

>> Carl Shapiro: Let us resume here. Our last panel of the day. So, I'm Carl Shapiro, the chief economist over at the Justice Department, one of the people on the working group. Thank you, guys, for being here and for sticking around until the last panel. I appreciate the interest. Before I introduced the panel, I came with my copy of the merger guidelines, which I never go anywhere without, the canary yellow merger guidelines. The blue one doesn't have '97. See, this is the '92 guidelines. See, this is why you need to learn more about efficiencies, okay. We'll talk about that. Your clients can benefit for that, I'm sure. Yellow is '97, okay? But little did I realize the FTC version, with the beautiful picture of the FTC that was going to be available for everybody today. I suppose I'll have to assign some of my staff to go and make sure that there's no additional things here that are not in the joint version. So, everybody, this is a big opportunity to get your own copy of the guidelines with the -- who knows, right? Get them while they're still in force. Okay. Let me very briefly introduce the panelists. The topic is unilateral effects. We've touched on that and it's come up a number of times earlier today. But probably in fact all of the panels to some degree. So on my -- on the right-hand side from my perspective, Alison Oldale is the chief economist at the UK Competition Commission. We're especially appreciative for her for coming to far to speak with us today, particularly given the UK's experience and with their own merger guidelines and unilateral effects analysis. So, thank you, Alison. Next to her is Renata Hesse, a partner at Wilson Sonsini. Renata has quite a bit of experience in the antitrust division. In fact, that's where we first met, as well as now in private practice. So I look forward to that dual perspective. The same can be said of M.J. Moltenbrey, who is a partner at Howrey. Also many years experience in the antitrust division and now in private practice, so it's extremely valuable. On my left, Steve Salop, my longtime friend. We were consultants together at Charles River. He's a professor of economics and law at Georgetown University Law Center, across the street, and a senior consultant at Charles River Associates. And at the end, Marius Schwartz, professor of economics at Georgetown University, Senior Academic Affiliate at Bates White, also a great friend of the antitrust division. Thank you, both. So as we have been doing in the other panels today, I want to give each of the panelists five to ten minutes to make some opening statements, then we'll have a discussion. Let me just very quickly frame what I see as one of our goals. We had one detailed question in our questions for public comment on unilateral effects. That would be question number ten, where we pointed out that unilateral effects were introduced in the guidelines in '92. There's been a lot of experience gained since then. The overall question here, I think -- we put it there -- should the

guidelines be updated to reflect this experience and learning that's taken place in the intervening 17 or 18 years, and we list the number of ways in which that might happen. It's pretty clear from earlier panels today, there's a set of issues around how unilateral effects interacts with market definition. We heard, for example, Larry White and perhaps Jonathan Baker, as well, in the previous panel say, well, if you've identified an effect, maybe a unilateral effect, a raising of the prices of the products sold by the merging firms, that there must be market around that, and maybe you could short-circuit or back out market definition. So there's an intersection with market definition. There's clearly an intersection, as well, that we are calling direct evidence, that is to say evidence that's not based on inferences from market structure. And earlier, we heard from Bobby Willig, saying, well, you should look at a variety of evidence. Maybe you don't want to have particular pieces of it and get carried away about that. But we want to talk about what will be the most probative and convincing evidence regarding unilateral effects and could the guidelines say more about that, because they don't get into any detail on what -- what lines of inquiry are followed. Okay. I mean, they explain the basic logic of unilateral effects, but don't go much beyond that question. Would it benefit if they did so? So, with that framing. Let's start with Alison.

>> Dr. Alison Oldale: Hi. I want to start by thanking the FTC and the DOJ for inviting me here to participate in the debate about the U.S. guidelines. As Carl mentioned, in the UK, we are in the middle of revising our own merger guidelines, so I know how challenging it can be to look back over recent practice and learning, and to try and capture all of that in a clear way and guidelines. And how much more challenging it is to take onboard the often passionately expressed views of commentators, practitioners and others. Challenging, but hopefully, leading to better guidelines, and I commend the FTC and the DOJ for organizing these workshops. I'm gonna make some opening remarks about the UK's experience of unilateral effects analysis in merger control, focusing on differentiated products markets. In one very important sense, there's nothing unusual at all about the UK experience. If we're looking at a case where we think there might be some unilateral effects, we will be focusing very much on trying to work out what effect the merger has on the pricing incentive of the parties. We will be trying to understand how they compete with each other, what other constraints there are that might affect what the -- what the behavior will be after the merger and generally how the market operates. We do think about market definition, but it doesn't dominate or determine or drive our analysis, and I understand that's pretty much the way

that the agencies here in the states actually do their cases. Perhaps what's unusual in the UK is how explicit we are that this is what we're doing. And that comes through in a number of ways. Our existing guidelines stress that market definition and unilateral effects analysis interact. It's not a sequential process of doing one and then the other, and that both of them often rest on very similar analysis and very similar fact base. If you look through our decisions, it's very rare that you will see a huge amount of emphasis on concentration measures. It's very unusual that we will put a huge amount of weight on them. In particular, in recent decisions, they are becoming quite explicit that high margins and high diversion ratios are pretty good evidence that a merger will lead to a big change in the pricing incentives of the merging parties and this is often captured in a measure of -- some measure of the pricing pressure, the upward pricing pressure that a merger creates. The version we usually call additive price rise. And we currently revising our guidelines to make all this even more explicit. So the draft that was put out for consultation in the summer also notes the evidential value of high margins and high diversion ratios for thinking about the change in pricing incentives of merging parties when we're looking at unilateral effects and differentiated product markets. It's also worth noting in the context of some of the debates that we've been going on earlier are existing guidelines. We already mentioned critical loss analysis as a framework for thinking about how to apply the -- the hypothetical monopolist test in the new guidelines were a bit more explicit that margins can tell you something about elasticities and you might want to use that in your critical loss. How have parties and practitioners responded to all of this? Well, there have been three main comments. The first comment is "hey, come on, guys, this is all too easy for yourselves. All you're doing is looking at the relationship between the two parties. What about all those other constraints that market definition process highlights and forces upon you? We do need to address this perception, I think. And we're trying to do that in some of the decisions. So the point, I think that we're trying to make is to stress that the unilateral effects analysis uses all of the information about all of the other constraints. There's no lack of discipline involved in looking at unilateral effects. For example, the diversion ratio is a ratio. On the top, you may have just the diversion between the merging parties. But on the bottom, you've got the whole world. So you have got the diversion to everything else that might be acting as a constraint. They don't get lost in the analysis. And also in order to implement some sort of unilateral effects analysis, you really do need to know quite a lot about the nature of competition and the intensity of competition on the market. That's where the margins and the elasticities come in. You still have to think about entry,

