in an effort to regulate across borders
20 cooperatively among agencies may not surprise you too
21 much. The first is globalization. As Commissioner
22 Ramirez said, globalization is a fact. The global
23 economy is the economy now that domestic agencies need to
24 regulate, and, you know, the case studies, you know,
25 about this are manifold.

1 The SEC has found that over half of their
2 insider trader investigations have a foreign component,
3 that is, some aspect of the trade, the tipper, the
4 tippee, or the information, comes from overseas. So, you
5 know, they feel they can't meet their obligation to
6 regulate insider trading without the ability to work with
7 their foreign counterparts.

8 Secondly, I think there's another reason for
9 this rise that also may not surprise the regulators in
10 the room, is that regulating cooperatively gives agencies
11 the prospect of leveraging their resources with those of
12 foreign agencies to meet their regulatory mission or a
13 way for the private sector to do the same sort of thing.
14 So, when confronted with the daunting prospect of making
15 sure that not just American banks but that foreign banks
16 that do business in the United States, which is almost
17 every foreign bank of any size, the Department of the
18 Treasury feels that it's simply better to be able to rely
19 on foreign bank supervisors to do some sort of the work
20 they need done to make sure that those banks are somewhat
21 stable, or at least roughly as stable as American banks
22 are hopefully supposed to be.

23 And then the third reason why we see these
24 cross-border codes of conduct is it's a lot easier than
25 the usual response of international law to global

1 problems, which is to conclude a treaty. The United
2 States is unique for being essentially unable to ratify
3 any treaties now. But, in general, it takes years, if
4 not decades, to negotiate treaties. You have to bring in
5 diplomats. And the alternative, which is to have
6 regulators talk to their foreign counterparts or to have
7 regulators work with business and regulated industry
8 interests, has just come to look a lot easier than that
9 traditional public governance alternative.

10 So, what I think you see are, you know, three
11 kinds of responses based on these three phenomena that
12 give rise to the rise of cross-border codes of conduct.
13 And sometimes you see, you know, sort of public
14 regulatory responses. Sometimes you see hybrid
15 regulatory responses. And sometimes you see private
16 regulatory responses.

17 So, the public responses are ones that I'm
18 particularly familiar with, and they range from agency
19 agreements with one another that can look like actual
20 rules, the Basel Committee's agreements on the capital
21 adequacy rules that apply to large international banks is
22 a reason of that, to something much less rule-like, like
23 agreements to cooperate in enforcement resources or to
24 promulgate sort of best practices for regulation and
25 supervision. And as you all know, those sorts of best

1 practices are kind of promising. You see them in the
2 private sector as well. And the idea is to find, you
3 know, the best in an industry, set that to be the
4 benchmark, and then try to meet it.

5 Ideally, some scholars think this can lead to
6 virtuous circles of regulation. You set a benchmark,
7 everybody meets it in either the public or the private
8 sector, and then you look around and see if anyone's
9 innovated in a way that enables you to set a new
10 benchmark for better or more efficient regulation.

11 Okay, for public/private hybrid methods of
12 international regulation, I guess an example of this that
13 is of maybe some interest lies in the growth of
14 international accounting standards. So, the SEC was
15 interested, and as would anybody maybe to, you can see
16 the efficiency reasons to have companies in Stockholm,
17 Shanghai or Schenectady to be able to file the same kinds
18 of accounting results that could be interpreted by the
19 same kinds of people reading those reports.

20 But it was early in the '90s, the SEC walked
21 away from efforts to create a global set of accounting
22 standards. They liked American GAAP standards and they
23 thought, oh, well, we're the largest capital markets in
24 the world, why should we cooperate with a mechanism to
25 create a new set of global standards that might now be

1 inconsistent with American values.

2 So, the SEC walked away, but Europe didn't.
3 And a private organization in London, the International
4 Accounting Standards Board came up with IFRS, an
5 accounting system that with European prodding has become
6 essentially the other accounting standard in the world.
7 So, now, the SEC and the accounting industry, as with any
8 public companies, is faced with instead of hundreds or a
9 hundred or a multiple number of accounting standards,
10 there's now two: GAAP and IFRS. And increasingly it
11 looks like there's going to be one and it's going to be
12 IFRS.

13 So, one reason to think about public/private
14 mechanisms of regulatory cooperation is these things can
15 require -- develop a level of inertia. That level of
16 inertia can mean that they spread. The European Union's
17 really interested in spreading its standards of
18 regulation on a multinational basis. And the outcome can
19 be a fait accompli, where the United States has to comply
20 with a set of regulatory standards that they didn't
21 implement.

22 Okay, so, I am essentially out of time, so I'll
23 just briefly talk about the third kind of sort of cross-
24 border regulation, and that's private sector regulation.
25 We've already heard a little bit about that. And

1 sometimes this is an effort to forestall regulation;
2 sometimes it's an effort to manage competition, as I'm
3 sure we'll hear about later from Chairman Kovacic.

4 But sometimes businesses have ethical or
5 marketing reasons to make sure that their sourcing is
6 sustainable, that their ingredients meet certain
7 standards, and you can imagine the reasons why that might
8 be something that might be attractive to industry. And I
9 think agencies can benefit from these purely private
10 initiatives, with the exception that they can go wrong,
11 as we've seen in the Karachi fire case, which maybe we
12 can talk about later in Q&A if you're interested.

13 In my view, these private standard-setting
14 exercises can be useful for regulators, but they're best
15 served when there are strong industry interests to comply
16 with those standards, and also where agencies can review
17 to see whether those standards are being, in fact,
18 complied with relatively easily. That's not the case
19 with every kind of purely private mechanism of
20 regulation, but where it is the case, I think it's a
21 promising alternative to more public approaches.

22 MS. FEUER: Thank you, Professor Zaring. Well,
23 you have brought up a lot of issues that I think will
24 help stimulate very robust discussion.

25 For now, I'm going to turn to Professor Cho,

1 who I believe you have a PowerPoint, and you can use the
2 lectern, and hear some other perspectives on this issue
3 of the rise of cross-border codes.

4 MR. CHO: Thank you. Once again, I'm glad to
5 be here, and thanks, Stacy, for organizing this wonderful
6 conference.

7 So, I'm from academia, so I warn you there
8 might be some jargons here, but I'm trying to minimize
9 the use of my jargon. But thanks, David, Professor
10 Zaring, put nice groundwork for my presentation. We are
11 working -- we've been working in similar process.

12 So, what's at stake? So, you know, this is new
13 thing, and we have two themes here. The first is
14 functionality. We're trying to achieve certain
15 regulatory goal, you know, initiated either by private
16 sector or public sector government agency. But one thing
17 common is we're trying to achieve certain regulatory
18 goals, such as consumer protection. That's one big
19 theme.

20 The second is governance. Some type of
21 governance, you know, is involved here. And what kind
22 of, what level of governance, that's the key of my
23 presentation today. The different level of governance
24 could be so called international government-to-
25 government, but my focus here is trans-governmental,

1 which means, you know, when you pierce the veil of the
2 government, the black box, you know, there is a people
3 there, like government official like Stacy, and I was a
4 government official myself in my past life. But, you
5 know, there's important, the dynamics is important, but
6 it's underappreciated and I think it's now time to bring
7 forth those kind of the dynamics to better understand
8 what's going on in this new area.

9 So, we love treaties. Like Professor Zaring
10 said, a treaty is a classical form of international
11 cooperation in trying to do some international, you know,
12 code. But not only there's logistical difficulties,
13 takes time, tedious, but there's a strong dilemma here, a
14 drawback, which is psychological, you know, difficulty,
15 psychological bias here, which means they don't like
16 binding. No country loves being bound by any kind of
17 commitment. And they are overcautious. And, you know,
18 that kind of impede the process of consensus and any kind
19 of cooperation.

20 And there's a lot of what-if question, what if,
21 what if. So, usually you end up with kind of, you know,
22 another jargon, the lowest common denominator, so if you
23 tried to draw a kind of tiger but you end up with kind of
24 drawing a cat. So, this kind of psychological, you know,
25 block, if we depart from this kind of rigid format, which

1 is a hard law, right, a bindingness, but what if it's not
2 officially binding but still we can create something
3 which is more kind of soft but still kind of feeling we
4 have to abide by this. Right? So, that's how -- that's
5 why we emphasize this government network.

6 This kind of network -- again, this is trans-
7 governmental, which means, you know, this sector-
8 specific, like this is all sector-specific. They have a
9 specialized something, you know, we have an environmental
10 agency here, a different agency focusing on different
11 subject matter of regulation, and those kind of people,
12 as a people, they stay in one post for 10 years, 20
13 years, and then they meet their counterpart in foreign
14 countries and they meet many times in conferences,
15 seminars, and they build up some kind of, you know,
16 relationship, I mean, you know, some kind of
17 understanding. They expand their shared ground.

18 Of course, I don't like to romanticize those
19 kind of -- the groovy kind of relationship, but
20 certainly, you know, what we see is kind of so called
21 epistemic, you know, professional in a kind of
22 understanding, shared ground. And that's critical to
23 build up something, if not, hard treaty but certain kind
24 of manual, guideline, protocol, if you like, gentleman's
25 agreement, but still this is something based on not

1 necessarily a kind of calculation or interest but, again,
2 understanding. We have to do it together and that's for
3 our common good. And the different kind of sociological
4 dynamic, that's important to understand why this kind of,
5 you know, phenomenon is so common today.

6 So, for what? This is a regulatory prototype.
7 Again, my apologies for jargon. But this is kind of so
8 called manuals, right, kind of code, protocol, if you
9 name it, right, we call it -- academia call it soft law.
10 Why? Because it's not treaty, right? But, again, still
11 something we feel we have to, you know, abide by. And
12 it's for our own good, right? We're not sacrificing
13 anything. So, that's a kind of a certain, you know,
14 basic form of new emerging norms.

15 So, now there is -- again, it's back to, you
16 know, the political, you know, players, even though this
17 network, this code of conduct, but still the destination
18 is how to harden it, right? The title of our conference
19 is "Enforcing Code of Conduct." I know, it sound like
20 paradoxical. Code of conduct, private thing, it's not
21 binding. But enforcing means make it binding, right?
22 So, this is a challenge, but eventually the government or
23 government organization like, you know, G-20 or other
24 international organization, they have to give their own
25 political capital and trying to, you know, enforce it,

1 make it formal. And I think that's a kind of last stage
2 of, you know, this life cycle of the codes.

3 Finally, always the question is is it
4 legitimate. So, what do you mean by being legitimate?
5 Two things. First, is it really effective? Do they
6 really work? Then the next question is how we measure
7 that, how we, you know, quantify that. That's one
8 challenge. The second one is the fairness. Okay, all
9 this private and public sector, you have resources, you
10 meet and you talk, but what about the developing
11 countries? Why -- what if they don't have those
12 resources and cannot afford to participate? That's a
13 future agenda. Thank you.

14 MS. FEUER: Great. Well, that was very
15 interesting, and I think we're sort of building more and
16 more for our discussion, but first I will turn to Joe
17 Mariano from the Direct Selling Association to talk about
18 a very specific example of a code of conduct.

19 MR. MARIANO: Thank you, Stacy. You know, it's
20 interesting, as I sit here, I'm reminded of that
21 Presidential Debate a few years ago -- the Vice
22 Presidential Debate, when Admiral Stockdale said, "Who am
23 I and why am I here?" Well, that's sort of the question
24 that some of you may be asking right now.

25 (Laughter)

1 MR. MARIANO: But, actually, as we prepared for
2 the session, and even as I heard all the speakers today,
3 I understand even more why I'm here today. It really is
4 a practical, real-world example of what's going on. Some
5 of the things that the Commissioner said and some of our
6 other panelists have said just ring so true with the
7 Direct Selling Association and our world body, the World
8 Federation of DSAs.

9 First, who direct sellers are, these are folks
10 who sell through personal explanation and demonstration,
11 usually in the home. And a great example is the home
12 party and door-to-door sellers and the like. Now, why
13 would we be interested in self-regulation, particularly
14 on a global basis? Well, you may or may not know this,
15 but right now there are Avon ladies, direct sellers,
16 floating down the Amazon River. And not just floating;
17 they're selling, that's why they're there.

18 And quite seriously, Brazil is now one of the
19 five largest direct-selling markets in the world. China
20 is as well; Korea is as well; Russia; Turkey; and, of
21 course, the United States being the most mature market
22 and the oldest. And I dare say many of you, if not all
23 of you, have some preconceptions about our industry and
24 our way of doing business. That's why back in the 1970s
25 we decided in the United States that we wanted to become

1 the most consumer-oriented progressive trade association
2 in the country. And the reason for that was because of
3 this negative reputation that we had and, indeed, some
4 real potential consumer and other types of problems in
5 the marketplace.

6 So, we had an obligation to get out there.
7 Just as Professor Zaring was saying earlier, yes, we
8 wanted to make sure that we precluded the need for
9 regulation by government. We also wanted to make sure
10 that our reputation in the marketplace was clean and
11 deserving and that we were able to do business.

12 Well, take that experience of the last 50 years
13 in the United States and translate that now to these
14 other markets, in fact, more than 62 markets where we
15 have DSAs, and 170 markets across the world, countries
16 where we are now doing business, of varying levels of
17 sophistication with government experience in regulatory
18 authority. So, how do we translate that figuratively and
19 literally to this international market? Well, we wanted
20 to make sure that our world body, the World Federation,
21 took what we had learned in the United States with the
22 self-regulatory code first adopted in the '70s and
23 transpose that, imposed it, if you will, on a worldwide
24 basis with all the same challenges that you've heard
25 talked about and I'm sure many of you are aware of,

1 literal translation issues, problems of authority. Who
2 are the people who are going to be doing that? What are
3 the standards of law that vary from market to market?
4 The things that apply in the United States may not very
5 well apply in Brazil or elsewhere. These are very real
6 challenges that we've had.

7 So, globalization of the industry was a
8 motivation; the reputation of the industry, and a sort of
9 self-protection, while, in fact, making sure we were
10 doing the right things in the marketplace were our
11 issues. We developed a world code of behavior, world
12 code of ethics, which, in fact, we could not impose on
13 these other 62 DSAs, but instead we said if you're going
14 to be a member of the World Federation, our umbrella
15 organization, you have to adopt this or something like it
16 and then also have an enforcement mechanism which meets
17 our standards.

18 So, again, this was a question of creating a
19 model, encouraging or requiring the adoption of some form
20 of the model, and then making sure that there was an
21 effective mechanism for the imposition of the standards.
22 Just quickly what are the standards, things like
23 prohibition on exaggerated earnings claims. You can't
24 run a pyramid scheme that takes advantage of people. You
25 can't impose large up-front purchase requirements on

1 individuals who are getting in; and, of course, general
2 prohibitions on unfair or deceptive practices with regard
3 to consumers.

4 Now, again, from jurisdiction to jurisdiction,
5 the law varies, and so we were very sensitive to that.
6 What have been the issues as we've gone forward to make
7 sure that all 62 at the very least of these associations
8 have these standards? First, the size and resources of
9 the market and the association there. Many of these
10 associations, unlike the DSA here in the U.S., are quite
11 small with limited resource, limited budget. How do you,
12 in fact, end up adopting and enforcing such a code?

13 The culture of the country. There may be a
14 very different consumer culture and general culture where
15 individuals are not comfortable going to a business or
16 self-regulatory organization or perhaps not even the
17 government to make sure that these things are taken care
18 of.

19 Communication and understanding. How do you
20 communicate somewhat nuanced concepts that are relevant
21 perhaps only to direct sellers to a marketplace that is
22 not familiar with this marketing method? How about the
23 imposition of -- seeming imposition of a U.S. standard on
24 these other independent countries and markets that we
25 have? And then another thing that the Professor just

1 mentioned, the legitimacy of the code. Is this really an
2 effective mechanism for, in fact, protecting consumers
3 or, in our case, not only consumers but also the people
4 who sell for us?

5 As we went through this process, and we'll talk
6 a little bit more hopefully through the questions and
7 answers, we also found, as the Professor suggested, that
8 sometimes this was like beginning to draw a tiger and
9 ending up with a cat, because what we wanted to do was
10 take something that looked, we thought, like a tiger here
11 in the United States and trying to make it into a tiger
12 abroad. Didn't quite always work, and it's still a work
13 in progress. And I look forward to discussing it with
14 you in greater detail.

15 MS. FEUER: Great. Well, I like that tiger-
16 and-cat analogy, and I think it's a nice segue to Robin
17 Simpson, who --

18 MR. SIMPSON: Why?

19 (Laughter)

20 MS. FEUER: I think it's a nice segue to Robin
21 from Consumers International, who has both participated
22 in developing multinational schemes and also at times
23 been a critic. So, I'll turn it over to Robin for his
24 first five minutes.

25 MR. SIMPSON: Thank you, Stacy, and thank you

1 for having me. It's a great pleasure to be here. I
2 teased Stacy when I received the invitation, saying that
3 given that I give the FTC quite a hard time and the OECD,
4 Consumer Policy Committee in the OECD, it's extremely
5 sporting of them to have invited me here today.

6 Perhaps if I -- one of the best ways to
7 contribute, I think, to the discussion following the very
8 interesting submissions we just heard is to describe the
9 range of things where consumer organizations have been
10 invited to take part. Consumers International is a
11 federation -- a global federation -- with our head office
12 in London of consumer associations.

13 And, so, our largest member in the world is --
14 happens to be the main United States consumer
15 organization, Consumers Union, who publish Consumer
16 Reports. They are a founding member of Consumers
17 International, a very, very longstanding member. And we
18 also provide the secretariat for the Transatlantic
19 Consumer Dialogue, which involves 27 United States
20 organizations and 50 European consumer associations.

21 Now, Consumers International have to take part
22 in many international negotiations, and I am one of the
23 people who negotiates across the table with the FTC and
24 other intergovernmental colleagues, for example, in the
25 OECD. But we're currently also working in the United

1 Nations on the guidelines for consumer protection, which
2 place a very heavy emphasis on self-regulation. We want
3 to see that updated.

4 We're very much involved in the negotiation of
5 individual standards, international standards through the
6 International Standards Organization, ISO. Currently I'm
7 working on both financial services, money transfer
8 services, and energy services. We've done water. We
9 were heavily involved in the ISO 26000, the famous
10 standard on corporate social responsibility, which some
11 of you may well be aware of.

12 The World Intellectual Property Organization.
13 The G-20, I've spent 18 months killing myself working on
14 the G-20 high-level principles on financial consumer
15 protection. We're rather disappointed with the wording,
16 though we welcome some of the detailed comment. And that
17 was seriously heavy -- heavy going, and we were
18 frustrated by the reluctance of the industry to come out
19 in public and debate many of these issues, but there we
20 are, the guidelines are up and running.

21 The World Health Organization codes on
22 marketing of food and drink to children in light of the
23 obesity pandemic, which is inflicting the world. We've
24 been very much involved with that. And with the
25 multinational enterprise guidelines of the OECD that

1 Peter will be discussing with you later.

2 So, the range is absolutely huge. And I think
3 Professor Cho made a very interesting observation, which
4 is frequently the negotiations in the -- across the table
5 often are as fierce as if we were indeed negotiating
6 international treaties. And sometimes I want to say,
7 Hang on, guys, these guidelines, for heaven's sake, you
8 know, nobody's going to die out there. They're meant to
9 be voluntary. And there is this ambiguity about many of
10 these documents. And, again, Professor Cho observed this
11 ambiguity.

12 Let me read to you something about the
13 multinational enterprise guidelines written by the OECD
14 in its own publication. And it says, "While not legally
15 binding, all multinational enterprises headquartered in
16 adhering countries are bound to comply." Now, I've tried
17 to deconstruct that sentence, and this is written by the
18 guys who drafted it. So, there is an ambiguity.

19 Now, personally, I am very pessimistic about
20 the prospects of taking a strictly legal approach to the
21 kind of codes that we're discussing today. I think
22 they'll get bogged down in interjurisdictional disputes.
23 I think they'll have many of the defects of the legal
24 system and few of the virtues, actually, because of that
25 ambiguity which surrounds them.

1 So, I think that the basic virtue of these
2 schemes, and we are in favor of self-regulation, within a
3 regulatory framework. We do support the concept of self-
4 regulation that meets the concept of a public commitment
5 to a certain standard of behavior. And sometimes it's
6 governments that equally commit, such as in the OECD
7 guidelines on financial services, it's effectually
8 governments that are committed to legislate. But, again,
9 nobody's going to be able to take them to an
10 international court if they fail. And sometimes it's
11 companies. And we're in favor of both of those kinds of
12 commitments operating in parallel.

13 But one point which I do wish to make is that
14 many of these commitments are not just on companies; they
15 are indeed also on governments and jurisdictions. And
16 it's quite hard to distinguish between those commitments.
17 They do actually run in parallel.

18 Last point is that there is -- we do believe
19 that self-regulation works best in a regulatory
20 framework. This is fairly common ground. The pendulum
21 is swinging, but there have been certain sectors,
22 financial services notoriously, which have been under
23 regulated in the traditional way. The sentiment is very
24 strong now in Europe on that. But I've also encountered
25 many companies who want to be better regulated. And

1 maybe we'll talk about that in due course. They are
2 actually remarkably relaxed about the prospect of
3 regulation as well as self-regulatory codes. And maybe
4 we'll elaborate on that in the discussion.

5 So, thank you for having me, and I'll look
6 forward to the day.

7 MS. FEUER: Great. So, this is a lot, I think,
8 for us to chew on and debate and think about. What I'd
9 like to do is start by throwing out a question to the
10 panelists and to encourage the panelists to encourage on
11 each others' presentations.

12 We'd also like to make this fairly interactive.
13 So, if you do have a question, stick up your hand. We
14 have some microphones in the back and we can bring them
15 around to you. And, so, I don't want to just leave the
16 Q&A for the end, but have it be part of our discussion.

17 So, I'm going to throw out somewhat of a
18 provocative question, and I think everybody here might
19 jump at it. And that's this: Do we really need these
20 multi-stakeholder codes of conduct? What if governmental
21 enforcers had better regulatory cooperation with their
22 counterparts, something we've been discussing a little
23 bit? For example, the Administrative Conference of the
24 United States just came out with a recommendation
25 encouraging all U.S. agencies to engage in better

1 international cooperation, both substantively and in
2 terms of enforcement with their foreign counterparts. If
3 we have better government-to-government cooperation, do
4 we really need these multi-stakeholder, public/private
5 hybrid schemes? Or is there still a role for them? And
6 I'll throw that out to whoever wants to take it first.

7 MR. MARIANO: Let me try, because I'm the
8 quasi-private sector guy here, even though I work for a
9 nonprofit. You know, clearly I think even within the
10 confines of the United States the regulatory framework
11 for every industry can't be as thorough as a self-
12 regulatory framework can be. So, translate that to a
13 global environment and you see the challenges of both the
14 substantive knowledge that would be required of
15 government regulators, as well as the resource questions.

16 In the United States you all know better than I
17 about the challenges that we see for consumer protection
18 organizations domestically. Now on a global basis you're
19 talking about the marshaling of those resources. And I
20 think the only way to make sure that there is this
21 complementary system of self-regulation and government
22 regulation is to, in fact, make sure that there is
23 sufficient self-regulation.

24 MS. FEUER: Let me ask Mary if she has any
25 thoughts about that. If we just had better enforcement

1 cooperation and regulatory cooperation with our
2 counterparts abroad, would we still need these cross-
3 border codes of conduct?

4 MS. ENGLE: No, I agree with Joe, because, I
5 mean, they are complementary. You know, they're not
6 substitutes. And I think it is a good point about the
7 depth of experience. I mean, the FTC is a primary law
8 enforcement agency, but we are regulators as well. And a
9 regulator can't know all the ins and outs and doesn't
10 have the flexibility, also, to adjust things as times
11 change, as technology changes. So, I feel like it's --
12 and just even the resources. You know, there is just way
13 more out there. I mean, that's the thing I really see on
14 a day-to-day basis is just the kind of enforcement and
15 monitoring that the private codes can bring to bear
16 really adds to the ability of the government to police
17 the market.

18 MS. FEUER: Robin, can I --

19 MR. SIMPSON: Yes, I would like to comment on
20 that. Yes, we definitely do need another forum than
21 simply government regulators cooperating with each other
22 because just because -- I mean, although I think there
23 are instances of under regulation it doesn't necessarily
24 follow that regulations are that wonderful.

25 I mean, right down the road from here in Blair

1 House, in 1992, I think it was, the United States and the
2 European Union reached an agreement to effectively
3 suspend the rules of the WTO in the agriculture sector.
4 And, so, I think the fact that governments may agree with
5 each other doesn't necessarily make it right for
6 consumers.

7 So, you know, there are also instances, of
8 course, where countries don't actually have any
9 regulations. I mean, I work a great deal in many
10 developing countries, but I'm not just talking about
11 developing countries. There are plenty of sectors which
12 remain heavily under regulated. If there isn't a proper
13 regulatory structure in place, the world doesn't stand
14 still. We don't live in a vacuum. We'll get fooled.

15 I have worked in Russia, where businesses who
16 were trying to build up a decent service and a decent
17 reputation among the Russian public were very frustrated,
18 not just by the absence of regulation but also by the
19 contradictory nature of that regulation which did exist.
20 In those circumstances, they wanted to have international
21 models on which to build.

22 So, the idea that government regulators between
23 themselves can sort things out, yes, of course we do need
24 that when it comes to fraud, when it comes to many of the
25 dubious products that have appeared in the financial

1 services sectors in the last decade, yes, of course
2 that's true. But you need third parties at the table.

3 MS. FEUER: David, Professor Zaring, I'm
4 wondering if you're going to sort of join this consensus
5 or challenge it?

6 MR. ZARING: Well, I mean, I think -- I think
7 that government-to-government regulation is really
8 promising. I talked about it a little bit. And there's
9 also an Executive Order now, which I know doesn't bind
10 the FTC, but that encourages agencies located in
11 departments to actively pursue international regulatory
12 cooperation.

13 I think sometimes -- hopefully I won't restate
14 what other people have been saying, but sometimes the
15 question as to whether we want to sort of try to leverage
16 the private sector depends on the kind of regulation
17 involved. And, you know, one of the places you see this
18 coming up is with sort of regulation of the food chain,
19 or you can broaden it more generally to the supply chain
20 of consumer products more generally.

21 But there's a question for regulators that is,
22 you know, is what we're trying to regulate here something
23 where we're trying to regulate the whole process of
24 supply? Do we need to figure out whether the dairy
25 farmers are treating their cattle in a particular way,

1 whether they're adding adverse chemicals to the milk,
2 which then gets turned into some sort of food product
3 that gets added to another food product that gets
4 eventually sent to you American consumers?

5 And, you know, there's been this view that you
6 could regulate that at the choke point, at the ports,
7 when it enters the United States you could apply American
8 regulatory and safety standards to the product. But I
9 think increasingly food and consumer product regulators,
10 and I guess we'll hear more about this later, think that,
11 you know, it's better to go with a whole process
12 approach, where somebody's looking at every part of this
13 process of creating these consumer products, even though
14 the regulators themselves may, in fact, pay particular
15 attention to those choke points. And maybe the HSA
16 process is a little bit like that.

17 But if you're going to engage in that kind of
18 whole process regulation, then I think it's great to be
19 able to leverage the private sector as well. And, I
20 mean, I also agree that it's worth noting -- it's worth
21 figuring out whether, you know, the private sector may be
22 able to innovate in coming up with regulatory standards
23 that are useful. And it may be more easy for them to
24 come up with novel approaches to solve regulatory
25 problems than it is for regulators themselves. And of

1 course regulators can always ratify those innovations
2 with regulation later, so that's another thing the
3 private sector offers maybe.

4 And then finally I agree with Mary. There's
5 this question of, you know, are you setting standards or
6 are you engaged in enforcement. And if it's enforcement
7 that's your big question, then maybe enforcement
8 cooperation can get you a lot of the place to where you
9 want to go. But if you're setting standards that apply
10 to a whole industry, it seems that there the costs and
11 benefits may work out differently.

12 MS. FEUER: Professor Cho, any thoughts?

13 MR. CHO: Yeah, let me say two things. First
14 of all, you know, the first one is talk and second thing
15 is about money. The first, talk, you know, enforcement
16 is only part of the regulation. You know, you have to
17 know what to enforce and why to enforce, right? So, you
18 deal with from the American -- the government
19 perspective, you deal with two different entities. The
20 first one is private sector regulatees; and second is
21 your equivalent and counterpart in other countries. But
22 if your regulatees in other country is not very clear
23 about why you've enforced this, right, there's no strong
24 effectiveness of this kind of control. So, my point here
25 is communication should come first before the control.

1 So, you have to invest in more time in the communication
2 and delivery why and what to enforce and why.

3 And second is money. Actually requires a lot
4 of money to enhance this kind of international
5 corporation, but this is true, you know. I would be
6 happy to see this kind of conference in Shanghai and
7 Korea and in African countries. And, also, they need
8 capacity. So, American or European countries, which
9 afford those kind of resources, they have to lend a hand
10 to enhance their capacity. That, I think, is important
11 factor.

12 MS. FEUER: So, these are all really
13 interesting points. I have a ton of questions, but I do
14 want to see if there are any questions in the room. I
15 see Scott. If you could just wait for the mic and
16 identify yourself.

17 MR. COOPER: Hi, I'm Scott Cooper with the
18 American National Standards Institute, and I think this
19 is a great first panel because it's discussing the
20 issues, I think, that hopefully the following panels will
21 get into in more detail. I'm also pleased to hear that
22 there seems to be consensus that there is a role for
23 codes and standards, and private sector efforts have to
24 be part of that system. And there has to be obviously a
25 continuity between the public and the private side on

1 that.

2 One of the things that I think that needs to be
3 discussed, though, and I'm hoping that this very expert
4 panel can at least begin that discussion, is a point that
5 Mr. Simpson made, is that sometimes it's so difficult in
6 the meetings to develop the code or develop the standard
7 or develop the public/private relationship that sometimes
8 it's just sort of sent out and people walk away and they
9 go back to whatever they were doing before.

10 And in most cases, I don't think it's the
11 standard or the code that is likely to be the problem. I
12 mean, when there's lead in toys, it's not the toy
13 standard. There's no toy standard in the world that says
14 it's okay to have lead in toys. It's the conformance to
15 that standard. It's the testing, inspection, and
16 auditing to that standard, I think, is the problem.

17 And it comes up to what I think Professor Dave
18 Zaring was saying, is that you can do all the inspection
19 you want at Newark or Long Beach, it won't make any
20 difference on global supply chains. You have to go to
21 the field or to the factory. And then the U.S.
22 Government has no standing overseas. So, it has to be
23 third-party if you're really going to be successful at
24 that, but it's got to be, I think, accredited. It's got
25 to be reputable third-party, not just any third-party.

1 And I'll throw out the example of the credit-rating
2 agencies that went from giving subprime mortgages AAA to,
3 you know, CCC in it seems like a period of a few days.

4 So, you need to have that oversight to make
5 sure that even your third party is doing well, but that
6 should be, I think, the discussion, that if we are in
7 agreement -- general agreement that third party is
8 important, that codes in private sector -- in
9 public/private sector enforcement is important, how do we
10 effectuate to make sure that that's actually going to
11 succeed in the real world. What are the practical
12 solutions that we need to develop here?

13 MS. FEUER: Wow, so, that's a very pragmatic
14 question, I think, not just sort of why are we seeing
15 these arrangements, but -- and I think we'll be touching
16 on this throughout today -- you know, what makes them
17 effective, what makes them legitimate. Does one of my
18 panelists want to take a crack?

19 MR. MARIANO: I'll try again first. I think
20 from a private sector perspective one of the things that
21 makes the standards which we have agreed upon effective
22 and credible, with our own members, the people who are
23 subject to our self-regulatory code, is, in fact, the
24 threat of real government action and enforcement, if you
25 don't abide by our standards or more importantly what may

1 be a similar or even lower standard from a government
2 perspective. And I think ultimately, especially when
3 you're challenged for resources in terms of enforcement,
4 even within the private sector self-regulatory
5 organization, it's the teeth of the government that
6 ultimately gives that real value.

7 Now, how the government, you know, develops
8 those resources to make sure that you actually are able
9 to enforce is another question.

10 MS. FEUER: Right, and I think that gets a lot
11 to issues of sort of design, because we sort of lumped in
12 a whole range of mechanisms under this term "enforceable
13 codes of conduct," and I think, you know, some have more
14 government involvement, some have less government
15 involvement, and it will be something interesting to
16 explore.

17 Anyone else want to take a crack at --
18 Professor Zaring?

19 MR. ZARING: I'll just say that in some cases,
20 you know, you can hope for labeling to be -- you know, if
21 that's of interest to, you know, the industry that's
22 being regulated either privately or possibly publicly,
23 and if the label that says "we're in compliance" is
24 perceived by them to be something of value, then I think
25 it might be an opportunity for private sector regulation

1 to have a real effect.

2 And I think it's -- you're right, it's not the
3 case that that's going to be the case in every private
4 regulatory process. And, also, and this is a bit
5 orthogonal to the point, but Sungjoon and I both briefly
6 touched on it. You know, one thing you have to worry
7 about with the private codes of conduct is, you know,
8 were these arrived at legitimately, were they open for
9 the sort of comment or the sort of good administrative
10 practices that we expect from public regulation. And
11 maybe that's another way of figuring out whether you're
12 in a promising area or not, how are these codes devised,
13 and how can they be amended.

14 MS. FEUER: Yeah, and I think that's a
15 particularly interesting point in the cross-border
16 context because, for example, Robin was talking before
17 about the U.S. and the EU, but there is a whole world out
18 there, and I think one of the questions is as these codes
19 proliferate are they just U.S./EU codes or who else is
20 coming to the table.

21 And I was very interested with Joe's image of
22 the Avon ladies floating down the Amazon and the idea
23 that there are all these sort of developing markets
24 coming in. And I wonder if any of you have any thoughts
25 about the rise of these cross-border codes outside that

1 sort of U.S./EU developed world framework.

2 Professor Cho?

3 MR. CHO: Just let me mention one thing, an
4 idea. The gentleman who questioned -- this is an
5 important question, especially from the standpoint of
6 global supply chain. And it's really challenging to make
7 things work, especially in the testing, sampling, and so
8 called the conformity assessment, who has to take charge.
9 And I think it's end of it, because of this new
10 phenomenon, you know, it is interest of actually the
11 industries themselves, you know, to comply with this kind
12 of -- not only the reputation, but also, you know, as
13 part of the properties nowadays, right, whether to comply
14 with those regulations.

15 And, also, there is emerging kind of sign of so
16 called race to the top, you know, different kind of
17 labels and a certificate and if you are a product, you
18 know, is -- we just received this kind of, you know,
19 certificate. That makes your products more sellable, I
20 think, so I think a lot of new kind of regulatory
21 competition in a benign sense is out there.

22 MR. SIMPSON: Stacy, can I say something?

23 MS. FEUER: Yeah, Robin.

24 MR. SIMPSON: Yeah, I mean, thank you to Mr.
25 Cooper for the question. Given that you are from the

1 standards institute, I think it is worth sharing with you
2 my experience in many African countries, where the
3 absence of legislation, the actual development of
4 standards, is seen sometimes wrongly, but generally
5 speaking correctly, as a darn sight better than nothing.
6 And, so, the reason why I'm slightly qualified about that
7 is that sometimes people attribute to standards the
8 properties that we expect of legislation. So, there is a
9 certain risk of confusion there.

10 But nevertheless, in many parts of the world,
11 international standards are the most realistic prospect
12 of getting something done in a sector where there is at
13 the moment nothing at all happening. And, now, we don't
14 want the best to be the enemy of the good. If we wait
15 for legislation in many parts of the world then we'll be
16 waiting for a very long time.

17 You know, we haven't done the great job in the
18 last two years here in the rich countries in terms of our
19 financial services sectors. Look at the consequences
20 now. But in many parts of the world where the
21 legislative accumulated body of law is very thin,
22 standards can actually be a much more rapid way of moving
23 forward. And the very fact that you can buy in, get in -
24 - and I don't mean buy in in the wrong sense -- that you
25 can get buy-in from industry, I mean, commitment to

1 applying a set of standards makes them all the more
2 likely to succeed.

3 MS. FEUER: And I think that's an interesting
4 point and one that I think we'll explore a little bit
5 more in this afternoon's panel on toy and food safety,
6 and that is the sort of role of standards and its
7 relationship to government rule making. You know, I
8 think it's interesting that the ISO, the International
9 Standards Organization, is one of those very multi-
10 stakeholder bodies, right, where you have governments
11 represented, industry represented, civil society
12 represented, and so it is an interesting model.

13 Are there any -- I see a question from the
14 floor in the back here. Last row. And if you can again
15 state your name and identify yourself.

16 MR. CROFT: I can just project if that's okay.

17 MS. FEUER: Could you stand, then?

18 JOHN CROFT: Sure. John Croft with Reed
19 Elsevier, and this is -- I think this is a fascinating
20 topic, and it's a fascinating panel with what you've
21 presented. And maybe you'll get to this in the
22 afternoon, but my question is have you -- is the panel
23 aware of any other areas where there's been successful
24 cross-border codes of conduct? I'm supposed to use the
25 microphone.

1 Is the panel aware of any other examples where
2 there's been successful cross-border codes of conduct in
3 other areas? And I'll just, not knowing those other
4 areas, I mean, for example, aviation or
5 telecommunications or customs or IP, are there examples
6 -- case studies you can look to that are ones that are
7 successful and perhaps those that are maybe not so
8 successful that you can learn from?

