THE BROOKINGS INSTITUTION

WEBINAR

NON-DIGITAL MARKET CONCENTRATION:
DO WE NEED NEW APPROACHES TO ANTITRUST POLICY?

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Keynote and Q&A:

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Panel Discussion:

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Panelists:

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P R O C E E D I N G S

MR. PATNAIK: Hello, everyone. And welcome to this event of the Center on Regulation and Markets at Brookings. I'm the director of the center and I'm very excited to see this event here today on antitrust and nondigital markets. We have a wonderful group of real high-level experts that will explore this topic in depth in the next one and a half hours.

This is part of a workstream at our center that is focused on consumer protection. Without further ado, I will hand it over to the vice president of the Economics Studies program at Brookings, Dr. Stephanie Aaronson. Stephanie, over to you.

MS. AARONSON: Thank you, Sanjay. It's really great to be here. Good afternoon, everyone. And welcome virtually to Brookings. As Sanjay said, I'm Stephanie Aaronson and I'm the vice president and director of the Economic Studies program here at Brookings. And I'm very pleased that you chose to join us for this important event.

We're here today to discuss antitrust regulations in nondigital markets. And we're honored to have several high-level experts with us today who are particularly well fit to provide their insights on the topic. For our keynote address we warmly welcome Timothy Wu, special assistant to the president for technology and competition policy in the White House National Economic Council.

As our panelist we're happy to host Bill Baer, visiting fellow in the Brookings's Governance Studies program, former director of the Bureau of Competition in the Federal Trade Commission and former assistant attorney general of the Antitrust Division in the U.S. Department of Justice.

We also have with us Edith Ramirez, partner at Hogan Lovells and former chair of the U.S. General Trade Commission. Howard Shelanski, professor of law at Georgetown University; partner at Davis, Polk & Wardwell, LLP and former administrator of the Office of Information and Regulatory Affairs. And our moderator will Nancy L. Rose the Charles P. Kindleberger professor of applied economics at the Massachusetts Institute of Technology.

Antitrust is one of the traditional fields of regulatory economics and arguably a key area of responsibility for regulators to ensure efficient and competitive markets. Whenever markets become

more concentrated, and high concentration reflects a lack of competition, outcomes may include higher prices and less choice for consumers as well as possible supply chain bottlenecks that impede the availability of critical products. This not only reduces the economic benefits of markets for consumers but also reduces welfare for the economy as a whole.

While digital markets have received outside attention in recent years, market concentration in more traditional industries such as agricultural production, baby formula and healthcare have come under increasing criticism. Many of these industries provide critical goods and services to large parts of the population. This elevates the need to revisit current antitrust policy in nondigital markets and explore new regulatory approaches and ideas.

I very much look forward to the more inspired speakers in the ensuing discussion. I'm not going to turn the proceedings over to our keynote speaker, Tim Wu, from the White House National Economic Council.

MR. WU: Stephanie, thank you so much and hi, everybody. I really appreciate this invitation up to talk on this topic is wonderful and thanks to Brookings Institute. And thanks to all of you who have invited me. It feels like I'm having a reunion with old friends, Howard, Bill, Nancy, Edith and others.

So I wanted to spend some time. We're going to have questions later. But as I said, I think this is a great topic because tech markets get all the attention. I think for a number of reasons. Companies are very well-known sort of like celebrity companies. Also, you know, they're in people's daily lives. I think, you know, I don't know what firms we interacted with the most in our day to day, but most of us use one of the big tech firms every single day.

But the fact is that non-tech markets matter very much and indeed are more of the lines -- constitute the lion's share of the economy depending on how you count at least over 80 percent. I sometimes think of myself or joke that I came to the White House thinking I was going to spend all of my time on social media markets or big data search. But in fact, I've spent enormous amounts of time on very old school industries like ocean shipping, trains and baby food.

And in that context, I think that we are in some ways once again facing in this country age

old challenges that we have never fully solved in certain kinds of markets. And I want to in some ways use this talk as an invitation to help us think about the challenges that we face, that we see. You know, it's true that while government has many talented people, many of the best minds of our country are outside of government. I think one of our great strengths as a country is the ability to draw on the expertise and people in thinking about these kinds of issues.

So what I thought I'd do is I'd talk about three of the tough issues that have been presenting themselves. Some of the stuff we're doing about them, how the Competition Council centered in the White House addresses and gives us an advantage point to think about these problems and then lead into questions.

