

>> Bill Kovacic: Welcome back. We're going to turn now to the topic that was touched upon in the first session, and that is the use of direct evidence of competitive effects in merger analysis. We're all familiar with the much quoted line in many a judicial opinion that says almost invariably that the starting place for analysis in a Clayton Act Section 7, "A merger case is the definition of a relevant market and measurement of market shares." A great deal of theory and applied work, certainly in the last 20 years or so, has turned back to the possibility recognized in principle from the very beginning of experience with the Sherman Act that it would be ideal, instead of using proxies, to directly assess the likelihood or the fact of any competitive effects. And that possibility has been recognized in a number of cases outside of the Section 7 area and touched upon in the FTC's administrative proceedings in Evanston, and we're going to look at more detail at the use of direct effect evidence of competitive effects as a way to assess mergers. We're going to have, basically, ten-minute presentations by each of our panelists. And then time for discussion. We have a terrific mix of folks who have not only had opportunities as academics and practitioners to deal with these issues, but have done so inside of the public enforcement community as well. Judge Doug Ginsburg, the judge on the U.S. Court of Appeals for the District of Columbia and formerly the head of the antitrust division; Leslie Marx from the Duke Business School at Fuqua; and also with Bates White Wesley, formerly chief economist of the Federal Communications Commission. Rich Parker, with O'Melveny & Myers, a partner there -- also formerly director of the Bureau of Competition at the Federal Trade Commission. Mark Popofsky, now partner at Ropes & Gray but also several key management positions at the Department of Justice Antitrust Division; and Bobby Willig, professor at the Wilson School at Princeton, Principal Economist at Lexicon and also formally the head of the economic analysis group at the Department of Justice who had a little bit to do with the 1992 guidelines as well. So a fantastic combination of not simply enforcement experience, but also practice outside of the agencies. They have looked at the merger guidelines from both sides and will be addressing this dimension of it. And if I could ask Doug, please, to get us started.

>> Judge Douglas H. Ginsburg: Thank you, Bill. Pleased to be here and to know that the division and the commission are proceeding in such an open, scholarly, informed way to the question of whether and how to revise the guidelines. I'm here in my capacity, as Bill said, as a judge, not at all as an economist. So I ask you to forgive my -- any misstatements that may be made. I make this disclaimer whenever there's a real economist in the room. And also in my capacity as a collector of

tidbits and films that lampoon government agencies. So if anyone has suggestions, I hope they'll let me know later on. Perhaps my favorite, relevant to this morning is from "Ghostbusters." Toward the end, Bill Murray finds himself in the bedroom of -- was it Susan Sarandon?

>> Bill Kovacic: Sigourney Weaver.

>> Judge Douglas H. Ginsburg: Sigourney Weaver, pardon me. Sigourney Weaver. Putting aside the context which some of you will know, says the EPA has a rule against sleeping with the possessed.

>> Bill Kovacic: Actually, it's just a guideline.

>> Judge Douglas H. Ginsburg: Now, I haven't yet seen "The Informant", but having read the book, I trust that some of us in the room may have been lampooned in that effort. So I look forward to that. My -- I have a couple of messages -- I hope they're clear and simple. The first is this. In talking about, thinking about direct evidence of competitive effects in the merger context, at least, the order of the day should be, in my view, simplicity. That is to say, in thinking about this with an eye to how it's going to be played out in court, which often it won't be, but that seems to be the fail-safe assumption. The best evidence -- the best direct evidence -- is empirical, historical evidence that can be readily -- from which you can readily extrapolate. In -- let's see, Darin Tucker who I think is here at the FTC, right?

>> Bill Kovacic: Yes.

>> Judge Douglas H. Ginsburg: Yes, and may be here today, I don't know. In a recent --

>> Bill Kovacic: Down there.

>> Judge Douglas H. Ginsburg: Where is he? I haven't met him. In a recent article said, "Examples of direct evidence include a natural experiment showing the effect of a change in concentration or a number of competitors, documentary or other evidence showing acquiring companies post-merger

plans, and changes in prices or output from a consummated merger." Now, these are all desiderata, of course, much to be desired, but going to be available only in select cases. And so it's often going to be necessary to do something well beyond that. One such case, of course, was mentioned earlier, I think, was Evanston Hospital. But that happened to be a consummated case. And so there was price experience, about which the commission and the parties could argue in light of the elapsed time, I think four years, between the consummation of the deal and the challenge. But the question there was whether the commission could define the market based on the econometric evidence, but the econometric evidence was, in turn, an analysis of empirical price data. In the recent airline filings, the Continental request for immunity from the Department of Transportation and switching from Skyteam to Star Alliance. The data suggested that we had -- that nonstop service as a separate product market, and the department using cross-sectional analysis of fare data show that fare is paid by nonstop passengers, increased typically 50 -- on average 15% in 2-1 transitions and 6 and 2/3% when nonstop carriers went from 3-2. As for whether the nonstop Transatlantic market is a separate market, I can hardly imagine that there's much of a market for service that stops while going across the Atlantic. I'm not sure what it would entail. Maybe just as you've described elsewhere, departures without arrivals. Staples is in a way the prime example especially since it's been ventilated in the district court where, of course, there were excellent data available. Parties could argue over the quality and meaning of the data, but the cash register data were, I thought, compelling. And showed the effect of whether Staples was facing two or one other similar office supermarkets. Now, when this kind of -- when this kind of data are available, it seems to me quite clear that one ought to avoid the more laborious methods of defining the market and try to do so in this rather more analytical data-intensive way. When it's possible. To the extent that there are limitations, and even when you have data, you're going to be drawn into using econometric models, and that's where the difficulties really start to ensue. I don't know if Greg came back after the break -- he did. But Greg and Luke and David Shefman I thought had an excellent piece called a discipline for merger simulation in one of the antitrust journals recently. And I'm just going to quote a few sentences that are not connected on the page as they are when I read them. The basic economic theory underlying unilateral effects from horizontal mergers is deceptively simple, but behind it is a model replete with assumptions about how consumers, retailers and manufacturers behave and especially about how competing manufacturers interact with each other and with retailers. By specifying a particular model, it is possible to make quantitative predictions of the