9 MS. FEUER: Well, I'll leave this to the
10 panelists, but I think one of the reasons why we convened
11 this workshop was that we saw that this was happening in,
12 you know, not only the financial sector but the
13 environmental sector, labor, human rights, you know,
14 obviously privacy. So, it was a phenomenon that we're
15 interested in exploring in part because of the sort of
16 wide topic areas. But I will turn to the panel to give
17 some examples, if you will.

18 Sungjoon, I know you've written --

19 MR. CHO: Yeah, let me -- I don't know, maybe
20 this is good or bad example, but let me give an example:
21 flu shot. So, every year we get flu shot, you know. And
22 this is something someone have to regulate. Of course,
23 there must be a lot of regulation, Federal regulation
24 about the flu shot. But, anyway, international level,
25 how -- do we have any kind of treaty about regulating flu

1 shot? I don't think so, you know. Of course, it's the
2 taking -- taking care of the World Health Organization,
3 but they should have some kind of code among themselves.

4 But what they're actually really doing is the
5 bunch of the smart, you know, Ph.D.s, you know, they
6 collect information every year from all over the world,
7 and then they make a cocktail, right, about this, you
8 know, vaccination. And then it all -- of course a hit or
9 miss, but they do their best, and then those -- the
10 prototype is, you know, the vaccine, you know, going to
11 different countries.

12 And then United States, Korea, in Japan,
13 they're all using this, you know, without asking whether,
14 you know, it's binding or not, you know. So, I think is,
15 you know, the necessity, right? And also the -- you
16 know, the trust, I think, that's the quality, the essence
17 of this new phenomenon, and of course some areas is
18 working better than other areas, but I think the flu shot
19 can be kind of an anecdote for that, you know, example.

20 MS. FEUER: So, we have flu shots without any
21 kind of codes or regulations. I'm wondering, you know,
22 no? Do you want to --

23 MS. TAYLOR: There is actually a regulatory
24 framework which does involve public/private partnerships
25 in influenza --

1 MS. FEUER: Do you want to -- can you maybe
2 identify yourself and just tell us about it?

3 MS. TAYLOR: Well, I didn't really want to talk
4 about the flu. I'm Ellen Taylor, I teach at Georgetown.
5 I actually had a question. And I work for WHO. For
6 Professor Zaring and Mr. Simpson regarding the use of
7 these codes of conduct, particularly in developing
8 country settings.

9 Professor Zaring, you made the very important
10 point that the efficacy of these codes depends on large
11 part on the willingness of the interested industry to be
12 regulated. One of the driving forces behind the
13 framework convention on tobacco control was the failure
14 of these kinds of codes, not only in low-income states
15 but in the high-income states. And now we have a lot of
16 interest in developing regulatory mechanisms on alcohol
17 marketing, on food marketing. How could you develop some
18 kind of effective code that's going to work in low-income
19 states, in these areas where there's really strong
20 industry interested in not effective regulation?

21 MR. SIMPSON: The WHO code on marketing to
22 children is a very good example. We've been very heavily
23 involved in that really for the last 10 years or so. And
24 the results are extremely disappointing. Now, it's
25 interesting that I heard Stacy once give a presentation

1 on the American code in the OECD, which I thought, you
2 know, sounded really rather good. It definitely sounded
3 like practice, like progress of the kind. But the
4 progress worldwide is extremely limited, and things are
5 probably getting worse rather than better at the present
6 time. It's driven us to a much stronger position than
7 we'd held at the outset, which is that many of our
8 members are saying, frankly, we don't think any
9 advertising should be directed to children at all.

10 So, now, one can argue for and against that. I
11 think on the whole I'm inclined towards that view myself.
12 But it does indicate there is a lesson, a broader lesson
13 there, for industry people to bear in mind and government
14 people to bear in mind. If the code doesn't work, then
15 people are going to say, well, you see, the code doesn't
16 work, we need legislation after all. So, simply adopting
17 a code of practice which you may put your name to and
18 then don't really apply it in principle. The world won't
19 stand still.

20 And, so, I think we may well find that just as
21 the -- eventually we've got tobacco advertising bans in
22 Europe, which I strongly -- which I campaigned for. I
23 think with regard to the food marketing to children, I
24 think you will get advertising bans for any kind of
25 advertising directed towards children if a code will not

1 work.

2 MS. FEUER: Professor Zaring?

3 MR. ZARING: So, I think, you know, improving
4 conditions in the developing world is always a difficult
5 question. And one of the things I think you might be
6 looking for is, you know, export-oriented industries.
7 It's long been a hope that, you know, it's Nike and
8 WalMart that are going to improve labor conditions in
9 countries in which they do business more easily maybe
10 even than the governments of those countries.

11 Now, of course, we've seen with the Karachi
12 fire tragedy that just because there's an export-oriented
13 industry that's a case where there was a factory in
14 Pakistan that was making blue jeans for sale in Europe
15 that had, I think, not just subscribed to an industry
16 code of conduct but also had a third-party sort of
17 assurance, you know, sort of organization coming in to
18 make sure that the organization was compliant. And then
19 there was a fire and there was only one exit, and it was
20 even worse than the Triangle Shirtwaist company fire in
21 New York at the turn of the 20th Century.

22 So, you don't know that just because you're in
23 an export industry conduct context that your codes of
24 conduct are going to be observed, but at least you have
25 companies with incentives to comply and the capacity to

1 impose conditions on their suppliers in a way that again
2 governments just can't necessarily do, I think, in that
3 part of the world, which leads to, you know, the second
4 thing I often think when I think about the difficult
5 question of how to get labor and safety standards imposed
6 in, you know, developing world countries is, you know,
7 you're dealing with a context where almost no option is
8 going to be as effective as you'd like it to be. So,
9 you're looking at the best of a bunch of bad options, and
10 so that's, you know, and sometimes you have to sort of
11 settle for the pretty good, at least especially in that
12 context.

13 MS. FEUER: Thanks. Professor Cho wanted to
14 say something, and then I have a question I'm dying to
15 ask.

16 MR. CHO: Right, thanks for your response.
17 Actually, what I meant was, you know, I don't think there
18 is a sector-specific treaty about the flu shot, right?
19 So, my point was there are certain regulatory framework,
20 but it's not treaty, but more like, you know, the
21 internal code or some, you know, internal guidelines,
22 right? Am I right? On an international level.

23 MS. TAYLOR: It is an international framework
24 binding on WHO and with networks of laboratories are our
25 binding agreements, but it is not a treaty.

1 MR. CHO: Yeah, it is not a treaty. That's my
2 point, you know, so it is not a treaty. There's no so
3 called under the classical public international treaty,
4 but that kind of regulatory body, I mean, the output is
5 kind of a new phenomenon. Sometimes it works better than
6 treaty, right?

7 MS. FEUER: Right.

8 MR. CHO: That's my point.

9 MS. FEUER: So, let me ask -- actually, I'm
10 going to ask two questions as we start to sort of wrap up
11 the panel. Oh, and I see there's one from the floor.
12 Let me ask my two, and maybe then you can ask your one,
13 and panelists can take them all together.

14 My first question is it's kind of interesting
15 to me that a lot of the discussion this panel has focused
16 on things that are tangible goods. And I know, Robin,
17 when we talked earlier you had suggested that one of the
18 reasons for the rise in cross-border conduct was also
19 increased global trade in services.

20 At the FTC, we also spend a lot of time
21 thinking about that borderless online world that
22 Commissioner Ramirez mentioned. And, so, one of my
23 questions is how do we think about this in the sort of
24 Internet world.

25 And then my other question, which I'll throw

1 out and perhaps at the risk of seeming too self-
2 interested, is we've been talking about this really in a
3 global way, but at the end of the day at the FTC we're
4 charged with protecting American consumers. And, so, I
5 have a question about whether the rise of these cross-
6 border codes of conduct is something that's good for
7 American consumers.

8 So, those are my two questions. I want to ask
9 the gentleman here to ask his question, and then maybe
10 we'll have some dialogue go on those three questions.

11 MR. HENRY: Clifford Henry, Procter & Gamble.
12 And for the academics, well, Robin, you may have -- you
13 may want to weigh in on this. You know, I think it was
14 good to make that distinction between hard and soft law,
15 but there is one example, and that's with the ILO, where,
16 yes, we did have opportunities with the core conventions,
17 which those who might not know, they had to do with child
18 labor, forced labor, freedom of association, collective
19 bargaining, and discrimination.

20 So, in some of those poor records with treaties
21 being ratified but the governments, trade unions, and
22 business came together and we now have this declaration
23 on the fundamental rights and principles, which all three
24 parties have said people need to respect. And, oh, by
25 the way, governments, even if you have signed the

1 treaties, it's here and you need to come to Geneva and
2 explain what you're doing towards those. So, is that
3 sort of a compromise between the hard law treaty that you
4 say some countries don't like and the soft law, which is
5 sort of just a voluntary with no teeth at all or it's
6 more -- I would say this is not -- it's an in-between
7 between the cat and the tiger.

8 MS. FEUER: Okay, so three questions on the
9 table, this sort of model from the field of labor and the
10 ILO and sort of that model and whether it bridges the
11 gap; the question about our borderless Internet world;
12 and then the question about American consumers.

13 MR. MARIANO: Let me take the last two first,
14 if I can, Stacy, with regard to Internet and borderless
15 world, as well as American consumers, and then I'll leave
16 the other, ILO, to the true experts in that subject.

17 I think clearly, clearly right now with
18 business being done by our individuals for both services
19 and products, by the way, tangible goods as well as
20 opportunity, using the Internet, now a consumer or a
21 practitioner of a business, a small business, is doing
22 business effectively globally. And what we have found is
23 that when you're doing business in 170-plus markets and
24 you only have a self-regulatory mechanism of whatever
25 degree of effectiveness in 62 of those markets, it's a

1 real problem.

2 And, so, what we have done is enforced our code
3 extra-territorially, meaning that even U.S.-based
4 companies or other companies elsewhere are going to be
5 subject to the provisions of our world code or in this
6 case our U.S. code, even if they're in a market where
7 there's no DSA and self-regulatory mechanism. So, a
8 consumer or other complainant can bring the complaint
9 here or in another market where there is a code and ask
10 our independent administrator to enforce the code on a
11 global basis. And that has become particularly critical
12 in an Internet-based world again where people are doing
13 business.

14 I found your question about the benefits
15 perhaps to American consumers of great interest, because
16 we have an attitude in times in the United States,
17 particularly as a mature market, in a sector to say,
18 well, we've been through it all, we know what we're
19 doing. But, in fact, some of the things that we've begun
20 to address in terms of our world code and apply in the
21 United States have been problems that we have seen
22 develop in less mature markets. So, indirectly, that has
23 benefitted American consumers by virtue of our code as we
24 have improved our code based upon what we've seen
25 globally.

1 MS. FEUER: Great. Robin, I see a scribbling.

2 MR. SIMPSON: I'm going to try and take all
3 three. U.S. consumers, first of all, when there are
4 great debates about the standards being set for food
5 safety under CODEX Alimentarius, the international food
6 standards body, there was great agitation among American
7 consumer organizations that this would mean leveling
8 down. When actually the working party of the different
9 consumer organizations looked at the standards, they
10 actually found that in the majority of cases there was no
11 standard in the United States or the standard that exists
12 under CODEX was actually higher than the American
13 standards.

14 So, I think my answer to that is that standards
15 are a floor and not a ceiling, and in international law,
16 where the WTO does indeed recognize the standards of ISO
17 and CODEX Alimentarius there is nothing at all in the WTO
18 treaty to prevent you setting higher standards, providing
19 you can justify them with a reasonable degree of
20 scientific justification. So, that's the first point.

21 The second point, the borderless world, yes, I
22 think that it's because in services now we don't have the
23 physical controls, of course, that we had previously with
24 physical goods, where you had border inspections.
25 Consumers can cross frontiers virtually, and so they've

1 become, therefore, vulnerable in these Internet
2 transactions. And the WTO negotiations have simply
3 ground to a halt. The WTO is yet to complete a cycle of
4 negotiations since its establishment in 1995. So,
5 there's a vacuum there, and that's why I think codes are
6 coming in.

7 On the last point, Mr. Clifford, a very
8 interesting example of the ILO, well, as it happens, in
9 the Transatlantic Consumer Dialogue this was fiercely
10 debated, the question of labor conditions in developing
11 countries. And Ralph Nader berated the Transatlantic
12 Consumer Dialogue, saying that there should be unilateral
13 trade sanctions taken against Pakistan for the use of
14 child labor. This is in 1998. At that time, he didn't
15 seem to be aware that the United States had not ratified
16 the ILO core convention on child labor. And when this
17 was pointed out, this created a certain embarrassment.

18 One year later in Seattle, Bill Clinton, having
19 been originally told that the U.S. could not ratify the
20 child labor convention because of something to do with
21 states jurisdiction, announced on his arrival at the
22 airport in Seattle for the famously aborted negotiations
23 that the U.S. was going to ratify the core convention on
24 child labor. The point of this story is that moral
25 pressure of a public nature actually in the end probably

1 works much better than legal cases being brought in the
2 various judicial forums. Thank you.

3 MS. FEUER: Professor Cho.

4 MR. CHO: Quickly, two things. First, ILO, you
5 know, I don't give any kind of value judgment here, but
6 certainly, yeah, United States has not yet ratified many
7 of the ILO conventions, but at the same time, a lot of
8 countries -- other countries who did ratify those ILO
9 conventions, that doesn't necessarily mean they all
10 comply with and really enforced it. So, it's kind of
11 different. And sometimes so called soft law type code of
12 conduct, the private standard that works better for the
13 reason that I explained earlier, because you state a
14 reputation, so it really depends on what kind of subject.

15 And, firstly, American consumers, well, this is
16 a dilemma. What American consumers thinks is different
17 from the European consumers, right? So, in America, you
18 can think -- you know, you eat hamburgers with the
19 hormone-treated beef, it's no problem, you know, not a
20 big deal. But in Europe, they say it is a big deal,
21 right? So, how can you have a same kind of food safety
22 standard while we have different culturally and not
23 necessarily commercially? So, that's kind of, I think, a
24 dilemma.

25 MS. FEUER: So, well, I want to thank my

1 panelists for a very wide-ranging discussion. I think it
2 shows sort of not only why we're seeing the development
3 of these models but the many issues that we do need to
4 think about. And for us here at the FTC I think it's
5 very -- raises a lot of very interesting things for us to
6 think about in our core areas.

7 So, with that, thank you very much. I do hope
8 you'll stay and participate in the discussions as we go
9 through the day. And I -- I've been sick for weeks --
10 and I'd like to turn the lectern back over to my
11 colleague, Randy Tritell, for a moment. Thank you. But
12 don't go anywhere. We're not having a break.

13 (Applause)

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1 SPEAKER

2 ANTITRUST IMPLICATIONS OF CROSS-BORDER CODES

3 MR. TRITELL: We're going to shift gears a bit
4 now and move to the antitrust implications of cross-
5 border codes. And for that, it is my special pleasure to
6 introduce our next speaker, Bill Kovacic. As I'm sure
7 you know, Bill is one of the true luminaries in our
8 field, having recently completed his third stint at the
9 Federal Trade Commission as Chairman and Commissioner.
10 Now a professor at George Washington School of Law, Bill
11 is a leader scholar and advocate of international
12 competition and consumer protection policy here and
13 around the world.

14 Among Bill's great contributions to our field
15 has been his promotion of competition and consumer policy
16 through means other than direct case enforcement, through
17 events such as this, which are designed to build
18 intellectual capital from which we at the agencies and
19 all of our stakeholders can draw. So, it's thus very
20 fitting to welcome back Bill Kovacic to this conference,
21 back at his real home here at the Federal Trade
22 Commission. Bill?

23 (Applause)

24 MR. KOVACIC: My deep thanks to Randy and Stacy
25 and the entire OIA team, which is unsurpassed in its

1 contribution to the development of good policy standards
2 internationally. And my further congratulations to the
3 agency for continuing a habit that goes back to its
4 creation, now almost a hundred years ago, devoting major
5 resources and effort to shaping ideas and thoughts that
6 influence ultimately policymaking in many settings by the
7 FTC on a very good day.

8 I want to talk about the competition policy
9 significance of code-making. When you use a bottle of
10 aspirin, any other kind of medicine, there's a panel on
11 the side of the container that says "side effects." And
12 in many ways I'm talking about the side effects of a
13 process that I think can have great benefits, but an
14 important side effect to take account in the formulation
15 of international code development policies, those that
16 involve firms and interactions with public policymakers
17 in deciding what standards of behavior should be.

18 I'd like to go about this by starting by
19 talking about some of the key features of the
20 policymaking environment, where these issues arise, and
21 background considerations that affect the valuation and
22 analysis of code setting.

23 I want to then talk about potential competition
24 policy traps that we know from past history are
25 associated with the formulation of codes; and then I'll

1 finish by talking about a few safeguards that code-
2 setting bodies, public agencies, and affiliated
3 organizations can take into account in avoiding falling
4 into the traps that I'll describe.

5 Four conditions to the policymaking environment
6 that are relevant to the formulation of codes and the
7 consideration of competition policy. I'll talk just a
8 bit about why competition itself deserves consideration
9 in the formulation of codes, why care about competition.
10 Second, to identify a few common temptations that
11 incumbent business enterprises may face in the way in
12 which they approach code-setting and the way in which
13 they may seek to manipulate that process. Third, some
14 distinctive cultures that set competition policy people
15 and consumer protection policy people apart, that
16 sometimes account, I think, for why the disciplines are
17 not joined up as effectively as they might be. And last,
18 the last condition is, as a result, a somewhat limited
19 degree of policymaking integration, both inside
20 individual jurisdictions but across jurisdictions in the
21 context of multinational enterprises. And in doing all
22 of this, I tried to lay the foundation for understanding
23 why competition ought to be considered but why in many
24 instances it gets perhaps too limited an amount of
25 attention.

1 First, why care about competition at all? Why
2 raise the topic in this setting? Three basic reasons.
3 First, competition can be a pretty good source of
4 consumer protection, because it pushes firms in a number
5 of settings to respond more completely to consumer
6 preferences. More than a few of us in this room know
7 about the world of telephone equipment before 1982, and
8 certainly in the days of my youth in 1960, 1970, if you
9 went to a store to obtain a telephone, that was a black
10 thing, fairly heavy, attached by a cord to the wall. And
11 if you said, could I have it in white, they come in
12 black. How about blue? Those would be black. Would it
13 be possible, God forbid, to hang it from the wall?
14 Absolutely not. That would be a crime against humanity.
15 None of these things were possible.

16 That was because there was a single telephony
17 provider and that single telephony provider owned the
18 only company that made telephone equipment that could be
19 plugged into its network. That was AT&T and its
20 subsidiary, Western Electric. And if you raised
21 questions about whether this heavy black thing called a
22 phone -- which unmistakably was durable, centuries from
23 now when they are unearthed from landfills, you will get
24 a dial tone, without a doubt, indestructible -- when
25 questions were raised about whether alternative features

1 could be added to this thing, the answer was, when it's a
2 good idea to do it, we'll let you know and provide it.

3 Probably the biggest single revolution that
4 results from the 1982 Department of Justice dissent
5 decree is not simply a change in the way in which long
6 distance telephony services are priced but a staggering
7 revolution in the way in which phones are designed and
8 offered today.

9 And many of you have in your pockets today a
10 little device that is not just a telephone, it's a
11 camera, it's a browser, it's a computer, it'll show
12 movies, and soon in the full constellation of Star Trek-
13 like capabilities, it will be a phaser, as well, I don't
14 doubt. All of that happened because competition pushed
15 firms to give consumers something that they wanted, even
16 though the specific desires might not be identified in
17 advance. The difference between the monopoly provider
18 and the competitive services sector has simply been
19 awesome. It's changed our lives, usually for the better.

20 The second thing it does is it inspires
21 dramatic cost and price reduction. One of the lasting
22 powerful contributions of this institution to good
23 policymaking in the modern era is the thing called the
24 Eyeglasses Rule, where the FTC catalyzed changes in state
25 law that made it possible for you to shop for glasses, to

1 get a copy of your prescription and take it to the
2 optometrist of your choice, with the result that not only
3 did the cost of frames and lenses go down, but if you
4 want a fine designer Armani pair of glasses or if you
5 want something bare-bones and simple you can get that.
6 And the very design of the lenses changed dramatically as
7 well.

8 I have a great degree of physical
9 nearsightedness, not intellectual nearsightedness. I see
10 small blobs of individuals now without these. At an
11 earlier time, to make my lenses, you would have had to
12 send the prescription to a company that made observatory
13 telescope lenses, so large, so great they would be. But
14 a modern revolution set in part -- set in motion by the
15 FTC's rule, was a dramatic change in quality. Miracle-
16 like plastics, that means that instead of crushing the
17 bridge of my nose these fit comfortably and lightly
18 without great distortions. Tremendous changes in
19 innovation in the sector that came about because of the
20 change in the legal regime that stimulated competition.
21 A huge advance for consumer protection.

22 And last, competition tends to stimulate
23 innovation in ways that have dramatic transformative
24 effects. On this day in 2002, the share price of the
25 Apple Company was closing in on \$16 a share. Yesterday,

1 at the end of trading, Apple closed at about 585. I'm
2 sure all of you bought baskets of it 10 years ago,
3 knowing what would happen, but what did Apple do? It
4 ceased being simply a maker of desktops and laptops. And
5 back to the wall, trying to find a way to succeed and
6 prosper, iPhone, iTunes, iPads over time. Unimaginable
7 even 10 years ago, but a tremendous transformation by a
8 company that was ailing, on the ropes, but desperately
9 sought a way to succeed and do it in an unconventional
10 way.

11 Competition did that: the urgency to succeed
12 by coming up with something newer and better. That's why
13 we should care about whether codes freeze in place
14 mechanisms that discourage rivalry rather than promote
15 it.

16 The second background consideration are the
17 temptations that incumbents face, especially well
18 established incumbents. What are those? There would be
19 a temptation, for example, to raise profits, not by
20 superior performance but simply by colluding with rivals
21 about output and pricing, to entrench a position by
22 suppressing exactly the kind of destabilizing innovation
23 I just described before. If you were Nokia or you were
24 Motorola, you probably don't go to bed at night thinking,
25 what kind of Christmas card can I send to Apple or to any

1 other producer of smartphones who are literally taking
2 away my industry.

3 Firms might also be tempted to discourage entry
4 or to raise rivals' cost, the economic insight developed
5 by Dave Scheffman and Steve Salop when they were both in
6 the Bureau of Economics at this agency in the early
7 1980s, their basic insight is that firms might, among
8 other things, be tempted to obtain regulatory
9 requirements that impose massive regulatory compliance
10 costs, which well financed incumbents can bear, but small
11 entrants cannot, and to deliberately seek standards that
12 are extreme in the sense that they outrun legitimate
13 regulatory concerns but they sure make it difficult for
14 new entrants to get a foothold in the market. And how do
15 firms give into these temptations? Sometimes through
16 private initiative; secret cartels. The other is to
17 engage the government in helping them out.

18 The last background condition I want to mention
19 is that these insights and knowledge of this reside in a
20 number of different institutions, and you would think
21 generally that agencies that do competition and consumer
22 protection would have integrated those insights. Indeed,
23 it's not just the FTC. Of the 120 competition systems in
24 the world today, over half of them have a significant
25 consumer protection mandate in addition to the

1 competition policy mandate. That is, half of the 120
2 have a major role in consumer protection, too.

3 And in principle you might think that having
4 those two capabilities and competencies under the same
5 institutional roof would lead to a degree of policy
6 integration. That would mean that the side effects I'm
7 talking about today would be routinely integrated into
8 policymaking dealing with codes on the consumer
9 protection side or international interaction.

10 I think as a matter of practical experience it
11 has been difficult, not simply for the FTC, but for
12 others, to achieve it. These tend to be different
13 cultures. They tend to be different institutional
14 configurations, and relatively few agencies have achieved
15 a fuller degree of integration.

16 The United Kingdom's Office of Fair Trading is
17 one where instead of having a separate Bureau of
18 Competition and Bureau of Consumer Protection, the OFT
19 created integrated teams that solve problems not simply
20 by reference to one element of the mandate but by both.
21 The United Kingdom is in the process of disassembling
22 that mechanism, so that will no longer be the case. So,
23 in principle, while you might have a good deal of policy
24 integration, achieving it inside the house can be a great
25 challenge.

1 What are the competition policy traps that can
2 arise in code setting against this backdrop? Let me
3 mention three. First, codes unwittingly can entrench
4 incumbents, first by establishing standards that snuff
5 out innovation. That is, incumbents have a preferred
6 standard, they have a preferred way of doing things, and
7 they will tend to promote the adoption of standards in
8 codes that entrench their preferred model for doing
9 business and to avoid the emergence of threats that could
10 challenge it.

11 Now, they don't always do a good job of knowing
12 where they are coming from. Did, for example, the
13 behemoths of a decade ago know that Google would be
14 coming after them in a direction they didn't anticipate?
15 Did anyone really worry that an undergraduate at Harvard
16 in 2004, 2005 that was sort of a cute gimmick to give
17 people a way to talk to their friends would become a
18 Titanic enterprise that could take on Google, Apple,
19 Amazon in the battle for global domination involving
20 information services? Who imagined that?

21 But even if firms can't imagine the specific
22 path of commercial development, they do have an instinct,
23 where possible, to adopt policies and practices that
24 freeze in place their preferred model and make it
25 difficult for others to make their way in.

1 Second trap is that codes unwittingly can
2 facilitate collusion, practices that encourage firms to
3 talk together about what might be done, and to formulate
4 a consensus can bleed imperceptibly into a process by
5 which they talk about lots of other stuff. And it is
6 part of the unhappy experience of the FTC in the 1920s
7 and early 1930s in a mechanism called trade practices
8 conferences that the FTC became an active participant in
9 encouraging industry-wide codes of ethical commercial
10 behavior and then saying we will enforce them if we are
11 convinced they are good codes.

12 Example of how these promoted collusion: the
13 industry came back to the FTC and said, Wouldn't it be a
14 good idea if we prohibited secret discounting off of list
15 prices? That's a pernicious process. You have a list
16 price, but then a consumer comes and says, is that your
17 best deal, and you say, no, and you discount, that's
18 obviously an unfair method of competition. And the FTC
19 said, so, it is, and we will use our authority to
20 prohibit it. The industry quietly and silently, even
21 though this was the time when you couldn't pop fizzy
22 adult drinks, nonetheless imagined the time when they
23 could and celebrated this contribution to the
24 reinforcement and successful operation of cartels under
25 the guise of a code-making process.

1 And the third trap, and this is especially true
2 in a number of different jurisdictions, which vary in
3 their legal approach to this issue. The codes themselves
4 and the code-making process can be taken to be a mandate
5 for collusive conduct. And if the code-preparation
6 mechanism is not shaped in a careful way in some
7 jurisdictions can act as a barrier to prosecution in case
8 collusive behavior develops. That is, in different
9 countries, the very mandate that says cooperate on this
10 frontier can be interpreted as a broader command to
11 engage in collaboration with respect to other matters and
12 in some countries can provide immunity from prosecution
13 under the antitrust laws.

14 Let me finish by suggesting three safeguards,
15 that is, what can be kept in mind in this process.
16 First, deeper policy integration between the competition
17 and consumer protection disciplines within individual
18 jurisdictions. That is, agencies of the kinds I
19 mentioned, this agency and many others, participate in
20 the international standard-setting process. They are
21 ideal candidates to raise these concerns in international
22 fora. But to raise them, you have to spot the issues.
23 You have to spot the issues; you have to appreciate their
24 significance.

25 In principle, agencies with dual

1 responsibilities are ideally positioned to do that, to
2 see the issue and address it, but it doesn't happen
3 automatically. It requires policymaking integration that
4 takes place through an international affairs group,
5 through working groups that link up the two separate
6 bureaus, through the integrated decision-making at the
7 top of the agency. In various forms it can happen, but
8 the first responsibility to spot the potential traps and
9 raise them comes within individual agencies.

10 But this is an affliction of the multinational
11 networks as well. You take an otherwise outstanding
12 agency, such as the Organization for Economic Cooperation
13 and Development, with its myriad committees, first-rate
14 secretariat, but it's only occasionally that those
15 committees walk down the hallways in the giant chateau
16 palace that exists in Paris and go from room to room and
17 sit in and talk with each other on a regular basis.
18 There is some of that integration, but it is not a deep-
19 seated part of the culture. And, again, to recognize the
20 possibility for the traps, I think, provides an
21 inspiration to engage in the intramural dialogue and
22 discussion across disciplines that raises the issues.

23 The second is to make -- second safeguard is to
24 make conscious consideration of competitive effects in
25 code formulation a routine part of code processing. That

1 can be the responsibility of the individual national
2 competition and consumer protection authorities, those
3 that I've just mentioned. It can be the responsibility
4 of the international networks that do the code-making
5 work. But on the list of considerations that attends the
6 drafting of codes, the approval of codes, the debate
7 about codes, and the implementation of codes, there has
8 to be an item on the checklist that is competition policy
9 effects.

10 And the last is a periodic assessment of how
11 things turned out, as the previous panel suggested.
12 Going back and asking how it's going, is it working the
13 way we thought is the crucial element of the virtuous
14 life cycle of good policymaking. And to go back and ask
15 what have been the competitive effects, have there been
16 unintended consequences, are we seeing policy developed
17 as we intended it to be so that the good possibilities
18 that come from the formulation of codes are realized, are
19 we actually seeing that in practice, or are there side
20 effects that can be treated through adjustments in the
21 process?

22 I think these are all well within the means of
23 the existing public institutions to put this on the list.
24 There's no question that the capability to do it exists.
25 And fortunately in many settings because of this

1 combination of functions in many agencies, the issue does
2 get raised and addressed in many ways. But I think a
3 careful reflection on what we've seen in different
4 industry settings, some of them within specific
5 jurisdictions, within the experience base of existing
6 industries, existing agencies, and regulatory regimes
7 provides a very confident basis for knowing what to look
8 for and how to go about looking for it in the future.
9 Thank you.

10 (Applause)

11 MS. FEUER: And, so, before our break, if there
12 is anyone who would like to ask Bill a question or make a
13 comment, please raise your hand and somebody will bring
14 you the mic. I know you're all stunned into silence.
15 Joe?

16 MR. MARIANO: Mr. Chairman, you gave advice to
17 --

18 MR. KOVACIC: God, that sounds good.

19 MR. MARIANO: Right.

20 MR. KOVACIC: I don't think you can say that
21 enough. I don't think you can say that enough.

22 MR. MARIANO: We can work on that.

23 MR. KOVACIC: As opposed to the alternative:
24 Hey, you.

25 MR. MARIANO: Mr. Chairman, what advice would

1 you give to NGOs who are in the process of formulating
2 these codes but also need to be sensitive and aware of
3 the very antitrust implications that you're talking
4 about?

5 MR. KOVACIC: I think in their own discussions
6 in many ways they tend to be. On the more negative side
7 of things, NGOs, especially business-related professional
8 societies, tend to receive a lot of counseling on these
9 points about what to do and what not to do, what can
10 happen inside the discussions and in the margins of those
11 discussions what can take place. But I think in the same
12 way that the competition policy deserves a listing on the
13 checklist of considerations that go into formulating a
14 code, I think NGOs should be equally attentive to that.
15 And many of them are keenly aware of how pathologies in
16 code-making, standard-setting processes, and other
17 settings have operated to the disadvantage of individual
18 industries and the larger commercial community.

19 So, my suggestion would be that this is a
20 deliberate, conscious element of policymaking as well.
21 That is, if we establish a specific standard, what is
22 that going to do for possibilities for growth improvement
23 -- progress within the individual sector and how is that
24 going to affect the competitive process itself. I think
25 that can be a conscious element of decision-making and a

1 useful contribution for NGOs as well. In many instances,
2 it may be an NGO that is well attuned to how a specific
3 standard or practice is going to make it difficult for
4 entry and expansion to take place by fringe firms.

5 And I think NGOs also have a good sense of what
6 it will cost to comply. Now, are worthy regulatory goals
7 to be abandoned because they're expensive to achieve?
8 No. Radar is an expensive system to have on an airplane,
9 but I'd rather fly in an airplane that had it than one
10 that didn't. It's worth the cost to do some expensive
11 things in a number of instances. But to make people
12 attuned to just what specific requirements cost and to
13 ask is the additional obligation commensurate with the
14 cost that's going to be incurred, and how do those costs
15 affect the possibility that the next person who's got a
16 great idea will or will not come into the market?

17 MS. MILLAR: I'm Sheila Millar with Keller and
18 Heckman. I wanted to get into a nuance of that antitrust
19 checklist. Many standards organizations, particularly
20 those doing product standards, have patent disclosure
21 policies, and I'd be interested in your comments on the
22 effectiveness of simply the disclosure part of the policy
23 in the standards-making process.

24 MR. KOVACIC: I suspect there's a -- you can, I
25 think, envision, the disclosure obligation in a couple of

1 different ways. One is that a standard-setting body says
2 that disclosure is mandatory. If you participate in our
3 process, standards that might implicate your intellectual
4 property have to be disclosed to us. You have to tell us
5 that.

6 What should the default rule be if there's no
7 policy on behalf of the standards organization? I've
8 always been taken by the approach that comes out of
9 contract law, the approach that comes out of the UCC
10 where businesses are accustomed to the notion that
11 there's an obligation to deal in good faith. I would
12 think the obligation to deal in good faith might well
13 compel the revelation of this kind of information.

14 I would see relatively low cost to society of a
15 mandate that says the default is to disclose rather than
16 to be silent. But even if the mandate was that you can
17 remain silent if you choose, I would think it would be
18 wise in the context of a standard-setting body to have a
19 habit or custom to wrap up discussions of specific
20 possibilities by saying does anyone have IP implicated in
21 this process, or for members to ask that question. The
22 answer could be silence; it could be how about those
23 Redskins; or it could be yes or no.

24 And if you get evasive answers to that
25 question, that tells other participants to dig further,

1 but I tend to prefer a norm that makes the default
2 disclose. But even in the absence of it, I would say
3 that it would be appropriate for those who guide the
4 process and participated in it to ask direct questions.
5 And if there is an evasive answer, that's a basis for
6 reconsidering the integrity of the standard.

7 MS. FEUER: So that's a really interesting
8 issue. Let me ask you one more question, and then if
9 there are any final questions we can take them and then
10 wrap up.

11 So, listening to you I'm thinking about of
12 course the Internet and the potentially, you know,
13 unlimited reach of a global market. Are the competition
14 concerns somewhat attenuated by the fact that you have
15 such a potentially large market? Or do the same sort of
16 considerations that we usually think of domestically come
17 into play?

18 MR. KOVACIC: I think that it increases
19 possibilities for entry expansion and increases
20 opportunities for the emergence of new providers. That's
21 why the sensitivity to code-related messages or
22 provisions that would seek to forestall recourse to that
23 would be important. I would be very attentive to
24 measures that sought to frustrate reliance on that
25 capability to increase the reach of suppliers who might

1 be able to participate in the market.

2 And if I were an incumbent that was fearful of
3 what would happen, that's precisely an area in which I
4 would seek to establish -- gain approval for mechanisms
5 that would frustrate that. So, I guess one thing -- one
6 way to think about this is where are the technology
7 developments that are likely to be disruptive. You know
8 it's 70 years ago this year, almost this month, that
9 Schumpeter writes the famous chapter in Capitalism,
10 Socialism and Democracy.

11 He talks about the capacity of the new
12 innovation to transform industries. He says that
13 competition on price has the tendency to affect firms at
14 the margins. It's like trying to force in a door. He
15 says innovation-related competition in the form of the
16 new business model, the new organization, the new
17 product, crushes them like a bombardment. And agencies
18 ought to look for the technological developments that
19 have that potential, because when those emerge, that's
20 when firms rally to try to forestall them most
21 aggressively.

22 So, the Internet is a great example of a
23 technology that's expanded possibilities, but it also
24 provides keen, desperate incentives for firms to make
25 sure that it does not work to their disadvantage.

1 MS. FEUER: Great. Well, thank you.

2 Just in the interest of time, I think that what
3 we should do, we had originally planned on starting the
4 next panel at 11:00. Let's all be back in the room no
5 later than 11:10, and we'll look at one of our case
6 studies, the first one for today, which is all about the
7 APEC Cross-Border Privacy Rules, a multi-stakeholder
8 endeavor. Thank you.

9 MR. KOVACIC: Thank you.

10 (Applause)

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CASE STUDY

2

APEC'S CROSS-BORDER PRIVACY RULES (CBPR) SYSTEM

3

MR. HEYDER: It's 10 after 11:00, so we won't have to switch to cross-border punctuality rules, we can stick with the cross-border privacy rules. Okay, good morning, my name is Markus Heyder. I'm Counsel for International Consumer Protection in the FTC's Office of International Affairs. I will be moderating the next panel on the APEC Cross-Border Privacy Rules System, also known as the CBPRS.

11

The CBPRS are an enforceable privacy code of conduct for cross-border data flows in the Asia-Pacific region. And they are one example of the type of self-regulatory or co-regulatory codes of conduct that we've been discussing this morning so far. I've been involved in the development of the APEC CBPRS since about 2005, and therefore I am particularly happy to moderate this panel this morning.