repositioning and buy power once you've done your initial analysis of whether there is an upward pressure on pricing, just as you do if you start with market definition and concentration measures. So we're hoping to stress that nothing gets lost in what we're doing. Again, some very recent decisions is to be more explicit that high margins and high diversion ratios not only suggest a big change in the pricing incentives of the merging parties but also suggest a big -- also suggest that the merging parties form a big part of a SNIP defined market, if not a market unto themselves. To use a phrase that one of my colleagues at the L.F.T. -- Chris Walters, whose been injecting a lot of energy into the process of getting these things into our practice -- he uses the phrase back into market definition from the unilateral effects analysis, which I think Carl mentioned earlier as well. So that's the first comment. The first comment is, guys, you're making life too easy for yourself. You're losing discipline. The second comment is, "hang on, this is all too difficult and onerous and requires far too much information." Well again, I think we do need to address this. And a way to do it, I believe, is to stress in our decisions the commonality between market definition and unilateral effects, as I just mentioned. But in particular in this case, how similar the question is. It is a really similar question, so the question for the -- the unilateral effects question is, would a hypothetical monopoly supplier of the party's products raise their prices? And the question for the market definition exercise is would a hypothetical monopoly supply of the party's products, plus a bunch of other stuff raise prices? It's a very, very similar question. There's no particular reason for thinking of either of them is more or less difficult than the other. So that's the first question. It's all too easy. The second question is it's all too difficult. But to be honest, the most common comment that we get is, "okay, you're going to do it? Please tell me how." Lots of these cases are in retail mergers, where the parties just want to know where they've got to make divestments. Most of the debate that we have with parties and their practitioners is about the details of how to do it rather than the principles. And I confess, this is all work in progress. There are quite a lot of practical questions that we're working on through our casework, but I would -- they're not closed yet. A biggie, margins and how to measure them, going to be increasingly important that we really understand how to do that. Diversion ratios and where to get them from. Can we rely on surveys and so on. What is the measure of upward pricing pressure that we should use? I said that we have been using a particular one, but there are questions what to do when you have multiproduct firms? Do you use the same sort of model? How do you do with asymmetry? Again, do you use the same model or should you use some variance? What about all of this sensitivity to the demand function.

We need to continue looking at these things. And then finally materiality, if we're going to start getting indications of some sort of upward pressure on prices, then how much is too much? I really like the approach of trying to link this pricing pressure to some sort of measure of required offsetting efficiencies following Katz-Shapiro/O'Brien-Wickelgren, and for me if the end game of the clearer focus on unilateral effects is a clearer focus on thinking about efficiencies of materiality, then I, for one, would think that's a good thing. Thank you.

>> Carl Shapiro: Thank you very much, Allison. Before I go to our next speaker, may I put you on the spot a little bit and could you just take another minute to tell us where you are in your process. I know you had a bunch of comments filed on your proposed merger guideline review. And what's the next step?

>> Dr. Alison Oldale: The next step will be to revise the draft guidelines in light of those comments and then put them out there. Hopefully -- hopefully the beginning of next year.

>> Carl Shapiro: Okay, well, good luck. And thank you. Next, MJ Moltenbrey.

>> MJ Moltenbrey: Let me start with what I think is probably -- at least on this panel and perhaps in general a relatively noncontroversial position that, yes, the unilateral effect section of the current guidelines should be revised. There may be a little more disagreement about exactly how that should be done. As many people have mentioned, and Carl mentioned in his introduction, the unilateral effects portion of the guidelines as a separate and distinct analytical exercise in merger review was introduced in the '92 revisions of the guidelines. And at the time I was a staff attorney at the Department of Justice. And I can't say that those guidelines and the introduction of those guidelines did have a significant impact on the way I and my colleagues looked at mergers and thought about competitive effects analysis when looking at a merger. Not that no unilateral effects analysis had been done prior to the guidelines, but it really did kind of institutionalize and discipline the process quite a bit. I don't have any statistics. I haven't tried to do this statistically, but if you do a kind of cursory review of recent cases brought by both the FTC and the DOJ, it's clear that unilateral effects theories of competitive harm have been increasingly important and prevalent and more and more there is a unilateral effects theory pled either on its own or in addition

to a coordinated effects theory, which, again, is something that is fairly different than from when I first started practicing antitrust law. Unless you have been in a cave -- if you're an antitrust lawyer or an economist, unless have you been in a cave for the past couple of years, you're going to be familiar with some of the work that Carl and Joe Farrell have done on trying to develop models for measuring unilateral effects in mergers. Looking at diversion ratios and margins and trying to develop an index to measure the effects of a merger and basically abandoning reliance on concentration as an indicator of likely competitive effects. I recognize that's done in their private capacity and not in their capacity as the heads of the economic teams at the two agencies. But -- and that's only one example of some of the thinking that's going on and some of the more sophisticated economic analysis that is out there and available to people to use when looking at unilateral effects, potential unilateral effects cases. Another observation I will make, though, is that while the agencies seemed to be looking at unilateral effects and people are thinking a lot about unilateral effects, it seems that the courts have not been quite as enthusiastic in terms of adopting or following or accepting the theories that had been deposited by the agencies, certainly not in some of the litigated cases. Just a couple of examples I would point to the baby foods case, the Whole Foods Wild Oats merger and Oracle Peoplesoft, examples where at least at the trial court level, the court seemed to struggle with the agency's use of a unilateral effects theory and the agency's evidence that they're relying on. And then even at the appellate court level, where the government has prevailed, for example, in the Wild Oats case -- whether you agree with the decision, the outcome of the decision or not, it's hard not to see some significant flaws in the reasoning of the court and the court's ability to take some pretty complicated economic concepts and apply them, again, dealing with a court that was not -- really very much a generalist judge and not an antitrust specialist. And so it seems to be that there's a clear need or a clear potential benefit of clarifying and expanding the merger guidelines to incorporate some of the agency's learning, to explain better what the agencies are doing. I am going to leave, I guess, for the discussion period because I don't want to take up too much time, some of this -- some of the more detailed suggestions that I might make, but I do want to make a couple of observations where I think changes might be warranted. Several people, it has come up several times today and Carl mentioned it again in his introduction, that it's hard to talk about unilateral effects analysis and not talk about market definition issues. But in the current guidelines, I think there is -- really a lot of -- as written, there's a lot of clumsiness in the way the unilateral effects portion of the guidelines talks about market definition and tries to