price effects of branded product mergers. It's important to assess the reliability of these predictions, yet there's scarce empirical evidence on their accuracy in predicting actual price effects of mergers. Now, what the authors have done is approached this all through the lens of Daubert and what constitutes admissible expert testimony which I think is a very sensible perspective, one of several that one should take in thinking about guidelines along these lines. And an important point that they make is, quote, any model used to predict the effects of a merger must fit the facts of the industry in the sense that the model explains past market outcomes reasonably well. Closed quote. Of course, that's all going to be subject to adversarial testing. And so it's all the more important that that criterion be met. There are at least two cases in which courts have essentially rejected expert opinion based on the kinds of models that we're talking about here. In *Concord Boat* in the 8th circuit, quote, the expert opinion should not have been omitted because it did not incorporate all aspects of the economic reality of the stern drive engine market, and because it did not separate lawful from unlawful conduct, closed quote. And from *California Northern and the American Booksellers* case, the expert model contains too many assumptions and simplifications that are not supported by real-world evidence. I think these are fair indications of the threshold that Daubert sets for -- with this kind of evidence in court. Now, something that may be less obvious is, that seems to me, that there's some utility to be derived -- I have not done this. I leave it to the agency's concern, but I think there's some utility to be derived from looking at the experience of the courts, and I'm familiar with some of the cases in the D.C. circuit, in accepting and rejecting conclusions based on models other than in antitrust cases. Sometimes other than economic models. Pardon me. A lot of these come up both economic and other models in environmental cases. And you see arguments about attacking the results, by attacking the model on the ground that some allegedly important phenomenon was not factored in. And the cases are -- there are a number of cases in which proceedings have gone for years through the environmental protection agency have been at the end of the process thrown out because of this kind of flaw in the model, and others in which the tolerance of the courts for the fact that a model is inherently a simplification, inherently is going to disregard certain data as inessential is also accepted in other cases before the court. So trying to do its apology of those cases, I think, would inform one's judgment in approaching anything to put the guidelines on direct evidence. Finally, on a couple of procedural comments, as I said, I think these workshops are an excellent way to begin considering whether to and how to revise the guidelines, I think it's also important before making those revisions to solicit comment on proposed changes.

I'm not sure whether that's been done in the past in revisions of our guidelines. It's been done in other jurisdictions. Most recently, perhaps, in China which went through several rounds, both in statutory drafting and then in drafting regulations of soliciting and analyzing public comment. I think I should leave it at that.

>> Bill Kovacic: Thanks for getting us off to a great start, Doug, both with respect to suggestions about the substantive approach but how to go about this as well as a matter of process. If I could turn now to Leslie, please.

>> Leslie M. Marx: I appreciate the opportunity to participate in the panel and thank the organizers, Carl Shapiro and Rich Feinsein for putting together today's workshop and I commend the FTC and DOJ for opening debate about possible revisions to the horizontal merger guidelines. The questions for public comment that were issued by the FTC and DOJ raise issues related to the unilateral effects portion of the guidelines. And the last panel today is devoted to unilateral effects. Although coordinated effects do not get much play in the request for comment, I believe coordinated effects require and deserve attention. In fact, it may be that coordinated effects are the more significant concern, particularly if coordination involves a suppression of rivalry among a much larger group of firms than simply those involved in a merger. It certainly does not make sense for competition authorities to emphasize their success in cartel enforcement while at the same time ignoring coordinated effects in merger reviews. The FTC lost a case based on coordinated effects arguments in Arch Coal in 2004 and to the best of my knowledge has not gone to trial with another case based on concerns about coordinated effects since then. The FTC needs to be secure in its ability to take action against mergers where coordinated effects are a concern. Otherwise firms that think there would be gains for mergers due to coordinated effects are going to pursue those mergers to the detriment of consumers and competition. Coordinated effects were included in the horizontal merger guidelines because they were believed to be an important issue. But overall, there appears to be a disparity between the analytical thinking that is expected from a unilateral effects analysis and what goes into the typical coordinated effects analysis. The guidelines ask for arguments about the likelihood of post-merger coordination. I view this as a deficiency in the current guidelines. I would propose a revision to the guidelines' approach to coordinated effects that focuses on how merger affects the payoffs to coordination. Payoffs can be

quantified using standard economic techniques and give us an indirect measure of likelihood given the presumed positive relations between the two. How can we quantify a merger's effect on the payoffs to coordination? This is a research problem that I've worked on, and I have published work with co-authors that supports my comments today. Merger analysis tends to focus on unilateral effects, so presumably there would be a model of competition allowing the measurements of the unilateral effect of a merger. Generally speaking, whatever techniques are used to measure the effect of a merger between two firms in an industry can be extended to measure the effects of additional or alternative consolidation involving the other firms in the industry. Thus we can use standard unilateral effects models to quantify the change in payoffs to coordination that results from a merger. This type of measurement would give you the payoff associated with coordination that is sufficiently well organized to be tantamount to a merger. In that sense, this type of quantification provides an upper bound on the payoff from coordination. One could argue that it does not provide a quantification of the merger's effect on the payoff from, say, a slight increase in tacit cooperation or something else falling short of perfect explicit collusion, but it's more informative than what's done now. If the upper bound on the merger's effect on the payoff from coordination is small, then there's no need to worry about the merger's effect on incentives for tacit cooperation. If that bound is large, then there's a lot more room for thinking about other contributors. The machinery for this line of analysis is immediately available to any economist who has conducted a unilateral events study. The analysis would only augment whatever is currently being done and could be done at relatively low costs because it just extends analyses already conducted. Let me give a quick, simple example. Supposed there are four firms in an industry. Cleverly labeled A, B, C and D. And we can let "D" be small. Suppose A proposes to acquire B but there are concerns about coordinated effects involving C. First, we can calculate a bound on the incremental payoff from coordination prior to the merger by contrasting the payoffs in the premerger market with those predicted by the unilateral effects model applied to a merger of A and C. Next, we can calculate a bound on the incremental payoff from the coordination after the merger by using the unilateral effects model for the merger of A and B and contrasting that with the unilateral effects model applied to the merger of A, B and C. Comparing these two bounds, we have a quantification of the change in the incremental payoff from coordination as a result of the merger. The questions for public comment ask about the possible role of evidence of head-to-head competition. This is would be pertinent to, for example, the recent JBS National Beef and CSL