19

For those of you who may not know, APEC stands for Asia-Pacific Economic Cooperation Forum. APEC has 21 member economies, as they are called, as countries are called in APEC. The CBPR system was developed in APEC's Data Privacy subgroup, which is a subgroup of the APEC Electronic Commerce Steering Group. The APEC CBPRS are based on the APEC privacy principles which are in the

1 APEC Privacy Framework, which was also developed by the
2 Data Privacy subgroup in APEC.

3 The basic ideas and purpose behind the APEC
4 Framework, the privacy principles, and now the APEC
5 cross-border privacy rules were to harmonize the privacy
6 protections for consumers in the Asia-Pacific region and
7 to lift the standard to a commonly agreeable level of
8 protection for consumers and APEC to increase and
9 facilitate cross-border enforcement cooperation among
10 enforcement authorities and also to facilitate e-commerce
11 in the Asia-Pacific region and the free flow of data in
12 that region.

13 And we've come a long way since we first
14 started thinking about consumers privacy rules in about
15 2005. And we are just now on the cusp of actually using
16 the system in the Asia-Pacific region. And, therefore,
17 this panel is particularly timely today to introduce you
18 all to the system.

19 Each of the panelists here, or their
20 organizations, have been involved in developing a system
21 from the beginning, so what we have here is essentially a
22 group of the key founders of the system. But I realize
23 and I notice that there are many other founders of the
24 system in the audience as well today.

25 Over the next 75 minutes, we will try to give

1 you a good understanding of how the system works and what
2 its purpose is from the perspective of the key
3 stakeholders: regulators, third-party oversight
4 organizations, and business members, and also the
5 viewpoint of civil society.

6 We have to cover a lot in a very short amount
7 of time, and we have a large panel, so we will have each
8 panelist speak for about eight minutes. The first
9 panelist will introduce the system in 10 minutes, and
10 then we will hopefully have some time for questions after
11 the presentations. Let me introduce you now to our
12 panelists, and in the interest of time, I will only state
13 their names and their affiliation. And you can find more
14 information about them in the materials you received this
15 morning.

16 First, to my left, is Josh Harris. Josh is an
17 Associate Director in the Office of Technology and
18 Electronic Commerce at the International Trade
19 Administration in the Department of Commerce. He is also
20 the Vice Chair of the APEC Data Privacy Subgroup, which
21 developed the APEC Cross-Border Privacy Rules, and the
22 chair of the Cross-Border Privacy Rules Joint Oversight
23 Panel. And he will explain to you in a minute what that
24 is.

25 Next to Josh is Danièle Chatelois. She is a

1 Senior Policy Advisor with the Government of Canada and
2 also the Chair of the APEC Data Privacy Subgroup.

3 Next to Danièle is Melissa Higuera. She is the
4 Director for Privacy Policies and Agreements within the
5 General Direction for Privacy Self-Regulation at the
6 Mexican Federal Institute for Access to Information and
7 Data Protection, also known as IFAI.

8 Next to Melissa is Frances Henderson. She is
9 the National Director for Privacy Initiatives at the
10 Council for Better Business Bureaus.

11 Next to Frances is Saira Nayak, the Director of
12 Policy at TRUSTe.

13 Then we have Scott Taylor, the Chief Privacy
14 Officer at Hewlett-Packard Company.

15 And, finally, we have Paula Bruening, who is
16 Vice President for Global Policy at the Centre for
17 Information Policy Leadership at Hunton & Williams. And
18 I might mention that when Paula first became involved in
19 the APEC process she was Counsel for the Center for
20 Democracy & Technology.

21 So, I'd like to turn this over to Josh, who
22 will now introduce and explain the system to us. Thanks,
23 Josh.

24 MR. HARRIS: Thank you, Markus. I'd like to
25 extend my thanks to the Federal Trade Commission for

1 putting this event on. I think this is a great
2 opportunity to be able talk, not just about case studies,
3 but also some of the high-level principles that are
4 associated with enforceable codes of conduct. This
5 specific panel is going to talk about the Cross-Border
6 Privacy Rule System.

7 My name is Josh Harris, as Markus mentioned.
8 I'm going to talk very briefly about the structure of the
9 CBPR System. We have a very deep bench here, as Markus
10 alluded to. We have some of the folks that were around
11 the establishment, including Robin Layton from the Office
12 of Technology & Electronic Commerce, who has been with
13 this project since the very beginning, as well as all of
14 the panelists, who have contributed to the development of
15 this system in one form or another. And they'll get into
16 their specific parts later. So, I'm going to keep this
17 very brief but would welcome any questions that you might
18 have about the structure of the system, not only to me,
19 but any of the panelists and perhaps even some folks in
20 the audience.

21 And, also, special thanks to Pablo Zylberglait
22 who is the mastermind behind the actual aesthetic
23 structure of this one-slide PowerPoint. Pablo, thank you
24 very much.

25 Okay, so to begin with, we're going to take a

1 look at how the Cross-Border Privacy Rule System would
2 function in practice. So, we start with Economy A in
3 APEC. They refer to them as economies because we have
4 some non-countries that are participants in the system
5 and economic areas. So, Economy A would begin by having
6 a privacy enforcement authority. This privacy
7 enforcement authority is defined as anyone who is charged
8 with implementing a law that has the effect or enforcing
9 the law that has the effect of implementing the APEC
10 privacy framework.

11 That privacy enforcement authority needs to
12 join what's called the Cross-Border Privacy Enforcement
13 Arrangement, CPEA. This is a voluntary regulatory
14 cooperation mechanism. The United States FTC has joined
15 this, as well as IFAI in Mexico, as well as I believe 17
16 other ministries across six other APEC member economies.
17 What this does is it demonstrates the conditions
18 precedent for an enforceable system of codes of conduct.
19 That is, you have the ability to be able to enforce the
20 terms of the codes of conduct -- excuse me -- on those
21 companies that choose to sign on to this system. Again,
22 this is a voluntary system.

23 So, the first thing that they would do is they
24 would fill out their notice of intent to participate in
25 this system, join the CPEA, they being those enforcement

1 entities. The next thing they would do is notify the
2 CPEA administrators. I believe the CPEA administrators
3 are currently the United States, New Zealand, the APEC
4 Secretariat, and Australia. And then they would be
5 considered, you know, making sure the paperwork is
6 appropriate, they would be considered CPEA participants.

7 Now, once they've done that, the designated
8 APEC governmental delegate could then apply to join the
9 Cross-Border Privacy Rules System. So, what they would
10 do is fill out a letter of intent to participate in the
11 CBPR System. This letter of intent has to have some very
12 specific pieces of information. The first thing it has
13 to do is confirm that they have a CPEA participant that's
14 within their jurisdiction. The second thing that it has
15 to confirm is that they plan to make use of a third-party
16 verifier on these codes of conduct. An accountability
17 agent is what we call them.

18 Now, you don't need to establish who that's
19 going to be right at the front end, because you may not
20 know yet. And I'll explain the process for recognizing
21 those accountability agents here in a minute. Then you
22 have to describe how it is that your regulations within
23 your jurisdiction have the effect of implementing the
24 CBPR program requirements that we've developed.

25 As Markus had mentioned at the beginning, the

1 program requirements themselves, there's 50 of them,
2 they're based on the nine APEC privacy principles. This
3 took us a couple of years to develop, but we did it in a
4 multi-stakeholder process, fully transparent, to make
5 sure that what we're putting together first accurately
6 reflected the framework, but second, accurately reflected
7 the needs of consumers, but also businesses that we are
8 hoping will join this system.

9 And then finally you complete that program map
10 and you would submit it to the Chair of the Electronic
11 Commerce Steering Group, the Data Privacy Subgroup Chair,
12 Danièle Chatelois, and then the Joint Oversight Panel.
13 And this is another entity that Markus had mentioned.
14 The Joint Oversight Panel is charged with a couple of
15 areas of very specific responsibility around this system,
16 the first of which is to be able to take this information
17 provided by the interested applicant economy and make
18 sure that that economy has filled out the information
19 correctly, that there are, in fact, laws sufficient to
20 enforce each of these privacy program requirements that
21 we've established, that they have the ability to enforce
22 the certification-related activities of a potential
23 accountability agent that might be coming from their
24 jurisdiction seeking APEC recognition, and that they, in
25 fact, have a participating enforcement entity that's

1 assigned under the CPEA.

2 Once they have gone through that findings
3 report, they then report out to the APEC member
4 economies, yes, this information is complete, at which
5 point they will be considered a participant in the CBPR
6 System. So, then what happens at that point?

7 Once an economy is a CBPR participant, they can
8 then put forward an accountability agent, somebody from
9 their own jurisdiction, a third-party entity. It could
10 be a governmental entity, that wants to perform
11 verification of the program requirements that a company
12 might want to sign onto. So, that accountability agent
13 would -- can either be nominated or notified to the
14 group.

15 Now, nomination would be for those economies
16 that have the authority to choose one specific actor over
17 another. Notification would be in the instances like the
18 United States where we in the Department of Commerce
19 don't have any particular regulatory authority to choose
20 one accountability agent over another. So, what we did
21 was put out a Federal Register notice and said we are now
22 accepting applications to become an APEC-recognized
23 accountability agent in the United States.

24 That application or that nomination or
25 notification would be submitted to, again, the Joint

1 Oversight Panel. The Joint Oversight Panel then goes
2 through a recommendation report. It's a bit different
3 than a findings report. This recommendation report would
4 confirm that the interested accountability agent, first
5 of all, to back up, is located within a jurisdiction
6 that's participating in the CBPR System. That CBPR-
7 participating economy has already demonstrated that
8 they've got a regulator. That regulator has already
9 demonstrated that they can enforce the program
10 requirements, so we know all of that stuff.

11 Now we're interested to make sure that first
12 the accountability agent actually resides there, and
13 then, second, that they have a program that either meets
14 the program requirements that we've developed or that
15 their existing program requirements map to the program
16 requirements that we've developed. So, this can create
17 quite a bit of work to be able to make sure that we're
18 created kind of a one-to-one match, to make sure that
19 where there are different codes of conduct that might be
20 applied to the CBPR System that they are sufficiently
21 meeting the needs that the group had determined were
22 required to be in compliance with the privacy framework.

23 Once that has been completed, that goes out to
24 the APEC member economies. All of the APEC member
25 economies at that point, because APEC is a consensus-

1 based organization, have the opportunity to then vote, up
2 or down, whether or not they think that that
3 accountability agent has met the requirements associated
4 with participation in the system. If they agree that
5 that is the case, then that accountability agent will be
6 deemed APEC-endorsed for the period of one year, at which
7 point they would have to follow up the following year,
8 again with an application. That process, unless there's
9 been a material change, should be significantly easier
10 than their initial application, at which point they can
11 go and certify companies as being CBPR-compliant.

12 As far as where we stand with this, we've
13 developed the system. In 2011, it was actually endorsed
14 by the leaders of the APEC member economies. The United
15 States has since filled out its -- we're participants in
16 the CPEA. We have filled out our notice of intent to
17 participate in the CBPR System, and as I had mentioned,
18 we put out a Federal Register notice for anybody that's
19 interested in being an accountability agent. We have
20 received one application so far. That's from TRUSTe.
21 And the Joint Oversight Panel is now in the process of
22 putting together a recommendation report based on that
23 application that TRUSTe has put out.

24 Mexico, similarly, has also joined the CPEA,
25 and as of a month and a half ago put forward their notice

1 of intent to participate in the system. So, this is
2 going to be that document that explains -- not only
3 confirms their CPEA participation but how you could
4 enforce these program requirements. In their
5 jurisdiction, they are now in the process of getting that
6 notification reviewed and hopefully will be finalized and
7 sent out to the group, so that Mexico could formally be a
8 participant in the system as well.

9 What happens at that point is that Mexico has
10 the ability to put forward an accountability agent of
11 their own, and then that would be subject to the process
12 that I described there down in the lower right-hand
13 corner of the chart, which would be the accountability
14 agent process.

15 So, that's where we stand at this point. What
16 we hope to be able to do in the future with this is not
17 just to be able to make it relevant to interested APEC-
18 member economies but to be able to make it relevant to
19 other parts of the world as well. We're currently in
20 discussions with the European Union to discuss how the
21 CBPR certification system in a company that has been
22 CBPR-certified might be able to interoperate. With
23 Europe's binding corporate rules approach, one of the
24 options here would be to consider how there are
25 similarities in terms of the program requirements and to

1 see whether or not there might be some way that you could
2 extend a benefit in terms of maybe heightened or
3 quickened BCR approval process for those CBPR-certified
4 companies.

5 So, that's the end of this overview. I'd like
6 to thank everybody again for the time and the
7 opportunity, and I look forward to your questions. Thank
8 you.

9 MR. HEYDER: Thank you very much, Josh, for
10 this comprehensive overview. I'm sure there are a lot of
11 questions. It's a fairly complex system on first view,
12 but I think things will become clearer as we go through
13 this panel.

14 I want to turn it over to Danièle Chatelois
15 now, who is the Chair of the DPS, can talk about the
16 Cross-Border Rules System from that perspective and from
17 the Chair -- and from the DPS's role in the process going
18 forward, and also maybe historically.

19 And also before I turn it over to Danièle, I
20 just want to mention that the enforcement aspect of these
21 rules in the United States, as some of you may know, we
22 will treat this -- enforce this code under our Section 5
23 authority to enforce against unfair and deceptive
24 business practices. So, in essence, companies will make
25 a promise to abide by these -- by this code, and if they

1 break that promise, we will enforce against them under
2 Section 5. That may not work that way in all APEC member
3 economies, so Danièle might also talk a little bit about
4 how the code might be enforced in countries that do not
5 intend to or plan on relying on a Section 5-like
6 authority for enforcement purposes.

7 So, Danièle, thank you.

8 MS. CHATELOIS: Thank you, Markus. It's a
9 great pleasure for me to be here as Chair of the APEC
10 Data Privacy Subgroup. So, as Markus said, what I'd like
11 to do is provide a bit of background in the development
12 of the CBPR System, the objectives it seeks to achieve,
13 and the policy context in which it operates.

14 So, you've already heard that APEC is a forum
15 of 21 member economies. It's populated by government
16 delegates who worked together to develop collaborative
17 projects. And the emphasis is on collaboration with the
18 objective of meeting trade development objectives. So,
19 increasing trade and investment in the APEC region,
20 reducing trade barriers, decreasing the cost of trade,
21 increasing exports, et cetera, et cetera.

22 So, again, APEC is not a treaty-based
23 organization. It works on a consensus basis, and
24 participation in anything really is voluntary, hence the
25 voluntary nature of the CBPR System. So, the Data

1 Privacy Subgroup, which developed the CBPR, is one of
2 many, many subgroups that operate at APEC, and they deal
3 with a variety of topics ranging from food safety to
4 agriculture, emergency preparedness, electronic commerce,
5 and privacy, of course.

6 And, so, as an APEC subgroup, the DPS is
7 required to engage in these collaborative projects, but
8 with a view to contributing and meeting the objectives --
9 the trade objectives -- of APEC. And, so, what does that
10 mean in the context of information and privacy? Well,
11 information has long been recognized as a key economic
12 asset and an integral part of most -- maybe not most --
13 but most economic transactions. And because of this, the
14 uninterrupted flows of information across the marketplace
15 are critical to economic growth and trade as well.

16 So, because of that and based on that policy
17 foundation, the DPS engages in activities that support
18 the development of a policy and regulatory environment
19 that supports this free flow of information across
20 borders. And in doing so, of course, it aims to develop
21 privacy protections that are meaningful, as Commissioner
22 Ramirez rightly pointed out earlier. And these privacy
23 protections have to be consistent across the APEC
24 regions. They have to be predictable.

25 And they also aim to provide certainty for both

1 consumers and businesses alike. And what that means is
2 they're trying to do away with the fragmentation that
3 causes such problems for consumers and businesses alike
4 and increases costs and the administrative burden that
5 they would face. And the CBPR System very much supports
6 these objectives and considerations.

7 And, so, because the CBPR System is based on
8 and incorporates the nine privacy principles of the APEC
9 privacy framework, it's able to bridge -- these are
10 commonly recognized and endorsed privacy principles
11 throughout APEC. And because of that they're able to
12 bridge the various privacy regimes that exist within the
13 region. And in order to do this bridging, if you will,
14 the CBPR was designed to be inherently flexible, and that
15 means it was designed to work with the various ways in
16 which privacy is protected throughout the region. And
17 one of the ways in which we can look at this flexibility,
18 as Markus said, is through privacy enforcement and the
19 backstop -- what we call the backstop enforcement at
20 APEC.

21 So, each accountability agent that certifies
22 and monitors the practices of the private sector has to
23 have an inherent dispute resolution mechanism. And when
24 that doesn't work, we have an escalation process that
25 we've contemplated, whereby matters can be taken to a

1 privacy enforcement agency in a participating economy.
2 As Markus said, in the United States, this backstop
3 enforcement would be undertaken through Section 5 of the
4 FTC Act.

5 So, let's say we operate under a scenario in
6 the future where every single member economy is now a
7 participant, and so we have 21 participants. So, if we
8 look at Canada and New Zealand, for example, who would
9 provide also this backstop enforcement, the two countries
10 are not able to enforce based on public representations.
11 Nor are they able to enforce based on violations or
12 alleged violations of the CBPR program requirements.
13 They're only allowed to and able to investigate based on
14 violations of the laws that they're mandated to enforce.

15 So, what that means is if a complaint was --
16 I'm thinking in French here -- if a complaint made its
17 way to the privacy commissioner of New Zealand based on a
18 violation of the CBPR program requirements, it would have
19 to be reformulated against the privacy principles in the
20 New Zealand privacy act and not the CBPR requirements.
21 And in Canada, it would be similar. Our privacy
22 commissioner's staff very much work with complainants to
23 -- who will not necessarily formulate their complaints as
24 such but make them work with the act.

25 So, for example, if there's a choice program

1 requirement in the CBPR program, well, Canada's law has a
2 consent requirement that's parallel. So, that's how one
3 would work with another. And I'm just going to check
4 time here. Oh, thanks, Markus.

5 So, that leads to the next burning question of
6 how does a matter get to privacy enforcement agency and
7 how do accountability agents -- how would they refer a
8 matter to a PA. And this would vary from economy to
9 economy. And, for example, in Canada and New Zealand,
10 Canada there's no legal ability for the privacy
11 commissioner to receive referrals of complaints, so only
12 individuals are able to complain. It doesn't have to be
13 the individual that's the target of the alleged
14 violation, but it has to be an individual. In New
15 Zealand, by contrast, it could be the accountability
16 agent, any legal person can complain in New Zealand, so
17 the accountability agent could complain to the privacy
18 commissioner of New Zealand, and the matter would be
19 addressed that way.

20 Another example of differences, we know that
21 the FTC has a wide range of remedies at its disposal
22 which are, I understand, the envy of many regulatory
23 agencies. But in New Zealand and Canada, the emphasis is
24 very much like accountability agents in the CBPR, which
25 would be to put an emphasis on dispute resolution, if you

1 will. So, they are not empowered. They don't have the
2 power to issue orders, fines, or penalties, but can very
3 much engage in dispute resolution, mediation,
4 conciliation. And they can escalate themselves as well,
5 so in Canada we can go to the Federal Court; and in New
6 Zealand it is the Human Rights Review Tribunal, both of
7 which have the ability to issue orders and award
8 penalties for damages.

9 So, what I've done quickly -- oh, my God, I'm
10 two seconds overboard. Basically what I wanted to do was
11 give a bit of an overview, an example of how the CBPR can
12 and does work within a legal context. It doesn't
13 override or set aside domestic laws, but very much aims
14 to complement and supplement them. It harnesses the
15 expertise and resources available in the private sector
16 to achieve this mutually desirable objective in a
17 collaborative and supportive way. Thank you.

18 MR. HEYDER: Great. Thank you very much,
19 Danièle. Next we have Melissa Higuera from IFAI, and as
20 Danièle mentioned, the goal is for all 21 APEC member
21 economies to participate in the system ultimately. The
22 U.S. is already in the system; Mexico is working on it.
23 And we actually have a mandate from the APEC leadership
24 from last November at their final meeting of the year
25 where they agreed and confirmed that each APEC member

1 economy would implement the system in their country, in
2 their economy. So, we're starting the process of
3 accomplishing that. So, I will turn it over to Melissa
4 to talk about how Mexico is implementing the system in
5 Mexico.

6 MS. HIGUERA: Thank you, Markus. Thank you for
7 the FTC and for having me here. I'm glad to be here.
8 And I have some slides. One more. Excuse me for the
9 color.

10 I will start with a brief overview of the data
11 protection legal framework in Mexico. Very brief. Here
12 is a chart. First of all, I want to say that in Mexico
13 that personal data protection is a fundamental right. It
14 is recognized by our Federal Constitution. It's somewhat
15 different from the FTC, but it's important to stress
16 that.

17 As you can see in the chart, to complement this
18 regulatory framework we have at the Federal public sector
19 the FOIA, like the Freedom of Information Act, that
20 although it is an access to information, an act provides
21 some -- it contains some -- that type of protection
22 provisions that has to be upstart by the -- it have to be
23 upstarted by the Federal governmental institution or
24 agencies.

25 And in the local level, we have several data

1 protection laws, are also like local FOIAs, that has to
2 be observed by the local public entities handling
3 personal data. Complementing that, in other hand, in the
4 private sector, we have -- it's quite simple because we
5 just have one law about data protection law, and this law
6 establish the minimum standards of data protection that
7 any person or agent or private -- private -- no, not
8 agency, sorry, any person or a private entity, must
9 observe when handling or processing personal data.

10 It's very similar, if you can see, the
11 principles contained in that data protection law are very
12 similar to the APEC privacy framework, and this law could
13 be complemented or supplemented in two ways. The first
14 way in which it can be complemented is by a sectorial
15 laws. It may be in the finance or in the health sectors,
16 more protection is needed for data protection in -- I
17 mean for those records, financial records or health
18 records. And this is one way in which it could be
19 complemented.

20 The other way is by what we call a binding
21 self-regulation or enforceable self-regulation that is --
22 I mean, this self-regulation is like a contradiction, but
23 it is established in the data protection law that any
24 persons and any private entity that wants to complement
25 what is established in that data protection law could

1 develop or implement some measure extra -- additional
2 measures. And of course it have to -- it has to meet
3 some requirements, and I'll talk about those a little bit
4 later in my presentation.

5 The next slide talks about the privacy
6 enforcement agency in Mexico. It's the IFAI, Federal
7 Institute of Access to Information and Data Protection.
8 It's a very long name. And the IFAI has -- enforces two
9 laws -- two Federal laws: the FOIA and the private data
10 protection law. And for that it has several powers. The
11 first one is to conduct investigations. It also solves
12 cases filed by individuals, when asking any private data
13 controller to exercise some rights regarding the personal
14 information. And when these data controllers do not
15 reply in a satisfactory way, well, they can file their
16 complaints before the IFAI.

17 And of course the IFAI has powers to impose
18 fines differently from what Danièle says about in Canada,
19 what happens in Canada. We have the powers to impose
20 fines. And very important and regarding self-regulation,
21 we have three main powers -- three main powers. The
22 first one is to develop jointly with the Ministry of
23 Economy the self-regulation parameters or self-regulation
24 guidelines.

25 Secondly, we manage a self-regulation mechanism

1 registry. Once we recognize some specific self-
2 regulatory mechanisms, we registrate in our register.
3 And, thirdly, we oversee all the data protection
4 certification system, and I'll explain it a little bit
5 later.

6 And that self-regulation parameters or
7 guidelines, these are secondary regulations that we are
8 in the way of developing. We have already developed that
9 with the Ministry of Economy jointly, but it is important
10 to know that they have not been officially submitted.
11 They are passed through a public consult process and we
12 have tackled any of the comments presented by the
13 particulars there, but we are now waiting for the final
14 resolution of the Federal regulation authority and in
15 order to publish them officially and to make them into
16 force.

17 But I want to make here a little note, because
18 we are changing our government, very similar that happens
19 here in the USA, where you have new president as of
20 December 1st. So, hopefully, this process of officially
21 submitting the self-regulation parameters won't take
22 longer, but we are not sure about that. So, it's
23 important to note that.

24 These self-regulation parameters establish and
25 regulate the minimum standards or points that any self-

1 regulation mechanism must contain in order to be
2 recognized by the IFAI. For example, and as we talked
3 before, it is important that self mechanisms must have --
4 self-regulation must contain enforcement measures to be
5 effective, and also to contain oversight, continued
6 oversight, maybe by their own or by a third party, I
7 don't know, consult or, I mean, lawyer or something.

8 And what else? These self-regulation
9 parameters also contain the general -- it describes the
10 details of the data protection certification system in
11 Mexico. And I have for that also a slide. That's the
12 next slide. The data protection certification system in
13 Mexico is made of several levels. And as you can see,
14 there are a lot of similarities with the CBPR System, as
15 a whole.

16 At the second level, you can see that we, the
17 IFAI, are the enforcement -- privacy enforcement agency,
18 and we are in charge of the oversight of all these data
19 protection certification systems. And we are going to
20 authorize accrediting entities that are -- that has the
21 -- that have the function of authorizing or approving
22 third-party certifiers or accountability agents in terms
23 of the CBPR System.

24 Below that level, in the third level, we have
25 the certifiers that are the accountability agents for the

1 CBPR System. And at the fourth level, we have the data
2 controller or processors that going to be certified by
3 this -- by this -- okay, sorry, that's the last slide.

4 So, very quickly I will explain that the
5 certification system in Mexico must be fulfilled by
6 anyone that wants to be certified in terms of -- that
7 wants to operate in Mexico but want to be recognized by
8 the CBPR System for the Mexican authority -- I mean, no,
9 so it's important.

10 And as Josh said, we have a file that we're
11 interested to participate in the CBPR System, and the
12 benefits we see in that is that the flexibility, because
13 as I've said for us the data protection is a fundamental
14 right, and it's very important to be protected to anyone
15 in everywhere, and that's we see a very important way to
16 do that by the CBPR System because it is flexible and it
17 adapts very quickly to technological changes. Very
18 important.

19 And, also, not just because it is a fundamental
20 right, we see that anyone that want to be certified must
21 have value added to their consumers and can attract more
22 consumers and can be recognized in all these regions.
23 So, we think it's very important for us in Mexico to be
24 part of this system. Thank you very much.

25 MR. HEYDER: Thank you very much, Melissa, for

1 the Mexican perspective on Cross-Border Privacy Rules.
2 Let me turn it over now to Frances Henderson and Saira
3 Nayak. Both the BBB and TRUSTe have been involved in
4 this process pretty much from the beginning, and have
5 commented and worked on all the documents that are part
6 -- the documentation that is part of the Cross-Border
7 Privacy Rules. And both represent organizations that are
8 potential participants as accountability agents, so I
9 would like to ask them to talk about this Cross-Border
10 Privacy Rule System from the perspective of potential
11 accountability agents and dispute resolution providers.
12 Thank you.

13 MS. HENDERSON: Thank you, Markus, and thank
14 you to the FTC for inviting me to participate in the
15 reunion of the APEC Data Privacy Subgroup. It's really
16 good to see everyone on the panel and in the audience.
17 It's remarkable to see that this new co-regulatory system
18 is being launched, and I'm thrilled to be here to talk
19 about the self-regulatory aspect of it, what we call the
20 sharp end, because accountability agents are critical to
21 the operation of the system on the ground, and if it
22 works well, we don't really need to involve too many of
23 the other parts of it, only occasionally.

24 And, so, as we contemplate or as any
25 accountability agent contemplates participation in the

1 program, because of the importance of having an effect of
2 self-regulatory aspect of the program, we think it's
3 important to look at some key issues that you want to
4 consider when you are joining the system and see what we
5 think at BBB are the four key elements that are essential
6 to effective self-regulatory programs and how is that
7 accountability agent required or enabled to implement
8 those elements.

9 And the first of those elements is you have to
10 have a decent code of conduct, you have to have
11 meaningful standards. And in this case, we definitely
12 have very specific and meaningful standards that were
13 agreed upon and hashed out at length. And we actually
14 have remarkably specific detailed questionnaires and
15 documents that can be used by all accountability agents.
16 Accountability agents also actually got to participate in
17 creating them, which is a good thing. And there's a
18 clearly defined rule, secondary rule, for accountability
19 agents to create and enforce their own program
20 requirements over and above those standards that are
21 mandated under APEC.

22 And the second element is independent, and I've
23 used the word respected, but I think it could really be
24 vetted, where a vetted third party acts as a trust agent
25 for industry participants. And I think in this case, at

1 the core of the CBPR program is an application for
2 recognition of accountability agents that include very,
3 very specific recognition criteria, many of which require
4 the accountability agent to demonstrate and document to
5 the Joint Operations Panel how they'll structure their
6 operations to ensure their independence, not just their
7 independence in dispute resolution, in impartiality, but
8 specific obligations to show how you will avoid conflicts
9 of interest between the accountability agent rule and
10 other business or corporate relationships, membership
11 relationships, or other corporate relationships they may
12 have with companies seeking their certification and/or
13 their dispute resolution services.

14 And by participating in this process and
15 subjecting their operations to continuing scrutiny by the
16 JOP because there is an annual renewal process,
17 accountability agents will be taking on a key role in
18 promoting consumer trust in their own operations and in
19 the integrity of the system as a whole.

20 Transparency, the fair and impartial dispute
21 resolution process is documented. The more transparent
22 that process is, the better respected and trusted it will
23 be by consumers. There is a provision for access of
24 consumers, which is something that has been a big concern
25 in other self-regulatory mechanisms, is meaningful access

1 by consumers. If the accountability agent model is a
2 trustmark, it's pretty straightforward, you click on the
3 trustmark, it gets you to an online complaint form. In
4 other possible program models, it may be more difficult,
5 but one way to do it is to insist on having full
6 accountability agent contact information and a direct
7 link, again, into an online system.

8 Another aspect of access would be cost, that it
9 be low cost or free. And then finally that there would
10 be reporting, and there are stringent requirements for
11 reporting on case outcomes and statistics.

12 Finally, accountability. A requirement to hold
13 accountable participating companies that don't comply
14 with program requirements or that in the event of an
15 adverse decision in dispute resolution fail to remediate
16 the situation or fail to do so timely. And this program
17 provides for an escalating series of measures, up to and
18 including a reporting back to the backstop regulator on
19 their compliance and publicizing the name and the fact of
20 noncompliance.

21 I wanted to -- I think I went too far. I
22 wanted to just run through a couple of BBB programs,
23 because I think the term accountability agent is a bit
24 opaque to most people. And while a trustmark is one
25 paradigm that we discussed a lot in these consultations

1 and negotiations, it wasn't the only model. So, at BBB
2 we have a lot of experience with trustmark models, both
3 privacy seals, other specialty seals, but also non-seal
4 privacy programs and other specialized programs that we
5 create in coordination with industry around varying sets
6 of standards. And we have numerous dedicated independent
7 dispute resolution programs that we've developed in
8 partnership with all kinds of industries on matters such
9 as privacy, advertising, some of which you'll be hearing
10 about later in the day.

11 We're still exploring how we might participate
12 in this system. It's clear that more than one
13 accountability model is permissible. Saira will be
14 addressing the paradigm of an existing trustmark or
15 privacy seal program that will map its program
16 requirements against the CBPR certification NDR
17 standards, but other specific types of seals could be
18 created or non-seal programs. And we expect there will
19 be participants from outside the trustmark community,
20 such as accounting or consulting firms, certification or
21 licensing entities that may want to take on this role for
22 specific industries.

23 Finally, I just want to mention that the
24 accountability agent recognition criteria also allow an
25 accountability agent to act only as a certifier,

1 contracting out the dispute resolution processes to a
2 third party. And that has to be by pre-arrangement and
3 essentially the two parties will apply together. And we
4 believe this provides maximum flexibility for new and
5 perhaps previously unconsidered models. And I'll stop
6 there and let Saira take over.

7 MR. HEYDER: Thank you.

8 MS. NAYAK: All right. Hi, everyone. I'm
9 Saira Nayak from TRUSTe. Thanks again to the FTC for
10 organizing this workshop. For those of you that have
11 been involved in the APEC process, you're probably more
12 familiar with John Tomaszewski, our General Counsel,
13 who's been heavily involved in the APEC activity. So, I
14 am your John Tomaszewski for the day.

15 I wanted to -- of course I will delve in in a
16 little bit about, you know, TRUSTe's existing
17 certification system and how it might adapt to an APEC
18 model. As Josh indicated, you know, we have submitted
19 our application and are waiting to hear back on next
20 steps.

21 So, I can't give too many specifics, but one
22 thing I did want to say is that, you know, TRUSTe has
23 been around, and I'll just give you a quick slide.
24 There, it's working. Overview of who we are, and we've
25 been around for about 15 years. We went -- we started as

1 a nonprofit. We went private in 2008, and we are now
2 technically a startup.

3 We operate in several different geographies, as
4 you can see. We already are working with consumers in
5 about 35 -- 30 countries, supporting over 35 languages.
6 And we already have a certification -- a number of
7 certification programs -- that are based on existing law
8 and regulations, for example, our COPPA safe harbor,
9 which is based on the COPPA statute.

10 We really see APEC as a great opportunity for,
11 you know, a global code of conduct that relates to
12 privacy, but and there have been a lot of criticisms
13 around voluntary codes of conduct and self-regulatory
14 organizations. Of course, and this was discussed in the
15 first panel, I think one of the big concerns there is,
16 you know, is self-regulation going to be enough.

17 Of course there's always the threat of
18 government enforcement, but another issue that I think we
19 should think about is consumer trust. Consumers, and our
20 research has borne this out time and again, consumers
21 believe in trustmarks, especially when they are enforced
22 and certified to high standards. And I think that really
23 helps in the promotion of a robust economy, especially an
24 online economy. We, I think here in the U.S., take for
25 granted our robust online economy. I've been spending

1 some time in Europe, and there's a huge initiative there,
2 the digital agenda. The Europeans have shut us down.

3 (Laughter)

4 MS. NAYAK: But I think our economy here is
5 almost the envy of several in Europe who want to build a
6 robust tech economy like the one we have. But a big
7 problem there is trade across borders. You know, if
8 you're ordering something in the Ukraine from England,
9 you're not always sure if it's going to reach you. And,
10 so, you know, perhaps APEC can be instrumental in
11 achieving that kind of system worldwide.

12 So, just some quick points about our APEC
13 application so far, we've been a very active participant
14 in the APEC process to date. We've applied to be an
15 accountability agent, which would allow us to certify
16 other companies under the APEC framework, and our
17 application is currently sitting with the Department of
18 Commerce, and who will be getting back to us very soon,
19 I'm sure.

20 MR. HARRIS: Right after this meeting.

21 MS. NAYAK: Right after this meeting. So, once
22 we are approved as an accountability agent, what happens?
23 Basically, you know, our programs will then be referenced
24 and officially endorsed by APEC for the CBPR System.
25 We're still trying to figure out whether we're going to

1 use a trustmark or not. Of course, you know, given that
2 our trustmark is widely recognized, it's something that
3 we're leaning to. But my understanding is that the APEC
4 Secretariat is still figuring out whether or not there's
5 going to be a special APEC seal. And until then, you
6 know, we are working with a lot of our clients already,
7 and we feel very strongly, we've done a lot of mapping of
8 our existent requirements to the APEC framework, and we
9 feel strongly that our current requirements will be
10 sufficient to show -- for a participant to show their
11 compliance with the APEC framework once our application
12 is approved.

13 All right, so, very quickly, going on to what
14 we do now, our current certification process is really a
15 five-step process. The first step -- or the first two
16 steps of analyze and advise can probably correspond to
17 the self-assessment step of the APEC system. So, I think
18 you know that in terms of an accountability agent and
19 what we need to do, there's kind of four steps. There's
20 the self-assessment by the company as to whether their
21 requirements are going to meet the APEC standards. Then
22 there's the review by the accountability agent, whether
23 it's us or someone else, as to whether the requirements
24 do meet the APEC standard. Then there's the recognition,
25 where we award the seal or whatever it is to signify

1 participation in the APEC program. And, finally, there's
2 enforcement and monitoring.

3 So, our current certification process and, you
4 know, kind of follows this model. The first step,
5 analyze, we actually have a three-step process. We will
6 manually look at, for example, a website or mobile app.
7 We will then provide a questionnaire to the company, so
8 that they can respond on specific points, for example,
9 security. We ask that our clients attest to certain
10 things regarding security, because if they divulge that
11 to us, it's no longer secure.

12 We also have scanning technology, which can run
13 across a website and monitor whether or not what the
14 potential client is saying and what they're doing is the
15 same thing. After we go through that process, we usually
16 order -- sorry, issue a report, a findings report, to the
17 client, a GAAP analysis that shows them where our
18 standard is and where they need to be. And once the
19 client has remedied that, we will then proceed to award
20 them our trustmark. And we envision a similar system for
21 the APEC framework.

22 And then, finally, there's the monitoring. Our
23 technology plays a big part in the monitoring phase,
24 because, as I said, we can sort of scan and see, for
25 example, if you're really providing express consent for

1 that particular type of data collection, et cetera. And,
2 of course, then we have -- once, you know, the monitoring
3 part actually has a few phases as well. So, I think the
4 most important for the APEC process, the two most
5 important, are certification and enforcement -- sorry,
6 consumer dispute resolution and enforcement.