incorporate -- at the time they were written, I'm sure there were a lot of efforts to kind of make this seem like not such a dramatic departure from what had been going on and what had happened under the prior guidelines, and so the unilateral effects section references things like the safe harbors of the HHI numbers and references 35% market share. In a lot of cases, not all, but in a lot of cases when you actually try and apply that there's just really a logical disconnect. If you are dealing with a unilateral effects merger involving two companies that are either close as substitutes and you apply product market definition, so you start with product a and you add the next best substitute, by definition it's product b, the merging party's product, and ask whether a hypothetical monopolist could raise price. Well, if you have a unilateral effects case, the answer is, yes, they can raise price and, therefore, that is your product market. To then turn around and say and then we look at whether or not you are above the HHI thresholds or whether or not you have a 35% market share, is a bit tautological because almost by definition you have just decided you have 100% combined market share for those two products. In other circumstances, if you have -- let's take a market where you have products a, products b, and products c. And in the event of a price rise of 5% or more in product a, most customers would shift to b but a significant number would shift to product c. And as a consequence of this merger, you believe that when A can capture those increased sales that would shift to C, suddenly a price increase that would not have been profitable beforehand, will become profitable. If you actually do the merger guidelines' current product market definition exercise, you start with A, you add B, because that's the next best substitute. Most people would switch to B. You ask whether the monopolist could raise price profitability. The answer is yes. You have defined your market. C is not even in your market. Although, clearly we know that there is a competitive effect when A merges with C. So in both of those examples, it's clear there's really not a good fit between what the agencies are doing and the current guidelines suggest that you go about market definition. When this just gets confused even further when you start talking about whether or not you are within or outside the safe harbors of HHI thresholds or whether or not you have a combined share of 35%. So at a minimum, I think, one of the exercises in the revision should be to clarify some of that confusion. There are cases where you're going to have to find a unilateral effect with a merger and you are not going to define it with a complete market. One example might be that you decide that if A and B combine, they could raise price -- A could raise prices by 3% but not by 5%. And so maybe okay, maybe you don't meet the SNIP test. So you're going to start adding more products in. So maybe there are some cases where you're

going to have a properly defined product market under the existing market definition principles that doesn't just consist of the two merging companies. But that's a kind of only one of the many possibilities that might come about. So I think that's an area that clearly could benefit from greater clarity and elucidation. We can talk about that for a while, but I know others on the panel can probably talk about it in more details than I will. So I will just mention one other area that I think might benefit from clarification. Section 2.212 of the current guidelines suggests that --

>> Carl Shapiro: Get your copies out. Come on.

>> MJ Moltenbrey: If other participants -- I won't say the market, but I'm not sure that makes sense. But if other participants in the industry might reposition so that they would capture more of the lost sales of the merging companies, that you would not likely have an anti-competitive effect and that should be taken into account. But both in the merger guidelines' commentary and I would suggest, even in the ABC practice, what was given with one hand seems to be taken away with the other. The commentaries, the agencies have said that they rarely evidence that repositioning would be sufficient to overcome unilateral effect and in fact it is hard to find cases where it appears that the agency's accepted a repositioning argument. I think that is an area that, again, warrants maybe more than the very brief attention that's given to it the existing guidelines. And ought to either be revised, and either -- depending on who you ask, either the guidelines or the agency practice might need revisions. And I will stop there and save the rest for question and answer.

>> Carl Shapiro: Okay, thanks, MJ. Marius Schwartz next.

>> Marius Schwartz: Okay, thanks, Carl. You all posed 20 great questions, and then question 10 itself has 8 parts. And I'm only going to deal with one part of question 10, which is the relationship between market definition and unilateral effect and only one aspect of that, and that is what type of evidence should we use in merger review and why. Direct or structural? And the quick answer, of course, is you use both. The order shouldn't matter, as has been mentioned. And you should iterate between those two types of evidence. None of this is remarkable, of course, but I hope to flesh out the reasons for doing that and illustrate with an example from a merger challenge that was brought by the Department of Justice where I was an expert. Okay, so go back to what horizontal merger

does. It consolidates the ownership of assets used by the firms to compete in supplying their overlap of product and services, right? So a necessary condition for there to be the risk of substantial harm to consumers, or creating parties more generally, is that the requisite assets very broadly define, tangible, intangible, whatever it takes to produce, to supply this stuff, are in sufficiently scarce supply to other firms. At least over the relevant time frame. That seems like a no-brainer. That's a necessary, not sufficient condition, because there could still be efficiencies. Now, so the fundamental question is do the mergers possess some unique assets? That's the question. And relatively important unique assets. Of course, the operational challenge is how do you get to this from the kind of evidence and practice? There are two ways to start the inquiry, which starts off with different types of information. I'm going to call one bottom up, which is started by trying to identify the fundamental assets that are needed and who might have them and the other one is top down. Start with evidence about competitive outcomes, who seems to be competing with who, what are the results, and then try to understand the why, the drivers. The bottom up approach starts by trying to identify the key attributes of the competing products, the physical dimensions, the geography, and so on. And then asking which other firms have or could easily get these things. To get the assets needed to generate those attributes. It's a structural analysis corresponding to the same kind of questions that we ask when we do market definition. We decide what is a relevant product. Well, you need to know what matters. And that all seems reasonable except that in often times when you try to do the market definition formally, it's hard to pin down the exact dimensions of the product market of the geography. Because it's not always obvious if you have -- if products that differentiate in many dimensions, it's not always obvious what the relevant importance of various dimensions. So if you try to come up with a market definition, you may well get stuck right there, unable to show that there's a narrow enough market in which concentration is high enough to warrant concern. And you get knocked off of stage one before you even get to first base. So that's a problem. Now, at the same time, in such cases, you may well have suggestive direct evidence that those part firms do seem to compete pretty strong directly with each other and lesser with other parties. That is sometimes information that's called evidence of competitive effects. I would like to actually distinguish that. It's the type of information. We see that they seem to be bidding against each other a fair bit as compared to others, but that doesn't quite tell us that it will be competitive effects. You have a few more things to cross before you get there, but it's a different kind of information. Okay. Enough to suggest that