So let me talk about the three different kinds of problems that we've seen repeated that are definitely non-tech problems. The first is what I would term the problem of essential industries. It has a lot of other names over history, but we often face challenges when we have industries that are relied upon by enormous numbers of other businesses that are in some sense bedrocks or foundations for other economic activity.

And then in that context have a lack of competition maybe a full monopolization and especially in recent times poor performance, higher prices. You know, what do we do about this challenge? It is a real challenge. I'll give you a specific example that I've spent quite a lot of time on, which are our railroads and the world's ocean carriers.

The ocean carriers obviously, you don't need to even carefully follow the news to see there's been enormous delays and extraordinary price increases up to 1,000 percent. Some of those have come down where I could say maybe this is where we pass legislation. But, you know, enormous bad service at very high prices and very high profit. I don't know if anybody knows this but in 2021, the ocean carriers made a combined -- the major ones, $190 billion in profit. Which going back to the theme of this talk is more than many of the tech co.'s combined. Maybe not all of them.

So that is a problem for a number of reasons and let me add railroads to this picture too. As many of you may know, railroads are having the worst year ever for service performance of the modern era as measured by many metrics. One thing that may have contributed to that is the fact that

they fired over 40,000 workers leading into the pandemic and also mothballed many engines. But they, you know, essentially shutdown and disposed of many of their workers and are now, you know, not a day goes by that we don't complaints about service quality. And yeah, at the same time reported some of the most profitable quarters in the history of the industry for certain companies.

So the thing about these dilemmas is we see a very obvious spillover or, you know, more technically externality effects for the whole economy. There's a lot of industries that rely on either shipping or rail. Just to mention a few our agriculture. Farmers, fertilizer, chemicals, smaller importers, all kinds of industries. Other industries are dependent upon them. And so, they are unable to function as efficiently when, for example, they can't predict if the railroad is going to show up or when the pricing or the contract that they have for pricing on shipping is just violated and the price is suddenly 10 times, or they can't get shipping at all.

So they get hurt and ultimately consumers get hurt as well by the lack of availability and higher prices. So here's the dilemma we face. What do you do with an industry that makes more profit by providing worse service? And adding to that one for whom bears entry are in these very high. And where the prospects for market entry seem limited. Maybe there's a startup railroad that I haven't noticed yet. But we haven't noticed an enormous number of, you know, newcomers to rail who are willing to lay entire new tracks and try and go for it yet even though the industry has proved more profitable.

So in some ways, what we're doing here is reencountering a problem that we faced throughout American and world history. It's gone by various names. You know, (inaudible) is the common carriage or the public calling challenge. Sometimes it can be called natural monopoly problems, regulated industry. I don't know. And, you know, there is reason to think we've seen this before but that doesn't mean that history provides any answers.

You know, if you look at the last, I guess, 100 years of history. We've experimented with various forms of solving this. One is to nationalize the industry. And other is to regulate as a natural monopolist, as a full-on regulation natural monopolist. And in the last 40 years, we've been experimenting in the opposite direction. Not entirely laissez faire, but more of a deregulatory measure. Yet now, we are coming back to the same problems that the laws were passed for in the first place.

So that doesn't mean we're doing -- the fact I say it's a challenge doesn't mean we're not acting. The President has done a lot of attention to ocean shipping in particular and obviously rail with the potential work shortage. And in the State of the Union, you know, called out some of the challenges that we're facing with ocean shipping. Called out Congress to pass a new law that Congress passed, and we mentioned to pass the ocean shipping reform act which strengthens. In fact, moves back towards, not all the way back, but back towards duties to deal and particularly it does a lot of work on fees and price transferences, that's another problem.

But, you know, I think the -- as indicated by what we've done. We think we are going to have to think very hard. And we're going to have to introduce some of the duties if we're going to have, for example, the shipping act has duties of nondiscrimination. If we're going to have the businesses on top flourish. And that's very important to all of us. But this is an area where we face repeated challenges in a non-tech sector.

All right. The second kind and in some ways related are what we term the challenges of middle man power. So we have an increasing number of industries. And once you start looking for it, you see it more. Where sometimes you have a fairly competitive producing sector. Retail can vary. Sometimes, can be relatively competitive. But somewhere in the middle is where the power lies. You know, maybe it's mixed monopoly. I'm not quite sure. But there's often been aggregation. I'm thinking about the alcohol industries and distribution. I'm thinking obviously in meat processing and processing itself.