7 So, currently, right now, we will actually
8 initiate an investigation based on one of four factors.
9 The most widely -- the most popular factor, of course, is
10 consumer complaints. We received over 9,000 last year,
11 of which half were put in the bucket of non-privacy
12 complaints. They were things like what's my user name
13 and password, because sometimes consumers are confused,
14 when they see our seal they think that perhaps we are the
15 site, but we are actually the seal. So, you know, if you
16 take away that half, we have about 4,500 complaints, and
17 there are some detailed statistics in our transparency
18 report, which is available on our website. But we've
19 definitely seen some interesting trends from the
20 complaints that we have had in the last few years.

21 Of course we'll also respond to a regulator
22 inquiry, if there's wide press coverage. And, then
23 again, if we scan a website or mobile app and see
24 something is not quite right there, we'll initiate an
25 investigation. And once a consumer has filed a

1 complaint, the company has about 20 days to respond to
2 us. We start what we call the notification process. If
3 the company is unresponsive, then we start a formal
4 enforcement process. And if they ultimately don't cure
5 the violation, then we terminate them from the program.
6 And last year we had about 11 terminations.

7 We've had a lot of questions. You know, we
8 certify over 5,000 clients, how is it that you've had
9 only 11 terminations. But we do a lot of the weeding out
10 sort of early on in the certification process, so if
11 you're advising a company and they come back to you and
12 say we're not going to do the things that you're saying,
13 then they don't get into our program to start with. In
14 fact, I think about 12 percent of our potential
15 applicants don't make it to the award phase where they
16 get our seal. So, we feel that we are weeding out a lot
17 of companies that wouldn't be compliant early on in the
18 process. It will be interesting to see how these stats
19 change under an APEC program.

20 And I don't know how much time I have. I'm at
21 the end, okay, so I will leave it at that. And if you
22 have any more questions, please let me know.

23 MR. HEYDER: Okay, great. Thank you, Saira and
24 Frances. And let me turn it over to Scott Taylor now to
25 talk about the business perspective on Cross-Border

1 Privacy Rules.

2 MR. TAYLOR: Thanks, Markus, and thanks to the
3 FTC. I appreciate being here. Markus asked me to talk
4 about a couple of things. The first one is why would
5 companies want to participate; and the second is what
6 would it take to participate. So, I put together some
7 comments on that.

8 Like the other panelists, we've been involved
9 from the beginning with the CBPRS and are very much
10 supportive of them. I think like with any code of
11 conduct or co-regulatory program, there's probably a
12 couple of factors that drive companies to be interested.
13 The first one is around trust, primarily around consumer
14 trust and trying to build that trust and reinforce it.
15 It's a reputational aspect.

16 The second is improving some form of the
17 business process. I think we heard from Commissioner
18 Ramirez this morning and the other panels that
19 predictability in this patchwork of change that's going
20 on is very important to industry. We have a lot of
21 examples of codes of conduct that industry has come up
22 with, which you can argue have been successful or not
23 successful. There's other third-party seal programs that
24 we've talked about, and there certainly are binding co-
25 regulatory programs that have come into existence, like

1 the EU BCRs.

2 In some codes, there is a review by an
3 independent or reputable agent, and I think that this
4 adds a tremendous value. In APEC CBPRS it goes a step
5 further, because there is this regulatory backstop, which
6 I think is even more important. It really takes codes of
7 conduct and makes them much more real for those that are
8 signing up to them and participating in them.

9 My opinion is that many of the codes of conduct
10 were created because of some form of a consumer concern,
11 but I also believe that many of them have fallen short
12 because of some of these factors that didn't exist, that
13 independent review and the regulator backstop. In
14 describing CBPRS, it's a little bit difficult, because
15 they're somewhat new. They're not exactly like a BCR,
16 where the regulator is actually doing the review.
17 They're not exactly like safe harbor, that was a point-
18 to-point model between Europe and the United States.

19 This is actually a very important development
20 and a very complex one in that you have this incredibly
21 diverse region, which it was hard to imagine anything
22 that could bind it together in this space. But, in fact,
23 I think that this program is beginning to achieve that.
24 Just the memorandum of understanding for the regulators
25 to be able to work together, to come up with common

1 agreements on this system, I think is amazing to have
2 watched this over the last seven years.

3 For business, it creates a level of
4 predictability. Imagine a global organization, or even a
5 small organization that's trying to operate in this
6 global Internet-based economy, trying to deal with this
7 patchwork of national laws and regulations. This, as
8 Commissioner Ramirez described, it actually -- we're
9 never going to get to a place where all of the laws and
10 regulations can be made consistent.

11 We just heard from Mexico it's a fundamental
12 right in their Constitution. Try to compare that to a
13 scenario like the United States. There's just
14 inconsistencies at that base layer that although many of
15 us would love to see that consistency, it's not going to
16 happen in the laws or the regulations alone. It's this
17 complementary system, this binding co-regulatory program,
18 where I think we can start to create some of this norming
19 and this consistency, a set of standards and expectations
20 of those businesses that want to build that trust, that
21 we can achieve these global interoperability objectives
22 that we would never have with the laws and regulations.

23 For organizations that care about this, and I
24 don't think it's dependent upon size of the organization,
25 I think CBPRS is a very valuable tool. When it comes to

1 companies considering this, I think the first step is to
2 really understand your own philosophy and your own
3 business model. The APEC privacy principles, just like
4 the OECD principles and the principles that were part of
5 the European Directive, are very clear. And there's a
6 lot of consistency in these principles worldwide, all of
7 these different regimes and frameworks.

8 A company needs to sit down and take a look at
9 those principles and determine whether or not they, in
10 fact, align to their philosophy and their company's
11 values. If there is alignment, then you simply sit down
12 and evaluate how you're going to deliver against those
13 principles. You put the appropriate policies and
14 programs into place. And if there is some form of
15 misalignment, you make the decision to fill that gap.

16 I think it's very important if a company is
17 thinking about CBPRS, just like if they were thinking
18 about safe harbor back in 2002, you have to start with
19 what is your company's philosophy and what are you going
20 to stand for, what commitments are you willing to sign up
21 for. So, I think you have to start there.

22 If the company's philosophy and program
23 actually aligns to those APEC principles, then I actually
24 don't think that the process that has been developed,
25 which is flexible and was designed from the beginning to

1 work for small organizations as well as large is that
2 difficult to achieve. There's been a big emphasis in the
3 Privacy Subgroup that the accountability agents that are
4 put in place, that there is some form of a sliding scale,
5 wherefore a small organization that there is not a
6 barrier to entry for that accountability agent to come in
7 and to help certify them.

8 Just like with BBB and TRUSTe in the past, I'll
9 use them as two examples, but there are many others in
10 the Asia-Pacific trustmark agent group, there's a very
11 different fee for a small organization, as there should
12 be from a very large, complex organization. This is very
13 important in this process.

14 I also think that the flexibility that's been
15 built into this system from the beginning is that it has
16 focused on the what, not the how. If you're a small
17 organization that has very sensitive data, the what
18 really shouldn't be any different than a very big
19 organization, but how you actually achieve upholding
20 those principles is going to be very different. What
21 can be done in a small organization with three people
22 is very different than an organization with 400,000
23 people.

24 So, it's the what that we need to stay focused
25 on, this principles-based approach, not how an

1 organization achieves that. And the flexibility of being
2 able to demonstrate your capacity to the trust agent in
3 all kinds of different ways of how you achieve or uphold
4 that standard is where the flexibility has been built
5 into this system from the beginning.

6 Having been part of this program for the last
7 seven years, there's a lot of benefits to it. And I
8 really think it starts with consumer trust and
9 organizational reputation. But as you've heard earlier,
10 there's a lot of benefits also in terms of administrative
11 burden. For us, we've already seen great success. As
12 you look at Singapore developing their law or their
13 regulations, Mexico, Colombia, every one of them are
14 actually looking to APEC, at least referencing APEC as a
15 potential mechanism for compliance against components of
16 those laws. To me, that is great success.

17 The fact that this exists as new laws come into
18 place or as laws are being revised, the fact that there
19 is something that exists that is across the region is a
20 great benefit towards us getting to that concept of
21 global interoperability.

22 Another success, and Josh alluded to it
23 earlier, since 2002, Europe has developed binding
24 corporate rules. I think it's a very successful program.
25 I think binding corporate rules and the regulators in

1 Europe are learning from APEC and this concept of "it's
2 not scalable to have a data protection authority doing
3 certifications alone." So, this concept of
4 accountability agents as being considered in BCRs, there
5 are strengths in BCRs that were considered and are still
6 being considered as we further develop Cross-Border
7 Privacy Rules. This cooperation that's happening
8 globally, I think, is very important.

9 And I also believe that one of the biggest
10 benefits to business is the fact that these programs are,
11 in fact, today being mapped. The Department of Commerce
12 and the Article 29 Working Party are looking at what
13 components of binding corporate rules and Cross-Border
14 Privacy Rules are consistent enough where components of
15 the two could be mapped. And as companies substantiate
16 their capacity to uphold the principles, regardless of
17 what those principles are, I think that that's a huge
18 benefit for business, it's a benefit for regulators, and,
19 more importantly, it's a benefit for consumers in their
20 protection of their data. So, thank you.

21 MR. HEYDER: Thanks very much, Scott. And now
22 Paula.

23 MS. BRUENING: Thank you, Markus. And thank
24 you to the Federal Trade Commission and the organizers of
25 the conference for allowing me to be here today. And I'd

1 like to take the opportunity to commend the FTC and the
2 Department of Commerce for all the work that they've put
3 into the APEC process over the years. Their steady
4 engagement and real concern about the process has been
5 really critical to its success, and we really appreciate
6 it.

7 I'm here representing the Centre for
8 Information Policy and Leadership, which is an
9 independent, nonprofit think tank and policy development
10 organization that's situated in the law firm of Hunton &
11 Williams. And our members consist of leadership
12 companies, about 40 of them, in the information
13 technology and the information industry. And among these
14 members, many of them early on in the APEC process
15 recognized the importance of engaging at APEC. And, so,
16 the center has been closely involved in the work at APEC
17 since its very beginnings.

18 As Markus said, when I first got involved in
19 APEC I was with the Center for Democracy and Technology,
20 and I brought a public interest perspective to the table.
21 And I'll talk a little bit about some of my observations
22 wearing that hat later in my remarks. But I think my
23 remarks are always challenged -- as being the last
24 panelist, you're always challenged because you've heard
25 so many good things said, many of them the things that

1 were in your notes. So, I'm just going to highlight a
2 few points that were made and talk a little bit about the
3 Centre's motivation for getting involved in this project
4 to begin with, which I think might actually shape some
5 context for a lot of what you've heard, because there's
6 been a lot of detail and a lot of nuts and bolts
7 mechanisms that have been talked about.

8 So, let me just say a few words about why we
9 got involved in it and what we think -- why we think it's
10 such an important process. And then I'll talk just
11 briefly about some public interest perspectives.

12 In making the decision to engage at APEC, the
13 Centre and its members were really looking for a vehicle
14 for data protection that addressed the realities of a
15 21st Century data environment. And while it's really
16 sort of a truism now that data is really everywhere, it's
17 collected ubiquitously, it moves where it needs to move,
18 when it needs to move.

19 If you think back to when the APEC process
20 started, a lot of what really brought the need for the
21 free, robust, and well protected flow of data globally
22 was business process outsourcing. Companies wanted to
23 move data to different parts of the world to take
24 advantage of the outsourcing market. And to do that,
25 they were moving data across and to nations and

1 jurisdictions where there were very varied levels of
2 protection, where data protection regimes were not
3 necessarily fully developed, if they were in place at
4 all.

5 And, so, it became really clear that there was
6 going to need to be some system of moving data around the
7 world in a way that would protect the data, that would
8 allow it to move robustly where it needed to be, but that
9 there would be, as Scott mentioned and as others did as
10 well, a high level of trust that that data and the
11 obligations that came with that data to be protected were
12 going to be enforced as it moved around the world.

13 And, so, when the APEC process really started,
14 at its beginnings, in developing a framework that set out
15 initial principles that would guide the movement of that
16 data and that would -- and from those principles then was
17 developed this very robust network of enforcement and
18 redress that you've heard us talk about in the last hour
19 or so.

20 But what was really important was making sure
21 that those levers could be pulled and pushed, that those
22 mechanisms were going to work well, and that companies
23 could trust that the data when they moved it to an
24 outsourcer that they would have the kind of relationship
25 with that outsourcer, with whoever they're transferring

1 data to or sharing data with, that the obligations that
2 they had with respect to that data were going to be
3 protected because their responsibility was attached to
4 that data, wherever it moved. So, that was really
5 important.

6 And then there was also the consumer piece,
7 which was how do we make sure that consumer complaints
8 are adequately addressed, wherever that data moves, and
9 in a way that was easy for the consumer to use. And
10 that's another piece of this that you heard about that I
11 think really is a remarkable development and the ability
12 to bring all of these countries to the table, all of
13 these interested parties and develop this kind of
14 mechanism that has global implications that is being
15 looked to by individual countries, by different
16 jurisdictions as a model is a remarkable accomplishment,
17 and I think one that's going to serve us well as we
18 continue to sort these issues out going forward.

19 The Centre thinks probably the two things that
20 really need to be looked at next are first what was
21 suggested, the question of small and medium-sized
22 enterprises and how we can be sure that this is a
23 mechanism that applies well and works well for them. If
24 this is to work it's got to be -- large, mature companies
25 need to be involved, but in addition, there needs to be

1 an ability for smaller players to engage and be trusted
2 players in this environment.

3 And then we also want to look at how does this
4 apply in an environment where we have highly networked
5 kinds of business models, where we're looking at things
6 like the cloud, mobile devices, and how can you apply
7 this kind of a model in those situations as well.

8 And I've seen a two-minute marker, so I'm going
9 to now turn just a couple a minutes to the public
10 interest. And sitting here where I do today I do not
11 presume to speak for the public interest, but I will
12 offer a few observations that I made while I was doing
13 that work, and I'm sure that there are others in the
14 audience who might want to chime in who are actually
15 wearing their public interest hat today.

16 I think one of the concerns that we heard
17 raised then in the public interest was are there
18 sufficient incentives for companies to engage in this. I
19 know we did talk about the incentive that you did have a
20 higher level of flexibility, there was more
21 interoperability. But are there also negative
22 incentives? You know, what are the sticks that are going
23 to get companies to engage in this kind of a system and
24 to adhere to it?

25 There were questions about whether

1 accountability agents have sufficient muscle to ensure
2 appropriate protections, and I think some of the things
3 we've heard today would indicate that there is a lot of
4 oversight being given to them. The sort of level of --
5 there's a high level that has to be reached in order to
6 be accredited to be an accountability agent, so I think
7 it's recognized that that is a concern and that's one
8 that's going to have to be addressed.

9 And then there's also the question of whether
10 this approach would serve consumers well when they bring
11 complaints for resolution. And I can remember at an
12 early APEC meeting making the remarks that, you know,
13 this has to work efficiently, it has to be easy for
14 consumers, and there has to be a resolution that is
15 real and that is meaningful. And that's going to be
16 very, very important if the system is to have
17 credibility.

18 And, so, on that, I will turn this back to
19 Markus.

20 MR. HEYDER: Thank you very much, Paula. I see
21 we have five minutes. I had a lot of follow-up
22 questions. There are so many more issues to explore with
23 CBPRS, but I would like to turn to the audience and see
24 if anybody has any questions. This is an initial
25 introduction of the system, so feel free to ask basic

1 factual questions about the system or anything else you
2 would like to ask. Please?

3 MR. CHO: First of all, thank you for a
4 wonderful presentation. My question is what is the
5 mechanism for securing the accountability of the
6 accountability agent? I mean, the government -- the
7 Commerce Department or the Mexican Department, they have
8 a certain kind of mechanism to monitor their -- what
9 they're doing? I'm Professor Sungjoon Cho from Chicago-
10 Kent. Thanks.

11 MR. HARRIS: Thank you. One of the things I
12 kind of mentioned at the beginning in terms of how this
13 system actually functions, the accountability agents
14 themselves have to be endorsed by all APEC member
15 economies. That endorsement -- we also have associated
16 with this an entire system of ways in which you can kind
17 of revoke that endorsement. Now, that's always for
18 cause, so it's not unlimited, number one.

19 Number two, you can't -- you have the ability
20 to be able to unilaterally, in effect, revoke endorsement
21 of an accountability agent that would be operating within
22 your jurisdiction. If it's an accountability agent that
23 you think is problematic in another jurisdiction, you
24 would need to be able to bring that to the floor, but
25 then you would have to recuse yourself from the following

1 determination as to whether or not to continue
2 endorsement of that, because it's a consensus-based
3 organization and we want to be able to make sure that we
4 don't have such a light touch on the trigger that we make
5 the business model for the accountability agents
6 unattractive. We want to make sure that they feel
7 sufficiently comfortable in investing in being an
8 accountability agent.

9 So, we have that, and then also we have the
10 ability to be able to take a look annually at an
11 application from an accountability agent, to make sure
12 that there aren't any difficulties with the performance
13 of the accountability agent.

14 MR. HEYDER: And this question over here?

15 Oh, one moment. Yes, Melissa?

16 MS. HIGUERA: In the case of Mexico, our
17 certification system, I mean, provides that the IFAI may
18 oversee these accredited entities that have to continue
19 to monitor this certifier -- third-party certifiers or
20 accountability agents. And it is -- we have not enough
21 resources to do that by ourselves, so we need these
22 accrediting entities to continue to monitor them. And,
23 of course, if they find something, they can revoke this
24 authorization or recognition and, of course, maybe we can
25 also impose a fine.

1 MR. HEYDER: Great. A question over here?

2 MR. HIRSCH: Hi, I'm Dennis Hirsch from Capital
3 University Law School. Two questions. One, has there
4 been any thought to allowing industry sectors to submit a
5 code for certification into the APEC system, or is it
6 only individual companies that can do that?

7 And, secondly, what's the nature of the safe
8 harbor with respect to the various national laws if you
9 follow the -- if a company follows the APEC privacy
10 principles, has their code certified by an accountability
11 agent, do they have a legal safe harbor, or could they
12 still be in violation of national laws in the various
13 companies where their data flows?

14 MR. HEYDER: You want to take that, Josh?

15 MR. HARRIS: Sure. Okay, so in regard to
16 your first question, basically because when we were
17 talking about the flexible approach here, you can
18 put forward any kind of code of conduct. There's a
19 mapping element to all of this, and this is one of the
20 functions of the Joint Oversight Panel, to make sure that
21 that code of conduct or those program requirements meet
22 the minimum requirements that the CBPR System has
23 established.

24 So, this could be done either by an individual
25 organization; this could be done if there was a sector

1 that wanted to get together through an industry
2 association to put something forward. That's also
3 possible. This is all going to be subject, though, to
4 the unanimous determination of all APEC member economies.
5 So, there is mechanisms built into the system to be able
6 to expand it beyond it's initial scope.

7 Regarding the kind of safe harbors that might
8 exist for getting CBPR certified, that really is very
9 much up to the individual member economies. And, so,
10 this is kind of a thing that happens after the
11 establishment of the system. So, for example, in
12 Mexico's law there's this principle of attenuation is one
13 of the concepts for taking up a self-regulatory code of
14 conduct in addition to the law. Now, that hasn't
15 actually been fleshed out yet.

16 MS. HIGUERA: I think you are talking actually
17 about the provision in our secondary regulation that
18 established that anyone that has an effective self-
19 regulation mechanism and the -- may be -- I mean, can
20 gain a reduction in fine. If we see that they don't
21 comply with something and they -- we impose a fine and we
22 see they have this self-regulatory effective, of course,
23 self-regulatory mechanisms, we can reduce the amount of
24 the fine.

25 MR. HEYDER: And just to add -- sorry.

1 MS. HIGUERA: No, it's okay.

2 MR. HEYDER: And to add from the U.S.
3 perspective, the APEC Cross-Border Privacy Rules do not
4 include a safe harbor -- an explicit safe harbor
5 provision or protection in the United States for
6 participants, but we have always said that participation
7 in a code of conduct will be taken into account when
8 making enforcement decisions. And participation in a
9 code shows an effort and due diligence and reasonable
10 behavior with respect to attempting to be in compliance
11 with an applicable standard. So, in that sense, it is
12 relevant whether or not you are attempting to comply with
13 a code.

14 Thank you. I think we are ought of time. I'm
15 told we're out of time. So, thank you very much to my
16 panelists. This was very interesting and instructive,
17 and thank you for the audience.

18 (Applause)

19 MS. FEUER: So, thanks again to the APEC Cross-
20 Border Privacy Panel. It is now somewhere between 12:25
21 and 12:30. We have an afternoon of fascinating panels on
22 topics as diverse as corporate social responsibility,
23 food safety and toy safety, and best practices and
24 metrics for cross-border codes. So, please come back by
25 1:30. And if you haven't picked up our "where to eat in

1 the vicinity of the FTC," there are flyers out on the
2 back table. Thank you.

3 (Whereupon, at 12:28 p.m. a luncheon recess
4 was taken.)

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AFTERNOON SESSION

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(1:35 p.m.)

3

CASE STUDY

4

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISE (MNE)

5

MR. FENTONMILLER: So, we don't get too far off
6 schedule, we're going to get started with the next panel
7 on the multinational enterprise guidelines from OECD.
8 And our moderator is Peter Avery who is very active with
9 OECD. He heads the Consumer Policy Unit. And he is all
10 the way in from gay Paris and we appreciate his
11 attendance and we look forward to the panel.

12

And there will be people trickling in, I'm
13 sure, from lunch, so hopefully it won't be too
14 disruptive.

15

Peter?

16

MR. AVERY: Okay, so thank you very much to the
17 FTC and everyone participating in this conference.
18 Actually, at the OECD, we have a very keen interest in
19 the role that codes of conduct can play in supporting
20 consumer policy objectives. And as some of you may know,
21 in 2010, we completed work on something we call the
22 Consumer Policy Tool Kit, which is this, which presents a
23 framework for improving consumer policy making. It
24 explores how 12 policy tools can be used, including, as
25 you can see on the slide, codes of conduct. And we now

1 have launched a new project, which is well underway,
2 looking at the role that industry self-regulation can
3 play in each of those 12 areas. So, we're very
4 interested in this conference.

5 And work has advanced on this project, but has
6 a long way to go. I was asked to provide some
7 indications as to where things stand now. I can provide
8 them only as a personal observation, and that would be
9 that industry self-regulation appears to work
10 particularly well in areas of technical standards and
11 licensing, but there is a need for oversight to avoid the
12 negative effects on competition. And I think that we
13 heard from Chairman Kovacic what those considerations
14 could be.

15 It works less well in areas of disclosure and
16 contracts. And here I think the role of co-regulation is
17 one that needs to be looked at very carefully.

18 Now, today, we're looking very closely at codes
19 of conduct with a case study on the OECD Multinational
20 Guidelines. We actually have expanded the scope because
21 we have expertise and experience in the ISO 26000, which
22 provides guidance on social responsibility. And there is
23 a link between these two instruments which we think is
24 very interesting. So, it's good to put both of them on
25 the table.

1 Now, the guidelines are interesting for us in
2 the sense that they cover a very broad range of topics.
3 They have specific chapters or sections which deal with
4 consumer interest and consumer issues, and you can see on
5 the slide there exactly which ones are covered.

6 So, we see these guidelines and guidance as
7 providing a significant potential to be used in the
8 consumer area to promote and support consumer interest.

9 Now, we need to emphasize from the outset,
10 because we've already had some discussions with the
11 participants in the panel, that these guidelines are
12 voluntary. So, they're not enforceable in the
13 conventional sense of the word. But we did already
14 receive some word from Mr. Simpson this morning that
15 companies may be bound to comply. So, already it's quite
16 interesting how these things are being interpreted even
17 within the walls of the OECD.

18 (Laughter)

19 MR. AVERY: So, what I'll do now is I'd like to
20 turn the session over to our panelists. They will talk
21 probably more generally about how these guidelines are
22 being used in the business community with no specific
23 focus on consumer interest because that's not their area
24 of expertise. Their areas of expertise more relate to
25 the use of these guidelines in a broader context.

1 So, we're going to start with a presentation on
2 the OECD MNE guidelines and then one on the ISO guidance.
3 The two first panelists will present how these two
4 instruments operate. We'll then stop and maybe you'll
5 have some technical questions that you'd like to ask
6 them. Then we'll proceed with the stakeholders to
7 provide their views on these instruments and have an open
8 discussion of some of the key issues that they raise.

9 So, without further adieu, I would like to turn
10 the microphone over to Alan Yu, who will provide you with
11 some insights and information on the operation of the
12 OECD guidelines.

13 MR. YU: Thank you, Peter, and thank you Keith
14 and the FTC for inviting me to participate. I'm the U.S.
15 National Contact Point for the OECD Guidelines for
16 Multinational Enterprises.

17 My task today is to just give you a quick
18 overview of what the guidelines are, what they're not and
19 also the function that the National Contact Points play.

20 What are the OECD guidelines? Well, as Peter
21 mentioned, at the core of them, they are voluntary
22 recommendations from governments to multinational
23 enterprises that are either headquartered in the
24 countries of governments that have endorsed the
25 guidelines or multinationals that are operating in those

1 countries.

2 The guidelines are the most comprehensive
3 corporate social responsibility instrument that are
4 endorsed by governments. There are any number of CSR
5 instruments out there with varying levels of breadth, as
6 well as participants in the creation and the
7 implementation. But the guidelines are both broad, as
8 far as substantive coverage, as well as have a certain
9 imprimatur since they are endorsed by not only the 34
10 member governments of the OECD, but also 10 other non-
11 OECD governments. And I'll speak a little bit about that
12 later.

13 I think the fact that these guidelines have
14 official multilateral endorsement gives them a little bit
15 extra standing kind of beyond other instruments that are
16 commonly known, such as the UN Global Compact, ISO 26000,
17 et cetera, that don't kind of enjoy the standing of
18 government endorsement.

19 One other instrument that many are aware of are
20 the Ruggie Principles on business and human rights, also
21 known as the UN Guiding Principles. Those are principles
22 that are endorsed by governments, but I think the
23 difference with Ruggie, notwithstanding the
24 groundbreaking impact that it's had, it's discretely
25 focused on human rights issues, whereas the guidelines

1 cover a broad range, including environment, labor, anti-
2 corruption, et cetera.

3 I'm going to skip just very quickly to -- I
4 wanted to -- as I mentioned, these guidelines are
5 endorsed by 44 countries, 34 OECD members, as well as 10
6 non-OECD member states, and you can see them on the
7 board. The interest of these countries are not only to,
8 you know, the substantive objective of raising
9 performance by their companies, as well as performance
10 within their territories, but also several of them aspire
11 eventually to OECD membership. So, this is obviously
12 something to demonstrate their commitment to these
13 principles.

14 There are other countries that are in the
15 queue. Russia, Jordan and Costa Rica are at varying
16 stages of -- Russia, more broadly, on OECD accession, but
17 Jordan and Costa Rica specifically looking at the MNE
18 guidelines.

19 Obviously, there are other major players out
20 there that are non-OECD governments that we're hoping to,
21 if not sign on to the guidelines, potentially look to
22 them as guiding principles. The OECD and several member
23 governments are speaking, for example, to China, Chinese
24 officials, India, Indonesia, et cetera.

25 Let me take a quick moment just to talk a

1 little bit about some of the issues that we talked about
2 earlier today and draw similarities and differences to
3 the guidelines. Both instruments, obviously, address
4 transnational conduct of businesses engaged in cross-
5 border commerce and guidelines are also premised on
6 voluntarily adopted industry codes of conduct developed
7 through multi-stakeholder groups.

8 I think one of the key differences between the
9 guidelines and the topics that people talked about this
10 morning is the approach to the enforcement concept, which
11 really is not applicable in the guidelines approach
12 because, you know, they are recommendations, as Peter
13 mentioned.

14 There is one core part of the guidelines that's
15 very important to emphasize. The key principle is that
16 an expectation of enterprise is to obey the national laws
17 in which they operate. But the rest are, you know,
18 recommendations for corporate conduct.

19 Let me jump very quickly to -- the guidelines,
20 as I mentioned, were established -- well, the guidelines
21 were established in 1976. They've been updated a number
22 of times since then. Most recently in 2011. At that
23 point, they added new provisions regarding supply chain,
24 expectations of companies, due diligence, a human rights
25 chapter that's consistent with what Ruggie has presented,

1 and a topic that I think Clifford may address, the
2 proactive agenda.

3 Let me just end by saying that as part of the
4 development of the guidelines, as well as an update of
5 the guidelines, there's been a very active multi-
6 stakeholder process, both in the update as well as in
7 annual meetings that the OECD holds with National
8 Contacts Points from all of the member states. And then,
9 at least within the United States, my office has a very
10 active discussion with stakeholders, both formally
11 through an advisory board, as well as informally.

12 I think I'll wrap up here and pass it to Gwen.

13 MR. AVERY: So, this is Gwen Manseau from the
14 Department of Commerce to talk about ISO 26000. Please.

15 MS. MANSEAU: Thank you, Peter. Thank you,
16 Alan, and everyone on this panel. I appreciate being
17 here. I'm a little bit the odd duck here, so I will talk
18 briefly about ISO 26000 as kind of a counterpoint to the
19 OECD guidelines.

20 I'm an attorney at Commerce and I was involved
21 in the development of ISO 26000, and so here are just
22 some thoughts for you.

23 So, just briefly, to think about how we
24 consider the universe of social responsibility issues, I
25 think there are many different kinds of instruments and

1 codes and everything out there. So, the first thing is
2 private bodies -- ISO 26000 is developed by a private
3 sector organization involving many stakeholder groups.
4 And I would also put in this bubble corporate codes of
5 conduct, individual companies developing their own codes
6 for themselves to follow.

7 I would also consider items developed by the
8 civil society groups. There are mandatory requirements
9 on governments, and those are just, as we know, labor
10 issues, civil rights, all the legal mandates.

11 Voluntary governmental and international
12 instruments, and in this bubble we'd include many of the
13 things we've talked about already, the UN guiding
14 principles, the MNE guidelines, UN Global Compact, all of
15 these things that were developed by governments as
16 members of these international organizations.

17 And then I would also add international
18 obligations, and these would be mandatory treaties and
19 conventions. So, as mandatory as one can be under
20 international law, the ILO instruments, the UN, and any
21 kind of development of customary international law.

22 So, this is how I tend to consider the various
23 options out there that one could or must follow in
24 thinking about social responsibility. Specifically about
25 ISO 26000, it is an international standard.

1 International standards have a special status in
2 international law, especially international trade law.

3 The standard itself provides guidance on social
4 responsibility. That means it's voluntary. There was a
5 big discussion during the development as to who it was
6 going to apply to and the result is all organizations,
7 not just corporations. So, that's why it's social
8 responsibility and not corporate social responsibility.

9 It's very long. And the working group that
10 developed the standard was made up of a number of
11 stakeholder groups, six in total, and they would include
12 groups like labor, consumer groups, government, as one of
13 the groups and others.

14 So, the standard itself provides principles of
15 social responsibility. It provides guidance on certain
16 core subjects. It's very broad, includes organizational
17 governance, human rights, labor, environment, fair
18 operating practices, consumer issues, community
19 involvement and how to integrate social responsibility
20 into your organization.

21 To compare to the OECD MNE guidelines, again,
22 this is a private sector initiative. While the OECD MNE
23 guidelines basically are based on -- the structure of it
24 is an international convention, this refers to
25 international law and treaties, but it also builds on it.

1 The people who are developing the standard did not
2 necessarily feel bound to the actual language of the
3 treaties themselves and also they were considering the
4 obligations that companies or organizations would impose
5 on themselves. So, they kind of took international
6 concepts of law and obligations and distilled them for
7 use by organizations. So, the language shifted a bit for
8 that reason.

9 Again, they are voluntary and they did raise
10 concerns -- the standard itself, in the development,
11 raised concerns for some governments because of potential
12 trade barrier issues and the misuse of customary
13 international law principles.

14 That said, I think, that, you know, the
15 considerations going into the development of the standard
16 were only the best of intentions. I think everybody
17 developing the standard really wanted to do something
18 very good to help organizations be socially responsible.

19 The result was a little bit unwieldy, and I
20 think the concerns that were raised during the
21 development of the standard were, again, this lack of
22 consistency with other international documents. For
23 instance, in human rights, John Ruggie had to write a
24 letter specifically to the working group to ask them to
25 bring the document more into the -- to be consistent with

1 his. And there are consequences on international trade.

2 And here, I can get into this much later, if
3 there is interest, but here's an example of a section of
4 the standard on consumer issues. It's very wordy, and I
5 think when you take -- when governments can take this
6 language and make it mandatory into their own laws, it
7 becomes much more of a trade barrier than I think people
8 were intending.

9 So, I'll leave it at that and I'll pass it
10 along.

11 MR. AVERY: Okay, so thank you very much. I
12 indicated that we would stop here because you may have
13 some questions to pose to these two panelists for more
14 information on how these instruments actually operate.

15 So, while you're thinking about your questions,
16 one I would like to ask Alan if he could elaborate a
17 little bit more on what the national contact point does,
18 what it is, and maybe -- I notice that two of our
19 panelists are on something called the Stakeholder
20 Advisory Board. So, if you could comment on what role
21 they play as well, that would be very helpful, for me
22 anyways.

23 MR. YU: Sure. I regret I didn't budget my
24 time very well. I was planning to address that in the
25 original presentation. But, Peter, thank you for letting

1 me do it through this vehicle.

2 So, under the guidelines, every country that
3 signs on to them is obligated to do three things. One is
4 to establish an office to implement the guidelines, and
5 that office is called the National Contact Point. And
6 different governments in different countries have used
7 different structures to implement this requirement.

8 The other two activities that they're required
9 to do is to promote awareness of the guidelines within
10 their country, both with businesses as well as with NGOs,
11 labor, civil -- other civil society organizations,
12 individuals, et cetera. And then the last requirement is
13 to offer good offices to deal with disputes that arise.

14 So, as I mentioned, the guidelines provide
15 recommendations to businesses for responsible conduct.
16 But there is a provision that allows for parties to raise
17 concerns about activities by MNEs, multinational
18 enterprises, that they consider to be inconsistent with
19 the recommendations of the guidelines.

20 So, if and when a party has a concern about an
21 activity, they can file a complaint with our office.
22 Typically, it will be an NGO or a labor union or an
23 individual. And what will happen is that complaint will
24 come to our office. What we do is take a quick look at
25 it to consider whether the complaint is bona fide. If it

1 is, then what we do is offer our good offices to help the
2 two parties try to resolve their differences, typically
3 through mediation. It's not an adjudication process;
4 it's not an arbitration process. Our goal is to get the
5 two parties together, help them identify areas where they
6 can work together to address these issues and then with
7 the hope that we have some kind of mediated resolution at
8 the end of the process.

9 The Stakeholder Advisory Board was an
10 initiative that this administration initiated. As we
11 looked at strengthening the capacity and the activities
12 of the National Contact Point Office, Secretary Clinton,
13 as well as the Assistant Secretary of State for Economic
14 and Business Affairs Jose Fernandez, said they wanted to
15 get the best input that they could get from stakeholders
16 on how to improve what our office was doing.

17 So, they convened a multi-stakeholder process
18 involving, you know, business, labor, NGOs, academics,
19 and they came up with a number of recommendations. I
20 should mention that Thea was one of the co-chairs that
21 led this process. And there was a report that came back
22 to the State Department, and one of them was to establish
23 an advisory body that would tell us how to do our job
24 better.

25 And among the members of the 14-person board

1 are Jonathan Kaufman and Clifford Henry, as well as other
2 representatives from other business interests, labor,
3 NGOs and academics. And they've been in place now since
4 spring of this year and have met, I don't know, maybe
5 about four or five times now.

6 And we've asked them to look at three things,
7 how our office can do a better job of raising awareness
8 of the guidelines, looking at how we're implementing our
9 procedures on dealing with this dispute resolution
10 process, and then the third is to look at the proactive
11 agenda, how we can implement the proactive agenda, which
12 is an initiative to try to bring stakeholders together to
13 look at CSR problems kind of before they become
14 complaints and how we can problem solve in a multi-
15 stakeholder context to deal with these issues and come up
16 with solutions.

17 MR. AVERY: Well, thank you for a very complete
18 answer. I think that's very interesting to see how the
19 mechanism is actually working.

20 What I'd like to do now is, if I could have the
21 clicker, we developed or I developed, and shared with the
22 panelists in advance, a series of questions that I
23 thought would be very interesting to focus on during the
24 discussion. And I understand, from what they've told me
25 so far, that they're going to touch on some of these.

1 There may be some other issues that they bring up as
2 well, but we'll have to wait and see what they may be.

3 So, first, what we'll do is we'll have all
4 three of them make their presentations and then we'll
5 open it up for a more open discussion amongst them, but
6 also with you in the audience.

7 So, first up would be Thea Lee, and as
8 mentioned, she's the Deputy Chief of Staff at the AFL-
9 CIO. So, we get a trade union perspective on the
10 operation of the MNE guidelines and maybe the ISO 26000,
11 if she so wishes.

12 MS. LEE: Thank you very much, Peter, and
13 thanks to the other panelists. It's a pleasure to be
14 here this afternoon.

15 As Alan mentioned, I had the pleasure to serve
16 as co-chair on a subcommittee on investment at the State
17 Department's Advisory Committee on International Economic
18 Policy. But what this was, essentially, was the State
19 Department asking labor and business and NGOs to come
20 together and bring together a group of -- a very balanced
21 group, including both Clifford and Jonathan, among many
22 other people, to review the OECD guidelines for
23 multinational enterprises and particularly to review the
24 U.S. implementation of those guidelines. And so, it was
25 an interesting process.