Talecris cases and any merger involving a so-called Maverick firm. The current guidelines raise the notion of a Maverick firm saying coordinated interaction can be effectively prevented or limited by Maverick firms. Firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals. The guidelines seem to view a firm's status as a Maverick as some exogenously given an unchangeable characteristic of a firm. But so-called Maverick behavior is a strategic decision of a firm, not an exogenous characteristic. The guidelines are written as if a Maverick's behavior is that of a wild animal. Rather than the behavior of a profit-maximizing firm in the marketplace. We must remember that Maverick like behavior might be a strategic decision by a firm designed to improve its position in a post merger cartel. By using the approach of extending a unilateral effects analysis, no additional data or information is required, assuming the unilateral effects analysis has the flexibility to be extended to other potential mergers. We would expect this to be true unless there is something special about the model used for unilateral effects, that means it can only be used to examine a merger between the two firms being considered and cannot be extended to consider other potential mergers. Furthermore, the approach I've discussed can incorporate an array of different aspects of a merger and post-merger coordination. For example, it allows the quantification of payoffs associated with the inclusion or exclusion of various firms in the post-merger cartel, allowing the identification of the profit-maximizing cartel membership which would be of most concern to the agencies. It allows the quantification of the payoffs associated with deviations from collusive behavior providing information about the stability of various post-merger cartels and allows the calculation of the efficiency gains that would be required to offset the potential loss in consumer surplus from coordinated effects. And it allows the quantification of how it would require divestitures might mitigate a mergers effect on the payoffs from coordination. I'm not alone in advocating for more rigorous coordinated effects analysis. For example, Andrew Dick in a 2003 law review article argues in favor of more rigger. But his focus is on constraints that prevent coordination in an industry. It's not clear what analytic tool one would bring to bear in this case. I propose a different guiding question. Instead I would ask how does the merger change firms' incentives to overcome whatever constraints on coordination might exist. Including how the merger changes incentives for an apparent Maverick to behave as a Maverick. In recent articles by Davis, Sabbatini and Davis and Hughes, authors have proposed quantifications using a particular model of tacit collusions. That's another approach. It also provides valuable information. It's a different approach in that it

produces an estimate of the payoffs associated with a particular type of cooperation where one might argue about whether or not it is feasible or likely for that type of arrangement to be implemented. Our approach avoids the issue of likelihood completely and focuses on what level of profits are available to the firms should they find a way to overcome whatever obstacles they face in organizing coordinated behavior. The greater are the available payoffs, the greater should be our concern that creative minds focused on profit maximization will find a way to achieve those profits. The opposition to the merger in Arch Coal based on coordinated effects may well have been correct. But the arguments presented in that case were not compelling to the courts. Yet since Arch Coal, U.S. authorities and European commission have successfully pursued many price-fixing conspiracies. In other words, the agencies remain vigorous enforcers of Section 1 of the Sherman Act, recognizing the ongoing threat to the competitive process from cartels and Collusion. It's important that the agencies be able to map this concern into merger reviews. To conclude, I think it would be valuable to recognize in the guidelines that the discipline of economics has much to say about post-merger payoffs from coordinated conduct and that thus we have much to say indirectly about likelihood since it is reasonable to believe that likelihood of post-merger coordination increases with the payoff from such conduct.

>> Bill Kovacic: Thank you, Leslie, in many ways when we think about the topic of direct proof, it often comes up in the context of unilateral effects context, and your presentation very usefully focuses on the possibilities of thinking about coordinated effects as well. And that's a very valuable part of the session. Rich.

>> Richard Parker: I want to thank everyone for inviting me, the organizers and I'm certainly going to try to say something from my own perspective and experience that I hope will be helpful. I think it is very important that the merger guidelines reflect actual agency investigational practice. Actual agency investigational practice, in turn, has to be calibrated to turn out cases that can be tried successfully because we all know that only a federal judge in the United States can stop a merger from closing. And ultimately these cases have to be presented. And I think what's important is that there be agency practice that makes a winnable case and that the guidelines set forth what that practice is. My experience in trying cases in federal district court merger cases both for and against the government is that the district judges are concerned about effects. They are concerned about

whether customers are going to be hurt, and they are concerned about the mechanism by which they're going to be hurt. And the government has to explain that whether there's going to be coordination or whether it's going to be some form of a unilateral increase simply because they're so big or because they have some close substitute-type issue. The government has to explain that. The best evidence of that is direct evidence. And what I call direct evidence is anything other than a presumption from market shares. The best evidence, of course, in my opinion is a natural experiment. And generals always fight the last war, so I mean in Cardinal Health which I tried back in 1998 with Mike Antalix and others, we had a couple of instances of what happened when the merging parties entered California, and we saw prices go down. And now that merging party's going to be out. Pretty obvious what's going to happen when that merger closes. Staples is probably the best example where we had evidence of what happens where two stores are across the street from one another and what happens when they're not. Pretty obvious, it seems to me, to a federal judge, almost all of whom are not antitrusters as to what's going to happen. That's the most important evidence. I think party documents are extremely important. Those of us who represent large companies know that they spend a lot of energy with a lot of very bright people trying to figure out what's going to happen when this merger closes before they invest a gazillion dollars of their shareholders' money in this, and so those documents can be instructive. And by the way, many of them, obviously are not going to help the government. They're going to help the parties. But I think those are very important expressions of what is likely under the standard going to occur after it closes. There's also other kinds of documents. Many of you may remember that I once had a document where senior executives said that would-be pricing synergies of this merger we should be able to get an immediate 15% price increase. I think that is very bad for the party, very good for the government, but pretty doggone good evidence as to what is going to happen. And I think that is what is important in trying a case. I want to talk about two things. Where does the structural presumption fit in and where do all the economics fit in? I think starting with the structural presumption, I think it's very important for the government that it have that because it gets you off to a good start. I don't believe for one minute that a federal judge is going to be moved by the structural presumption alone. They are going to want to know whether, in reality, somebody is going to get hurt. The defense always has the argument, and trust me, I've made it before, that the government -- they're talking presumptions, and they can have every presumption under the sun, but I've got the facts. And when trying a case for the government, you ought to say, you know

Your Honor, we do have this presumption. That's what the Supreme Court says. Absolutely. But I'll tell you something. Let's pretend like it's not there. I'm going to show you what's going to happen to these people. I'm going to show you why there's something the matter with this merger and why people, the customers who we're supposed to protect are going to get hurt. So I think you want the presumption just because it's in the law and because it's modestly helpful. But don't anybody think that it's all that helpful to the government and that you somehow need it to win a case. I don't think you do. I don't think the judges are all that impressed with it. The economics, I respect the economics profession. I respect the scholarship that goes into all these tests. But I've never been in a case where I didn't have a Ph.D. on my side say the other side's test isn't any good. Or the data isn't any good. Or, or, or, or something. And there's a better test that should have been applied and it comes the other way. Of course, that ought to be part of a case. But in my opinion, if I'm the government, the way I want to end my case is I want to say, I have presented direct evidence. I've presented natural experiments. I've looked at the party's documents. I've looked at this, that and the other thing. I've got customers who say how they benefit from the competition among these parties. And by the way, we've done the best economics can do with some tests, and they corroborate. They corroborate the direct evidence. Now, that's the case that's going to win. And on the defense, obviously, I'd make the same point. Direct evidence is on my side, and this test we run is corrupt. But I think that's where they fit in. All right. This is an exercise in revising the guidelines. What are the practical implications of this? I find myself agreeing with a speech that commissioner Tom Rush gave a few weeks ago. I think it was last month where he said that market shares in HHIs and whatever and however you revise them should not be set up as a gating issue the way they are in the guidelines now because I don't think they are in practice. Anybody who deals with the agency knows they're not. The commentary says they're not. They shouldn't be set up that way. I would set up -- I would start the guidelines off by saying the fundamental question -- I'd say it fancier than this -- but the fundamental question is whether customers are going to get hurt, and we're looking for evidence about whether or not they're going to get hurt, and here are some examples of the kind of stuff we look for. Next point, markets, yes, we define markets, yes, we look at concentration, but please note they're going to be more important in some cases, that is coordinated cases, than in other cases. And so that would be the way -- that would be my own practical suggestion as to how to deal with the guidelines. And it's not a huge revision. I mean, I think a lot of his work was already done in the commentary, you simply talk about we're