even though we may not be able to define the market with any precision, which would have tripped us up in stage one, we have to take a hard look. Another way to think about it is, we may not know why it is that Steve and I are strong competitors, but there may be good evidence that we are. At least good suggestive evidence. So that's how I think of this. Now, so it makes sense to start there, are say well are there some fundamental underlying structural factors, fundamental assets that do in fact validate that these two firms are especially close? And that other firms couldn't step into the mix. It's important to not stop with this suggestive evidence. It is important that, one, there could be a lot of data problems with win loss and these kind of measures. And there's other reasons that we could talk about later. And so it's -- I view these as very complimentary approaches. You look at the suggestive evidence, then you try to understand there's something fundamental that validates that. And that second step requires basically the kind of stuff we do when we do a market definition concentration, I think. Now, let me just illustrate all of this -- like I said, sounds pretty obvious. Let me illustrate it with a case study where I submit a declaration. This involves a merger of -- proposed merger of two amphitheaters in southern California that these are open-air venues that were mainly used to stage rock concerts in the summer. So this is the division trying to get the youth vote. And we show our hipness when we refer to Mr. Ricky Lee Jones. For those who remember that. Now when I first look at this case, there's so many dots on southern California that were potential venues, you had no idea what to do with this stuff. How could there be a possible case here? You say well, what the relevant geography? Is it Orange County or is it also Los Angeles? Not obvious. Product market. Concert venues differentiate by dimensions, by location, proximity to freeways, availability of parking, noise restrictions, size, outdoor versus indoor, general ambience. Lots of stuff. If you try to define the market for first principles, you would have been killed, right. There's just not enough information there to get a strong market presumption of a market definition and high concentration. At the same time, picking up on what John Baker says, let's see how they view each other, who do they think they're competing with, there was a document that showed of all of the times when one facility bid to attract an act, 90% of the time they lost to the other guy. Well, that's interesting. It says there's something going on. There's also documents suggesting that price competition between those two was responsible for rock groups getting a bigger percentage of the gate revenue there than in other markets. So all of this was interesting. And pushed us to try and understand the why. Look at the documents, talk to promoters, talk to industry participants and pretty soon you got some insight into this. It turns out that these venues

were very close. That mattered. 20 miles as opposed to 40 miles matters in southern California. They were comparable size. Stadiums, for example, which were 50,000, are fine for the Rolling Stones but not are not fine for Mr. Ricky Lee Jones. The open-air nature matters. So furthermore, those attributes, what you understand why it is that these firms are uniquely close competitors are not things that competitors could easily replicate. Try getting a zoning variance in southern California. All of which gave you a fair bit of confidence that you have got something. Now to supplement this and to put the market definition concentration overlay, what I actually did a robustness check. Let's suppose we include in the geography also Los Angeles, what happens? Let's suppose we include also closed-air facilities and under 5,000, what happens? It turns out concentration still remained quite high. Now if you include a stadium and you measured your shares by -- when I say concentration, I meant by revenues, how we measure it. If you use your capacity as you measure, number of seats, well yeah, it's diluted because a couple of stadiums wipe out the concentration, but that's not relevant because these are differentiated products and just counting seats is not the right method. So I give that as an example of how, you know, when we think of unilateral effects and market definition, there's an aspect to this in which is there's different kinds of information we tend to put under those buckets and I think both those are useful and they should both be used. And so let me, let me just stop there and leave the rest for q and a.

>> Carl Shapiro: Thank you so much. That's a very good example. Even a little dated, I think. But those very issues come up all the time. So thank you. Next I would like to turn to Renata Hesse.

>> Renata Hesse: So I was going to actually try to talk about Oracle without really talking about Oracle. Because I think everybody's probably sick of hearing about it, but it is something -- because I was involved with it at the division and also because I work for technology companies a lot now, this case I have given a lot of thought to. And I have tried to figure out precisely why it is that judge Walker ended up where he was, given that we thought it was pretty clear these two companies were very close competitors and that we had a lot of evidence suggesting that that was the case. And so I don't mean exactly how we got to the end result. Because there's been a lot of discussion about how in some ways that might have been a foregone conclusion. But what I really mean is what to me is problematic about the decision is this inherent tension in it that he felt between how you define markets and there's a lot in the decision you can read about how he was

struggling with this idea of how you -- of defining markets too narrowly. And the assessment of competitive effects in the context of differentiated product markets, where what you're trying to focus on is figuring out whether or not the products of the two merging firms are really next best substitutes. In a sense, whether it's a merger of a monopoly for these two products. And I think, in my view, Judge Walker ended up in a place that's not particularly helpful because it -- it defines that -- he defined a very narrow set of cases where you could find a problem. But what does that really have to do with the guidelines? So I think one of the things you can give him credit for -- and obviously as a losing party, I'm willing to give him credit for very few things. He really was struggling for guidance. He was looking for help with unilateral effects. You could see if he read the opinion, that he read all kinds of economic articles. The economists in the room might think he didn't quite get them right, but he did look for information. And I don't think the guidelines gave him very much help, because they really don't say very much about how to look at market definition and unilateral effects in the context of differentiated product markets and they really don't address the unique issues associated with this kind of -- these two pieces that you're looking at, market definition and competitive effects. And I think everybody so far who's spoken has basically agreed that in the context of at least differentiated products, the analyses really aren't very different. But the guidelines don't really say very much about that. And so I think it would be helpful to have more explanation of how it really works. And I guess in my view you really -- there are kind of two things you can do. And I guess there's a third thing, which I will start with, which is basically saying you don't need you to define markets when you're looking at unilateral effects in differentiated product markets. I think given that the Supreme Court has basically said you have to define markets, that's pretty much off the table. So despite the fact that that might be economically the right thing to do, I'm not sure you can just mandate through guidelines that you don't have to define markets. I think people are going to continue until case law changes to define to have to define markets. So once you're in the world of defining markets, I think you've got two choices. And one is to really understand and make more transparent that in the context of differentiated product mergers and unilateral -- I always get tongue-tied around this -- unilateral effects cases involving differentiated products, that the market definition of analysis is going to tend to lead to much smaller and narrow markets and in many, many cases may in fact lead to just two firm markets. And that you shouldn't be afraid of that. That it's really -- it's okay. I mean, you can look at -- I think it's in the Staples decision where you sort of get the feeling that Judge Hogan

is like, " I can't define this narrowly as a market. I will call it a submarket. And that'll be okay." It's a market. I mean, if you want to think about that as a market, in terms of competitive effects it's a market. We should let the world know that's all right, judges, you can do that. The other option, I think, is to continue to do what I'll call sort of traditional market definition, which will tell you I think something about market dynamics but it won't really give you very much insight and it certainly won't tell you enough about what's going on so that you can get into the world where you're talking about presumptions. And if you go that route, I think there, you know, there has to be some explicit statement, that that's also okay. By that I mean, I think what I'm really talking about is a sort of a recalibration of how we think about market definition in this context. So if you define markets narrowly, it may not be appropriate to label a firm dominant, as Judge Walker said in Oracle. In a traditionally defined market, the firm may have very low market shares. In fact, that was what Judge Walker thought was the case in Oracle. Conversely, if you continue to define markets more broadly but then in terms of thinking about competitive effects focus more uniquely on the competitive interaction between the two firms, it may be similarly inappropriate to say to the Plaintiff, in many cases the agency, that you failed to meet a presumption and you don't have a prima facie case because you don't have a structural case, and the concentration of the market is not concentrated and, therefore, you can't go forward. And I think there just has to be some acknowledgment that you -- these two different ways of -- two similar but different ways of thinking about market definition in the context of unilateral effects cases are different than what you're going to do in a case -- in a coordinated effects case, for example, but they really are okay. They may seem a little bizarre at the beginning but they're actually from an economic perspective, correct? And that courts and practitioners shouldn't shy away from them. So there's a lot more to say about these things, but I will pass the mic back to Carl.