1 And I think what I wanted to do today was talk
2 a little bit about the guidelines. And, of course, my
3 experience with them is much more related to labor rights
4 and conditions than it is to consumer protection across
5 borders. But I think there are some interesting lessons,
6 and I know you've spent the first part of today talking
7 about where voluntary guidelines are appropriate, where
8 more stringent measures are needed. And I think it's
9 interesting, actually, that the title of today's
10 discussion is enforceable codes of conduct. I think
11 everybody is very insistent that the OECD guidelines for
12 multinational enterprises are not enforceable and they're
13 not enforced.

14 Certainly, for the labor movement, and I know
15 for a lot of my environmental colleagues as well, this
16 creates a lot of tension. And there was tension. Just
17 to actually use the subcommittee on investment as a
18 microcosm of some of the discussions that we had, the
19 tension between business and the labor and environment
20 groups about how the OECD guidelines can or should be
21 used, what is the potential of them, how can they be most
22 helpful.

23 And one of the key things that we went back and
24 forth about, and even in the preparation for this panel
25 today, we went back and forth about this, was whether we

1 use words like comply, enforce, adhere, or even
2 complaint. You know, the very language of OECD
3 guidelines is very specific that nothing is to be
4 enforced, everything is voluntary. The companies can
5 walk out of the room at any moment that they get annoyed
6 or offended or discomforted by the procedures. And that
7 means that it's very difficult to raise some of the tough
8 issues.

9 But with respect to consumer concerns, I just
10 did want to talk a little bit about it because I was
11 thinking about it in preparation for the panel, the
12 transnational consumer concerns. There are lots of ways
13 in which consumers need protections across borders. And
14 I know the online shopping e-commerce piece is one that
15 the OECD has taken up, that the OECD has a separate set
16 of guidelines for consumer protection in the context of
17 e-commerce. It's separate from the MNE guidelines, but
18 it's also a set of rules and strictures.

19 As I was looking through those, I was struck by
20 the fact that they're actually stronger and more
21 stringent and there's talk about adopting and adapting
22 laws to protect consumers across borders. And I was
23 wondering why is it, in that context, okay to talk about
24 laws and enforcing laws and actually putting in place
25 better laws, which is something we'd like to see in the

1 context of international labor rights protection.

2 And I think one of the key things, and I think
3 this is one of the takeaway lessons for the discussion
4 about voluntary codes versus enforcement mechanisms is
5 that it's in the interest of business, to a large extent,
6 to have some enforceable rules across borders with
7 respect to e-commerce, that business can be hurt and
8 victimized by violations of some of those principles and,
9 therefore, business is more cooperative in the
10 transnational protection of consumers with respect to
11 e-commerce.

12 Business is not that cooperative, let me just
13 say. Clifford can fight me later on this front.
14 Business is not that cooperative, not as cooperative as
15 we'd like to see them be, with respect to labor rights,
16 environmental standards and human rights because they see
17 it as a cost and they don't want to be held accountable.
18 They don't want to be more transparent than they have to
19 be.

20 Some of the other transnational consumer
21 concerns also of interest, financial transfers, which are
22 extremely important for immigrant workers, remittances
23 and so on. And the protection of consumers as they send
24 money to their loved ones and family back home is
25 something where I think we probably do need better

1 transnational kinds of protections and regulations and
2 enforcements than we have, something certainly not
3 touched upon at the moment by any of the OECD guidelines.
4 Something that ILO has tried to take up, but has not
5 succeeded.

6 And product safety and integrity, and that's
7 something that we do tend to deal with within the context
8 of trade laws and trade rules, and so, it's covered by
9 the harder laws.

10 Some of the advantages and the disadvantages of
11 the OECD guidelines with respect to protection, the
12 advantage -- I think one of the advantages, as Alan was
13 saying, it's a multi-stakeholder negotiation, tends to at
14 least develop some of the provisions, whether it's the
15 consumers in business talking about the e-commerce or
16 it's labor and business having an official role in the
17 development of the guidelines.

18 The OECD, as some of you may or may not know,
19 has two groups, the BIAC, the Business Industry Advisory
20 Council, and the Trade Union Advisory Council, which are
21 official parts of the OECD machinery, and those can be
22 very helpful. And the Stakeholder Advisory Board, I
23 think, is a good example of that in the implementation of
24 the OECD guidelines.

25 The disadvantage is that it's non-binding, and

1 it is something which does not lend -- so that you've
2 taken all of these very important issues, whether it's
3 worker's rights, human rights, environmental protections,
4 and some consumer protections, and you had governments
5 tell their multinational enterprises, these are what's
6 important. We want you to comply with these, but we have
7 no economic sanctions to enforce them and there's nothing
8 we can do to you if you don't enforce them. And it
9 becomes a little bit of a circular discussion that is not
10 as useful as it could be.

11 So, let me just sum up, because I see the
12 lights blinking, so to speak, that the basic principles
13 for cross-border regulation or for cross-border
14 protection, whether it's of consumers or workers or the
15 environment, is -- one is to develop the international
16 consensus, and that's where I think a body like the OECD
17 is not only useful, but necessary. But also the
18 International Labor Organization, the World Trade
19 Organization, the United Nations, these are the bodies
20 where governments come together and can hammer out a
21 consensus on what the level of protection ought to be.

22 The second piece is coordinating the
23 implementation and the enforcement of those rules, and
24 that's where it's much more difficult. You start at the
25 national level where countries, in principle, ought to

1 put in place laws that reflect that international
2 consensus and they ought to enforce them. They don't
3 always do that, and that's the hard part.

4 The transnational enforcement is very
5 difficult. I think the strongest mechanism that we have
6 in place is trade laws and trade actions where one
7 country could block the imports of another country at the
8 most extreme instance, if there's a violation. And
9 that's something I think you all know within the
10 globalization debate, the labor and environmental
11 organizations and others have fought hard to put more
12 enforceable mechanisms into our trade agreements, into
13 our trade preference programs and to raise the issue with
14 the World Trade Organization, although not very
15 successfully.

16 Less than that, we have lawsuits, transnational
17 lawsuits and that can be an important mechanism. You
18 have the bilateral investment treaties, which tend to
19 serve mostly the business interests.

20 The third element is the supportive elements,
21 and I really am wrapping up right here, but this is where
22 I think the OECD guidelines can and are most useful.
23 Things like enhancing transparency, cooperation, public
24 education. And those are sort of the soft elements of
25 transnational protection, transnational regulations. But

1 I think what's important -- and this is the last thing I
2 will say. The most important thing is that those
3 supportive elements are necessary.

4 Nobody thinks that having international rules,
5 whether it's through the trading system or through a
6 treaty, as Gwen said, is going to, in itself, magically
7 improve the lot for child labor or environmental
8 protections. And so, you need both governments and
9 corporations to set high standards, to abide by those
10 high standards, and to be educating themselves and their
11 clients and their suppliers and their workers and so on
12 and so forth. But those supportive elements shouldn't be
13 seen as a stand-alone.

14 And so, that's the last thing I will say is
15 that mechanisms like the OECD guidelines for
16 multinational enterprises are really an important,
17 supportive set of rules and guidelines and informational
18 support, but should never be seen as the primary
19 mechanism through which we're going to enforce important
20 rules with respect to worker rights, environmental
21 protection and consumer protection.

22 Thank you.

23 MR. AVERY: Thank you very much. Now, we'd
24 like to turn to Jonathan Kaufman who is, as was
25 mentioned, on the Stakeholder Advisory Board, and is

1 wearing another hat as a staff attorney at EarthRights
2 International. Jonathan?

3 MR. KAUFMAN: Thanks, Peter. So, I want to
4 maybe pick up on some threads that Thea raised, but I go
5 to maybe a more specific level. In our conversations at
6 the OECD level, in the ACIEP subcommittee, and also in
7 the Stakeholder Advisory Board, I think that all of the
8 three branches of the stakeholders -- and you have them
9 all represented here, labor, sort of environmental/human
10 rights/civil society, and business -- I think we agree on
11 a lot of things.

12 But the place where it turns out that we tend
13 to part ways is accountability in specific circumstances
14 where things break down. And I think that everyone very
15 much agrees -- and I know Clifford is going to speak a
16 lot about trying to head off problems before they arise.
17 And I'm kind of excited about the way that -- or I hope
18 that our Stakeholder Advisory Board is going to be able
19 to come up with some really great suggestions for the NCP
20 and for the OECD as a whole on how to do that.

21 But the place where we end up disagreeing is
22 the place where we start coming down to what we would
23 term as accountability. And the place where the NCP
24 comes closest to accountability is in the specific
25 instance mechanism, which Alan mentioned, which is the

1 mechanism by which a party who thinks that multinational
2 enterprise has been acting in a way that's not consistent
3 with the guidelines can raise those concerns to a
4 National Contact Point for some sort of resolution.

5 And so, I thought that I would go through a few
6 recent cases so that we can look at the specific ways
7 that different National Contact Points have been handling
8 these cases, so that we can think about what elements
9 actually work and assist in resolving these disputes in
10 which elements may make it harder for NCPs -- that's
11 National Contact Points -- to resolve the disputes.

12 The first case that I want to raise is a case
13 that was brought to several different National Contact
14 Points in, I think, four different countries over the
15 cotton industry in Uzbekistan. Now, this was a case
16 raised mostly by European NGOs, in the U.K., France,
17 Switzerland, Germany. There may have been others, but
18 those are the four that I'm aware of. Alleging that, in
19 Uzbekistan, the cotton -- Uzbekistan is a major source of
20 cotton for Europe. But that child labor is used
21 systematically in the supply chain for cotton in
22 Uzbekistan. And one of the parts of the OECD guidelines
23 suggests that companies should always be acting to
24 eradicate child labor.

25 Now, I'm aware of how two of the NCPs, the

1 British and the French NCP, dealt with the case. And in
2 the end, they came to -- they were able to broker some
3 sort of mutual understanding between the civil society
4 organizations and the companies in which the companies
5 recognized that child labor was a problem in Uzbekistan
6 and they promised to set up essentially an ongoing
7 roundtable in which they would share views and work
8 together with civil society to try and head off the
9 possibility that child labor would be involved in the
10 supply chain for cotton coming in to these countries and
11 through these companies.

12 Another successful case in terms of resolving a
13 thorny dispute was brought to the Norwegian National
14 Contact Point, and this was in the case of Cermaq, an
15 aquaculture company that was raising salmon in fish farms
16 in Chile. And this was a situation in which the NGOs in
17 Norway complained that Cermaq was not acting in an
18 environmentally responsible way, they didn't have
19 environmental management plans that were appropriate to
20 their enterprise, and on top of that, they were not
21 communicating appropriately with the local communities
22 and, in fact, they were also committing labor abuses.

23 The Norwegian National Contact Point was able
24 to broker what was considered at the time to be something
25 of a groundbreaking settlement in which the company

1 agreed that they would, in a looking-forward sort of a
2 way, they would strive to environmental excellence, they
3 would agree to certain protocols for communicating with
4 local communities and making sure that indigenous
5 people's rights were respected. So, that was successful.

6 And I would contrast that with a situation
7 which the U.S. NCP tried to take a really positive role
8 in the case of Innospec, a company that was providing an
9 additive for leaded gasoline, which it turns out is only
10 sold in six countries, which are places like North Korea,
11 Afghanistan and Yemen. And in that case, Innospec said
12 they had no interest in participating in the NCP process,
13 they didn't want to mediate, they didn't trust the NGO
14 that was raising the complaint, and they walked away.

15 So, I wanted to pose what are the differences
16 in these structures and why might it have worked in some
17 cases and not in others. Some of the issues are
18 structural. The OECD guidelines are voluntary for
19 companies and so is the specific instance process, which
20 means that if an NCP wants to be able to bring a company
21 to the table, they need to be able to offer something or
22 they need to have some sort of leverage.

23 Now, Alan has taken great strides in providing
24 credible mediation services. He's engaged the services
25 of the Federal Mediation and Conciliation Service, which

1 is fantastic. But one form of leverage that the
2 Norwegian and U.K. and French NCPs have, which the U.S.
3 does not, is that those NCPs are able to make findings of
4 fact. They are able to actually go into the field, look
5 into the situation and come back, and they come up with a
6 decision and they say, from what we can tell, this is
7 what happened, and that this is or is not a violation of
8 the guidelines.

9 The U.S. NCP does not have that in its toolbox;
10 it's not allowed to do it. And so, if a company wants to
11 avoid bad publicity, that's a form of leverage that the
12 European NCPs have that the U.S. does not.

13 One thing that I would put on the side of the
14 complainants is what the forms of the demand are, what
15 are you actually engaging the NCP to do? In the
16 Norwegian case, all of what they were asking for was
17 forward-looking, it was striving for excellence, it was
18 cooperation. These are the sorts of things that I would
19 submit, in general, voluntary codes are probably pretty
20 good at promoting. Whereas in the case of the leaded
21 gasoline situation in the U.S., the NGO wanted this
22 company to cut off a whole section of its business, which
23 I presume is something that most companies are not going
24 to do on a voluntary basis if that's part of your
25 strategy.

1 I think I need to end here, but my point -- I
2 guess my point here is just to think about what kind of
3 leverage you can create in a situation in order to come
4 to a solution. I think that every company wants to have
5 a good name, every company wants to -- most companies
6 want to act responsibly. But when they're in a dispute
7 situation, what can you do short of actual enforcement
8 when it's a non-enforceable situation that can provide
9 incentives to come to the table.

10 MR. AVERY: Okay, thank you very much. Now, we
11 turn to a stakeholder in the business community, Clifford
12 Henry, who is Associate Director at Proctor & Gamble, to
13 perhaps provide us with a different perspective on the
14 functioning of these instruments.

15 MR. HENRY: Thank you. Good afternoon. It is
16 indeed a pleasure to provide the business perspective on
17 the OECD guidelines, and I'd like to thank Keith for
18 inviting me to be on this panel.

19 A little bit of background in terms of my
20 involvement with the OECD guidelines. In 2010, when the
21 guidelines were up for revision, I was asked to serve on
22 the BIAC, the Business Industry Advisory Committee, to
23 the OECD on the guidelines, and as a result, got
24 nominated to be a vice chair of that committee. So, I
25 was actively involved in the update for 2011.

1 Subsequently, thanks to Thea and others, I was
2 also on the ACIEP Committee providing recommendations,
3 and with Jonathan, have been on the Stakeholder Advisory
4 Board. So, I've had a fair amount of knowledge with the
5 update, as well as working with the NCP on the
6 guidelines.

7 Now, from a business perspective, we clearly
8 went on record that it was a document that we would
9 support. I mean, BIAC and other trade associations have
10 been communicating the OECD guidelines to our member
11 companies through webinars, speeches, newsletters. We
12 even have a guidebook on the OECD guidelines. I've
13 personally shared the OECD guidelines with a number of
14 organizations via the USCIB. I'm a member of In
15 Progress, which is a group of responsible companies
16 involving responsible sourcing, and have brought them up
17 to speed with the OECD guidelines.

18 And I've had the pleasure at the University of
19 Cincinnati to talk to several international lawyers on
20 the guidelines. I prefer not to talk about all the other
21 things that P&G would be doing, but give them something
22 that when they go back to their various countries, they
23 can actually use that from a practical point of view.

24 Now, there are several areas that were in the
25 update to the guidelines. We had a section on due

1 diligence, supply chain, human rights, and the proactive
2 agenda. The first three sort of brought the guidelines
3 up-to-date with what was going on in the area of best
4 practices for industry. So, for example, the human
5 rights chapter is fully aligned with Professor Ruggie's
6 framework, and that was something that we stressed that
7 we wanted to do. We did not want something that was
8 different.

9 And interestingly, the specific interest now
10 provides a mechanism whereby if they're human rights
11 abusers, a complainant can bring to the NCP, if it's done
12 by a multinational, a case to say they don't believe that
13 a particular multinational is following the
14 recommendations of the guidelines.

15 But one area that I think does require some
16 attention is the proactive agenda. We, in industry, feel
17 that it would be extremely helpful if we could really do
18 that, but it's one of the most confused elements in the
19 updated guidelines. Typically, when you talk about the
20 proactive agenda, people immediately begin to think that
21 we're talking about promotion, and that's not so.

22 So, what is it? Adam Greene, who is the vice
23 president -- one of the vice presidents for USCIB, and
24 myself, with the help of BIAC, introduced that concept.
25 Now, having worked with a lot of stakeholders within P&G,

1 I thought it would be great if the NCP could use it's
2 good offices to bring business, trade unions, NGOs, to
3 talk and hopefully address issues before they got to the
4 point where they were at the level of a complaint.

5 Case in point, when the guidelines were being
6 updated, the trade unions wanted to replace employees
7 with workers. And some of you may wonder, well, what was
8 the significance of that? What I realized in the
9 discussion, that there was a growing trend among some
10 companies in using temporary workers without all the
11 benefits of company employees. And so, they were, in
12 fact, de facto employees but without the benefits. And
13 my thoughts, at that time, why didn't we use this forum
14 to discuss both the company's and the employees' needs
15 and work and have a resolution before we got to the point
16 where a complaint was lodged?

17 Now, Peter asked me to talk about how are the
18 guidelines used within companies. Jonathan and I had the
19 pleasure last week of listening to five EU NCPs and one
20 from North America, and one of the things that they kept
21 saying over and over was that with all the work that they
22 have done, not many companies understand the guidelines.
23 And, typically, some only know about the guidelines when
24 they get in special incidents.

25 So, I was hoping that the proactive agenda

1 would be that thing that would allow people to say that
2 the guidelines does allow some good things to come out of
3 that.

4 I will say one more thing to end. The
5 guidelines have several uses within companies. If you're
6 starting from scratch, then it is a good tool if you want
7 to understand what are the expectations of society or
8 government. For a lot of companies with an existing code
9 of conduct, we already will have that. And so, what I
10 did when I first took over the role was to look over the
11 OECD guidelines -- this was ten years ago -- and compare
12 that to what we had.

13 When we were going through the update, I did
14 the same thing. This time, I started sending out to
15 various individuals within the company new chapters as
16 they were being revised and said, are there gaps, and if
17 gaps were identified, then we had to make a decision how
18 we would actually implement the recommendation that was
19 made. So, that's sort of the new ones.

20 So, the final thing is, as consumers, I do want
21 to -- hopefully, I'll get a convert today. I've already
22 gotten one. I'm hoping everybody in here does wash their
23 clothes with cold water and probably does use Tide Cold
24 Water, right?

25 (Laughter)

1 MR. HENRY: And if not, you can talk to me
2 after this panel. But we, as a company, have identified
3 that there is enormous savings from energy, climate
4 change, and what have you to wash your clothes in cold
5 water, and we have a product that will deliver the
6 results.

7 Now, the guidelines ask us to communicate and
8 educate consumers in this area. So, I'm doing that
9 today.

10 (Laughter)

11 MR. HENRY: But what I want to let you know is
12 that we did that because it was part of our business
13 strategy, and it is wonderful to realize that the same
14 things that we're working on, that the members of the
15 OECD have the same interests. So, that's when you can
16 actually can say that, yes, it is good to have the
17 guidelines and it's good for companies to be observing
18 that.

19 So, with that, I'm going to turn it back over
20 to Peter and see what questions you may have. But,
21 remember, if you're washing with cold water, please see
22 me after the panel.

23 (Laughter)

24 MS. LEE: Can we get some free samples,
25 Clifford?

1 MR. HENRY: I can get you some coupons.

2 (Laughter)

3 MR. AVERY: Well, thank you all very much for
4 the presentations. I think they've been very helpful in
5 seeing that there are various ways in looking at these
6 guidelines. There seems to be some consensus that
7 they're not good for dealing with specific instances
8 necessarily, but they do have some value in helping
9 companies to identify what their corporate policies are
10 going to be and to checking to see if they're up-to-date,
11 and that they may be very helpful in getting companies to
12 think differently about the big issues.

13 One question I do have, and I will, of course,
14 like to hear the questions and then responses from the
15 panelists, is that it was mentioned that these guidelines
16 have been in effect since 1976. And I think the National
17 Contact Points come together on an annual basis and they
18 discuss things and come up with a big report on the
19 operation of the guidelines. And I wonder if any of you
20 would have some comments as to what these reports have
21 shown in terms of the impact they're having on the
22 business community.

23 Yes, Thea?

24 MS. LEE: I'll start if Alan won't take the
25 bait.

1 MR. YU: No, no, you first.

2 MS. LEE: So, the guidelines have been in place
3 a long time, since 1976. And in our view, up until
4 pretty recently, the U.S. didn't do a particularly good
5 job enforcing the guidelines -- not enforcing, enforcing
6 is the wrong word. Encouraging compliance with the
7 guidelines.

8 MR. KAUFMAN: Compliance is the wrong word,
9 too, Thea.

10 MS. LEE: Encouraging people not to completely
11 ignore the guidelines.

12 (Laughter)

13 MS. LEE: And that was partly, you know, an
14 institutional decision or, you know, it came out of maybe
15 a lack of resources and so on that there wasn't really
16 adequate personnel devoted to this issue over at the
17 State Department, and there maybe was, you know, as we
18 said, some resistance by the businesses.

19 But I think an interesting question has been
20 what the National Contact Point does when a specific
21 instance -- see, we can't call it a complaint -- a
22 specific instance is received, is notified and, you know,
23 how much detail is in there. Is the National Contact
24 Point encouraged or allowed to actually do any
25 independent research and to look into this issue or are

1 they completely dependent on the companies to bring
2 forward information?

3 As Jonathan said, we see a real variety, a real
4 variance across countries of how National Contact Points
5 interpret the words on paper of the OECD guidelines. So,
6 what that says to me is that there is scope. There is
7 potential, certainly, for the United States to be a
8 little bit more aggressive, maybe a little bit more
9 demanding about how to implement and how much information
10 ends up in the final report.

11 For a long time, the U.S. National Contact
12 Point didn't even issue a final report on any of the
13 instances. And so, people like us, unions and other
14 NGOs, would file these cases and then nothing would
15 happen. They would sort of, you know, molder in the file
16 cabinet someplace. And now there is. And I think that's
17 one of the differences that came out of the 2011 review
18 is that there is, at the very least, a requirement or an
19 expectation that there will be a final report issued, so
20 some kind of conclusiveness. So, I think that's helpful.
21 But others may want to add to that. Alan?

22 MR. YU: Yeah. I guess I would agree with Thea
23 that I think that one of the challenges that we've had
24 here in the United States is basically, fundamentally,
25 it's awareness of the guidelines, awareness of the

1 National Contact Point and how that can influence
2 behavior.

3 I think what has happened in a number of the
4 European countries is, you know, there's just been a
5 record of greater activity which has raised awareness by
6 businesses there and has potentially influenced how they
7 conduct their businesses.

8 What I guess my hope is is that we've gone
9 through a revision of our procedures here. They've been
10 in place for about a year-and-a-half. I think that we're
11 doing a number of things that are raising awareness,
12 raising the profile of our activities, and I think, in
13 particular, you know, when we have an opportunity to go
14 through a mediation and then issue a public statement
15 that comes out of it, that has a demonstration of fact, I
16 think not only will it potentially have an impact on
17 companies' behaviors; I think it also will have an
18 influence on business comfort or understanding of what
19 this process is and is not.

20 I think that there's a lot of misapprehension
21 out there of what this process could be, you know. Is
22 this some kind of adjudication or some kind of penalizing
23 process?

24 My hope is that we'll have a successful
25 mediation, we'll talk about it publicly. People will get

1 comfort with it. And then, hopefully, there will be a
2 virtuous cycle that will come out of it.

3 MR. KAUFMAN: If I could just kind of add to
4 that a little bit. I think the thing that I've seen, and
5 I think Thea would probably agree, is that the places
6 where the NCPs have managed to -- even had the
7 opportunity to do successful mediations are places where
8 the process, although it's not adjudicatory, has some
9 veneer of an actual process where you're actually trying
10 to find out something of the truth.

11 And so, that's why, in my presentation, I
12 harped on the fact that there are NCPs that have the
13 possibility of going out, finding facts and deciding
14 whether or not there actually has been action that's not
15 consistent with the guidelines.

16 But another thing that I just wanted to mention
17 -- and, again, this takes us a little bit away from the
18 strictly voluntary nature of the guidelines -- but one
19 thing that you're seeing in a number of places around the
20 world, including now in the U.S., is an uptake of the
21 guidelines in ways that actually are more binding.

22 There are a couple of countries in Europe, I
23 believe one is Belgium or the Netherlands, where in order
24 to get export credit assistance from the National Export
25 Credit Agency, you have to actually swear that your

1 company will make its best efforts to comply with the
2 guidelines. To my knowledge, there's never been a
3 situation where the Belgian government has said, well,
4 you didn't make those efforts and, therefore, we're
5 retracting our assistance, but it's an actual putting it
6 on paper and, in general, you know, that means something.

7 There are some countries in Europe, again,
8 where in order to get investment permits, I believe for
9 incoming investment -- this is in Slovakia or Slovenia
10 and one or two other countries -- you also need to
11 certify that you are a country that abides by and acts
12 consistently with the guidelines.

13 Here in the U.S., just recently when the U.S.
14 decided to relax the investment ban on going into Burma,
15 the State Department has proposed, and this proposal is
16 now going through final approval processes, that
17 companies will have to report on their environmental and
18 human rights and labor performance and they are referred
19 to the OECD guidelines as essentially a template for what
20 that reporting should look like. Suddenly, this is
21 potentially game-changing. Every company that wants to
22 invest in Burma, at the very least, now has to think
23 about the guidelines.

24 There's nothing in this reporting requirement
25 that says everything you do needs to be consistent with

1 the guidelines, but in terms of raising awareness and
2 making companies realize that this is relevant and it's
3 out there and provides useful guidelines for how you can
4 act in complicated situations, suddenly, a whole gamut of
5 companies that maybe otherwise would never even have
6 thought about it, they're going to be reading these
7 requirements and they're going to know now, let me think
8 about this in terms of what the guidelines require.

9 So, there are sort of a sliding scale of
10 obligation that can put the guidelines and the principles
11 that they represent more front and center when companies
12 are thinking about how to order their operations.

13 MS. MANSEAU: If I could follow that up with
14 just a small thing. I was very interested with what
15 Jonathan was saying. I think a number of countries,
16 especially in Europe, are also using ISO 26000, in
17 efforts to, for example, limit government procurement to
18 companies that have certified to a national version of
19 ISO 26000.

20 Now, I think that is of much greater concern to
21 governments. I think when it comes to the OECD
22 guidelines, because it's a governmentally developed
23 document with input from stakeholders, governments have
24 basically a level playing field. They know what they're
25 dealing with and they have agreed to it.

1 With ISO 26000, government was one of six
2 groups and had really a very minor role to play. As a
3 result, the text of the standard became kind of a dumping
4 ground for policy that was not necessarily agreed upon in
5 the global level. There is language in there now that is
6 -- it comes from Europe, basically. It puts in European
7 policy that the U.S. and Canada and India and others were
8 very opposed to because it could impose trade barriers on
9 anything that did not meet an EU type of policy.

10 It also became an effort -- like China, for
11 example, made an effort to integrate language related to
12 common, but differentiated responsibilities during the
13 whole climate change debate, when it was already being
14 debated in the UN context.

15 So, I think that that's kind of an endorsement
16 for the OECD guidelines because governments have agreed
17 upon it. In other voluntary standards developed in the
18 private sector, there's no such guarantee that
19 governments would agree with that language.

20 MR. KAUFMAN: I should say, just to agree with
21 that, that one of the reasons why the State Department
22 felt comfortable incorporating a reference to the
23 guidelines was because it was U.S. endorsed. If it had
24 not been a U.S. Government officially endorsed framework,
25 then I think it probably would have been a lot more

1 problematic for them.

2 MR. HENRY: If I can say one thing. I mean,
3 Alan said to it and the Secretary General of BIAC has
4 said the very same thing. In order to have a level
5 playing field, there are a number of countries that are
6 not in the OECD and have not yet even joined the group of
7 non-OECD countries that have signed to adhere to the
8 guidelines. And I think that is an opportunity to really
9 level the playing field, because there are other
10 countries today that have multinationals that are playing
11 all over the world without the same level of
12 recommendation from their governments as we have with the
13 guidelines.

14 MR. AVERY: Okay. Well, thank you very much.
15 And I know we are running out of time and I really did
16 want to get some comments from the audience. Maybe you
17 have some specific comments on these guidelines in
18 general. But maybe, even more interestingly, how you
19 think they might be used in a consumer policy context.
20 Does anyone have any questions, comments?

21 Robin?

22 MR. SIMPSON: I'm very privileged.

23 (Laughter)

24 MR. SIMPSON: I was part of the OECD Consumer
25 Policy Committee in which I was frequently in debate

1 across the table with the United States delegation. And
2 one of the issues over which I was in debate with the
3 United States delegation in that committee on the MNE
4 guidelines was ISO 26000. So, there is a link here.

5 It is notable that in the consumer chapter of
6 the MNE guidelines, there is no reference to ISO 26000,
7 even though it was actually agreed the same month that
8 the ISO 26000 guidelines were agreed. So, it does seem
9 rather an odd omission at the time.

10 Now, there is reference to ISO as a standards-
11 making body, but not to ISO 26000. Whose fault is that?
12 Mine. Because I made a fuss about the fact that we
13 couldn't have a chapter without any mention whatsoever of
14 ISO. But the reason why there's no mention of ISO 26000
15 in the chapter is because the United States voted against
16 it. So, I think in making the comparisons at this table
17 this afternoon, you have to be aware that, as Gwen has
18 illustrated, that the position of the United States was
19 very much to block out the ISO 26000.

20 Now, I have to admit that I think Consumers
21 International has some responsibility for the attitude of
22 the United States towards ISO 26000 because we made the
23 mistake of using the UN guidelines mis-describing the
24 legitimate needs which were in the UN guidelines as
25 consumer rights. This is something which I warned my

1 colleagues about. This is the careless use of language.
2 The UN guidelines on consumer protection does not contain
3 a list of consumer rights; it contains a list of
4 legitimate needs.

5 The American delegation to ISO raised this in
6 the last meeting saying that, to some extent, previous
7 meetings have operated under a misconception, and I'm
8 afraid they were right. But sadly, in my view, the
9 United States voted against ISO 26000 and alongside, dare
10 I say it, Luxembourg, India, Turkey and in full
11 solidarity with Cuba, the other four members who voted
12 against the guidelines.

13 The last point that I'd like to make, the OECD
14 -- I'm delighted to hear what's just been said about the
15 National Contact Point in the United States. I don't
16 want to be one of these pesky Europeans. I am wearing a
17 global hat. There is great variability within the
18 European National Contact Points as well. I was talking
19 last week to a German colleague who is extremely
20 dissatisfied with a lack of any recognizable procedure at
21 all in the German National Contact Point, and 60 percent
22 of cases that have been brought by the NGOs to the German
23 National Contact Points have been rejected outright.

24 But according to the survey of OECD Watch, up
25 until 2010, which is just before the moment of revision,

1 the United States was unique in never having resolved or
2 concluded a single case form an NGO. Not one. Now, in
3 the light of what's been said, I have no reason
4 whatsoever to doubt it, we can look forward to a very
5 different approach in the forthcoming year. So, I'm
6 delighted to hear that good news.

7 MR. AVERY: Thank you, Robin.

8 Do we have some comments from our panel?

9 MR. YU: I guess I should. I think it's better
10 to look forward than to look back, let me just say that.

11 (Laughter)

12 MR. YU: But what I will say is that I think
13 that we've had a lot of useful feedback from the
14 Stakeholder Advisory Board, from stakeholders on how we
15 can do our job better. I'd like to think that we're
16 making some progress along those lines.

17 There's been a little bit of feedback from our
18 side to stakeholders as well, which I think has helped
19 inform the process for them. There have been a number of
20 filings that we've gotten over the last year or so. And
21 I would say that the quality of the filings are much
22 better than they were in the past and it lends themselves
23 to greater potential for us to solve a problem and to
24 come to a resolution.

25 But those are still works in progress. We

1 don't have one yet under our belt, but I'm optimistic.

2 MR. AVERY: We have a final question or comment
3 from Stacy. No?

4 MR. McCLOUD: Thank you. I am Bill McCloud,
5 and I, along with Robin, had the privilege of
6 participating in the discussion of the new guidelines as
7 they came out. And one of the critical distinctions I
8 saw between the previous and the current editions is the
9 dramatic expansion of the coverage of consumer protection
10 issues.

11 But to Robin's point and the point that we've
12 been discussing during the panel today, I would like to
13 question how far we do want to go in actual reference to
14 other standards like ISO 26000 and how far we would want
15 to go by case-by-case mediation or adjudication because,
16 at some point, we could lose the vitality and the utility
17 of the guidelines if the guidelines become, rather than
18 guidelines, some more particular level of regulation.

19 When I was a public official, I took an oath to
20 uphold the Constitution of the United States. I didn't
21 bring a single case under the Constitution. I brought
22 cases under the various regulatory and legal regimes
23 support by the Constitution. And I think we can look at
24 the guidelines as somewhat the same way, not even in a
25 governmental capacity, but rather as an overarching

1 guideline, perhaps like the ICC Code governs advertising
2 self-regulation around the world. We don't see the code
3 itself invoked in advertising disputes, but we do see
4 that code influencing any number of disputes and
5 influencing the direction of the resolutions of those
6 disputes. And I think that's precisely the benefit that
7 the guidelines, as we have developed them, at least on
8 the consumer side, are going to show their worth here as
9 well. Thank you.

10 MR. AVERY: Do we have time for another
11 question? Yes? Okay. Or comment.

12 MS. FEUER: Thanks, Stacy Feuer from the FTC's
13 Office of International Affairs.

14 Let me just ask a quick question because it's
15 something I really don't know the answer to. In the
16 United States and in the Stakeholder Advisory Group and
17 in the NCP process, is the consumer movement, you know,
18 an organization like Consumers Union, are they involved
19 at all? Because I've heard a lot about the environmental
20 and labor and human rights issues. But given that the
21 MNE guidelines now do contain a consumer interest
22 provision, I'm just wondering if there's been sort of any
23 uptake in the consumer policy area or consumer
24 enforcement area?

25 MR. YU: The quick and short answer is no, and

1 it's unfortunate. I think there's great potential for
2 that. But, again, I think we -- it goes back to this
3 whole question of raising awareness of the guidelines.
4 And I actually think this is -- today's conference is a
5 great opportunity for my parochial view to get that info
6 out to people who follow these issues. I'd welcome it.

7 MR. AVERY: Okay, I think we have to end there.
8 But I would like to say thank you to all of the
9 panelists. It certainly has been an educational
10 experience for me and it's good to see stakeholders
11 talking and working together in this way.

12 And I'd like to mention that when we did review
13 the guidelines, the chapter on consumer issues, consumer
14 interests, we had all the stakeholders at the table, we
15 had an initial text and we received comments, more than
16 100 comments, and we were able, over time, to eliminate
17 or address all those comments and issues and ended up
18 with more or less agreed text which did, as Robin points
19 out, include reference to the ISO, if not ISO 26000.

20 (Laughter)

21 (Applause)

22

23

24

25

1 CASE STUDY: TOY SAFETY AND FOOD SAFETY

2 MR. FENTONMILLER: Thank you. Okay. So, we're
3 going to set up for the next panel right now on toy
4 safety and food safety. Moderating this panel is Scott
5 Cooper from the American National Standards Institute.
6 And I want to especially thank Scott for providing a lot
7 of thought and insight into how to think about these
8 issues of enforceable codes of conduct and, in
9 particular, raising the issue in the areas of toy safety
10 and food safety, which I think provide good case studies.
11 Although outside of the areas that the FTC traditionally
12 regulates, they can provide some good insights on these
13 issues.

14 (Brief pause)

15 MR. COOPER: Well, I want to thank the FTC for
16 putting this on. One of the speakers earlier, in one of
17 the earlier panels, mentioned the fact that we're
18 creating intellectual capital here, and I think that's
19 really true, that these issues are very much live issues,
20 they're ones that are works in progress. They're sort of
21 the two steps forward, the step to the side, you know,
22 step back. Sort of there's a waltz or something that's
23 going on here. But there's significant incremental
24 progress being made. And that's what I think really
25 counts here.

1 And there's no point where it should stop, that
2 we keep making progress and, hopefully, will continue to
3 make progress on these issues. There's a lot of unmapped
4 white areas in global governance that I think conferences
5 like this are very important to help fill. So, I'm glad
6 to be able to host this panel because I think that the
7 case studies we're looking at here are very good examples
8 of where you have some practicable solutions to very
9 significant problems in the global marketplace and in
10 global supply chains.

11 So, I want to move fairly quickly on this
12 because I'd like to leave as much time as we can for our
13 discussion in the panel and also for Q&A. So, I'm going
14 to introduce the panel members briefly and in the order
15 that they'll present.

16 So, first, we have Richard O'Brien, who is the
17 Director of International Program and Intergovernmental
18 Affairs at the CPSC. He's a retired former U.S. Foreign
19 Service Officer, and before his diplomatic career, he was
20 in trade promotion at the Department of Commerce
21 International Trade Administration.