looking first and foremost about direct effects and talk about kinds of things -- the kinds of evidence, maybe examples or something of what you want. And then talk about where market concentration comes in. Not as a gating issue but basically another form of analysis that I said is going to be more important in some cases or other. I think if you do that, you would have some output that would be helpful to parties trying to understand what happens down here. And Frankly, would it be at least helpful to courts in understanding basic antitrust -- basic antitrust analysis.

>> Bill Kovacic: Thank you very much, Rich, for, again, tying together your own experience in a courtroom but also thinking about how things went when you were bringing the cases yourself and also to think about how that might actually affect the recasting of the guidelines themselves. Let's turn to Mark, please.

>> Mark S. Popofsky: Thanks, commissioner and thanks to the organizers and it's a pleasure to be here. I start from the same position as brother Parker to the left, that direct evidence covers a broad array of stuff. I mean, it's essentially anything other than the structural presumption in establishing a prima facie case of illegality. This is a vast topic and it's really the heart of the merger guidelines. And several panelists later today are going to explore particular facets of it, but this is a great biodiversity of antitrust here. We had professor Marx talk about a model as part of direct evidence. We had Judge Ginsburg talk about the sort of evidence in Evanston and Staples/Office Depot as part of direct evidence. We had litigator Parker talk about how it's really everything you're going to persuade a federal judge with. This is a vast topic. And what I want to suggest in linking that vast topic to practical revisions to the guidelines and something that's going to persuade generalists judges which I think is a very important point here that the agencies should proceed with some caution. With that said, let's talk about how it can be relevant, direct evidence to merger analysis, generally. And I approach this in part as a litigator and counselor, in part as a poor part-time academic. But nonetheless, this is how I'm approach it. It's uncontroversial direct evidence putting aside market definition and the structural presumption can make a case for a merger being illegal. The Supreme Court has said that market share and market definition are mere surrogates for anticompetitive effects for Section 1, little weaker proposition along those lines for Section 2, we've had no other authorities than Judge Posner tell us that the test -- under Section 1 of the Sherman Act, and Section -- have converged. That being the case, why can't direct evidence, when asked,

create a presumption itself of illegality in certain circumstances and place potentially of an analysis of market share and concentration? That's sort of a starting point. And then one thinks about the different types of settings where that could arise. The most obvious analogy for that, I believe, is a case like *Evanston* where you have a consummated merger. There's where the analogy to what the Supreme Court said in the *federation of Dennis* about market share and market power being mere proxies is more powerful. You have conduct. You're trying to look at its actual past effects. What would be the more logical thing to ask than what the merger did, assuming you can create a persuasive case of showing what it did, an important question of proof, Parker has talked about how you might play that out in a court, wouldn't just be some fancy econometric analysis isolating all the variables except the change in number of players, but intuitively, at least, a consummated merger is where the idea of using direct evidence in lieu of the structural presumption is most powerful. And then the question is how you deal with the diversity of evidence. Trickier, and I think this is the real key question for revising the merger guidelines is what one does in the case of unconsummated mergers. And here the \$64,000 question, I submit, is not where direct evidence can be relevant, but where it tentatively can be dispositive. You can think about how day-to-day direct evidence is used by the agencies analyzing mergers. One way that certainly fits within the more general inherited legal landscape we have in Section 7 is exculpatory direct evidence. In a unilateral case, the parties are not close competitors. There has been a history of entry. In a coordinated case, the nature of the product marketing pricing, et cetera, is such that coordination is just implausible. You can see how, from a law enforcement perspective of trying to decide which merger one is going to take into a second request or even to court, exculpatory direct evidence is clearly important and something that the merger guidelines should, I think, discuss how it is being used. The question of what level to do it, given the diversity is a question I'll leave for the discussion. So that's the exculpatory side. And I think the hardest question in all, and I'll be brief so we can get to Professor Willig and leave plenty of time for discussions, is when direct evidence can be inculpatory and not just that can it self substitute for the structural presumption and basically create a *prima facie* case of illegality by itself. And, of course, there have been noted efforts to suggest frameworks for doing that. Of course, the director of the bureau of economics at the FTC and the current and one-time, again, deputy assistant attorney general for economics have proposed such a test. And I want to suggest here is that one should proceed with caution in suggesting in revising the guidelines that direct evidence by itself can carry the day and the sort of simple level

that I think Judge Ginsburg laudably says we would like to have in litigations. The reason for that is that it's not clear to me at all that the simple tests of direct evidence is inculpatory are going to tell enough of the story to be persuasive to the courts. The courts have inherited a legal landscape that says we want to look at what the definition of the market is, not just because the supreme court in Philadelphia National Bank told us it's useful, but there's an intuition behind that. We want to know more than just the relationship between these particular parties. We want to know what's likely to happen with repositioning. We want to have an intuitive sense for how much price might rise to the extent you're saying look at just these insiders. We want to look at a lot of things. And I think if you say there's a simple category of direct evidence, there's going to be a humdinger, that's enough to establish illegality whether it's the price increase in Staples which I think interesting enough, was cleverly used by the government to establish the relevant market, or some of the tests for unilateral effects they're going to be proposed. You're risking three dangerous things. One is you're going to risk having a method for how the agencies operate that's out of step potentially with what generalist judges will accept. And I know that was a subject of earlier panels today. I'm sure it will be a subject of later panels. I think there's a danger of an intra-agency analysis that is not going to be persuasive to the courts. It may be a few transactions to get there, but, of course, those decisions that get written are influential. It creates the incidence by which the parties act and the agency acts in the merger review process. It's important. The second, if these tests for direct evidence are relatively weak, it's enough to have evidence like Staples or Office Depot. It's enough to have diversion ratio times margins. That's enough, rebut it. I think you're going to be potentially risking some false positives that might outweigh false negatives. Suggest that might be a possibility. And if you believe that and that you're basically saying, "okay, we can flip the burden, the parties now have to rebut something, that will be put the simple test forward," I suggest it might not be good not just for merger enforcement, but for the role the merger enforcement plays in the economy. Finally, and this links back to diversity point, tests for establishing a prima facie case with direct evidence we might want to be simple. The rebuttal is going to be diverse, the point I started with, and complex. So I think the challenge in revising the guidelines is to mediate between those positions. Add clarity potentially to the factors that go into this great space of what do you do beyond the structural presumption. But recognize that simple answers may not always be there. And although the supreme court in Sylvania said that antitrust divorced from economic principles would last sound mornings, we should also remember that antitrust is part of a legal system where

parties must be able to predict their conduct, and we must have transparency and rule of law as well. Thanks.