>> Carl Shapiro: Thank you, Renata. We are going to follow up on that. I promise you that. But not before we hear from our last panelist, Steve Salop.

>> Steven Salop: Thank you. I just want to say as I begin this represents joint work that I'm doing with my colleague Serge Moresi at CRA. What I want to focus on today is really, really two issues. And a third if I've got a little -- if I've got time. The first is downgrading the importance of market shares and concentration of unilateral effects cases. I don't think there's anything wrong with

defining a market in unilateral effects cases, though Mark Popofsky told us this morning that both he and Judge Pozner think that Section 7 of the Clayton act don't actually require that. But rather whether or not we define a market, the issue is the importance that we're going to place on market share and concentration. Second thing I want to talk about is alternative presumptions, alternative evidence that we can use in unilateral effects cases if we do downgrade the role of market shares in concentration. And then third, if there's time, I want to talk a little bit about deterrents and the role of deterrents in the merger guidelines because it's something I found that was left out of the questions and something that's really very important. In the previous panel, with respect to market definition, they talked about, "gee, there's really consensus, a lot of consensus about the SNIP test," and I don't think that's true. I think that the -- there's not much consensus -- well, there may be a lot of consensus but there's not consensus on the SNIP test, which implies unanimity. I think there are real problems with the hypothetical monopolist SNIP test in the guidelines, and I think that it requires a lot of renovation that also indicates why we should be downgrading the role of market shares. The SNIP test is really very elegant methodology, but it's both complicated and very imperfect. And as a result it often leads to very ambiguous results. It's noisy evidence at best. You often can't tell what market is most -- most appropriate. And I think the -- I think the revised guidelines should explicitly concede this point. And, you know, it was very made nicely in a paper by Katherine Shalansky. And it implies that the role of concentration of market shares should be downgraded. Now, we already know from Baker Hughes and other cases that the Philadelphia National Bank presumption has been weakened over the last 40 years, and I think a key reason for that are the flaws in market -- in market share and concentration as indicating competitive effects. But, of course, it should be recognized, I would say sort of it's interesting the ABA's comments to the question ignored the fact that if you weakened the presumption, the Philadelphia National Bank presumption, which they wanted to do, that implies that you would also weaken the safe harbor production. And that door swings both ways. If market shares and concentrations are an unreliable measure of the likelihood of anti-competitive harm so that they can't be used to create an anti-competitive presumption, well then they're flawed with respect to the safe harbor presumption as well. And I was quite taken by the fact on the previous panel that Joe Simons, who is usually associated with the conservative wing, is someone who thinks that safe harbor also should be downgraded. With respect to market definition, I think there are several areas in which the implementation of the snip test is very problematical. The first is the smallest market principle,

which I think should be deleted. Most importantly it's a matter of policy. As many other people have said. The fact there may not be a problem in the narrowest market does not mean that there's not a competitive problem in a broader market. So you simply can't stop with the -- with the smallest market. Secondly, you know, it can lead to a very distorted view of competition by using this next-best substitute algorithm. I think that the current guidelines fall for the cellophane fallacy, despite the fact they recognize its existence. The use of the prevailing price, unless there's evidence strongly suggested a passive coordination, I know of virtually no cases in which the agencies have used a lower case. But tacit coordination is pretty common, and one should be very cognizant of the potential for falling for the cellophane fallacy. And in our comments we suggest a way around it. Third, margins may be high not because of tacit coordination but because of differentiated products, and when products are differentiated we think we should use the Katz-Shapiro/O'Brien-Wickelgren methodology that uses margins as an indicator of elasticities, like the OFT is doing in their merger guidelines. Fourth, the merger -- the SNIP test is very complicated when there are multiproduct firms. Either substitutes or complements. Very complicated when they're dynamic effects and one cannot count on the simple-minded SNIP test to give a reliable answer and to put multiproduct firms and dynamic competition into account in the SNIP test. You essentially have to do a simulation model that simply eliminates efficiencies. Very complicated analysis. So the point I want to make here is that these are all reasons why the market definition process isn't necessarily complex and perfect and error prone. Sometimes it's virtually intractable. And while we may want to define a market, because market definition is very useful for getting an understanding of who the close substitutes are, it says that we should be downgrading the role of market shares and concentration. You don't want to put too much weight -- you don't want to put too much weight on that. So what should we do in unilateral effects? Well, I start from the idea that there's lots of evidence of -- that's relevant for unilateral effects besides market shares. There's direct evidence from natural experiments, such as Staples, and kind of evidence in Staples and Whole Foods. Sometimes there's direction of pricing interaction. Sometimes the firms claim pricing interaction as did documents in both Whole Foods and Staples. There's also circumstantial evidence available from the closest of substitution from consumer switching evidence, from entry studies. A whole variety of evidence that can be used to throw light on closeness of substitutes. I want to focus here on one particular type of circumstantial evidence, these upward price pressure indices of a sort that Allison was talking about, and that we talked about in detail in our comments,

price pressure index, ppis, and they could be gross upper price pressure index or net ones. You know, they -- upward price pressure and unilateral effects depends on the closeness of substitution, which I think you can proxy by the diversion ratio in the margin as well as other factors. But that particular measure that looks at the diversion ratio in the margin is very useful. It's generally pretty simple to calculate, and it could be used as a presumption. It could be used to replace the HHI that is the product of the market shares or the combined market share. There was a lot of anxiety expressed in the ABA's comments about this upper price pressure index. And it's funny for two reasons. One, I started consulting around 1982, and clients were willing to pay me a lot of great money to calculate HHIs in 1982. Lawyers were very uptight about the HHIs. But now, you know, that's considered old hat. Anybody can do an HHI.

>> Carl Shapiro: Those were the days.