22 We'll then have Alan Kaufman, who is the Senior
23 Vice President, Technical Affairs of the Toy Industry
24 Association, with more than 35 years of experience
25 addressing product safety, quality assurance, regulatory

1 compliance and product testing issues for toy companies
2 and retailers. He is a certified quality engineer and is
3 the nominated U.S. expert for the current revision of ISO
4 IEC Guide 50 on children's safety.

5 We then have Charlotte Christin who is Senior
6 Policy Advisory for the Office of Policy at the Food and
7 Drug Administration. She focuses on food safety policy
8 and contributed highly to the development of the Food
9 Safety Modernization Act, FSMA. She chairs the FSMA
10 Accredited Third-Party Certification Work Group, and is
11 the lead for developing the agency's third party
12 regulations.

13 Joseph Scimeca is the Vice President of Global
14 Regulatory and Scientific Affairs, Corporate Food Safety
15 and Regulatory Affairs at Cargill, Inc., where he
16 provides leadership for ensuring that companies' food
17 products and processes are safe, including being
18 protected against intentional acts of adulterations and
19 bioterrorism. Before that, he has worked for Kraft,
20 Pillsbury and General Mills.

21 And then finally, but not last, or actually
22 last but not least is Caroline Smith DeWaal -- I'll get
23 that phrase right before we're done here.

24 (Laughter)

25 MS. SMITH DeWAAL: Definitely last.

1 MR. COOPER: Definitely last, but hopefully can
2 tie all these issues together. And Caroline is the
3 Director of Food Safety over at the Center for Science in
4 the Public Interest and co-author of Is Our Food Safe? A
5 Consumer's Guide to Protecting Your Health and the
6 Environment. She has testified many times before the
7 U.S. Congress and also presented papers in food safety to
8 over 100 scientific and public policy conferences and
9 regularly publishes in scientific and legal journals.

10 Caroline has participated in a number of World
11 Health Organization consultations on food safety, as well
12 as FDA, USDA and CDC advisory panels.

13 So, as you can see, we've got a very good panel
14 for helping to contribute to this creation of
15 intellectual capital. Also, as we get into these issues,
16 I want to say that the members of this panel have taken
17 the sacred oath that they will stay within their five-
18 minute allocation of time so that we will have enough
19 time at the end for, hopefully, a very robust discussion
20 and Q&A.

21 Certainly, as I mentioned earlier, in the
22 discussions this morning and into the afternoon, I think
23 the sum total of what I'm picking up on this is that
24 we're starting to fill in some of these blank areas in
25 global governance. There's just a lot of work, very much

1 a work in progress, where we don't know exactly how we're
2 going to get to where we want to go, but I think the
3 consensus is developing that we all want to go in
4 basically that same direction. And I think that's true
5 certainly for government officials, I think it's true for
6 industry, I think it's true for consumer groups,
7 academics. I think we all sort of know intuitively where
8 we need to get to.

9 That doesn't make it any easier perhaps in
10 actually implementing that direction. But I think that,
11 again, events like this I think are very important to
12 help effectuate that change.

13 Unfortunately, the will for effectuating change
14 is often because of tragic accidents, such as was
15 discussed earlier this morning about the Karachi textile
16 fire. As also mentioned, it is eerily similar to the
17 Triangle Shirtwaist factory fire of a century ago. And
18 in both cases, ownership was opaque, the exits for fire
19 doors were both blocked or locked, and over 100 mainly
20 young women died in both of these tragic accidents.

21 What I think we have coming out of at least the
22 Triangle fire, though, is this glimmer of hope. What
23 actually was effectuated was that there was this will to
24 change and we saw that in the history of that period,
25 that it was this fire, this tragic accident that, in a

1 sense, was the genesis for the National Consumers League,
2 one of the first and most effective third party efforts
3 in this country to develop sort of countervailing
4 authority on these issues.

5 It also marked, and I think most directly, as
6 the starting point for the U.S. Progressive Era,
7 culminating, as some might say, in the charter of the
8 Federal Trade Commission.

9 So, I think that you have to look at these
10 issues as sort of points that you have to get some kind
11 of use out of, that you have to find some way to take
12 advantage of an accident that should not have happened,
13 but because it did, you want to make sure that it doesn't
14 happen again.

15 And I think that the issue that we're going to
16 be discussing today, whether it's lead in children's
17 products or problems with food adulteration and food
18 imports or other examples perhaps not quite as horrific,
19 of where those in this room can work together to find
20 ways to take care of problems that have never been really
21 addressed in the past. We've always sort of accepted
22 that there will always be these problems, that we will
23 always have to deal with these problems on a case-by-case
24 basis.

25 I'm hoping that coming out of events like this

1 we can say, no, that doesn't have to be the case, that
2 working together, again, all the consensus groups that
3 are here and in this room, we can find ways to fill in, I
4 think, some of those blanks in the global governance.

5 And so, I want to turn to this panel again so
6 we'll have more time at the very end, but I think that
7 those who are represented on this panel really are
8 important for developing those solutions in this global
9 marketplace, and I look forward to the comments from the
10 panel and hopefully the dialogue that will develop
11 afterwards about how these two issues of children's
12 products and food products can be I think sort of leading
13 indicators of the direction that I think we need to go in
14 global governance.

15 So, at that point, in the order that we have it
16 here, I'd like to turn it over to Rich.

17 MR. O'BRIEN: Thanks, Scott.

18 Well, I think it's appropriate that as we get
19 into the holiday season we're here talking about toys,
20 because there will be a lot of toy shopping going on.
21 And I assume that when we get done talking about toys,
22 we'll slide into discussions about fruit cake and egg nog
23 and such things.

24 (Laughter)

25 MR. O'BRIEN: So, it's pretty good timing.

1 I actually get the light lift here today
2 because I'm going to discuss a little bit about toy
3 safety from the CPSC standpoint and particularly how we
4 implemented certain aspects of the revision to our law in
5 2008. The reason it's such a light lift is because the
6 points that I have to hit are pretty -- it's really not a
7 lot of points, to be honest with you. So, I don't have
8 slides. If there's anything that you want to follow up
9 on, you can go to our website and go to the business
10 section of our website and you'll find pretty much
11 everything that I'm going to tell you right now.

12 Well, we didn't have a Triangle fire, but we
13 did have the toy recalls of 2007, and there was enough
14 concern over excessive lead in toys at that time and the
15 recalls that took place. In particular, the fact that a
16 major player who was well respected had its product
17 identified as having excessive lead and it happened in
18 spite of a lot of measures that they had in place.

19 So, what did that mean for companies that
20 really weren't taking the time and trouble to enforce
21 good practices in their supply chain?

22 Congress reacted with the Consumer Product
23 Safety Improvement Act of 2008, and that act focuses on
24 children's products. It's not exclusively children's
25 products, but that's where the focus is. It granted new

1 authorities to the CPSC. It mandated a number of safety
2 improvements for products, for children's products
3 particularly. It made the ASTM F963 Toy Standard a
4 mandatory standard by regulation. So, now that reference
5 standard is incorporated by reference and is required.
6 And, in fact, Alan will take about that a little bit more
7 during this time.

8 And it required the CPSC to set up a third-
9 party certification program for the testing of children's
10 products to ensure that they meet CPSC requirements.
11 That's what I'm going to spend the next few minutes
12 talking about.

13 First of all, you have to understand that if a
14 product has a federal requirement, then in order to put
15 it on the market, if it's under CPSC's jurisdiction, it
16 has to have a general certificate of conformity that --
17 which is essentially a supplier's declaration of
18 conformity, for those of you in the trade world. And it
19 says, basically, we have done our due diligence and this
20 product meets the federal requirements. That's basically
21 what it is.

22 And that's subject to a reasonable testing
23 program. So, if you were to make that statement and, in
24 fact, had no program behind it, and there were a
25 violation, then the commission would probably take that

1 into consideration in assessing the level of the penalty.

2 Well, if it's a children's product, then the
3 certificate has to be a little bit more specific. That's
4 a certificate with the third-party testing requirement.
5 That certificate has to show who did the testing, that is
6 what laboratory, when was the testing, what's the
7 specific test, et cetera. That information has to be
8 available so that, at minimum, the CPSC could follow up,
9 if there were a problem with the product identified.

10 Certainly, that information is going to be of
11 benefit to any subsequent retailer or wholesaler in the
12 supply and distribution chain who might discover that
13 they have a problem on their hands. So, that
14 information's valuable to them as well.

15 Now, I mentioned that it has to be tested by a
16 third-party laboratory. It's not just any laboratory; it
17 has to be a laboratory that's in our program.

18 The CPSIA gave the CPSC the choice of setting
19 up a third-party testing program from scratch or adopting
20 something -- some sort of accreditation system that we
21 could point to. And being the shrewd and thrifty
22 government employees that we are, we pointed to one. We
23 pointed to the ILAC system that's already in place, and
24 I'll come back to that in a second.

25 There are three flavors of laboratory under the

1 law. One I guess you would call a regular commercial
2 laboratory, you know, something like an Intertek, Bureau
3 Veritas, for example. The next flavor is specifically
4 called, under the law, a firewall laboratory, and that
5 would be a lab that's owned and operated by the company
6 that's manufacturing the product. That can only take
7 place if -- and only can get approved, actually, by a
8 vote of the commission.

9 And then, finally, there's governmental labs
10 and that's with any government ownership or
11 participation. And that has certain additional
12 guidelines requirements that are in the law.

13 So, in order to participate in our program, you
14 have to be laboratory accredited by a body that's an ILAC
15 signatory. The baseline is that you're accredited to ISO
16 17025, which is basic laboratory operations and the kinds
17 of things that ensure against undue influence. And then
18 after that, you have to be accredited for whatever test
19 it is that you want to do. Again, same process. We want
20 to see the accreditation for that specific test.

21 Then you can get on our list, and it's on our
22 website. And if you want to find a lab by country or by
23 test, you can look at it on our website. And if you want
24 to apply to be a lab, you can apply, and all that
25 information is on our website.

1 And then the last thing I would say is we have
2 no specific requirement as to the relative locations of
3 the various players. So, for example, if the country the
4 lab is located in allows for an accrediting body in
5 another country to accredit a lab, that's okay with us as
6 long as the accreditor is a signatory to the ILAC
7 arrangement. The manufacturing can be someplace else
8 and, obviously, the market is in the United States. So,
9 theoretically, you could have four jurisdictions somehow
10 involved in this process. But we count on ILAC to be the
11 anchor for it being done in a universally uniform way
12 throughout the world.

13 So, that's the process, and I think that kind
14 of sets the stage maybe a little bit for the rest of the
15 toy testing.

16 MR. COOPER: Thanks, Rich. Alan?

17 MR. KAUFMAN: Okay, thank you. Unfortunately,
18 I did not bring a printout of my slides, so I'm going to
19 speak from the podium here.

20 Just real quickly, I wanted to -- and I'm going
21 to try and keep it to my five minutes as well. Just a
22 real quick snapshot of the U.S. toy industry. The
23 average price of a toy is about \$8, a little less
24 actually. There are about three billion units of toys of
25 all types sold every year. There's about 22 -- a little

1 more than 22 billion in direct sales in the U.S., with a
2 total economic impact of about 81 billion. And there are
3 about half a million jobs, FTE equivalents or full-time
4 equivalents, that are part of the toy industry and
5 suppliers and providers to the industry.

6 Here are some of our members. This is just to
7 tell you a little bit about TIA. We're a trade
8 association representing the industry. But the reason I
9 wanted to touch on this will become clear in a minute.
10 But this is just a sampling of some of our members. We
11 have about 550 members and they account for about 85
12 percent of the U.S. toy industry by sales.

13 What I wanted to leave you with is the fact
14 that toy safety is not new to us. We've actually been
15 involved in it since the 1930s. TIA has been around for
16 almost a hundred years and we've been involved in safety
17 initiatives, going back to the 1930s where we got
18 involved with the National Safety Council. We actually
19 generated the world's first toy safety standard, which
20 was called PS 72-76, back in actually 1976. Hence the
21 name. And that actually eventually morphed into ASTM
22 F963, which Rich referred to and I'll get to in a minute.

23 Here are the basics. And what happened was
24 Congress endorsed both the ASTM F963 standard -- they
25 basically said, look, here's -- we have a voluntary

1 standard that is out there. Now, by statute, the CPSC is
2 required to defer to a voluntary standard over mandatory
3 rule-making if there is an effective standard and it's
4 being followed. If those are not the case, obviously,
5 they can proceed to mandatory rule-making.

6 So, Congress said, look, we've got a great
7 standard here, it's being adhered to by most of the
8 industry, and so we're going to endorse that standard and
9 we're also going to endorse that consensus process. And
10 this is kind of a unique arrangement. We're going to
11 endorse the process by which that standard gets
12 developed.

13 It was adopted as a mandatory rule by CPSC, and
14 there are -- the ASTM F963 standard, the F15.22
15 Subcommittee meets on a regular basis and considers
16 whether there are changes needed to it either because
17 there's an emerging hazard, which people have just become
18 aware of, or because there's innovation within the
19 industry. There are new types of products which need to
20 be addressed by the standard. And so, it's a living
21 document.

22 So, what happens is every time it gets revised,
23 ASTM notifies the commission, the commission has 90 days
24 from that publication date to reject it, and if they
25 don't reject it, it becomes mandatory 180 days after

1 publication.

2 The copyright's still owned by ASTM; however,
3 ASTM has said that any standard which is referenced in a
4 federal requirement is available free of charge at their
5 website. Also, the CPSC, while there is a comment period
6 going on in terms of considering changes to F963, the
7 commission does provide read-only copies on their website
8 as well. But this is the key safety requirement for toy
9 safety here in the U.S.

10 History, the first version I mentioned PS 72-76
11 was actually developed by industry. It was published by
12 what was, at that time, the National Bureau of Standards,
13 which is now the National Institute of Standards and
14 Technology. It became F963 in 1986 and it's gone through
15 a number of iterations. The most recent revision is ASTM
16 F963-11, which was published in December of 2011.

17 CPSC adopted the first version. They've
18 adopted every subsequent version. It became mandatory in
19 June of 2012. It addresses thermal, mechanical,
20 electrical, a number of other requirements, packaging,
21 toy chests, et cetera. There are sections for prevention
22 of choking, laceration, strangulation. I don't need to
23 go through it. You can see it here.

24 And there's also guidance on developmental age
25 grading to make sure that a toy is aimed at the correct

1 age group. In other words, to make sure that it's
2 appropriate for the age of the child that's going to be
3 playing with it.

4 The Standards Committee reviews anything --
5 typically incident data from the CPSC. There's some very
6 good data that the CPSC is able to provide to the
7 subcommittee. So, what that subcommittee does is review
8 those data. And there is broad representation on that
9 committee. In other words, you not only have industry,
10 we're there, but also consumer organizations, medical
11 experts, child development experts. There are a number
12 of people who all participate. Anyone -- they're open to
13 the public. Anybody can participate in the meetings. If
14 you want to be a voting member, it's a very low bar.
15 It's \$75 to join ASTM. So, we would encourage anybody
16 who has an interest to join that subcommittee.

17 CPSC and Health Canada also are very active
18 members of that subcommittee. And so, there is
19 government input to that process.

20 The revisions have to achieve consensus at the
21 subcommittee level, and then they also have to achieve
22 consensus at the full F-15 consumer products committee
23 level before they go to the CPSC.

24 So, what we really do is we have some
25 advantages here. We've got a unique public/private

1 partnership where you have a broad representation on a
2 voluntary standards committee that develops a standard
3 and can react very nimbly. It's a very nimble process.
4 They can react very quickly if there's an emerging
5 hazard. They can make a change much more quickly than a
6 regulatory agency that's burdened by the Administrative
7 Procedures Act can operate.

8 And then that government agency then can, in
9 this case, the CPSC, makes it a mandatory standard and it
10 becomes enforceable by force of federal law.

11 The other nice thing about it is that from the
12 perspective of concerns that this subcommittee might do
13 something that doesn't improve safety or that makes --
14 that reduces the level of safety, the CPSC actually has a
15 veto. They have 90 days during which they can say, look,
16 we don't like the changes, we're not going to approve it,
17 it's not going to become a mandatory standard.

18 Typically, that's going to be very rare because the
19 commission is an active participant and because a lot of
20 the information that the subcommittee is operating on is
21 actually coming from the CPSC in terms of incident data.

22 Thank you.

23 MR. COOPER: Thank you, Alan. Charlotte?

24 MS. CHRISTIN: Thank you. So now we're ready
25 to talk about fruitcake apparently.

1 (Laughter)

2 MS. CHRISTIN: Thank you for the opportunity to
3 be here with you today. As I looked at the materials
4 that the other speakers had shared on the website, it
5 became very clear to me that even though we are focusing
6 on different areas and different themes, the questions
7 that are implicated by public/private partnerships and
8 enforceable codes of conduct really are common. And I
9 think, as I work on FDA's program for accreditation of
10 third-party auditors to conduct food safety audits, it's
11 become clear to me that what is key is determining the
12 best way to structure the public/private partnership in a
13 way that incentivizes industry to want to participate and
14 also results in outcomes that are reliable and credible
15 for government to use.

16 I think that is, as I think about the topics
17 and the issues that I deal with, I think that's what I
18 try to keep in mind.

19 I think that with respect to the heart of the
20 issues that I want to talk about today -- again, this is
21 all in the context of a new mandate that FDA received in
22 January 2011 to establish a program for the accreditation
23 of third-party auditors to conduct food safety audits of
24 foreign food facilities and to issue certifications based
25 on the results of certain types of food safety audits.

1 The program really does build on -- the mandate
2 builds on work that's currently being done by industry.
3 It is the work done by conformity assessment bodies or
4 also known as certification bodies, and there have been
5 real successes by leaders in industry in establishing
6 these programs. It's an opportunity for us to build on
7 these existing efforts, nonetheless recognizing that
8 there have been some obvious and well publicized problems
9 with the system. And so, those problems represent the
10 challenge that we face as we try to build this system.

11 And as a result of, again, those well-known
12 problems, we've had some real skepticism from the public
13 about the appropriate role for third parties and the fact
14 that we're even, you know, beginning to implement what is
15 a congressional mandate.

16 Within the community that is concerned about
17 our reliance on third-party auditors, two of the key
18 themes really relate to concerns about conflict of
19 interest and transparency. I think that these are
20 probably themes that others who have spoken with you
21 today have echoed as well, that these are -- when we
22 think about public/private partnerships, it really --
23 these are two of the key issues that go to the heart of
24 the matter.

25 And in the Food Safety Modernization Act,

1 Congress gave us some direction about how to approach
2 these issues. So, in FSMA, Congress focused on conflicts
3 between the certification body and the facility that it
4 audits. The program -- the mandate includes recognition
5 of accreditation bodies by FDA, but the focus with
6 respect to conflicts has to do with the certification
7 body and the auditor for the body.

8 The conflicts provisions focus on the
9 ownership, management or control of the certification
10 body and the ownership and operation of the facility
11 itself. Those are the areas, those are the issues that
12 Congress viewed as being the potential conflict which
13 might threaten the impartiality of the audit.

14 In the statute, it's also very interesting that
15 not only did Congress speak to the conflicts of the
16 certification body, but also the audit agents, the people
17 employed by or subcontracted by the certification body,
18 the people who actually go out to those facilities and
19 conduct the audits. So, the statute itself extends
20 certain responsibilities to those audit agents, those
21 individuals. And so, they cannot own or operate a
22 facility that is to be audited either for certification
23 purposes or for mere consultation purposes. The idea
24 being that Congress was very concerned that whatever
25 these results, whether they be ones that FDA rely on or

1 ones that are purely for internal purposes, that that
2 audit agent be truly objective and impartial with respect
3 to the results and the outcome of their audit findings.

4 The certification body also, under the statute,
5 must have procedures to address potential conflicts of
6 interest. There is a requirement for -- okay, this is
7 annual disclosure of conflicts of interest, compliance
8 with conflict of interest requirements, and once again,
9 the duty extends to the officers, the employees, and the
10 agents, including the audit agents.

11 There is a provision that is addressed towards
12 conflicts associated with the use of an audit agent for
13 more than a certain period of time, the potential for
14 familiarity types of conflicts.

15 And then there is this general mandate to
16 establish implementing regulations that include a
17 structure to decrease the potential for conflicts of
18 interest. So, it's very general, but it gives us a lot
19 of discretion with the eye towards, again, Congress
20 underscoring the fact that they're very concerned about
21 the potential conflicts of interest.

22 Transparency. And so, with -- the other key
23 issue, I think, is transparency. We certainly heard from
24 consumer groups that there's a real concern that we're
25 talking about a system that currently is a system of

1 private audits, the results being confidential. Quite
2 frequently, the results are not shared with government
3 unless there is -- unless it's required by law. And, in
4 fact, FSMA does speak to the question of disclosure of
5 certain audit information to government. The statute
6 requires the submission of audit reports associated with
7 certification audits. They're also known as regulatory
8 audits.

9 It gives us some limited records access
10 authority based on whether it's an internal consultative
11 audit or an audit for certification. It also requires a
12 public registry both of the accreditation bodies if
13 they're part of our program, as well as the accredited
14 certification bodies. And I think many of those things
15 are common with what is done in the CPSC context as well,
16 the idea of having a public registry.

17 But the question of transparency really is more
18 about these audit reports, because once they come in to
19 the agency, then they become agency records until there
20 are questions of FOIA-ability, you know, what sort of
21 performance metrics would be involved, and this ties
22 back, of course, to the question of incentives. If, you
23 know, given a certain level of transparency, what might
24 be an incentive or disincentive for industry to
25 participate? So, these sorts of balancing issues that

1 really are so critical and, again, go to the heart of the
2 success of the program are ones that we're thinking hard
3 about. And I think that the folks on the panel today and
4 certainly throughout the day, have had a lot of
5 experience in grappling with those issues as well.

6 So, I thank you for your time and I look
7 forward to the questions.

8 MR. COOPER: Thank you, Charlotte. Joe?

9 DR. SCIMECA: Good afternoon. Thanks to Peter
10 and the other organizers for this opportunity to speak to
11 you this afternoon.

12 I was asked to talk about the Global Food
13 Safety Initiative. And in terms of full disclosure, I
14 have no financial interest in GFSI. However, Cargill is
15 a corporate member and I do chair one of the technical
16 committees. And, finally, I should indicate that my boss
17 is on the Board of Directors. So, I'm clearly a disciple
18 of GFSI.

19 So, I wanted to give you a little background on
20 GFSI. I'll just voice over some of the slides that are
21 missing. It started in 2000.

22 (Brief pause)

23 DR. SCIMECA: So, GFSI started in 2000. It
24 followed a mandate from the Board of Directors of the
25 Consumer Goods Forum, at that time, and it really was

1 created to address a crisis in consumer confidence in the
2 food supply. If you remember, this kind of followed the
3 mad cow outbreak that occurred in the late '90s and there
4 were a number of other issues at that time.

5 So, since then, GFSI has now grown to include
6 650 members, and these are retailers, manufacturers,
7 service providers, and other stakeholders, across 70
8 different countries. And some of the largest companies
9 in the world are members now, retailers like Metro,
10 Tesco, Wal-Mart and food companies like Con Agra, Kraft,
11 McDonald's, Coca Cola. So, very large companies with
12 very important brands to protect.

13 So, let's see if we can get the next slide
14 here. So, what we have here is the mission, which is to
15 continuously improve the food safety systems that are in
16 place and to increase consumer confidence worldwide. The
17 four goals that you see up there are the key ways in
18 which this will be done. One, we want to reduce food
19 safety risk, we want to develop competencies and capacity
20 building throughout the world. We want to have a good
21 exchange of food safety knowledge and networking. And,
22 finally, we need to manage the costs so that we can truly
23 focus the food safety improvements where they're most
24 needed.

25 I should also point out the GFSI principles are

1 harmonized to the CODEX principles on food safety.

2 All right, so these are the four approaches,
3 the GFSI will accomplish this mission. The first one is
4 to create links with key organizations and regulators;
5 secondly, to improve communications; third, a
6 geographical expansion; and then finally, build
7 confidence in the third-party certification system.
8 We'll talk about each of these areas.

9 So, there's a number of different links that we
10 feel are important in gaining our mission. We need to
11 have good strong links and dialogue with government
12 organizations, with international organizations, as well
13 as trade and other scientific organizations.

14 So, GFSI has created a technical committee,
15 which is the Global Regulatory Affairs Working Group.
16 And this group is tasked with creating these linkages
17 with various governments and you will see here there's a
18 number of papers that have been addressed, white papers
19 that will be used to help communicate the purpose of GFSI
20 and what they intend to do. And we've had some success
21 with a few countries, notably, Netherlands now recognizes
22 GFSI certified companies.

23 So, the next program is the Global Markets
24 Capacity Building Programme. And in those emerging
25 and -- and as well as those sectors in developing

1 countries where there's a need for capacity building,
2 GFSI has an approach to phase in the deployment of the
3 different standards that are needed. And as you can see
4 here, it's not intended to plateau at any one stage, but
5 continually get to the highest certification that's
6 needed.

7 So, we feel like, ultimately, on the right-hand
8 side, you'll see seven out of the nine recognized schemes
9 that have been benchmarked against the GFSI guidance
10 document, and the goal is to get all the companies that
11 are following this up to that level within a couple of
12 years.

13 So, the next strategy is to improve
14 communications. There's a number of ways in which this
15 is done. As you would expect, various communication
16 vehicles, meetings and papers and website and so forth.

17 So, as you can imagine, in gaining confidence
18 in this third-party certification, it's vital that we
19 have independence and trust in what is being done. One
20 of the areas that we see that is often criticized is in
21 the auditing aspect and, particularly, in the competency
22 of the auditors. So, GFSI has developed a program to
23 build on this confidence. And as you can see, this was
24 started a couple of years ago. They're determining the
25 various roles and tasks and expectations of the auditors,

1 and then to define the competencies or skills that are
2 needed to meet these expectations.

3 So, looking forward here, we want to
4 geographically expand. We have a presence with 70
5 members -- I mean, members in 70 countries, but we want
6 to go much further than that.

7 So, I want to leave you with two success
8 stories. Here is one with the Metro Group on the --
9 nope, it's not there. Very odd.

10 (Laughter)

11 DR. SCIMECA: Well, I'll tell you. I don't
12 know why certain slides are missing. Maybe it's an
13 effort to cut down on the talk.

14 (Laughter)

15 DR. SCIMECA: So, the Metro Group was able to
16 save over 400,000 euros in reducing the number of audits.
17 They reduced the number of recalls from 20 down to 2, and
18 they've been able to expand their supplier base that are
19 now certified in a number of emerging countries, like
20 Vietnam and Egypt, and to reduce post-harvest losses by
21 over 40 percent.

22 In terms of Cargill, we had a business -- our
23 salt business that was being audited 17 times a year.
24 Salt, which they like to say is cheaper than dirt. And
25 it was just an enormous cost, over \$150,000 a year just

1 to manage these audits. We're now down to one audit a
2 year of around \$8,000. So, that was just two quick
3 examples.

4 You can go to these various sites and locations
5 to gain more information on GFSI. Thank you.

6 MR. COOPER: Thank you, Joe. And there was no
7 method to the madness. I don't know where those missing
8 slides are, but they're probably with the 18 minutes from
9 Watergate. We'll find them one of these days.

10 (Laughter)

11 MR. COOPER: Caroline?

12 MS. SMITH DeWAAL: Thanks. Good afternoon, and
13 you're to the last speaker, so you should start planning
14 your questions now.

15 We are -- I'm going to talk a lot about imports
16 here because under the new FSMA law, the ability of FDA
17 to utilize third-party auditors is limited to imports.
18 So, as you can see, we've had a huge increase, really
19 astronomical over the past probably 20 or 30 years. Just
20 since 1990, the volume of imports has doubled, but if you
21 sought back to like the '80s or the '70s, it's just
22 really dramatic the volume of food that FDA is
23 responsible for regulating.

24 And in 2003, FDA was, for the first time, given
25 the ability to register food facilities and, very

1 rapidly, after registration began, the number of import
2 facilities registered with FDA was well above the number
3 of domestic facilities. It's now at about 250,000
4 foreign facilities in 150 countries.

5 FDA inspects -- FDA's major tool prior to FSMA
6 for import control and safety was border inspections.
7 And they were inspecting less than 2 percent of food
8 shipments coming over the border and less than -- they
9 were actually visiting less than half a percent of those
10 facilities. Actually, the number of tests being run was
11 well under 1 percent as well. FDA has really been under-
12 resourced to manage this very large volume of import.

13 Well, there are always -- you know, there's
14 always opportunities and challenges when you're facing
15 something like this. Imported products certainly
16 represents an opportunity for some people, and we've seen
17 really dramatic increases in food being imported from
18 countries such as Vietnam and China. And this is very
19 helpful to their economy. This also provides benefits to
20 U.S. consumers. All of these imports do, whether they're
21 coming from Europe -- I mean, there is clearly consumer
22 demand for these products.

23 But you also see the challenges. The little
24 blue line you can barely see along the bottom represents
25 the increase in import line inspections during the same

1 time period. So, you can just see the mountain is
2 growing over the regulatory ability of the agency to
3 respond.

4 We've also seen -- and now we get to my missing
5 slides. Okay, we've also seen a history of risk tied to
6 imported food. Just this summer, we've had three major
7 outbreaks tied to imports. One was from listeria in
8 ricotta cheese. It resulted in two deaths and 20 people
9 hospitalized. We also saw salmonella in mangoes coming
10 from Mexico. 121 illnesses in 15 states with 25
11 hospitalizations. And then some of you may recall a very
12 large outbreak, over 400 people were sickened from tuna
13 that was showing up in sushi. You know, it was -- I
14 study outbreaks. This was the first major sushi outbreak
15 we had seen. Fifty-five people had to be hospitalized as
16 a result of that. And that's just this summer.

17 So, Charlotte's absolutely correct. There was
18 a lot of distrust and continues to be among the consumer
19 community about the use of third-party certifiers. CPSI
20 was fairly innovative because we were the ones who kind
21 of said, how are we going to -- how is FDA actually going
22 to be tasked to do this job, this mission impossible of
23 ensuring the safety of imports. And we felt that every
24 tool needed to be considered.

25 So, we looked at the fact that trade rules

1 often allow and require certification as a control. And
2 in addition, the USDA, which regulates meat and poultry
3 products, recognizes foreign governments to do that type
4 of certification. So, they recognize foreign governments
5 to actually approve the products that are being shipped
6 to the U.S.

7 And, additionally, third party is relied on
8 heavily by the food industry. I am going to start
9 skipping things.

10 So, the important thing to know about FSMA is
11 that it is limited to third parties -- excuse me, it's
12 limited to imported foods. The key questions that are
13 often asked, what standards are being enforced, the
14 standards will be set by FDA. FSMA allows FDA -- FDA can
15 recognize these accreditation bodies that then can
16 accredit these third-party auditors.

17 Now, FDA may choose to skip over the
18 accreditation body part and just go directly to
19 accrediting auditors themselves. They could do that.
20 But we do anticipate that at the end of the day, foreign
21 governments will be auditors, foreign cooperatives will
22 be auditors and private parties will be auditors, third
23 parties. This is in the law. So, we anticipate that
24 will occur.

25 And the other thing that we anticipate is that

1 the growth of the use of third parties in a regulatory
2 context will be very modest to begin with. FDA can only
3 mandate its use with high-risk food products and they
4 have to specifically mandate it. So, what I expect to
5 see is the growth of the use of these third parties in a
6 regulatory context that will be very gradual to start
7 with and they may start covering more and more of the
8 food coming in.

9 We have defined here what the federal
10 responsibilities are, what the external management is and
11 also what federal oversight -- the slides are already up
12 on the website for the conference, so I guess you'll have
13 to read them there.

14 The third party, though, importantly, is not
15 synonymous with private. We fully anticipate that
16 foreign governments will play an active role here in
17 providing the type of assurance that FDA needs if it's
18 going to trust that imports are safe to come to the U.S.
19 And, importantly, FDA can't really bar imports. I mean,
20 they really have very limited ability to ban products
21 from coming in and they use it very rarely, only in cases
22 where there are repeated problems with specific food
23 items.

24 So, there's a lot of other information about
25 what's in the law that we're just going to skip through

1 because he said it was the end and if you're speed
2 readers, you can cover all this. But, otherwise -- and
3 Charlotte already covered the conflict of interest
4 standard. So, now you see why I'm last and now we get to
5 the questions.

6 MR. COOPER: Thank you, Caroline. For the
7 panel, I think they deserve -- because they really did
8 meet their sacred oath here of being on time, which gives
9 us time -- hopefully, you have been thinking of questions
10 for this.

11 The FTC gave us kind of a cheat sheet of sort
12 of framing questions, and I have to say in the short
13 amount of time that the panel had, they covered pretty
14 much all the questions that were sort of framing this
15 panel. The one that's still out here that I see is one
16 that is, again, going back to sort of the original global
17 governance issue that I raised in the beginning, and that
18 is, what lessons are there in other areas of consumer
19 protection that could utilize some of the lessons
20 learned, say, from both the toy safety and the food
21 safety legislation and implementation efforts? I'd like
22 to throw that out as sort of the first sort of framing
23 question for this panel is, where do you think this will
24 go and what lessons learned do you see that should be
25 taken to heart by those in this audience and others who

1 hopefully will see the slides later down the road?

2 MS. SMITH DeWAAL: Can I start?

3 MR. COOPER: Please.

4 MS. SMITH DeWAAL: So, seeing as I'm on the --
5 seeing as I was short at the end, I did want to note that
6 third parties are used extensively in the private sector.
7 They've been used in Europe for a number of years. It's
8 how food moves essentially over borders. So, the private
9 industry has been using them for a long time.

10 One thing I did not get to, but I think is very
11 important for you to understand, is that by bringing
12 third parties under a regulator umbrella, we get to tell
13 them what they have to do. And in FSMA, it requires the
14 auditors must immediately notify FDA of findings of
15 conditions that could cause or contribute to a serious
16 risk of public health. And that means there is a new
17 source of information coming in.

18 The things we've learned is that in the case of
19 PCA, in the case of a number of other major outbreaks,
20 PCA was a peanut butter outbreak in 2010, 2011, that
21 killed nine people in the U.S. These people had been
22 repeatedly reviewed by private third-party companies that
23 were certifying for them for something, but it certainly
24 didn't end up being safety. So, we've seen repeatedly
25 where these systems have failed. So, this is an

1 opportunity to show us if they can work.

2 MR. COOPER: Okay, thank you. Rich, you
3 certainly had a forced march on CPSIA. I think you had
4 35 rule-makings or it may have been even more that you
5 had to go through in a very short amount of time. Coming
6 off of that process, what lessons learned do you see for
7 other agencies or sort of what works, what didn't work in
8 sort of the implementation of the toy safety bill.

9 MR. O'BRIEN: Okay, well, this being
10 Washington, I'm really not going to answer the question.

11 (Laughter)

12 MR. COOPER: But it was asked.

13 MR. O'BRIEN: I'm going to use the opportunity
14 to say something else.

15 (Laughter)

16 MR. COOPER: But you're candid about it, so we
17 must be in Virginia or someplace else.

18 MR. O'BRIEN: I'm right up-front with it. And,
19 in fact, it's really not my place to speculate about
20 things that would really be the purview of our
21 commission, the commissioners, I would say.

22 MR. COOPER: That's fair.

23 MR. O'BRIEN: But I would like to point out
24 that one of the issues that you have to grapple with when
25 you're talking about third-party inspection, testing,

1 auditing, whatever, is the quandary of the golden sample.
2 If you're talking about a specific product, it's very
3 easy to understand, and it doesn't necessarily imply any
4 problem with the testing laboratory.

5 That third-party lab has a sample that was
6 presumably obtained in good faith, in a good way, using
7 all the best practices. It passes with flying colors.
8 And then the next thing we know is we have products with
9 hazards, they have to be recalled.

10 And then the question that you have to ask
11 yourself is what happened. Why was it that the lab
12 passed it and presumably correctly, but the rest of the
13 product has problems, why we had to do that?

14 Now, with a facility -- in one of my previous
15 lives for Commerce, I worked at Agriculture. So, I'm a
16 little familiar, too, with the problem of inspecting
17 facilities. Facilities is a little bit different in that
18 if you know you've got a clean facility, you're probably
19 good for some period of time, although it doesn't take
20 long to contaminate it. And it doesn't take very long at
21 all to contaminate a line.

22 But you still have the golden sample issue
23 which is the fact that you inspected a facility and it
24 passed and there doesn't seem to be any problem. And
25 none of the training manuals are, you know, out of date

1 and everybody seems to be doing everything right, but
2 yet, suddenly, we've got this problem.

3 So, I guess my answer to your question is, this
4 problem will exist until the end of time. It's a
5 question of how do we manage our way through it. And
6 every system that we put in place has to be put in place
7 with the full understanding by everybody, you know, all
8 of the stakeholders involved, that best practices from,
9 you know, the time we get to work in the morning until
10 the time we punch out at night, those are the best
11 practices that prevent the problems, not the testing that
12 happens to find, you know, that the sample passed.
13 That's the thing we're going to always be grappling with.

14 MR. KAUFMAN: If I could add something to that,
15 I won't comment on the difficulties that the agency had
16 to go through because I can't imagine.