>> Bill Kovacic: Thanks, Mark. You and Rich, again, drawing on your experience from both sides of the enforcement process, have done a nice job here, I think, of laying out the menu of possibilities of different types of proof that can be brought to bear, and we can come back on that in a moment. Bobby, please.

>> Robert Willig: Thank you. You know, direct proof of competitive effects sounds so powerful. It sounds like such a marvel. What a great thing to skip all this nasty work that we always do under the guidelines or any other analytic frame. It's my bottom-line view that direct evidence is almost never a magic bullet that obviates the need to do a real competitive effects analysis. Direct evidence is not, and I've hardly ever seen it be, a bypass of competitive effects analysis, but it can be a terrific and powerful source of data for competitive effects analysis. I'm hedging my language here because Rich is on the panel. I say almost never. Almost never, due to the occasional board document that Rich will have uncovered in his old role which asserts to the board that the merger will enable prices to rise almost as surely and significantly due to the taming of our most powerful competitor. And I know some of us seek those documents and maybe that means with a smoking gun in hand there's no need to do anything else. And I'm not one to say that that's not right or not occasionally the truth of the case. But more usually, there is no magic bullet. Jim, you'll recall 20 years ago we were sitting in the front office looking at the evidence, talk about direct evidence, the merging parties were clearly directly bidding against each other for the business of their many customers, directly bidding against each other. One of the examples on the setup list of elements of direct evidence that maybe should be incorporated in the new guidelines. The direct evidence showed them directly bidding. But still more direct evidence that you instructed the staff to look for indicated that the customers chose two or three rivals to go head-to-head and bid directly against each other out of the five players in the marketplace. And the customers did not really care very much which two or three they drew out of the five in the marketplace. So if the five became four through a merger, there would be no diminution of competition. Direct evidence, first said "oh my God, they're bidding against each other. Stop all analysis." But under the guidance of Mr. Rill, I hope I'm not mischaracterizing, Jim. My memory is rosy. Of course, yet more direct evidence

from a search in competitive analysis showed that that first direct evidence would have been misleading if it had been viewed as a magic bullet. On the other hand, I've seen firms making commodities that were very close substitutes to each other. And they never bid against each other. And we looked and looked. There's no evidence of them bidding against each other. So, oh, magic bullet. Exculpatory. I think if we're going to change the guidelines, we have got to keep that language out. What does exculpatory mean?

>> Mark S. Popofsky: You had to look it up, Bobby.

>> Robert Willig: I did. I sort of remember, but I didn't see inculpatory on the other hand. So maybe that's exculpatory or something. But a deeper analysis, the more complete analysis showed that when one of those two firms that never bid against the other had an output cut back, it raised prices in the industry for everybody, including the other merging party, proposed merging party. It's not necessarily about bidding against each other. Sometimes it's about total output in the market. Direct evidence without a competitive analysis full of pitfalls for the foolish looking for magic bullets, I would say. How about a proposed merger of retail category super stores not Office Depot/Staples but some others I've encountered in my life as a consultant and an analyst. And simple data analysis showed absolutely prices are higher in areas where there are fewer of the outlets of the big three chains in this marketplace. So higher prices, correlated with fewer players among these big super store chains. Is this a natural experiment in which we all craved? Does this prove competitive effect from a merger that would shrink the three down to two? In some areas the two down to one? Well, maybe in some circumstances yes. But only a fool would reach that conclusion without a deeper competitive analysis. We ran those data in this particular instance. And we found that the companies' own guidelines for where to enter local markets keyed on certain market factors, the desirability of the local market. If the market stank from their point of view, they were not going in. And likewise, the rivals weren't much either. And those same competitive factors that made entry stink also raise the cost of doing business on average and tended to raise prices. And so experience correlation between concentration and price, which "direct evidence" the marvelous natural experiment that we all crave would have misled us into finding. Of course, in Office Depot/Staples, the evidence turned out to be right of that kind. Not econometrically, but because the smoking gun document showed that. Right, Rich? I think it was that which ultimately

persuaded the courts -- the companies said, "Yeah, we charge higher prices where there is no competition around." It wasn't the econometrics stand off that led to the conclusion.

>> Richard Parker: I don't think the econometrics have won any case that I'm aware of.

>> Robert Willig: How about prosecutorial decision making? So sometimes that direct evidence is actually indicative, and sometimes it's not. I've looked at a situation where the transactions cost had risen for future contracts on LIBOR interest rates. The futures contracts on those kinds of interest rates, whatever they are. I'll tell you later. And when the transaction costs went up, volume fell off, sure enough. The data are collected daily, hourly, minute by minute. It's easy to see tracks like that on the data. But at the same time, when one looked to see a corresponding volume rise on futures contracts at another exchange based on treasury bond interest rates, there was no corresponding rise in volume there. As volume fell off, on the contracts on LIBOR interest rate scored futures contracts. Evidently, no substitution in the data. Well, I think I'm with you about this exculpatory stuff. Because sometimes the absence of a finding of substitution actually requires less analysis than the opposite finding where there could be all kinds of confusing factors. And so we reached the conclusion and ultimately the merger went through that at least in this particular area of possible market definition, there was no relevant market that included both of those futures contracts. And, therefore, no competitive concerns.

>> Mark S. Popofsky: See, you used exculpatory perfectly.