>> Steven Salop: Those were the days, yeah. But same thing with respect to the upward price pressure index. In fact, it's not alien at all. I don't have the section. Maybe Carl can find it. Talk about the next best substitute is defined by the value of diversion. Well, I think the best measure of the value of the diversion is the diversion ratio times the margin. That would be the proper analytic measure. And so really, in order to carry out the SNIP test and merger guidelines, you already need to know this upward price pressure index. It's also not alien because diversion ratios are basically the ratio of the own elasticity the cross elasticity, rather, to the own elasticity. And those elasticities have been around in merger analysis since the Dupont and Brown shoe case. Indeed, this upward price pressure index, the gross price pressure index that Serge and I focused on in our comments is a very close cousin to the market definition test in Katz-Shapiro/O'Brien-Wickelgren. So we think it's really a very useful bit of circumstantial evidence, it's not direct evidence. It's circumstantial evidence, but it's better circumstantial evidence than looking at than looking at market shares. And it can be used to form the presumption, either the safe harbor presumption or the anti-competitive effects presumption. In fact, it is -- it's very interesting because this index that we use, the diversion ratio times the -- times the margin, in fact, it is the market definition test if the hypothetical SNIP is a SNIP for just a single product. If it's a uniform SNIP, then it's a little more complicated. It's the diversion ratio times the margin divided by one minus the diversion ratio. So at least in the simple form where everything's symmetric. So it is

very closely related, and it's a good way to think about the presumption. I mean, suppose you find that by raising the price -- the proposed market just to the product of the merging firms and you find that an increase in the price of one of the products would be profitable, so that the -- those two products would define a market. That seems like a pretty defensible presumption of anti-competitive harm. Not any rebuttable presumption, because this is only using part of the information but is rebuttable presumption as good as the HHI, as good as the combined market share, it really seems much better. And then you can go with that fairly simple presumption, then you can move on from there and gather the additional evidence that you need in order to evaluate the likelihood of anti-competitive effect. One last -- do I have one more minute to talk about deterrence?

>> Carl Shapiro: One minute.

>> Steven Salop: One minute. You know, the guidelines are really all about deterrents. They're not just about analyzing a single merger. The goal of merger enforcement goes beyond analysis in particular mergers that happen to come before you. They also have to take into account deterrents. We know there are false positives and false negatives in merger analysis as in anything else, but deterrents goes beyond the false positives and the false negatives for the deals you have but also the effect on the deals that are being proposed. And false negatives include insufficient remedies. So I think it's important for inseting these presumptions and in working through the guidelines that you figure out the impact on deterrents. I mean, section seven talks about incipency. In 1960, that was about a trend of concentration but in the world of decision theory that we're in now, what incipency must mean is a greater concern about false negatives and under deterrents than about false positives and over deterrents. And so I hope that the agencies in thinking through the guidelines, and in particular in setting -- in deciding what cases that you're willing to go to court over, that you take the deterrents effects into account. You know, there's been a lot of talk in the last few years about won/loss records. One, economics makes it very clear there's selection buy us. That won/loss records tell you virtually nothing about -- about the litigation because -- because of settlement rates. And it looks -- it seems to me in looking at sort of what people have been writing about the last few years, that the agencies are paying too close attention to won/loss rates and possibly are being too risk adverse with respect to the cases they bring. So, thank you.

>> Carl Shapiro: Okay, thank you, Steve. Thank you, all, for your comments. Let me -- there's a lot more to talk about and not that much time. Let me frame at least my first set of questions around the relevant section in the guidelines that deals with less than new competition through unilateral effects and in particular differentiated products. Which, I have to say my experience at least the last eight months being back at DOJ, that's a lot of the cases. I can't give you a count, but it's a lot of the cases. Particularly intermediate goods where we see suppliers are bidding for patronage of their downstream business customers. So there's about two pages on this in the guidelines, page and a half. And I want to read -- bear with me -- and read after describing unilateral effects generally what they are, and here's, I think, the main guidance. It's not a push on where we would go beyond that. It says, "substantial unilateral price elevation in the market for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard guard the products of the merging firms as their first and second choices." So our staff is often looking at that question, first and second choices, that's very closely related to diversion ratios. But notice that it's framed in terms of shares of sales in the market. Okay. Now I want to set that in contrast, now you can imagine some modifications there that wouldn't necessarily refer to the market when doing that part of the test, okay. And I want to then bring in your example, Marius, where you said you don't know what the market is, you don't know what the boundaries are, you could look at a win/loss record. You could look at bidding, you could look at some other measures at how often the two firms bump against each other. And so if you do that, and then -- but then Bobby Willig warned us this morning. He says, "well, careful, if you just look at those win/loss records, you might be missing the fact that there's other firms, let's say other venues in your case, that are almost as good substitutes to the two merging venues and if you ignore them and just look at the direct competition, you get a false positive." So maybe, Marius, starting with you, could we do modest revisions here, for example, that would reflect your iterative process, not assume you have figured out the market yet, to give guidance about how this actual investigative process would work?

>> Marius Schwartz: Can you make the question a little more precise?

>> Carl Shapiro: What do you do next? Okay, after you look and you see they're often bidding against each other. What do you do next to make sure that you've paid enough attention to surrounding competition, even if you haven't defined the market?

>> Marius Schwartz: Yeah, I mean -- I'll tell you what we did, and I think it's a good general lesson, is you try to understand why it is that you're seeing this seemingly close competition. So you talk to people, you read documents, decision documents, and try to pin down what are those fundamental assets that might be driving this, and it's important -- I agree with Bobby there, that if there's no fundamental assets or anything that is explaining this pattern, you have to worry a little bit.

>> Carl Shapiro: You have got your obvious locations and venue, physical properties in your case. That's often the case. We have some pretty well defined product attributes.

>> Marius Schwartz: You have that, but if you don't know how important those are, somebody says "oh, consumers at the drop of the house could drive 30 miles." That blows me out of the water, right? So you need to try to get information, how important these things are. And with that information, you can come back and try to craft some -- maybe a range of candidate markets, all of which would show you if you have done right, there's pretty high concentration. I mean, back to the point that if there is -- if your confident in natural effect, there ought to be market there.

>> Carl Shapiro: I'm trying to get confident I guess is the problem. As, I think, MJ said, "well, if you figure out the unilateral effects, you can back out the market." But how do we figure that out? Okay, if we're not going to do it based on market shares, does that mean we're doing the full competitive effect analysis? What if we look at the bidding and maybe margins, is that good enough, or do I back out the margin from that or is that -- is that too easy? Others?

>> Steven Salop: This is a drafting issue, Carl. I mean, it seems to me that the share of the sales accounted for you should just interpret as the diversion ratio. The importance of the other substance, as Alison pointed out, they're all on the denominator. There are already taken into account. You need to take the margin into account. It seems to me that Bobby -- you know,

Bobby's example came from some testimony that Bobby gave at the antitrust modernization commission that --

>> Carl Shapiro: Speak into the mic, will you?