17 MR. O'BRIEN: You're actually free to do that.

18 MR. KAUFMAN: Yes, I know, but I wasn't there.

19 (Laughter)

20 MR. KAUFMAN: Clearly, Congress put a
21 tremendous burden of tasks on the agency in a very
22 short time frame. But to amplify one of the things that
23 Rich talked about is the fact that when you audit a
24 facility -- I mean, it's a snapshot in time. You know
25 that it meets a certain number of criteria at the time

1 that you audit it, but that doesn't tell you what that
2 facility might look like a month or a year down the road.
3 And so, those audits have to be repeated on a periodic
4 basis.

5 The other piece is that the idea of third-party
6 testing certainly is a good start, certainly it is
7 something that most of the people in the industry were
8 already doing long before CPSIA. But it's only one piece
9 of a full quality assurance program. You need to make
10 sure that the design is robust, and I don't know a good
11 way to legislate or to regulate that. You need to make
12 sure that a facility and manufacturing processes are
13 capable. And this is something that the players in our
14 industry do because they recognized a long time ago that
15 it's in our interest to make sure that we provide safe
16 product and that parents can buy the product with
17 confidence. So, testing is one piece of the puzzle.

18 I think the other challenge that we're faced
19 with is the fact that when you put in place a third-party
20 testing regime, it's important to make sure that you've
21 assured that somebody is going to test the product
22 adequately, but try to minimize the administrative burden
23 that goes along with that. And that's always a
24 challenge. Because any time you have to make something
25 mandatory, there has to be, of necessity, some burden.

1 MR. COOPER: Charlotte, you have even less
2 leeway than Rich does since you've got a rule-making
3 still as a work in progress.

4 MS. CHRISTIN: Right.

5 MR. COOPER: But are there any generic lessons
6 learned or things that you've discovered in your forced
7 march, your long march over the last year and a half that
8 you could share with the group?

9 MS. CHRISTIN: Well, you know, I think, for
10 myself, we, as I think my colleagues from CPSC have dealt
11 with, you live the language you were given. You live the
12 mandate you were given. So, there are things that we are
13 required to consider and do. There are ways that we are
14 required to structure the program that, you know, we are
15 putting into effect. In some ways, they're similar to
16 the mandate that CPSC got; in some ways, very different.

17 I think the biggest challenge, again, remains
18 the recognition that, although Caroline alluded to the
19 mandatory certification for the imported foods, but in
20 general, participation in the program is voluntary. No
21 accreditation body has to seek recognition by us, no
22 certification body has to seek accreditation to conduct
23 food safety audits under the program. The only hammer,
24 when you think of a true hammer, comes in with respect to
25 the food products from these foreign firms. They won't

1 be granted admission if they're subject to a mandatory
2 certification requirement.

3 So, the challenge -- the balance for us is how
4 do we ensure sufficient rigor and oversight of the
5 program that gives us credit results, gives the American
6 public the confidence that they need in the system, but
7 also, at the same time, is flexible enough and consistent
8 enough with industry's needs such that, you know, the
9 food industry is searching for these accredited auditors
10 to perform this work and these auditor certification
11 bodies, therefore, are also looking for recognized
12 accreditation bodies. If we don't strike the right
13 balance or come as close as possible, it really will and
14 can affect what the program looks like and, ultimately,
15 whether it gets off the ground in the way that we hope it
16 does.

17 MR. COOPER: Yeah, finding practicable
18 solutions is kind of the -- the whole consensus process
19 is definitely some -- I won't say it's just over the next
20 hill, but it's definitely something where everybody sort
21 of understands the need, but the implementation is always
22 strange and wondrous.

23 Let's open it up to questions then from the
24 audience. Again, I think these are two cases studies,
25 but I'd like to think of these as sort of examples of

1 sort of where, at least the U.S. Congress thinks that
2 these issues are going and how does that dovetail with
3 what's going on other places around the world, or what
4 lessons learned do you see as people working these issues
5 that you can take away from this panel?

6 So, please, I'd like to open it up at this
7 point.

8 MR. BRANDT: Hi, Allen Brandt from the Graduate
9 Management Admission Council. In the data privacy world,
10 the data controller or the person who is collecting data
11 is responsible end-to-end for the process. So, from the
12 time of collection through moving and everywhere it goes,
13 you are ultimately responsible.

14 What I'm troubled by, and I'm going to say this
15 out of my league as a consumer, when I see what the CPSC
16 or the toy industry does, that's only the end user
17 product. And so, where's the responsibility to make sure
18 that -- and I'll pick on Apple because they're in the
19 news every week. You have child labor, you have
20 chemicals in the factory. Where is the responsibility,
21 even though the end product meets all the standards, the
22 point from the raw material to where it gets to me does
23 not. And I have to live with that chain in data. How
24 come we don't do it in product?

25 MR. KAUFMAN: Are you speaking about -- I'm a

1 little confused. Are you speaking about a standard in
2 terms of the safety of the product or are you talking
3 about the conditions under which it's manufactured?

4 MR. BRANDT: The conditions under which it's
5 manufactured. The end product is safe, but the
6 manufacturing facility is not.

7 MR. KAUFMAN: Okay, I'll take that one.
8 Actually, it's something that the toy industry grasped
9 and dealt with a long time ago.

10 There's actually an independent non-profit,
11 which is call the ICTI CARE Council. And what ICTI CARE
12 does is they collect fees from factories in order to
13 audit them to a set of what we consider to be minimally
14 acceptable social responsibility standards, that people
15 are being paid at least the legal minimum wage, that
16 they're being paid for overtime, that they're not being
17 worked more than a certain number of hours a week, that
18 there are adequate fire exits, that there are fire
19 extinguishers, that there's no sexual, physical
20 harassment going on of workers. It's a very extensive
21 audit.

22 So, what we've done as an industry, the Toy
23 Industry Association has required all of our members to
24 pledge to only buy product from factories which are
25 certified to that ICTI CARE Code of Conduct and have been

1 audited by ICTI CARE. So, it is something that we're
2 concerned about. It is something that we're aware of and
3 it's something that we've been doing for more than a
4 decade.

5 MR. COOPER: I think this goes back, too, to
6 some of the initial ideas that there's still a lot of
7 white areas on the map of global governance, and that's
8 just the nature of the beast at this point.

9 What I would say to sort of mitigate the fact
10 that we're still playing catch-up on this is that not too
11 far in the past, these issues weren't even on our radar
12 screen. They were issues to those particular countries
13 and there was very much a firewall between what would
14 happen in Bangladesh or wherever and what would happen,
15 the end result, you know, when product finally came to
16 the United States.

17 So, the fact that we don't have solutions is a
18 problem and we need to recognize that. But the fact we
19 now have, I think, sort of the stewardship, recognized
20 stewardship obligation that companies and consumer groups
21 and agencies of the U.S. Government and other agencies of
22 other governments have sort of taken on, that we
23 recognize that this is part of what has to be filled in
24 on that map is the first step. And then the question is,
25 do we continue to make significant -- incremental, but

1 significant progress in sort of filling in those areas.

2 And that, I guess, is sort of what, again, I
3 think is the intellectual capital we're trying to create
4 in this conference and other places, as well.

5 MS. PRAGER: My name's Nancy Prager. I'm an
6 attorney in private practice. My question really relates
7 to something that was not addressed here, which is the
8 globalization of standards. It is very difficult for
9 small businesses in the United States to transact
10 business on a global scale when they are having to go
11 through regulatory compliance for safety, toy safety
12 let's talk specifically, where the differences between
13 the EU and the U.S. are pretty stark to begin with, and
14 then you go into countries -- I was just talking to a
15 colleague of yours from the toy industry about the new
16 Philippines law. We need to really sort of start working
17 toward that as a globalization standard because it's a
18 real issue.

19 I mean, I can't even -- I guess I'm not being
20 very articulate. I had it all thought up in my head. My
21 question is, what can we do to move toward a uniform code
22 that can be operated across borders, number one?

23 Number two, another difficulty that I have
24 faced as counsel on these issues to clients is these
25 regulations are written by engineers. And first of all,

1 the fact that they are behind a firewall that is costly
2 is something that we really need to look at. And I've
3 dealt with this in building codes as well and there's
4 something a little wrong with this. I don't know what
5 the solution to that is either. But those are two
6 questions/observations.

7 MR. COOPER: Thank you.

8 MR. O'BRIEN: Thank you. Lucky for you, Alan
9 and I have heard this question before.

10 (Laughter)

11 MR. COOPER: So, we're ready. And, quite
12 seriously, it is better to look forward than to the past,
13 as we heard earlier. Governments these days are very,
14 very committed to trying to coordinate as much as
15 possible on requirements that they're putting in place.
16 And I can speak for our agency that a normal and
17 increasing part of our work is to coordinate with our
18 foreign partners as we go forward.

19 But you have to bear in mind that the majority
20 of product safety requirements, and it's certainly true
21 with toys, and the data shows it, the majority of product
22 safety requirements are based on standards that are put
23 together by stakeholders who are not governments. That
24 means that, in many cases, and I will focus on toys. In
25 many cases, it is the global industry that's in the best

1 position to even out the difference in the standards that
2 are out there being used in different jurisdictions.

3 Now, in the case of ASTM standard, the CPSC --
4 I won't speak for our commissioners specifically, but I
5 will say that they have expressed their willingness to
6 look at changes in the ASTM toy standard that might bring
7 it in line with something else, another standard used
8 elsewhere, from the standpoint that the alignment is good
9 and the safety's not diminished in any way. That's not
10 for us to instigate; that's for the industry to work on.

11 And as far as other countries or jurisdictions
12 that may put in place something that's, you know, either
13 radically or moderately different from toy safety
14 requirements that are currently on the books, it does
15 happen. And it can happen two different ways. One, it
16 can happen because they're inexperienced, they're going
17 about it for the first time, and they think the right way
18 to do it is to do it the way that they do everything
19 else, which is to create something that makes sense for
20 them and for their population, without regard to how it's
21 done pretty much everywhere else. We see that pop up
22 from time to time, and there are ways to work with that.
23 But it's a tough row to hoe.

24 The other area, which I will say very little
25 about, is when politicians see a problem and decide that

1 they're going to solve it.

2 MR. COOPER: So...

3 MR. KAUFMAN: On that note, yeah, in fact, Rich
4 did touch on something I was going to talk about. On
5 both sides of the water, both in the U.S. and in Europe,
6 there have been instances where politics has basically
7 trumped science and the politicians have said, you will
8 do it and you will do it in this way. In fact, the CEN
9 process for developing the EN 71 toy safety standard is
10 essentially that. The CEN Technical Committee gets a
11 charge from the European Commission saying, you will do
12 this, you will regulate this, regardless of whether it
13 necessarily needs to be regulated.

14 So, getting back to your original question,
15 nothing would make the industry happier than to have
16 aligned standards. And I think toys actually are closer
17 than a lot of other industries. I would say that -- you
18 know, if I had to take a stab at it, I would say that the
19 major toy standards in the world, ASTM F963, EN 71 in
20 Europe and ISO 8124, which is sort of a global -- was
21 originally envisioned as a global toy standard are about
22 80 percent aligned. A lot of the requirements are very,
23 very similar, primarily because the industry put together
24 PS 72-76 back in the '70s and that was the genesis of a
25 lot of these standards. That's where they came from.

1 And so, a lot of people who were developing
2 standards in other countries simply said, well, we could
3 reinvent the wheel or we could look at this existing
4 standard and we can take what we like and maybe make some
5 changes to the stuff that we don't like. But it's that
6 last 20 percent that's very, very difficult. There are
7 structural barriers in place, in some cases, to bringing
8 the standards closer together. And, of course, there's
9 certainly the issue of, you know, when you talk to
10 someone about alignment, the answer is, yes, we're happy
11 to align, you can adopt our standard.

12 (Laughter)

13 MR. KAUFMAN: That's the standard answer no
14 matter where you have that conversation. But it doesn't
15 keep us from continuing to try. We are, you know,
16 currently working with governments in Europe, governments
17 in Canada, and we are talking to the government in the
18 Philippines through the U.S. Government in terms of
19 trying to make them aware of the fact that there are
20 existing standards that could be adopted that would
21 certainly accomplish their policy goals without creating
22 barriers to trade.

23 MS. SMITH DeWAAL: So, I know your question was
24 on toys, but you should be aware that in the food area,
25 there is actually an organization celebrating its 50th

1 anniversary this year called CODEX Alimentarius, where
2 national -- regulators from governments all over the
3 world get together and negotiate food standards. Now,
4 they're used widely in developing countries. They are
5 part -- GFSI did adopt them as one of the base standards
6 for companies working under that scheme.

7 They're not used widely in the U.S. or the EU
8 because we like to -- you know, we like homegrown
9 standards. But there is a base of international
10 standards that can be litigated at the world court.

11 MR. COOPER: Stacy, we have about 90 seconds
12 left, or perhaps less, but I'll say 90 seconds. Would
13 you like to sum up the intellectual capital that's been
14 created on this panel?

15 MS. FEUER: I don't think I could sum up the
16 intellectual capital; although I do find it very
17 interesting. One question I have though is, a difference
18 between this panel where we're really talking a lot about
19 imports, whether they're food imports or product imports,
20 and the issues we talked about earlier today, you know,
21 the APEC Privacy Model which deals with flows of data
22 across borders, is that the model that you're positing is
23 sort of incorporating standards into this regulatory
24 framework, some of them have a lot of international buy-
25 in.

1 But what I guess I'm not hearing and I wonder
2 if it exists, apart from the CODEX, is are other
3 countries doing the same thing? Are they also looking at
4 third-party certification? Are the third-party
5 certifiers in any way global? Do they talk to each
6 other? I'm just wondering what the level of
7 international coordination is throughout this sort of
8 government and stakeholder chain.

9 MS. CHRISTIN: With respect to food safety and
10 FSMA, certainly we've had a lot of dialogue with our
11 international regulatory partners. And there's a lot of
12 interest. I can't even begin to tell you how many
13 delegations we've hosted and that sort of thing. So,
14 there certainly is a lot of interest in this model in
15 figuring out how to -- to share perspectives on how we
16 might implement our statutory mandate without obstructing
17 trade or doing -- you know, creating any hindrance to
18 trade. So, we've gotten a lot of feedback on that sort
19 of -- those sorts of issues.

20 Certainly, the private audit industry that's
21 grown up is global. It's international. I mean, a lot
22 of the food industry that uses these audits, many of them
23 are multinational. And I think that the idea being, as
24 Joe alluded to, the idea being that one audit could serve
25 in a number of different venues.

1 I do need to -- I do want to make one point. I
2 was debating whether to interject this, but I think it is
3 important for you to know. One of the characteristics of
4 the statutory mandate that we were given in FSMA is that
5 the standard by which the facilities will be assessed is
6 compliance with FDA's Food, Drug and Cosmetic Act. By
7 contrast, in another part of the same provision of the
8 statute, when it talks about the qualifications for the
9 auditors or certification bodies, Congress directed us to
10 look to existing standards as -- in effect as of the
11 date.

12 So, you know, there it seems to be look around,
13 you know, consider what's out there. And yet, with
14 respect to what are the audit criteria which serve as a
15 basis for determining whether certification may issue,
16 Congress was very clear that, you know, look down at your
17 law. So, I mean, I think it's very interesting how, you
18 know, we see flavors of both in our mandate.

19 MR. O'BRIEN: In consumer products, governments
20 are increasingly working together, mainly in two places.
21 One is in the OECD working party on consumer product
22 safety. Peter, he's our overseer. And the amount of
23 work being done is just increasing all the time. And the
24 other is in the International Consumer Product Safety
25 Caucus. So, yes, lots of cooperation, growing

1 cooperation, and a lot of work on trying to align our
2 approaches, including product safety requirements.

3 Third-party testing is normative behavior in
4 the consumer product industry, but it is not widely
5 accepted by other governments as something that should be
6 required.

7 MR. COOPER: I'll take growing cooperation as
8 the final words of this panel and thank them very much
9 for their participation.

10 (Applause)

11 MR. FENTONMILLER: So, we'll just take a short
12 break and reconvene around 4:15.

13 (End of panel)

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1 PANEL: BEST PRACTICES AND METRICS

2 MR. FENTONMILLER: We're going to move into our
3 final panel, which is going to attempt to tie everything
4 in together from the day and wrap it up in a nice package
5 for the holidays. No, but seriously, we're going to just
6 try to step back a little bit and get some perspective on
7 what we heard, see if we can elucidate some of the best
8 practices or at least the key elements of these schemes
9 that we've put under the enforceable codes of conduct
10 scheme, and then also talk about how do we measure the
11 legitimacy and the effectiveness of these types of
12 schemes, noting that they can have a wide variation.

13 So, without much introduction, I'm going to
14 turn it over to the panelists. And I'll just give you a
15 very brief introduction of each of the panelists because
16 the details are in their bios.

17 First, we have Professor Anne Meuwese, who's
18 here with us from the Netherlands, and we greatly
19 appreciate her traveling great distances to share her
20 wisdom with us.

21 I'll just go in the order that the people are
22 going to speak. At the end, we've got Norma Tregurtha,
23 who's a Senior Policy Manager at the ISEAL Alliance. And
24 I'm sure she will tell you more about what ISEAL is and
25 what they're doing that is very relevant to the reason

1 for us being here today.

2 We've got Sheila Millar, who's very actively
3 involved with the ICC with regard to marketing and
4 advertising, and she's also a partner with Keller and
5 Heckman.

6 We've got Lee Peeler, my ex-boss, the guy who
7 hired me here. And even when he left, I decided to stick
8 around, even though it was very sad. But Lee is very
9 active with the Advertising Self-Regulation Council.
10 He's Executive Vice President of National Advertising
11 Self-Regulation for the Council of Better Business
12 Bureaus. Before that, he had a very long career, a 33-
13 year career with the FTC.

14 And then going last in terms of prepared
15 remarks, Robin Simpson, who we've heard from already.
16 So, I don't think he needs introduction.

17 MR. SIMPSON: Too much.

18 MR. FENTONMILLER: Yeah, maybe a little too
19 much.

20 (Laughter)

21 MR. FENTONMILLER: All right, okay, turning it
22 over to Anne.

23 PROFESSOR MEUWESE: Thank you very much. It's
24 a great pleasure to be here.

25 In modern law schools, we actually try to teach

1 students a little bit about the things we've been talking
2 about today in order to prepare them for life as a lawyer
3 in the real world. And one of the things I've done in
4 the past is to give them a case study where they have to
5 decide, as a particular business, whether they would in
6 the end, opt for self-regulation or they would perhaps
7 rather have the government regulate a certain issue.

8 And, of course, in the beginning, they're all
9 like, gosh, it's easy, you know, it's great making your
10 own rules, probably is going to be that. But then after
11 they've gone away, looked at the case study, looked at
12 everything that's involved, they tend to come back and
13 say, well, actually, you know, given all the transaction
14 costs that are involved or the quality standard for
15 rule-making processes themselves, maybe it's just as easy
16 if we just let the government regulate.

17 Well, of course, I'm not here to argue that
18 that's what you should do at all, but just to say that I
19 think we have a common understanding in this room that a
20 lot is involved in making any kind of self-regulatory
21 regime work these days. And that is also, I think, a
22 sign of maturing of regulatory regimes, that they start
23 thinking about things around the standards themselves
24 that perhaps some public regulation is, in some cases,
25 already a little bit more advanced.

1 One such issue, I think, is evaluation where
2 we've seen -- well, in the U.S. already for a little bit
3 longer, but in Europe only recently, a huge increase in
4 instruments such as impact assessments. Well, there,
5 self-regulation tends to be one of the policy options
6 that is being assessed. But I don't think that there's
7 any reason why it could not also be an instrument
8 deployed by private regulators. And I'm hoping that
9 maybe Norma will say a little bit more about that later.
10 Who knows? She's got some practical experience in that
11 regard.

12 And one specific criterion that I think should
13 be very prominent in these evaluation processes is
14 effectiveness and it's not just because it happens to be
15 a theme of this panel. And the reason why I think is
16 that it forces parties to think about their policy
17 objectives. Because even in these private regulatory
18 regimes, what you are doing is making policy, I mean, at
19 the very least. Because if you wouldn't be doing what
20 you're doing probably government would step in. So, I
21 think that alone connects it to policy.

22 And then what happens a lot, I think, is that
23 we defer agreement on what the policy objectives should
24 be in order to get everybody on board. And it's quite
25 often we regulate something and only when it comes to

1 then asking the question, is this working, yes or no, we
2 found out that actually we had little bit different
3 things in mind when it comes to the goals of this certain
4 regulatory regime.

5 I mean, just to simplify a little bit, say you
6 want to do something about child labor. What does that
7 mean? Do you want to eradicate it? Do you just want to
8 decrease it a little bit or are you more thinking along
9 the lines of improving circumstances? I think that if
10 you don't make it very specific, what is the aim for the
11 regulatory regime, you're really going to get into
12 trouble later on.

13 Just the final issue, we've been talking a lot
14 about enforceability here. Of course, that's very much
15 related to effectiveness, but they're not the same. A
16 code with enforceability problems is very likely not
17 going to be effective. And a code where the
18 enforceability aspect has been well taken care of has
19 good chances, I think, to be effective. But still
20 they're not one in the same because it can very well be
21 that although a code is very well enforced, maybe it's
22 design is just not very suited to its objectives, or it
23 could be that your objectives have gradually been
24 changing and often have become more ambitious. And if
25 there's no explicit recognition of that, you may actually

1 get problems in the regime.

2 So, then who should do this? Who should
3 evaluate the effectiveness? Now, on this, I have to warn
4 you, is way too much for a black-and-white picture in
5 such a hybrid world that private regulation is, but it's
6 just to make us think a little bit about different
7 options. And then if we would, in the end, opt for more
8 of a multi-stakeholder arrangement when it comes to
9 evaluating the regime, at least we know what the pros and
10 cons are.

11 And here, I would like to draw your attention
12 specifically to the final category and that's a sort of
13 new phenomenon that's the existence of meta regulators.
14 And here, again, I'm looking at Norma because I would
15 take the liberty of saying that ISEAL is an example of
16 that, entities, organizations that help with the process
17 of regulating.

18 So, how? Very quickly, a few best practices.
19 The use of indicators here is, of course, very popular.
20 But they can also be very tricky. And one quick example
21 of that -- well, I'm taking the example from the Dutch
22 context, if you don't mind. There, the government was
23 saying self-regulation in the legal profession is not
24 working because we see very few complaints. And everyone
25 was like, yeah, but that's because it's working. And the

1 government is like, no, no, no, that's because the
2 complaint procedure is not accessible. No, that's not
3 true, it's because it's working.

4 And then the government said, okay, show us,
5 you know, burden of proof is on you. Show us that the
6 lack of complaints actually means that your self-
7 regulation is working. And the bar association really
8 couldn't do that very well. And then the government
9 said, okay, that, in itself, the fact that it's hard to
10 get information on performance, is an indicator of lack
11 of effectiveness.

12 I think here the key is that it's important to
13 agree on these kind of things beforehand and it's an
14 important topic of discussion between the public and the
15 private parties in a certain regime.

16 Attention for side effects, and I think here we
17 only need to be reminded of the speech on competition
18 effects. That could be something that can be taken into
19 account as well.

20 And, finally, to conclude, do think about this
21 option of involving a meta regulator, coming back to
22 those transaction costs that are often involved and that
23 those law students picked up on so well. I think that
24 there are already lots of mechanisms out there and it may
25 help put in place mechanisms to help evaluate our

1 regulatory regimes. Thank you very much.

2 MR. FENTONMILLER: Norma?

3 MS. TREGURTHA: So, good afternoon, everyone.
4 It's a real pleasure to be here this afternoon. As you
5 can see or as you've heard, I work for an organization
6 called the ISEAL Alliance. And ISEAL is essentially the
7 global organization for sustainability standards.

8 And in today's language, we're essentially the
9 membership organization for a group of code-based systems
10 that all try and advance sustainability in the sectors in
11 which they operate. We are, quite rightly, called a meta
12 regulator. We're the standard setters for standard
13 setting organizations.

14 What does ISEAL do? Well, first of all, we
15 define what good practices look like for the design and
16 operation of credible sustainability standards systems.
17 The second thing we do is we actively work and promote
18 these as tools that can make a real difference to the
19 environment and to social issues worldwide. They make
20 supply chains more sustainable.

21 The third thing we do is we work with the users
22 of standards systems, governments, businesses, civil
23 society for them to really understand the difference
24 between credible standards and non-credible standards.
25 We've seen an enormous proliferation in the number of

1 standards and labels that are available on the market and
2 it's increasingly becoming hard to distinguish which are
3 the more credible of those. It's our job to give the
4 users of these systems signposts or guidelines as to how
5 they can distinguish the good standards.

6 As a membership organization, here is an
7 example of -- well, here are our members. We have full
8 members that are in compliance with our codes and we have
9 associate members who have committed to coming into
10 compliance with our codes of good practice within a year.
11 So, you can see they cover a diverse range of sectors.
12 And what unites them is the fact that they are
13 international in their scope.

14 The heart of my presentation is really about
15 ISEAL's codes of good practice. ISEAL has developed, to
16 date, three codes. The first code, which was developed
17 in 2004, is our code of best practice around standard-
18 setting. This code requires that those who want to
19 develop standards firstly be very clear about the
20 objective they hope the standard will achieve. Right
21 from the beginning, clearly define what your objective
22 is.

23 Then the second obligation under our code is to
24 really justify the need for this tool. Why? What gap in
25 the market does it fulfill?

1 The third requirement of this code is around
2 being a multi-stakeholder code and that really requires
3 the person developing the -- or the organization
4 developing the code to really have a clear stakeholder
5 map to understand who would be affected by the code and
6 also to ensure that there's active participation of all
7 those who are affected, and active participation means
8 providing the means of opportunity for everybody to
9 participate. If they disadvantage stakeholders, there's
10 a real obligation on the standards setter to figure out
11 how to bring those disadvantaged stakeholders into the
12 discussion.

13 Our second code, which was finalized in 2010,
14 is around the requirement that standards systems really
15 access the impact they have. And this is really
16 important not only to provide the empirical evidence for
17 the claim they're making, but also around improving their
18 performance. Because if you're having a standard that
19 says that you're reducing or eliminating child labor, you
20 need the evidence to substantiate that claim.

21 Our third code is really around assurance. How
22 do you assure credible verification processes? Within
23 the ISEAL, as a meta regulator, we find our code fulfills
24 four main functions. Firstly, it's around performance.
25 Really, they codify what good practices look like and

1 this codification exercise leads to improved impact.

2 Secondly, it's around legitimacy because our
3 codes provide global benchmarks of good practices and we
4 are increasingly seeing governments and other
5 organizations showing a willingness to recognize ISEAL
6 member codes and the work that ISEAL has been doing.

7 The third function our code fulfills is really
8 around transparency and this is really around the
9 convening function of our codes. Our codes are not
10 developed by a group of people sitting in an office.
11 They're truly multi-stakeholder. They take two years to
12 develop and lots and lots of resources.

13 Our fourth and probably -- well, the fourth
14 function of our code is a governance function. Really,
15 compliance with ISEAL codes is a membership requirement
16 and that allows the users of standards systems to -- it
17 underscores the point that they, in fact, are credible
18 systems.

19 And that's the end.

20 MR. FENTONMILLER: Thank you, Norma.

21 Sheila?

22 MR. MILLAR: Thank you, Keith, and thank you to
23 the FTC for inviting me to participate today. It's been
24 a very stimulating discussion.

25 I wanted to start -- I've been asked to talk a

1 little bit about the International Chamber of Commerce
2 marketing and advertising code. But I'm going to start
3 to set the scene a little bit, because throughout the
4 day, we've been talking about three very different models
5 of codes. And I'm going to call them regulation, co-
6 regulation and self-regulation. And we've heard public
7 regulation, public/private partnership and private
8 regulation, but I'm going to stick to regulation, co-
9 regulation and self-regulation, because they have very
10 different legal underpinnings and implications.

11 For all three paradigms, you basically need a
12 process to identify issues of concern. In regulatory
13 environment, that's done through the legislature, through
14 the regulatory bodies. There typically has to be some
15 process to get input about what those concerns are.
16 There's generally, certainly in the advertising arena, an
17 element of establishing a level playing field that gets
18 to Bill Kovacic's notion of protecting competition and
19 making sure we have a robust marketplace where trade can
20 flourish.

21 As Anne pointed out, in her students' work,
22 they're looking at these regimes and deciding is it
23 better, is it faster, more flexible. If it's not, it's
24 not going to be as cost effective as regulations. So, we
25 have to think about the cost and, of course, there has to

1 be some type of enforcement or accountability mechanism.
2 Certainly, that can be separated from the process of
3 developing codes. But there has to be some type of
4 accountability mechanism and that can vary depending on
5 the topic.

6 So, with that as a background, I want to talk
7 about a true example of self-regulation at the
8 international level, through the ICC code of advertising
9 and marketing practice. The ICC code has been in place
10 for 75 years. It's a very old and mature form of
11 advertising self-regulation. It actually forms the basis
12 of many national advertising codes and effective
13 advertising and marketing self-regulatory programs around
14 the world.

15 It is periodically revised and updated to
16 address new issues and concerns. This ICC is a business
17 organization and the process that is used to get input on
18 those issues really flows from the national committee
19 structure. So, members are representing essentially
20 countries. And we bring to the table, as a
21 representative, issues of concern in our marketplace. We
22 also bring to the table issues that we hear from our
23 regulators. And for the companies, they will bring to
24 the table concerns that they hear maybe directly from
25 consumers.

1 The codes are amended periodically, so we look
2 at roughly a three-year cycle. The most recent update of
3 the code directly addressed, in much more detail, digital
4 marketing issues. We've also used a rather novel
5 approach, which is what we call framework guides. As
6 part of the ICC, I chair the working group on
7 sustainability, and a few years ago, we developed
8 framework guides for environmental marketing, because we
9 were seeing increase in environmental marketing claims
10 and the ICC code didn't cover all the new claims we were
11 seeing.

12 One of the things we decided, through our
13 national committee process, is that we were not going to
14 try to tackle every new claim. We were going to try to
15 look at high-level principles. And what we also decided
16 to do is develop useful checklists for advertisers and
17 advertiser agencies to help them work on claims. So, the
18 code's translated in many languages.

19 And while the ICC code does not form the
20 underpinning of our advertising and marketing self-
21 regulatory system, it's enormously important throughout
22 the world. And so, we can see on this global chart, in
23 the black, the areas where the ICC code does form the
24 basis for self-regulation. And if you want more
25 information and copies of the codes, you can check their

1 website.

2 So, I want to end, in my last couple minutes or
3 seconds -- seconds really -- I see you. What are some of
4 the considerations for the cross-border effective codes?
5 And there has to be an effective process to find common
6 ground. We've alluded to this throughout the day, but I
7 can't understate the importance of really thinking
8 through the impact that different legal regimes,
9 different cultural and social expectations have in
10 getting to yes on just the substance of the code. We
11 have to assure that codes advance both consumer
12 protection goals and trade goals. And there is,
13 particularly on the enforcement side, often a need for
14 capacity building.

15 So, when we looked at the globe chart in Russia
16 and China and parts of Asia, there's a great effort at
17 the ICC to work with these regions to help expand their
18 capacity to work on enforcement of the codes.

19 And I think as we've heard through the day,
20 we've seen the toy safety paradigm, we've talked about
21 privacy, we've talked about advertising. One size does
22 not fit all. And I think it's very important, as part of
23 this dialogue, to really think about making sure when we
24 talk about best practices that we're not trying to create
25 a box that impedes our ability to effectively manage and

1 address issues of concern.

2 So, that's it. Thank you.

3 MR. FENTONMILLER: Thank you.

4 Lee?

5 MR. PEELER: So, I want to start off by
6 thanking Keith for that great introduction and thanking
7 all of you for staying here through the panel. I think
8 this is going to be the best panel of the day, so you're
9 going to be rewarded.

10 (Laughter)

11 MR. PEELER: I also want to congratulate the
12 FTC and the OECD for sponsoring today's workshop. I've
13 been doing self-regulation for years now and I've learned
14 a lot today. I think there's a lot of knowledge to be
15 gained and I think self -- as the OECD tool kit says,
16 self-regulation can be an important consumer protection
17 tool if it's used the right way. And I think this is a
18 great start.

19 I think you heard today about the APEC Privacy
20 Code model which is a huge breakthrough in terms of
21 international application of self-regulatory principles.
22 I think that's really important.

23 But I wanted to echo a little bit of what
24 Sheila said today about make sure that you keep a broad
25 perspective on self-regulation. And I want to talk

1 primarily about accountability where my organization, the
2 Council of Better Business Bureaus, has really been a
3 leader. We administer a group of programs that all
4 address basic questions of advertising self-regulation in
5 the U.S. As Sheila said, there are similar organizations
6 all over the world that administer these types of
7 advertising programs.

8 And when you step back from them, there's
9 really four things that you want to measure them against.
10 And this is the accountability/enforceability part of
11 self-regulation. You know, do you have meaningful
12 standards? There's been a lot of discussion about how to
13 get there. The second thing is, do you have an impartial
14 administrator? Is the process transparent? I don't
15 think you can have enforceability without being very
16 public about what you're doing, especially on a self-
17 regulatory basis. And the last piece is, are there
18 consequences?

19 So, if you look at how we've implemented that
20 in the U.S., the independence comes from our association
21 with the Better Business Bureau. It is 100 years old, so
22 we don't have to say nearly 100 years, like the FTC does.
23 We actually had our centennial. And the BBB is known for
24 its complaint resolution. Last year, it handled over a
25 million complaints from U.S. consumers, but it also

1 administers these programs and it administers them in a
2 fair and objective manner.

3 The BBB also does business ratings. You can
4 see two ratings here. One company is rated A+; the other
5 company is rated F. The company that is rated F is also
6 under an indictment in California for collecting fake
7 debts. So, this is information that consumers can use.

8 Transparency, every decision that we issue is
9 publicly reported, whether it's a win, lose or draw. So,
10 if people want to evaluate how advertising self-
11 regulation is done in the United States, they read the
12 decisions, you know, and say they got it right, they got
13 it wrong, I disagree with it, I agree with it.

14 And accountability is a huge issue. If we have
15 a company that refuses to comply with -- to participate
16 in the self-regulatory process or comply with a decision,
17 we publicly refer it to the FTC. The FTC doesn't bring
18 every case we send to them, but they do back us up.

19 And it brings up sort of an interesting issue
20 for self-regulation. It's almost a reverse relationship
21 with the government. The government is looking at what
22 we do to determine whether or not it violates the law
23 rather than our making a determination whether it
24 violates the law. We're looking at whether you're
25 complying with our standards and the government is

1 looking at whether it complies with the legal process.

2 The support that the government gives to self-
3 regulation is vital. We were just in a conference in
4 Southeast Asia on promoting self-regulation and one of
5 the major needs was that the government step up and say
6 that they would support the process.

7 So, I just want to flip through to this last
8 slide. This is a program that was started a couple years
9 ago. It addresses a very specific privacy issue. It
10 addresses the collection of data to support online
11 behavioral advertising. The entire industry came
12 together, came up with a set of standards, told the
13 public and the government, here's the standards we're
14 going to enforce, and then turned over to us, to the FTC
15 -- I mean, to the BBB -- Freudian slip -- the process of
16 enforcing the standards.

17 The great thing about this is we have learned
18 continuously from the implementation, one of the great
19 strengths of self-regulation is it's flexible. From what
20 we have learned, the process has just been announced --
21 been incorporated in the ICC code, it's been announced --
22 a new program's been announced in Europe. There are
23 other countries that are also adopting that process. So,
24 it's very much an icon of the strength of self-
25 regulation, which is an iterative learning, but

1 enforceable process.

2 So, with that, I'll turn it over to Robin.

3 MR. FENTONMILLER: To Robin, yes.

4 MR. SIMPSON: That's me?

5 MR. FENTONMILLER: You're up.

6 MR. SIMPSON: Right. I have the luxury of
7 intervening for a second time in a panel, so I shall be
8 briefer than I was before.

9 The questions are which elements discussed
10 determine the legitimacy and effectiveness of cross-
11 border codes of conduct? As a result of today's
12 discussion, I identify three really. One is that codes
13 should be multi-party. This isn't just to allow
14 interfering busy bodies like me to poke their noises into
15 industry's affairs. It's because it is a genuinely
16 constructive process. I mean, I've hugely enjoyed
17 working on ISO committees with people from completely
18 different words.

19 At the moment, I'm working on an ISO standard
20 on mobile transmission of cash internationally. A hugely
21 important subject for developing countries. I know
22 nothing about the technology, but the guys I'm working
23 with are all engineers in a sector that know nothing, and
24 are disarmingly frank in saying so, about consumer
25 protection. That's what it's about really. It's about

1 how you educate each other.

2 I think there should always be a forum --
3 second point, there should be a forum for conciliation,
4 whether it's instances, as we heard with the National
5 Contact Points on the OECD MNE guidelines, where you're
6 looking at company policy, like in Uzbekistan we heard,
7 or whether it's individual cases of alternative dispute
8 resolution. Each of them have their role.

9 And, thirdly, and perhaps we haven't said this
10 enough, codes need to be above and beyond the law. We've
11 heard a lot about the relative virtues of codes and law,
12 but compliance with the law really, inadequate though the
13 law often is, should go without saying. And I'm fed up
14 with reading draft codes, such as the British Banking
15 Code in the early '90s, which said we, the British banks,
16 with all our due pomp and circumstances, graciously
17 accept that we must obey the law. Well, thanks very
18 much, guys. Jolly splendid chaps you are, too.