>> Robert Willig: I'm getting there. It's so good being educated by you, Mark. Lawyers and economists, should be friends. I've seen natural experiments showing impacts of market ups and downs on the demand side, leading to episodes of entry and exit. Definitely providing all kinds of fruitful evidence about the character and height of entry barriers, exit barriers, the timing of entry, how long would it take for entry or exit to react to changes in the market? But the connection between entry and exit from evidence like that to the real issue of whether entry should alleviate competitive concerns over a merger in that same space as we all know, it would require deep competitive analysis. The natural experiment is the beginning of the evidence. It's not the end. It actually doesn't provide the answer. But it provides enormously valuable evidence for an ordinary

competitive effect analysis. So with all of these examples, and there's tons more that will be coming to your minds, I'm sure, I come back to my conclusion that direct evidence can and should supplant competitive analysis. It should be part of it. But it can't supplant it. Direct evidence is often a provider of central data and input into a true competitive analysis of mergers. So those of you who are rewriting the guidelines, please have the guidelines say this. Nothing like some good direct evidence to help inform a proper competitive analysis. And the commentary that goes along with the guidelines can have endless examples of the kind that I was just recalling for the sake of this presentation. Sometimes the examples say "yes, direct evidence can be quite persuasive." And a lot of examples say "caution, caution, you've got to go on and ask further questions before you regard that direct evidence as a magic bullet." In other words, showing both the power of direct evidence and the need for caution in interpreting it should be part of if not the guidelines, the commentary. And that will bring the state of the art of antitrust analysis along in a beneficial way. And I think you can do that with part of this revision. But magic bullet, no.

>> Bill Kovacic: Thanks, Bobby. And your comments draw attention back, as all of you have to what specific kinds of approaches might be built into the guidelines. And I'd like to take one theme that all of you have addressed and pose a question based on that. In thinking of casting the guidelines, do you think it is either wise or necessary to have at least some attempt in the presentation of the case to sketch out what the boundaries using a traditional approach of a relevant market would be? To think of it another way, can you imagine the time would come, or should come, when you would see a complaint that would not include the words relevant market or market share at all?

>> Richard Parker: I could see a time when that is part of a complaint, that is a theory in a complaint. But somewhere, you've got to have to have -- maybe in a different count, you've got to have a market because that's what's called for under the case law. Note that under the Sherman act, this is an antitrust crowd, the Republic tobacco case and Indiana federation of dentists has started to talk about pulling away from actual market analysis in the Sherman act cases. And it seems to me, in some cases, nudging the courts in that direction is not a bad idea. And I think there's a lot to it. But you have got to nudge them. Right now you can't go into federal court without or part three in,

my opinion, without defining a relevant market. How important that becomes in the litigation, I think I talked about previously.

>> Robert Willig: I would like to see relevant markets remain a critical part of the court case, I suppose. But to me, even more importantly, of the discipline exercised by the agencies in making enforcement decisions. However, I would also like the agencies to articulate publicly the current practice which is to make inferences about relevant market and delineations of relevant market based on the best available evidence. And that evidence may arise from the kinds of analysis that we've been talking about, or so-called direct evidence, or more inferentially from consumer interviews or from marketing studies. Whatever is the best evidence. And an assortment of lines of evidence, obviously, is complimentary. One part to the next, but still the discipline should be part of the agency's review process to articulate at the end of the day what is the chosen definition of the relevant market.

>> Richard Parker: Could I just make one point? Somebody ought to go back and look at the complaint that that agency filed. I wish Molly Boast was still here, because she was handling it in the BP/AMOCO/ARCO deal where we were saying that there's a problem in Alaska. And I think we had two theories there. One, there was a price discrimination market involving sales to California refineries. But I also think we had a count based simply on direct evidence that the one of the parties was already exercising monopoly of power there, and that the party that they were buying was the only potential antidote. I think that may have been -- that may actually have been in that complaint. Because that's the theory we were going to perceive. It was never tried. The transaction was abandoned, but somebody ought to look at that in the course of this. Because it goes directly to your point, Bill.

>> Judge Douglas H. Ginsburg: It may be hard to imagine the complaint that doesn't have it, but one can more readily, perhaps, imagine the proceeding that doesn't get to it. I think, Bill, Jim Rill will know, 35, 40 years ago didn't William Schwartz write an article on the efficient sequencing of questions in trying an antitrust case. And I think people aren't familiar with it now because what he said is so much the practice in terms of motions to dismiss and summary judgment on it, starting with basically the least evidence intensive questions. Although he didn't put it quite that way. So I

can imagine it being in the complaint, but I readily imagine cases in which that's just not necessary to litigate it to death.

>> Bill Kovacic: One debate that comes up in the discussions about direct proof is that some have said that it's a jurisprudential prerequisite coming out of the language of section seven of the Clayton Act, the discussion of effects in a line of commerce, that it's indispensable. Others have said that the court might -- court ultimately might be willing to import the approach that's been developed in section one and section two cases that suggests that certain types of direct proof of effects by itself might be sufficient. But I gather in part that what at least a comment that's been mentioned a couple times here is that, at least by way of providing a familiar frame of reference or a approach to beginning to think about actual likely effects, actual likely effects that some discussion of a relevant market is a useful internal analytical discipline and a good element of guidance and a good element of the presentation of the case in court.

>> Robert Willig: Yes, I agree on that entirely.

>> Judge Douglas H. Ginsburg: Would you say that equally with its respect to geographic market.

>> Bill Kovacic: I suppose that's a fair question. Yes, yes.

>> Judge Douglas H. Ginsburg: You would?

>> Bill Kovacic: Yes.

>> Richard Parker: I agree on that. But what I was saying was that that ought to be in the guidelines, that discipline to go through. I assume you can simply say it's not a gating issues. And you can simply say that it is probably more important in some cases than others in the market analysis.

>> Bill Kovacic: One basic question is, again, think of who the audience for the guidelines is and what their purpose is. Is it to principally to reveal the internal decision making calculus of the

agency and its approach by making that evident to enable parties to come forward with arguments that will assist in the assessment of the case? Are they designed on their own terms to guide the courts towards the acceptance of certain analytical techniques and methodologies? Is there ultimately expected to be a difference between what the agencies will do inside the house and what they'll do in the courtroom? And that guidelines might make clear that there are certain things we're explaining to you to for the purpose of saying here are analytical approaches we will use on the inside. But we won't necessarily try cases this way. We will use another vocabulary. We'll use another approach. We will welcome the more detailed econometric analysis inside because we have the capacity to do it, we have experience doing it. And we welcome that. But when it comes time to try the case, maybe in the way that Rich was just saying, we won't do that. There's the famous interview that Judge Hogan gave after the Staples case in which it was asked in the book on Microsoft, how much did the econometrics matter to you? And he said, not at all. That is, "I relied on the documentary records that is who is the audience for this document." And is the document really taking -- is it to take two approaches, one to say for parties who come before us this is evidence we'll use to decide to prosecute. But when we go to actually proceed to bring a case and lay it out, we won't necessarily use the same techniques or methodologies that led us to decide to go ahead.