>> Steven Salop: I'm sorry, that said if you've got two gas stations on a traffic circle that are perfect substitutes and then you've got some other more distant gas stations that are little more distant substitutes, so I suppose the relevant market would be all of the gas stations, not just the ones on the circle but the merger involves the gas stations on the circle. So if you raise the price at one of the stations on the circle, all of the sales will be diverted to the other station, and so it would seem like there's a unilateral problem but in fact if they really try to raise the price, people would go to the other stations. And the problems, the conclusion is problematical because his example doesn't hold together. If the two stations on the circle were perfect substitutes, like you assumed, and if they weren't colluding -- if they weren't colluding, you definitely wouldn't allow the merger if they were colluding, but if they weren't colluding and they're perfect substitutes, they'd compete the price down to cost. The margin would be zero so there would be no unilateral effects concerned. So the example just doesn't work. If you fix the example so they're differentiated products, then this upper price pressure index works just fine. If you raise the price of one of the stations, some people would go to the other station and they would be protected. But the people that didn't go to the other station, they would get harmed from the merger. And so you need to deal with unilateral effect about -- that could occur from raising only than a single price. It seems to me that the people that are worried about the more distance substitutes -- I mean, clearly they need to come into account to a full analysis, but the people that want to just say that trumps, they are ignoring the fact that a unilateral effect can involve a subset of the product's prices being raised, not a uniform price increase. And that's the flaw in their reasoning.

>> Carl Shapiro: So let me pick up on that materiality. And, Alison, I know you mentioned this, but you don't have to respond if you don't feel like it. The one notion of materiality is there is going to be a significant price increase. How do we know about that? Another would be, well, it's maybe not just a product or two, does that really count? I mean, if there's two guys that sell two different brands of breakfast cereal but their whole different set of cereals that are offered and we

think the price of one or both of those brands will go up a bit but there's just two of many, is that enough under -- you know, should that be enough? What might we say about that materiality, the magnitude or scope of the price increase? My sense is some judges might say "look, that's a submarket or that's a narrow part of a market. That's not enough." Reactions? Alison?

>> Dr. Alison Oldale: I have to say, I don't have an answer at all. I have got more questions on materiality. I'm really not sure how to think about it. I think probably the best characterization is the way that we've tended to think about it in the UK is in terms of the rise of the price increase rather than the volume of products that are affected in relation to the size of the market. But it's not particularly either of those are right. Should we care more about bigger markets? Is there some notion of materiality being related to the size of rising? I think it's an important and underexplored area.

>> Carl Shapiro: Go ahead, briefly.

>> Steven Salop: If you take this gas station example, if the only people who would be hurt would be the people that stayed and you only felt a small portion of the consumers would stay with the first gas station, but their efficiencies that apply to, you know, large efficiencies that apply to all of the customers, then you might say it's immaterial. That's because, okay, if 10% of the customers that buy the two products are going to be harmed, but the other 90% are going to benefit, then you might say that's not material. So I'd say it's always relative to the efficiency benefits that you expect in the market.

>> Carl Shapiro: Renata, this is sort of directed at you. But again, I'm not trying to put anybody on the spot too much. You said we should say it's okay to have narrow markets. But there's certainly a sense that if the market seems narrower than courts are likely to be comfortable with, then it will at least raise eyebrows, and I'm sure you experienced that when you were at DOJ. So, and you mentioned Oracle, and since many of us know that, maybe it's good for illustrative purposes. If you said -- I mean, strictly speaking, you'd say "okay, if there's a unilateral effect between Oracle and People Soft, then they could be a market, the two of them, without even including S.A.P." That would be somehow the logical conclusion, at least if they were next closest substitutes, which is

kind of an artifact anyhow. So it seems would you say that's -- and I should add, the commentary gives a lot of language about how these markets that we get could be -- could exclude a lot of products that are substitutes for some customers. It's the same idea. Should we pour in language from the commentary? If we're going to go that route, of course, if we are convinced that's right as a matter of analysis, we would like to convince -- make the arguments for the courts either in the guidelines or case by case. Are you just telling us to be brave, or what?

>> Renata Hesse: Maybe so. I mean, I think obviously, the challenges that you have these cases sitting out there and so you now have to do something about them. And so I think one of the probably in my view, one of the biggest priorities that you all should have is actually finding a good differentiated products case where you can try to fix what's wrong in Oracle. And I -- and I -- now, that's not an easy thing to do. So -- but I think the guidelines at the very least could give --

>> Carl Shapiro: Are some of your clients going to offer us a good opportunity?

>> Renata Hesse: I'm hoping not. Could -- could offer some more explanation for why -- how this really works and why that's not -- why the narrow market isn't something that you should be afraid of. For me personally, I think actually the other route is preferable because I think it's a more true reflection of what the overall market dynamic is.

>> Carl Shapiro: What do you mean by that?

>> Renata Hesse : Meaning, that you look at the market and you don't define it as just Oracle and People Soft. You define it as Oracle, People Soft and S.A.P. And the shares of Oracle and People Soft are lower. They don't meet the structural market concentration, Philadelphia National Bank presumptions, but you could say, "okay, this is what the market looks like but if you look at the competitive interaction between these two parties, we've identified a significant number of customers who account for a significant portion of the sales on the market who will be harmed." And we can show that to you in a variety of different ways, merger simulation, competitor testimony, customer testimony, documents from the parties, et cetera.

>> Carl Shapiro: And what about the other way to go, I imagine, would be to say even if the SNIP markets are fairly narrow and aligned with unilateral effects as you've said, we could plead broader markets either by abandoning the smallest market example, using the biggest SNIP, whatever. And then we might have relatively small market shares and argue, "well, these market shares understate the shares because these two firms are selling products that are very close." And we see them against each other a lot, then we'd be up against arguments, the markets shares are so small you guys are wrong, and then it's sort of a safe harbor. Were you going to pick up on that?

>> Renata Hesse: Yes.

>> Carl Shapiro: I thought you were.