19 Twenty years later, look at the state of the
20 British banking industry. It has -- first of all, it
21 failed miserably to regulate itself with these absurd
22 self-regulatory codes. It lobbied intensely against
23 government regulation so there was a complete lacuna of
24 any regulatory discipline regarding the sector. And what
25 happened, it ended up not even complying with the law

1 itself, which is regarded as the minimum.

2 We have had malpractice on an industrial scale.
3 One single form of malpractice, which is the payment
4 protection insurance mis-selling, the government -- the
5 companies have now paid the banks 12 billion pounds in
6 compensation. That's about \$15 billion, in a country
7 which is seven times smaller than the United States. The
8 level of payout of compensation is so large that there
9 are rumors that it is actually destabilizing the industry
10 itself. It has brought on this state of affairs. It has
11 destabilized itself by its own lack of internal self-
12 discipline.

13 The taxpayer has paid a huge bill to bail it
14 out. Every individual in the U.K. has paid 900 pounds,
15 \$1,400. Having three children, my family's paid 4,500
16 pounds to rescue the British banking industry. And as I
17 said, 12 billion for one single instance of malpractice.

18 And the ombudsman who has been appointed, a
19 very successful institution, it is cleaning up the mess.
20 It's dealing with 400,000 cases a year, 160,000 for this
21 one single malpractice of payment protection insurance
22 mis-selling. This is an absolute catastrophe and it
23 shows what happens.

24 Fine, okay, guys, if industry wants to lobby
25 against regulation, that's your privilege. There are

1 arguments against regulation. There are arguments
2 against legislation, too. But if you then follow that
3 with a vacuum of a complete lack of self-regulation,
4 then, you know, you pay the consequences, and what was
5 once a very reputable industry now finds itself despised
6 and loathed by its own public.

7 So, that is a cautionary tale as to what
8 happens. If you take the deregulatory logic to its
9 ultimate conclusion of not passing legislation, then do
10 not put your house in order to fill the vacuum that then
11 ensues. So, I finish with that cautionary tale. Having
12 taken a swing at the United States for much of the day, I
13 think it's about time I gave my own country a going-over.
14 So, thank you for your patience with me.

15 MR. FENTONMILLER: Following up on the question
16 that Robin was answering, are there -- I'll reframe it a
17 little bit. But are there certain core elements that cut
18 across all of these code-based schemes or what we're
19 calling code-based schemes, understanding that they come
20 in different flavors, whether they look more like
21 regulation or look more like self-regulation, are there
22 certain key things, key factors that we should focus on
23 when evaluating their effectiveness? And I'll just --
24 anybody can just jump right in if they want.

25 MR. PEELER: So, I think one of the points that

1 Anne made in her presentation is you got to make sure
2 that they're addressing the actual issue that is being
3 raised and that they're addressing it in a narrow way.
4 Binding self-regulation actually isn't all that different
5 in terms of its impact on consumers than the regulation.

6 I was disappointed Bill Kovacic didn't mention
7 that the FTC's first action with regard to self-
8 regulation was in the 1970s, they told all the self-
9 regulatory groups that they would sue them if the
10 continued their ban on comparative advertising on
11 television. You know, that was a ban that was there to
12 protect competitors, not to protect consumers. So, you
13 know, you need to look at that.

14 And, you know, I'm a Johnny One Note on this, I
15 think you then have to look at whether it's transparent
16 and whether there's oversight. And in terms of
17 evaluating whether self-regulation is the right tool, you
18 have to be sure that it's something you can provide
19 meaningful oversight on.

20 I don't think self-regulation can provide
21 safety and soundness inspection for banks. I think self-
22 regulation can do a really good job on advertising. You
23 know, working with the NAI and Marc Groman, I think we've
24 developed a system where we can do a really good job on
25 monitoring OBA data collection, but you have to make sure

1 you can provide the oversight.

2 MR. FENTONMILLER: Before anybody else jumps in
3 on their top core elements, I just want to follow up on
4 that. Why would it be, in your opinion, that say the
5 financial regulation area would be less conducive to
6 self-regulation or that end of the spectrum than
7 something like advertising?

8 MR. PEELER: So, I guess I'm talking about the
9 third-party oversight piece of it. You know, if you use
10 the term "self-regulation" broadly, you're basically
11 talking about everything that business does to make sure
12 it conforms to its own policies and to the law.

13 I guess what I'm saying is the advertising
14 industry's pioneered a separate cut at self-regulation
15 which includes providing third-party oversight and
16 monitoring to make sure that it's actually working.

17 MR. FENTONMILLER: I just want to make sure I
18 understand. So, in theory then, for say the financial
19 services industry or the insurance industry, some
20 industry where the risk to consumers or the economy is
21 potentially substantially greater say than with the false
22 advertising, because there's more risk involved, do you
23 think you have to be extra cautious when you're thinking
24 about implementing a system of public/private regulation
25 that implements third parties?

1 MR. PEELER: So, I thought the panel you had
2 earlier this afternoon on the food and toy industry was
3 terrific. I mean, those are industries where I think the
4 risk to consumers are very substantial. And I thought
5 the discussion there was very good, that there is and
6 will have to be a role for third-party work to ensure
7 compliance with legal standards. You know, I think
8 that's a good issue in terms of policy even if you
9 separate it from the fact that, you know, there are not a
10 lot of government resources and there's a lot to do.

11 So, yeah, I think that you need to have those
12 models, you need to implement those models. They're
13 different models from the ones that we've been able to
14 implement in the advertising act.

15 MR. FENTONMILLER: Norma, do you want to jump
16 in with your top three?

17 MS. TREGURTHA: What I want to say is, at the
18 moment, we have 13.

19 (Laughter)

20 MS. TREGURTHA: I promise you. ISEAL, what
21 we've done is we've distilled the essence of our codes in
22 a consultation process known as our -- well, these
23 credibility principles. And this is essentially a
24 framework for anybody to look and evaluate what are good
25 sustainability standards.

1 And I think whatever your top three really
2 depends on the kind of sector you operate on. We believe
3 our credibility principles are directly applicable to
4 sustainability standards. We have 13. We are in the
5 middle of a global consultation. We had a very
6 successful meeting which a number of you attended in
7 Washington a month ago. And we're asking businesses,
8 consumers, governments which aspects are important to
9 you. And this thing will become a framework to evaluate
10 standards.

11 So, we know what we think are the top 13, but
12 it's not ultimately for us to decide.

13 MS. MILLAR: I think there are -- you have to
14 bifurcate this, or trifurcate it, if that's a word.
15 There has to be a process to identify what the concern
16 is. So, that's the first task. And then you have to
17 develop credible standards that are responsive to the
18 issue that you've identified.

19 I'm going to disagree with Robin because I
20 don't think in each and every instance a multi-
21 stakeholder process is desirable or necessary. And I'll
22 use the example of the environmental framework guides at
23 the ICC. We put those framework guides together in less
24 than a year. We got them all through our process at the
25 ICC through the national committees and published. The

1 FTC went through its ten-year review. It took five
2 years. The ISO process has taken ten years.

3 So, I think that's an example of a contrasting
4 system. There are different purposes. But the reason we
5 were able to work through those issues is our process for
6 stakeholder input involved using the business contacts to
7 reach down to the local jurisdictions to identify what
8 the issues of concern were so that we could come up with
9 what we believed were credible standards that could be
10 implemented in a useful way by the business community.

11 And then the third element is the enforcement,
12 the transparency. In the ICC world, the ICC does not
13 enforce the Code of Advertising Practices. It is handled
14 by regional, national self-regulatory organizations or
15 SROs, who have their own procedures. And, again, I think
16 it's important to recognize that if you're talking about
17 processes in Australia, in France, in Canada, all over
18 the world, they have different frameworks. They have
19 different cultural and social assumptions.

20 So, apart from the environmental issues that I
21 talked about, one of the things we end up talking about
22 at the ICC is the Europeans are frustrated that we'll
23 show ads. Look at this level of violence in the ad.
24 It's perfectly customary to see that in the U.S. We see
25 shoot'em-ups, fast cars, wrecks, et cetera. We'll look

1 at European ads, like, wow, there's a lot of nudity
2 there. Culturally acceptable there. And those types of
3 differences, particularly in the advertising arena, as
4 well as the privacy arena, really inform your code
5 process.

6 So, you have to have a commitment on the code
7 side to get to yes, right? So, you have to have a
8 process that bridges those differences at at least a high
9 level so that you can agree on high-level principles that
10 can be implemented internationally and then figure out
11 whether or not there needs to be some nuanced changes at
12 the enforcement level to deal with those legal, cultural,
13 social differences.

14 MR. FENTONMILLER: Just to follow up on the
15 comment about the multi-stakeholder involvement, I'm
16 assuming this is true for ICC and for the NAD rules, but
17 correct me if I'm wrong. So, those are basically
18 entirely industry-formed. So, there are no stakeholders
19 from consumer groups or academia or other possible
20 stakeholders. Is that true for NAD?

21 MR. PEELER: I think it varies with the
22 programs that we --

23 MR. FENTONMILLER: Well, let's just say the
24 advertising rules, Lee.

25 MR. PEELER: I'm talking about the advertising

1 rules. Within those six programs that I put up in the
2 first slide, there's a range of differences. The NAD
3 enforces the FTC standards, enforces them very strictly,
4 but enforces them.

5 The Children's Advertising Review Unit has an
6 academic advisory board that advises them. The
7 Children's Food and Beverage Advertising Initiative got a
8 lot of feedback from a lot of companies and from a lot of
9 consumer groups in terms of both establishing its
10 baseline program and the program as its evolved. So, you
11 know, there's really a range of responses.

12 But I think the point Sheila was making and
13 that I was trying to make is in looking at self-
14 regulation, it would be a mistake to think that there's
15 one way to do it and that that fits each issue.

16 MR. MILLAR: Well, and I want to say it is
17 critical to get that external input. At ICC, we have,
18 you know, representatives from consumer groups,
19 academics, FTC, EU will come in and speak to the
20 meetings. And you get that input through the national
21 committees -- you know, here's what we're hearing in
22 India, this is a big concern here -- through their
23 process.

24 And so, I don't want to leave you with the
25 impression that you're working a black box where you're

1 getting no input. That's not an effective way to do it.
2 But I am saying that there are many ways to get the input
3 and we need to be careful when we're thinking about best
4 practices that we avoid trying to come up with an unduly
5 restrictive standard that will actually inhibit the
6 ability to flexibly respond to these many different
7 circumstances that merit, you know, the regulation, co-
8 regulation, self-regulation approach.

9 MR. FENTONMILLER: That sort of leads me to the
10 broader question, if multi-stakeholder involvement is
11 sort of an ideal, but how it plays out in any given
12 scheme will vary, that sounds like what you're saying,
13 and each stage of the process it may vary, whether it's
14 at the design phase or at the implementation phase or at
15 the evaluation phase. I'm just wondering, Lee and
16 Sheila, you know, with regard to the schemes that you're
17 involved with. So, it sounds like at the design phase,
18 with some variation, it's mostly industry-led, at least
19 in terms of the lead voices, who has the ultimate say in
20 what things are going to look like.

21 And then when it's implemented in terms of
22 evaluating specific instances of alleged false
23 advertising, in the case of NAD, that is also -- it's
24 single stakeholder NAD staff determining that. And then
25 any evaluation that takes place, say with the CFBAI and

1 issuing their reports on how the food marketing
2 guidelines are being implemented, that also is an
3 industry-led evaluation.

4 So, in an instance where you have mostly single
5 stakeholder involvement at each phase of the system, does
6 that potentially undermine the credibility of the system
7 and, thereby, its potential effectiveness?

8 MR. PEELER: So, great questions. It
9 highlights the importance of that second prong of
10 effectiveness, which is the transparency. So, NAD, every
11 decision it sets out, in gruesome detail, exactly what
12 they looked at, exactly what they found, exactly what
13 they thought the problems were. And the idea there is
14 that if a challenger, a consumer or an NGO thinks that
15 those are the wrong decision, it's right out there and
16 they can -- you know, it's right out there to be
17 criticized and evaluated.

18 The point that Robin made, though, I think, is
19 important, that self-regulation is really its best and
20 its strongest and its most useful when it's going beyond
21 the law. And if you are going to go beyond the law, you
22 need the industry's support to make it effective.

23 You can have programs -- and we have one
24 program where people volunteer to enter the program. The
25 most effective self-regulatory programs are ones that

1 apply to everybody in the industry. You know, you need
2 to build industry support. And what you find in all
3 those programs, at least what I've found, is that they're
4 iterative.

5 You know, you start doing one thing and, you
6 know, Robin says, boy, that's really a terrible program,
7 you ought to be doing this or that. And people sit down
8 and say, you know, he's wrong about these two things,
9 he's right about that, we need to put that in.

10 But that's one of the big differences between
11 self-regulation and regulation, you know, regulation,
12 once you issue the regulation, you're sort of stuck with
13 it. Self-regulation, you can move it along.

14 MR. FENTONMILLER: And just in terms of setting
15 the agenda for going beyond what the law is, you know, to
16 what extent can you really do that in a credible way if
17 you don't have multiple stakeholders involved in at least
18 setting the goals?

19 MR. PEELER: Well, so the key thing there,
20 again, is that the industry, that you're going to
21 basically say, we want everyone in this industry to
22 follow these standards, has to support going ahead.

23 MR. FENTONMILLER: Mm-hmm.

24 MR. PEELER: So, in the online behavioral
25 advertising area, you know, we put together a set of

1 guidelines and we've said, everybody who collects or uses
2 data for online behavioral advertising has to follow
3 those whether they want to or not. And we've had 100
4 percent compliance with enforcement because they get
5 that. They get the fact that there is a shared value in
6 taking this step forward and addressing these issues.

7 MR. SIMPSON: Well --

8 MR. FENTONMILLER: Go ahead.

9 MR. SIMPSON: No, please, continue.

10 MR. FENTONMILLER: Anne, I didn't give you an
11 opportunity if you wanted to -- if you had a top three or
12 don't want to reveal it.

13 PROFESSOR MEUWESE: Well, maybe following up on
14 these last points. I mean, my thesis would be it's
15 better to have an honest transparent single stakeholder
16 process than to have a multi-stakeholder process where
17 you have a great disparity of resources among different
18 stakeholders. And I think that's what you do see. That
19 sort of, you know, more suspect self-regulatory processes
20 are under a much larger amount of scrutiny. And I think
21 that's also where maybe I would think a word of warning
22 is maybe appropriate because we do tend to expect a great
23 degree of effectiveness of self-regulatory arrangements
24 or self-regulatory in the wider sense of the world.

25 I think, well, regulation, it's hard, you know,

1 it's messy. Ultimately, we're trying to change people's
2 behavior. So, I think that's -- it's more important, I
3 think, to use the process of evaluating for
4 effectiveness, to identify the weaknesses and also to
5 really see the regulation in that light. In light of
6 trying to change behavior, where does that go wrong,
7 where is there a mismatch between the technique being
8 used to regulate and the effect it has on people's
9 behavior? And then I think you can constructively go
10 forward and see how you can come maybe to some help from
11 public regulation.

12 But I think it's sometimes too easy to just
13 throw away very good initiative by insisting not only the
14 legitimacy, transparency, et cetera, but also the
15 effectiveness of private regulatory arrangement should be
16 greater than we would ever be able to expect in the
17 public sphere.

18 MR. FENTONMILLER: I would like to -- unless
19 there's something pressing, I'd like to move the
20 discussion a little bit more to the transnational aspect
21 of these code-based schemes. One of the key issues that
22 was discussed in the first panel was given the lack of a
23 global government entity that regulates commerce for the
24 most part, how can we give these codes cross-border
25 reach? Is there one answer? Are there multiple answers?

1 Does it vary based on the sector or the particular
2 practice? Anybody?

3 MR. PEELER: I think it varies a lot based on
4 the sector and what you're trying to accomplish. If it's
5 an environmental goal or a sustainability goal that's got
6 to have a cross-border reach, you know. The advertising
7 programs so far have been implemented on a national
8 basis. I think, you know, again, the APEC model that you
9 heard about this morning is a model for constructing a
10 new approach and putting it in place. I know there's a
11 lot of work to do to still implement it, but it was a
12 great effort.

13 MS. MILLAR: In Europe, there's the European
14 Advertising Standards Alliance that does do work on
15 implementing rules for advertising across Europe, but it
16 is limited to Pan-European and there are still national
17 self-regulatory organizations as well.

18 I do think it can be extremely challenging and
19 you have to look at the fundamental legal underpinning
20 because the willingness of countries to take on board
21 these systems is also going to vary. And so, the
22 paradigms that apply do vary, and I think Lee's
23 absolutely right. You can't say there's one solution.
24 You have to really try to get to those agreements on the
25 high level principles and then look at whether or not it

1 makes sense to have a uniform transnational
2 implementation process.

3 The APEC process is one example that seems to
4 be usefully moving in that direction. But we heard this
5 morning very clearly that complying with APEC doesn't
6 guarantee that you're going to comply with national law.
7 And that becomes a potential barrier to participation
8 because there's a lot of cost and expense to joining a
9 system like that.

10 You may decide it's helpful because it's going
11 to take you a long way to meeting the EU standards or,
12 you know, it will help increase consumer confidence, but
13 those are the business decisions that have to go in to
14 determining whether or not you are going to voluntarily
15 subject yourself to a code without assurances that it's
16 going to cover kind of the legal waterfront for you.

17 PROFESSOR MEUWESE: Yeah, I think there you can
18 also think about incentives for public actors to help the
19 process along. I mean, for instance, the Canadian
20 guidelines on lawmaking -- that's not how they're called,
21 but that's what they are -- contains a provision saying
22 that, basically, whenever there's international
23 standards, the government should make a good case for
24 introducing specific Canadian standards. So, then always
25 the burden of proof is then on governments to argue why

1 you would need a national standard when there are --
2 well, transnational standards there.

3 MS. MILLAR: There's one other point I want to
4 make that really relates to the prior panel. And that is
5 while we are talking about a lack of international
6 harmonization, let's not forget, especially when it comes
7 to things like product safety, we do not have
8 harmonization in our internal market here. We just
9 don't. And so, Al can probably tell you about green
10 chemistry and chemical bans and Proposition 65 and all
11 sorts of additional rules that impact how you can manage
12 your business and it has nothing to do with the
13 international framework.

14 MR. FENTONMILLER: Well, I think California is
15 its own country, isn't it?

16 (Laughter)

17 MS. TREGURTHA: I wanted to directly follow up
18 with Anne's point. What we're finding within ISEAL is
19 that our codes are readily accepted by international
20 standards, but it's at a national level where there's
21 some reticence to actually adopt it.

22 We have a program, at the moment, operating in
23 China, India and Brazil around how to create better
24 interoperability between national standards and
25 international standards and also satisfy that need for

1 homegrown standards. So, it's really an exciting time in
2 the standards community to learn how to build global
3 consistency but local applicability.

4 MR. SIMPSON: Keith, your question is a really
5 good one. I don't really have an answer, but I do have a
6 couple of observations, which is that, you know, I've
7 just spent 18 months negotiating the G20 principles,
8 which are housed in the OECD, for consumer protection and
9 financial services. And for much of the time, it was a
10 miserable process. I mean, the language of the
11 principles is so heavily qualified that every single
12 principle -- and these are important things like very
13 basic consumer protections, but nothing particularly
14 revolutionary.

15 Each time it's qualified as appropriate to the
16 extent necessary, there's such a grudging tone to each
17 and every principle.

18 And in addition to that, what makes it worse,
19 is that the preamble goes to huge lengths to say this is
20 non-binding and voluntary and in the great big all-
21 singing, all-dancing conference held by the OECD in
22 October of last year, you know, the deputy secretary
23 general turned to the audience, largely of bankers,
24 saying, it's only voluntary, it's not really binding,
25 meaning this with a very sort of reassuring tone.

1 Basically, don't worry your little heads about it. If
2 you don't really want to apply, you don't have to. If
3 you look at the wording, that is true. The wording is
4 chock full of exceptions.

5 So, I mean, I would rather have had actually in
6 industry code where the industry had made commitments for
7 themselves, whereas what the governments were doing --
8 basically, what was in the back of their minds was, we
9 are negotiating down the extent to which we can legislate
10 for our industries to make commitments. And so, it got
11 diluted and diluted and diluted.

12 And then the second point, which is related to
13 that, is that I've actually been pleasantly surprised in
14 negotiating in ISO committees and also, in fact, in the
15 OECD consumer policy committee. I'm finding that often
16 the industry representatives are often more relaxed about
17 making undertakings than the government people are. Why
18 this is so, I'm not entirely sure. But I've often found
19 that, actually, the governments worry too much about what
20 their industries can undertake to do.

21 And I've had stakeholder conversations with
22 multinationals. I've met with Barilla, the big Italian
23 food company, and Suez, the big water giant. They were
24 completely relaxed about ISO 26000, completely relaxed
25 about the OECD MNE guidelines. Well, the MNE guidelines

1 I can see because they're so chock full of exceptions
2 that if you really don't want to apply them, you don't
3 have to.

4 MR. FENTONMILLER: Lee, I just have a quick
5 question for you on the transnational idea. We heard
6 this morning from the Direct Sellers Association, which
7 has a code that relates to, I guess you could say, a
8 subset of marketing, direct selling, that has extra
9 territorial application. Has BBB given any thought over
10 the years to extending its code beyond the borders?

11 MR. PEELER: No, we are still very much a --
12 first off, I think that's a great effort. You know, I
13 think if you have -- I think it's a good example of where
14 you have companies who are truly multinational and who
15 are undertaking a set of best practices. But because our
16 code is mandatory, we have not extended it.

17 We do have -- you know, one of the issues that
18 comes up is if a consumer in Turkey has a problem with a
19 U.S. company, you know, who's going to handle that? We
20 do resolve those complaints. We have agreements that we
21 will take complaints from EASA members. And then we have
22 a great program that Frances Henderson runs under the
23 U.S. Safe Harbor Program where we process complaints from
24 European Union members about privacy.

25 So, there's a lot of collaboration there, but

1 we don't have any international codes. And, again, I
2 think that the APEC code that was talked about today is
3 sort of a breakthrough on that.

4 MR. FENTONMILLER: Do you think that that
5 model, I'm not sure how exactly, could extend to the
6 advertising context?

7 MR. PEELER: You know, it's interesting to me
8 how national advertising to be. We have not seen -- and
9 we get reports from our counterparts all over the world
10 because everybody follows basically the same transparency
11 principles. You know, we have very few similar problems.
12 There are cultural problems that do spill over, you know,
13 in terms of taste and decency. But in the U.S., because
14 of the Commercial Speech Doctrine and First Amendment, we
15 don't really regulate taste and decency.

16 MS. MILLAR: Yeah, I think the other issue is,
17 again, part of your social framework derives from your
18 legal environment. So, I've always been struck that when
19 we look at the EASA reports or some of the reports from
20 other SROs internationally, the bulk of their complaints
21 come from consumers. At NAD, there are very few consumer
22 complaints. They're mostly competitor complaints.

23 So, I think when we drill down into that, we
24 determine that the American consumer calls up, blogs,
25 files a lawsuit, calls the FTC, calls their AG --

1 MR. PEELER: Calls the BBB.

2 MS. MILLAR: Calls the BBB. But they don't
3 file a challenge at NAD. In Europe, I'll use Europe as
4 an example, the competitors don't sue each other.
5 Competitors make up the bulk of the NAD complaints. The
6 consumers calls the ombudsman if there is one, but they
7 use the SRO process to complain about advertising in a
8 way that American consumers just don't.

9 So, I think to get to that commonality of how
10 the system would work, I think it will be challenging
11 because of some of those cultural differences. It's not
12 impossible. But in issuing the decisions, those
13 decisions are often informed by your social environment
14 and what you think is deceptive or unfair in your local
15 region. And that doesn't universally translate in a
16 global environment in advertising.

17 MR. FENTONMILLER: I wanted to open it up, if
18 anybody has any questions. We can go here and then there
19 and then there. Grab a mic. Just please identify
20 yourself.

21 MR. SMITH: I'm Scott Smith from the State
22 Department, and I have two comments that I'll convert to
23 questions. One --

24 MR. FENTONMILLER: Just raise your voice at the
25 end.

1 (Laughter)

2 MR. SMITH: Yes. Eh?

3 (Laughter)

4 MR. FENTONMILLER: Yeah, yeah.

5 MR. SMITH: One is, and maybe this is for
6 Norma, although I'd welcome it from anyone. At least in
7 the meetings that I attend, we often jump straight into
8 the topical focus. And based on what you've said, which
9 I really appreciate, it seems like we're skipping some
10 steps. The approach or the model that we take isn't
11 necessarily discussed. Anne, also in your comments,
12 talking about framing how we approach something and the
13 design and getting to that agreement about, you know,
14 what we're trying to do, would seem to be useful steps.

15 I guess my question is, do you have a
16 convenient, nicely drawn-up reference?

17 And my second, I saw a talk recently that
18 impressed me and it may be out a little beyond the
19 horizon for where we are, but it was a guy from New York
20 University named Clay Shirky, who was proposing using
21 open source software tools for regulatory, legal, tax
22 code type issues, a multi-contributor model. And I was
23 wondering -- and the example he gave was GitHub. I was
24 wondering if you know of anything like that in this field
25 where something is put out into this kind of multi-author

1 platform that allows a wide range of active contributors.
2 If there's anything out there, I'd be curious.

3 MS. TREGURTHA: Well, I'm going to take the
4 first shot at this question. First of all, there is
5 something out there. ISEAL codes of best practice are
6 exactly that. They're very -- you know, they're very
7 interactive. There are many different ways in which
8 people can participate. There's online space. It's
9 incredibly dynamic and exciting. So, that's the first
10 thing.

11 The second thing is that around our processes
12 we have our code of good practice for standards setting,
13 which is essentially a step-by-step process that you can
14 follow if you wanted to set a sustainability standard.
15 And the interesting thing about ISEAL codes is that they
16 are in the public domain. So, they're freely available
17 and we really encourage anybody who develops
18 sustainability standards, whether or not they want to be
19 an ISEAL member or not, that's irrelevant. It's that we
20 say, well, you know, use this document. This codifies
21 everybody else's, you know, 20 years of experience, all
22 the kind of -- you know, all the challenges everybody
23 faces, you know, we've kind of got solutions. You follow
24 this recipe and you're going to have a good standard at
25 the end because it's about process.

1 MR. FENTONMILLER: And those are living
2 documents? They're reevaluated periodically?

3 MS. TREGURTHA: Minimum every five years, but
4 also we recognize that in the sustainability world, it's
5 incredibly dynamic. So, sometimes the codes have to be
6 updated more frequently.

7 The real challenge that we have at ISEAL is
8 that they're incredibly expensive to update and to run
9 these processes and our members are NGOs, so we --
10 actually, you talk about the co-regulation and the role
11 of government. Well, we've been fortunate to get quite a
12 lot of government support actually for code development.

13 MR. FENTONMILLER: Not from us. We can't even
14 provide coffee.

15 (Laughter)

16 MR. PEELER: You know, I'm not sure what the
17 second part of the question was focused on, but there are
18 multiple websites -- one of my favorite is consumers.org
19 -- that, you know, critique advertising in a very
20 aggressive way. And every company that's an advertiser
21 right now spends an incredible amount of time watching
22 their blog to see what kind of reaction they're getting
23 from their advertising.

24 You know, we don't do taste and decency, but
25 there are multiple examples of ads that have disappeared

1 almost overnight if the blogosphere considers the ads to
2 be inappropriate or indecent.

3 PROFESSOR MEUWESE: Did you mean more like to
4 put it in Web 1.0 terms, Wiki style --

5 MR. SMITH: It is a bit more like that. It's a
6 multi-author platform. There are several out there.
7 GitHub is one example. But it's used for open source
8 software development where you have tons of people
9 developing things that have to interoperate.

10 PROFESSOR MEUWESE: I mean, I only know through
11 field experts in the public sphere where government
12 actually would withdraw from the process as soon as they
13 realized what the implications would be.

14 (Laughter)

15 PROFESSOR MEUWESE: But maybe I can try to find
16 something else on that.

17 And as for the framework, I could recommend
18 looking at the European style impact assessment, which is
19 not so much cost benefit focus, but more sort of a common
20 sense framework of steps to take, you know, proven
21 definition, objective setting. And I can also send you
22 some specifics on that if you're interested.

23 MS. MILLAR: I think you also have to think
24 about how the code process works. So, there has to be a
25 point where you actually have a code. It can't be

1 constantly changing or how are you going to enforce it?
2 So, we have to think about the process and all the pieces
3 of the process, including that transparency and
4 accountability piece so that a Wiki style process, where
5 you're constantly changing, how would you ever implement
6 it? I think that's a practical problem, not that there
7 isn't a role.

8 I mean, I think, Mark, correct me if I'm wrong,
9 but I think the NAI did a public consultation, online
10 process for the NAI code a few years ago. And so, we do
11 have examples, but it's like a regulatory process.
12 Comments are due by X date, cut-off, and then there's a
13 decision made and you move on.

14 MR. HIRSCH: Dennis Hirsch from Capital
15 University Law School. My question has to do with
16 process design, specifically with respect to flexibility
17 and adaptability of codes. Just by way of background,
18 one hears a lot that codes are more adaptable and
19 flexible than regulation. I think Lee said something
20 along those lines. We heard it on the last panel. It's
21 in the literature on codes of conduct and collaborative
22 regulation.

23 I had the opportunity to study Dutch data
24 protection codes of conduct, which are negotiated between
25 an industry sector and the government, no other

1 stakeholders. And what I found was that the codes were
2 not adaptable at all. They weren't changed during the
3 five-year period. And then many of them expired and they
4 still -- they lapsed and it took years for government and
5 the industry to reach a new agreement because they had
6 worked hard at this agreement and nobody wanted to reopen
7 it, it's expensive.

8 So, when you think about privacy codes of
9 conduct here, it's clear -- and I hear from a lot of
10 people -- you couldn't do industry government
11 negotiations in the United States. You're going to have
12 to involve stakeholders for it to have legitimacy.

13 And Robin has said one of the central criteria
14 is multi-stakeholder. Norma has said a key thing is
15 bringing in lots of different stakeholders. So, if you
16 bring in lots of stakeholders and you finally reach
17 agreement, it seems to me it's going to be even harder to
18 revise it and reopen an adapt.

19 So, my question is, how do you design this
20 process in a way that is participatory, is transparent,
21 without losing the adaptability feature? Is it possible
22 to do that?

23 MR. PEELER: So, I would think there's some
24 clear trade-offs. I mean, in the OBA data collection
25 area, we've revised a code that's been -- you know, it

1 was adopted in 2010 and it's been revised twice since
2 then. In the food area, we adopted a code in 2006 and
3 we've upped it probably four or five times since it was
4 adopted. But if a code -- if it becomes an agreement
5 between parties, then it's much harder to change. If
6 it's an industry code, then the group of stakeholders
7 that adopted it can change it.

8 Again, most of the work we have done has been
9 very iterative on that front.

10 MS. MILLAR: Well, and that's not --

11 MR. PEELER: And, also, I can just tell you
12 from being at the FTC, changing a regulation is almost
13 impossible.

14 (Laughter)

15 MS. MILLAR: The example you provided, to me,
16 sounds like -- and Anne can comment on this if I'm
17 accurately describing it -- but it sounds like
18 essentially a type of an adjudication process. So,
19 you've got your industry sector roles, which are
20 accounted for and allowed under the data directive. You
21 have a national DPA who takes the lead and approves it.
22 But once it's approved, it's almost like an analogy would
23 be a consent agreement, to me.

24 And so, reopening a consent agreement is darn
25 difficult. An agreement with a multi-party industry

1 group and the government has got to be that much more
2 difficult. So, to me, the issue is the role of the
3 government in approving that, as opposed to a process
4 where you would have top line approval. If you had these
5 principles in your industry sector code, then it's going
6 to comply with the data directive in our national rules,
7 because that would allow the formation of more robust and
8 iterative codes along the lines of living codes where
9 they could be more flexible and respond to changing
10 circumstances.

11 But I think the issue becomes, in that example,
12 it's a process problem to begin with that is difficult to
13 change.

14 MR. FENTONMILLER: And I would just say, just
15 in reference to the prior panel, I think it was the prior
16 one, on toy and food safety, I mean, they do sort of have
17 this concept incorporated -- well, I guess it would be
18 more in the toy safety as I understand it, where they
19 incorporate that particular ASTM standard, that's sort of
20 a living, breathing regulation that since it's
21 incorporated by reference in the federal law, but the
22 specifics aren't. So, whatever process they're using,
23 which presumably is a multi-stakeholder process,
24 apparently it's able to be quite responsive.

25 So, I don't think it's, by any means,

1 impossible or necessarily impractical to have a living,
2 breathing set of standards. Now, maybe high level
3 principles is a different story. If those are going to
4 change, that seems like a big deal. But when you get
5 down to the nuts and bolts, you know, maybe it is
6 feasible.

7 So, we're a little bit over. I'm going to call
8 up Hui Ling Goh just to give some brief closing comments.
9 I'll ask the panelists just to sit here and we'll let you
10 go.

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1 CLOSING REMARKS

2 MS. GOH: Okay. Well, first off, thank you to
3 my colleagues at the FTC who helped put together this
4 wonderful event, in particular, Stacy Feuer, Keith
5 Fentonmiller, and the Division of Advertising Practices.
6 Also, the Office of International Affairs, Samantha
7 Konstandt and the media team and also the staff of the
8 Division of Consumer and Business Education. So, let's
9 thank them all.

10 (Applause)

11 MS. GOH: I'd also like to thank the panelists,
12 many of whom traveled long distances to participate in
13 our forum today. And also to thank you, the audience,
14 for your engaging and relevant and fascinating
15 discussions. So, thank you.

16 (Applause)

17 MS. GOH: So, let me just make some conclusions
18 about what we learned today and what questions face us in
19 the future about the role of cross-border codes of
20 conduct in protecting consumers across borders. I won't
21 summarize each panel, but instead will provide an
22 overview of what we learned today, focusing on three main
23 points.

24 My first point is that cross-border codes,
25 however you define them, they are on the rise. So, we

1 heard about a wide range of codes. We heard about
2 voluntary industry-based codes, such as the Direct
3 Selling Association's Code of Ethics. We heard about
4 guidelines, such as the OECD Multinational Enterprises.
5 We also heard about standards and guidance, the ISO 26000
6 on social responsibility. And also multi-stakeholder
7 rules with the governmental roles, such as the APEC
8 Cross-Border Privacy Rule System.

9 We also heard about third-party standards
10 certifications, which have become incorporated into laws.
11 So, for example, in relation to food safety and toy
12 safety.

13 So, these codes have covered a wide range of
14 topics. They range from privacy, corporate social
15 responsibility, ethics, toy and food safety,
16 sustainability and advertising and marketing.

17 And you may wonder why these codes have arisen.
18 Well, we heard various reasons today. We heard that
19 often they complement more traditional regulations, such
20 as bilateral treaties and international agreements.
21 Sometimes they address failures or perceived failures in
22 regulation. In the cross-border context, they are
23 increasingly used to address certain challenges that
24 can't be addressed within our national borders.

25 So, my second point is that cross-border codes

1 have a number of advantages and disadvantages. On the
2 plus side, these enforceable codes of conduct, they're
3 flexible, they're easier to put into place than treaties
4 and international agreements. They adapt to changing
5 conditions, especially involving technology, and as well
6 as different cultural norms and expectations. They also
7 bring in multi-stakeholder views.

8 Some of the challenges that we've heard about
9 today include awareness, costs and conformance to the
10 standards. They can also raise anti-trust concerns that
11 we heard this morning; for example, facilitating
12 collusion, barriers to prosecution.

13 My last point I'd like to make is that we do
14 already have some indications from our discussion today
15 about what makes an effective cross-border code
16 legitimate and effective. We've heard a lot about
17 accountability. We heard about it in the APEC Cross-
18 Border Privacy Rules Program. We also heard about
19 enforcement and transparency; for example, in the audit
20 reports in food safety and in the public decisions by the
21 Better Business Bureau on their website. We also heard
22 about minimizing administrative burdens.

23 We also have some ideas about how to evaluate
24 and measure these elements. We heard about the use of
25 indicators, credibility principles, evaluating something

1 that you can provide meaningful oversight and impact
2 assessment.

3 So, in going with the theme of today, going
4 forward, we plan to use today's forum in our continuing
5 exploration of a set of best practices and metrics that
6 stakeholders can use to develop cross-border codes of
7 conduct and evaluate the effectiveness of these systems
8 for protecting consumers across borders. We will
9 consider the thoughtful comments we have heard today, as
10 well as submissions from panelists as we go forward. And
11 we will be working on a report, although we don't quite
12 yet know its final form, but this will help inform
13 further discussions.

14 So, if you do have any additional relevant
15 academic articles, papers, codes of conduct studies or
16 any related materials, especially after our great
17 discussion today, please send them to our Office of
18 International Affairs by email or fax. The email is
19 OIA@ftc.gov.

20 Thank you.

21 (Applause)

22 (Whereupon, at 5:40 p.m., the workshop was
23 concluded.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2

3 MATTER NUMBER: P035302

4 CASE TITLE: ENFORCEABLE CODES OF CONDUCT

5 DATE: NOVEMBER 29, 2012

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: DECEMBER 12, 2012

14

15

16 LINDA METCALF

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the transcript for
21 accuracy in spelling, hyphenation, punctuation and
22 format.

23

24

25

SARA J. VANCE