>> Leslie M. Marx: I view the guidelines as giving some structure for how the agencies are going to go about figuring out whether a particular -- a quantification of whether a particular merger is going to increase or decrease consumer surplus. And that and whether it will affect competition, the nature of competition. And economists have a lot to say about quantifying whether a merger might increase or decrease consumer surplus, but essentially nothing to say about proper legal strategies. So I could imagine guidelines that were geared toward analysis that's going to guide you toward the correct policy decisions and it might be quite divorced from what you would expect the agencies to go forward with as their legal strategy.

>> Richard Parker: Can I say one point about the audience here? I don't overlook the clients. You've got somebody who wants to do a billion dollar transaction and cannot understand why he or she has to wait all this time in Washington, and as council, it is really helpful to -- I mean I always tell them, I say, look, you know, we may disagree with how the agency comes out. But I

always say these are good people who know what they're doing. For example, take home the merger guidelines and you will see exactly what they're going to look at. And you will see that it makes sense. And so I think that a document that lays out what you're going to do in terms and that holds together and is coherent actually is very good for the agency's role in the broader economy and most certainly helps outside counsel who are trying to explain why it is they can't close their deal for ten months and they have to go to court to do it, or whatever. I just think the business community, you know, it's important to communicate that you folks know what you're doing. You do know what you're doing. But it's important to communicate that. And I think the merger guidelines are one way to do that, in my opinion.

>> Mark S. Popofsky: Let me pile on to that for just a second. I could not disagree more strongly to Professor Marks here. I don't think anyone said it better than Judge Bryer and Barry Wright in dissent. All right. Antitrust is not a mere applied economic exercise. It is a system of law enforcement. It is something that very much as Rich said affects businesses in the real world. And the weaker the link between the methodology the guidelines lay out the principles that are applied in court and the principles by which primary actors, you know, are guided in their conduct, I think the more disastrous it is the link should be tight and it should be strong.

>> Robert Willig: Defend yourself, Leslie.

>> Leslie M. Marx: No, my point is that the type of procedures that you would expect an agency to go out in evaluating the effects of a merger are not necessarily in the order or of the presentation you want to make in a legal case.

>> Mark S. Popofsky: I'm making even a deeper point, I guess, than that. I don't think what the agency should do should be a mere applied economic exercise to calculate consumer surplus. I think, as Professor Willig said, it's competitive impact analysis. As Jonathan Baker once wonderfully wrote, when a piano drops on the sidewalk and hits someone, you don't ask, was there negligence? You ask, who was negligent? You know, in going through the everything we do as a disciplining matter, market definition, calculating shares, all the things the guidelines lay out as a way of thinking about it is wonderful for that. Because it structures the analysis of decided who

dropped the piano. But I think when you get farther away from that and say, you know, let's engage in some mathematical modeling exercises of how the piano got dropped, I think there's a danger in many respects. It's just where I come from on this.

>> Robert Willig: Okay, let's imagine economists are always saying "assume a can opener." Let's imagine an agency whose leadership is really integrated and works well as a team. I think this is sometimes a reasonable approximation of reality. Not always, to be sure. Okay. And suppose the agency decides to bring a case against the merger, and suppose that the econometric analysis call it that or call it the piano tuning if you like, but the deeper analysis -- call it econometrics was actually necessary for the agency to make up its collective mind. Not in an environment where the lawyers say "oh, that's crap." And the economists say, "you're full of crap." Not that sort of agency. But where the parties, the leadership actually listen to one another. Judge, you mentioned the airlines case, the Alliance situation. That may be a situation where there is obviously competing considerations and maybe we actually do need to look at the data to find out whether the efficiencies or the anti-competitive effects are stronger. Maybe. And maybe those econometrics you saw were not really the right ones. I'll send you some that are different. I needed to get that in, sorry. So the agency decides to bring the case. The economics were crucial to the agency's decision. That won't always be the case. Sometimes it just amuses the economists. Sometimes it tends to lead to a search for evidence that will be persuasive to everybody covering the same ground but is not econometric. And maybe that was the case of Staples/Office Depot, I don't know. But imagine the econometrics were really salient to the agency. Now are you all really saying that when you go to court you shouldn't use those econometrics? Because you're going to run into a well-informed other side that will rebut all of your evidence and the same way that the agency wasn't persuaded, why should the court be persuaded, unless the trump card of the economics is played in an understandable way in court? I just don't get it.

>> Mark S. Popofsky: I certainly wasn't advancing that proposition. I can't say any better than brother Parker. It's confirmatory, it's consistent with, it's a piece of the whole analysis.

>> Robert Willig: You're saying it's not needed?

>> Mark S. Popofsky: It may not be needed.

>> Robert Willig: Okay, but what if it is needed?

>> Mark S. Popofsky: You were posing the hypothetical where for a decision is made, it was needed.

>> Robert Willig: Yes, exactly. That's the case.

>> Mark S. Popofsky: So, you know, and that is how the decision maker is acting.

>> Robert Willig: So what do do you with that case, sir?

>> Mark S. Popofsky: What do you with that case, it's important and a tipping factor, sure.

>> Robert Willig: So then do you show it in court?

>> Mark S. Popofsky: I don't think you would bring a merger case without my Bobby Willig by my side putting up my calculations, my data, my equations. I would be negligent to my client.

>> Robert Willig: I will beat the pants off the other side, believe me.

>> Mark S. Popofsky: We would.

>> Robert Willig: Okay.

>> Richard Parker: This is getting good, guys.

>> Robert Willig: As long as we have that on the record, we're fine.

>> Mark S. Popofsky: What I object to, though, is the notion of merger analysis is a quest for econometric truth. That is what I was objecting to.

>> Leslie M. Marx: I mean, certainly my proposition is it is a quest for the truth. And the truth comes to us in a board memo. That is one thing, but I think we need to -- the whole nature of -- what we're worried about are competitive effects in mergers. That's economics. That's how the market is going to be affected by the merger. We need to be looking at economic evidence. And so I think the economic evidence ought to be primary in these cases. And maybe you want in the presentation of the legal case, maybe it's easier for your audience to understand a board memo. But I think that the fundamental quest of the agencies should be the economic truth.

>> Judge Douglas H. Ginsburg: Well, first, I just want to point out that this whole discussion takes place in the context for which we convened of thinking about mergers, merger cases. And so there's no occasion in any imaginable merger case for worrying about direct evidence as a economizing device. All right, so it's not like a Polygram situation. If the government is going to bring this case, it's going to use whatever resources it has. It's worth challenging. It's worth defending. It's not something where the economizing on the proceedings is an important value. However, the handling of direct evidence may well spill over into private nonmerger cases. So it's a concern that ought to be in the background as revision goes forward. There's been -- there have been two articles in the last year -- pardon me. One by Professor Stuckey that's been published questioning -- arguing that merger law in the United States does not meet rule of law standards because of problems of predictability and transparency. There is a more recent manuscript, I think on SSRN that has not yet been published, taking a very recent -- taking a similar view of the law of the European commission on mergers. I think that is an important concern. If that becomes a widespread perspective, I think it's very deleterious to of the agencies and to the lesser degree to the rule of law itself. So I think they answered the question, I think you posed at one point, Bill, about whether the guidelines should reflect whatever they can about the agency's internal process. It has to be yes. Even if it doesn't always carry over into the presentation of evidence.