>> MJ Moltenbrey: So, I think -- it's difficult I guess to think about this partly as a purist in the way a economist would think about it and the way a lawyer would think about it, which are not necessarily identical, especially if you're not a lawyer who was raised as an antitrust lawyer. I think all of us, all of the lawyers in this room who do this every day, are relatively comfortable with economic models and looking at econometrics as a way to define markets and to say it doesn't matter that in an industry where the firms identify one another as -- maybe identify five or six firms as their big competitors, look at them, respond to them, nevertheless, there is a market that consists of only two of those firms, and in fact, you know, when we think about it accurately when we say there are probably multiple markets within that industry, all of which are relevant for antitrust purposes, and all of which could be appropriate. But as lawyers when we think about how we're going to present a case, when you think about case law, the precedents you're going to be looking at and the fact you may well be in front of a judge who maybe does two or three difficult antitrust cases in their entire career, that's not really a very attractive way to think about markets. The challenge, I think, is going to be in the guidelines is to find a way to explain why this localized competition is what you're going to be focused on, but not in a way that makes it seem as though everything else that's happening out there is irrelevant. If you sit there and say, a merger between -- and I'm not suggesting agreement or disagreement with any of these particular cases, but if you look at the Whole Foods Wild Oats case, for example, and you say competition between Whole Foods and Wild Oats is very important and this merger is going to eliminate this localized

competition and prices are going to go up, it doesn't follow from that, that the other supermarkets in the relevant geographies are irrelevant. It doesn't mean that the importance of another supermarket is basically no different than the importance of the dry cleaner down the road. Obviously, that's not how the agencies are thinking about it. So I think the challenge is to find a way to reconcile those two things. Some of it may be about language. When I started at the antitrust division back in the mid-80s, to date myself, it was a time period when if you actually used the word submarket when talking about things, you were immediately chastised and ridiculed and kind of sent back to your office to write 1,000 times, there is no such thing as a submarket. And that comes out of the misuse of the concept of submarkets in the courts and in some older cases. But I'm not sure that that isn't a useful -- possibly a useful way to talk to a non-antitrust specialist about why we care about a merger between two firms, even though there are other competitors in a market. Maybe there are other ways, if people are too afraid of reintroducing some of the abuses that you have from submarkets and sort of talking about localized competition or something. But to me, that's really an expositional problem. It's not an analytical problem. But it is an important part of what the guidelines do, is to help courts understand exactly what it is and frankly lawyers and practitioners who may not be as facile with some of the economic concepts to have this make sense to them.

>> Carl Shapiro: Let me --

>> Steven Salop: I think that what M.J.'s saying, that's really very wise, is that Philadelphia National Bank and submarkets were crutches and they're crutches that have turned out now, you know, 40 years later, to get in the way of getting the right result. And so if you go back and abandon Philadelphia National Bank and just take competitive effects approach, the first principles approach and come up with credible evidence that there's harm irrespective of the presumptions and then bring in the presumptions in the secondary way, we win even if there are no presumptions but by the way, there ought to be a presumption, maybe not based on market share. Maybe based on a price index, then that's the way to do it.

>> Carl Shapiro: So let me pick up on that with that last question and we will go just a few more minutes. So we heard earlier today from the first panel -- the first two panels actually this morning this presumption isn't so strong anyhow. And agencies need to tell a convincing story of effect to

convince a judge that customers will be harmed. That's the way Rich Parker put it, for example. So -- in unilateral effects cases, the guidelines don't really get into what categories of evidence are convincing or probative or what you look to. There are a bunch of ones I can list. And I just want to very quickly, have people say do you think the guidelines should get into talking about some of these categories of evidence or is that too much of detail, for example? So there's win/loss reports, bidding episodes, other head-to-head competition, one can look at margins, you can look at shares of some collection of products, customer surveys, company documents, merger simulation at the high end of a more sophisticated, hard to understand maybe. Should these -- what about listing some of these and how we look at them and what role they play, is that -- would that be helpful or too much detail? Let's go down, sort of very quickly, each person.

>> Marius Schwartz: I think without being textonomic, and saying "yeah, we take them seriously, especially because they give a window to how the participants view the competition." That would be helpful. That's certainly how I approach things. So why not list it?

>> Steven Salop: I think some categories would be useful. In fact, there are categorization in the market definition section. There's a categorization of types of evidence. I think you certainly should have on that list natural experiments. I mean, that's really key.

>> Carl Shapiro: MJ? Just going down.

>> MJ Moltenbrey: Yeah, I agree.

>> Renata Hesse: I'm against listing actually, in part because I think there are some markets in some industries where some of these tools don't work very well, and so if you list them out, people are going to feel like -- "oh, my God, what if I can't do a merger simulation or I don't have win/loss." From the outside, people look at these list and they think "okay, I can check off these boxes." And the other reason is that I actually think that it's always some combination of these things. And they are informative, and I guess you can list them in a way and say these kinds of tools can be informative.

>> Carl Shapiro: So I have to push -- if we said, and I think this is the way it's done in other parts of the government, here are the types of things we look at. Each case is different, you would typically, you might have none of these or some of them, it all depends, these are just instructive, would you still be pretty uneasy with that, Renata?

>> Renata Hesse: I think what you're going to end up doing is driving people towards specific kinds of evidence.

>> Carl Shapiro: And that's bad?

>> Renata Hesse: Yes, I mean because it could -- yes.

>> Carl Shapiro: Alison, you want to weigh in on this or not?

>> Dr. Alison Oldale: A couple things. I think there's a possibility between -- I think there's a possibility of difference between listing types of evidence and types of tools. So evidence may be a bit more doable than tools. I have the impression our tools are evolving all the time as we get better at what we do and they may not last 20 years or however long it is between revisions of guidelines in quite the same way. I have to say, I mean, our guidelines do contain quite a lot of lists but I've heard quite a lot of arguments today that maybe your guidelines are -- the guidelines ought to focus on the more durable bits and some of the lists should be perhaps in commentary, which I'm going to take away and think about.

>> Carl Shapiro: Your draft is quite a bit lot longer than our guidelines, for example.

>> Dr. Alison Oldale: Yeah, yeah. It is much longer.

>> Carl Shapiro: For better or worse. Okay, I know I'm imposing on you a little bit. We are slightly past time. But let me give each panelist up to a minute, if they want, to leave us with a last pearl of wisdom.

>> Marius Schwartz: I will take less than a minute. I just suggest to the crowd it may be a good idea if the agencies released a draft of the proposed guidelines so we can look at the actual language and maybe have a second round. At the risk of creating more work.

>> Steven Salop: I just think you should put a page limit on the guidelines.

>> MJ Moltenbrey: I think you should do everything you can to avoid putting any Greek letters into the guidelines. Other than that --

>> Renata Hesse: So as my prior comment indicated, I think I'm in favor of more general but explanatory information, use of hypotheticals, maybe along the lines of the merger commentary but not a lot of real detailed, specific information.

>> Dr. Alison Oldale: And I just think you have a challenge, so there seems to be quite a common view about what we actually do and what we ought to be doing for unilateral effects but also a very common view that trying to express this in the existing framework for the way we do market definition is quite difficult.

>> Carl Shapiro: Thank you. Join me in thanking the panel. So we're going to adjourn until Tuesday, when we're in New York.