>> Richard Parker: I mean there's a sense which -- I mean, that is extremely important. Just think about it, folks. I mean, you know, what -- I don't do just mergers. I mean, I'm spending most of

my time right now trying to figure out whether prices were fixed at a meeting that occurred three years ago in a certain place in the economy. You're in a merger case, you're not doing that. You're trying to figure out what's going to happen in the future. And so I can't think of any other kind of case that I've been involved in, maybe there is somewhere in the law where you're trying to predict the future, and nobody really knows. I'm what I'm suggesting -- I'm not suggesting you just look at board memos or anything else. I'm suggesting that things from the past like that, natural experience, other kinds of things are really going to be the most persuasive. That does not mean that the agency goes to court without doing the econometrics or doing the best it possibly can given the current economic capabilities of the day. It can do both.

>> Mark S. Popofsky: Just one further comment on that. I think mergers is actually an area where the agencies have a particular responsibility to think about the link between how they are approaching transactions and what the legal principles are, putting aside the sequencing issues. I know another panel will probably address what it starts with, as I said maybe exculpatory evidence or very inculpatory evidence. I'm not talking about sequencing. I'm talking about the ultimate analysis. And the reason for that is the reality that very few cases, of course, get to Judge Ginsberg. It's rare they go to district court. It's even rarer that they go to the court of appeals. And, of course, it's not been since General Dynamics or Citizens, which ever you want to think is really a merger case, that they've been to the Supreme Court. It's an area, given the realities of both business, how the legal system works, and other factors that the agencies really are acting in a law enforcement role or in some sense they're both judge and jury. I think that creates a special responsibility for that type.

>> Bill Kovacic: We're just about at the end of the session. And to close up, I wondered if I could go back to the panelists, see if you have a thought that you'd like to close with for a minute or so. Why don't we pick something maybe that you haven't drilled on or another point you want to drive home. And maybe to start with Bobby and come back this way.

>> Robert Willig: Thank you. One question mark in my mind, and I call it a question mark but I think I have a leaning, is in view of the plethora of kinds of direct evidence and I agree with all of us when we make the point that there is tons of different kinds. When we think about the different

kinds of analytics that are necessary to handle different kinds of direct evidence to test their salience and their veracity, whether the superficial look is absolutely sufficient to be taken seriously -- should we really put all that stuff in the guidelines? Because in a way we're worried about checklists on the coordinated side. This will be an infinitely long checklist of different kinds of direct evidence and ways to test direct evidence. What a burden for the reader, for the user of the guidelines as opposed to having laundry lists like that and examples often the commentary. And keeping just the principles and the guidelines to which we hope direct evidence may go once that direct evidence is properly tested through the analytics. It's a question, but I think I know my answer to it. Yeah.

>> Leslie M. Marx: One of the other things that was raised, and some of the questions for comments are about whether the presence of buyers with significant market power should be viewed as something that might deter fears about coordinated effects in a merger. And so I would want to be cautious about putting something like that into the merger guidelines. Because there are a number of examples like in Vitamin C where Coca-Cola was an important buyer of Vitamin C. And the cartel, although that made them pay attention. They had to have special meetings to deal with Coca-Cola. The presence of the buyer -- the significant buyer there did not deter the cartel. And food flavor enhancers, you see the decisions that's a cartel where they were four cartel members and only three large buyers in Europe. That's a problem for the cartel to divide up those buyers, but they use counter purchasing agreements and managed to work things out where cartel members would buy requirements from each other. So I would be cautious about including language in the guidelines that suggests that significant buyers necessarily reduce the threat of coordinated effects.

>> Mark S. Popofsky: Since Bobby spoke, and it's safe to speak, but I'm going to echo his theme. You know, there is a tension between what business would like which is something of a checklist, I mean how many clients, Rich, come you and me and say "we would like to know, can we do this, can we not do this? Show us where they say can we do this or not." On the other hand, there's virtues in being modest. And virtues in keeping one's options open. And I suggest in this quest for finding nice, neat answers that help make the law predictable in a merger area and finding potential substitutes for the Philadelphia National Bank presumption, that the agencies be relatively modest.

And recognize there is a lot that one still doesn't know. And then when one is using direct evidence as a surrogate for that, there's a lot of trouble one can get into if one wants to basically flip the burden to the other side.

>> Richard Parker: Those of you who know me as somebody who talks often and a lot are going to be surprised. But I think I've already said what I think. I hope it was clear and unambiguous. And I most certainly hope it was helpful.

>> Judge Douglas H. Ginsberg: Just following up on Professor Willig's last observation, principles only in the guidelines illustrations checklist and so on in the commentary, that's probably a good organizing principle. I'm not sure how much of a practical difference it makes, unless things changed, the commentary isn't amended any more frequently than the guidelines. Has that changed?

>> Bill Kovacic: The commentary are the first of the type. They were sometimes called guidelines on the guidelines.

>> Judge Douglas H. Ginsberg: Okay, I think it's worth -- this is a perennial, but I hope you might find occasion to revisit it at the agencies in connection with this project. And that is doing something more by way of closing statements when cases are not brought. That would supplement the guidelines in a meaningful way. And something that could be very brief and suggestive rather than detailed and certainly you have to be concerned with trade secrets and so on. But that would give some ongoing guidance. And in my far outdated experience, every potential merger case involved a story or two stories. And Hardee's came in and told us their story, and the staff came in and told us why that story was not right. Or why, in fact, it checked out later on. And a lot of those stories are totally unique. But like common law cases, the culmination or the cumulation rather of unique cases enables people to triangulate their position and to steer accordingly.

>> Bill Kovacic: I want to thank everyone for addressing what will be a fundamental focus of concern for the revision process as it takes place. There is, again, a traditional framework that everyone is familiar with. If you plug in the relevant language, you get the countless number of

cases that begin by saying we always begin the section seven case inevitably by defining a relevant market, measuring market shares then going on from there. Yet, there's been another literature body of experience, it says in a number of instances that's not strictly necessary. It can even be a source of confusion. And I think today there's been an excellent discussion of how those two views might be reconciled in a new drafting effort here. And grateful for all of you helping us see theory meet practice and talking about the topic. Let me ask you to thank our panel. And I think the panel three on market definition starts off again at 2:00.