And, you know, these pose different challenges that I think the sort of more traditional idea of just thinking about the monopoly producer that doesn't help us. I won't say we've never faced this problem. When you think about it for a minute, Standard Oil was a refining monopoly. And so, once again it is a problem in some sense we're facing again.

Meat processing is good case study for this, and I'll try to speed up a little bit. It's a concentrated industry, just a few major players. There's been an enormous number of mergers over the last 20 years or so. So that's four meat packing companies with 85 percent of beef, poultry. The top four processing feeds control 54 percent. And, you know, this isn't taking into account geographic markets

which makes it sometimes even more concentrated throughout the monopolies in some geographic cases.

So the challenges when you have so much power in the center, it's often the company's center is able to increase their profits at both the expense of the producers. In this case, farmers or cattlemen and consumers. And, you know, so you're faced with a situation, and sometimes you're challenged on both ends. And I think we haven't traditionally, or I don't -- or maybe traditionally have addressed this. But in the last 40 years haven't been on focus on these kind of rungs. And, you know, these are things that matter to the President. Maybe he's in a different way in serving different constituencies.

You know, rangers get diminishingly a small share of the dollar a consumer spends on beef. Usually about 60 cents now. It's about 39 cents. And chicken farmers get a tiny amount of consumer dollars.

Now, this is an area which the President has taken action. We can talk about this. And we've taken action. The Department of Agriculture has reinvigorated the Packers and Stockyards Act to strengthen the position of farmers. And is embarked on a series of rulemakings, three rules in total.

The Justice Department has begun -- and I know everyone noticed this. The Justice Department is enforcing the Packers and Stockyards Act as well. So they've been -- the antitrust division is using the Packers and Stockyards Act and they've obtained a settlement which we can -- which I think is an important settlement in the poultry industry. Which for the first time -- in its settlement requires abandonment of the tournament system.

And finally, which is something you may know about, some of you not. Finally, another measure we're taking in this area is to try to seed more competition with the understanding that the spring cases don't always work. We're spending over billion dollars to try to build out competition in processing to the extent that's feasible and that's something that's beginning to get underway.

All right. The final thing I want to mention, and I'll just spend less time on this. But a third challenge we face, again, not entirely new, but it is certainly the case, and as we've seen in heavily regulated industries sometimes yield some of our greatest competition challenges.

Now, here's what I want to say. I want to make clear. We're often talking about necessary regulations. One of the challenges we face this spring was the challenge in promise in infant formula, baby food. In formulas, not baby food. But, you know, if you think for a minute. I don't think there's anyone even the diehard libertarian who's fighting for a fully laissez faire approach to infant nutrient.

So we're talking about rules that are often very necessary but that can -- especially in dynamic markets and when we face shocks lead to challenging consequences in the infant formula of the Spring. The closure of a single plant owned by a company that controls almost half the market created a national shortage. And one of the challenges, one of the challenges we've been addressing is the fact that FDA certification of plants is a lengthy process, you know, some ways. Once again, you don't want to have unsafe baby food, but, you know, it's like the ability to bring more supply in.

So a big challenge we face is how to balance these -- I mean it's sort of easier and we've had cases and rulings. Where we've had rulemaking -- regulation that is out of date or, you know, it's just sticking around. It's lost its reason for existence other than being a barrier to market entry or -- but when you have legitimate, real important regulation, but you also want the benefits of a more competitive economy that is an ongoing puzzle. So I'll put that there.

So let me kind of close by talking about this sort of institutional way we're addressing these issues. So we have -- as many of you already know. The President last year signed an executive order on competition that set an enforcement policy and directed the agencies to vigilant in pursuing the promotional competition. Also, added -- included 72 directives. We have meetings every six months or so with the President and the main agencies to see what they're doing and how they're doing.

But I want to say a little bit more about that and the advantages and I think the importance in -- the lasting importance of having the White House involved in competition policy. And I think it comes to the fact that we sit in a good vantage point to see many of the problems that are across the entire nation and also have in some ways different and complementary set of tools to act. Yeah, let me say this a little more academically.

I think some (inaudible) has been said that the relationship between macroeconomies

and antitrust is underdeveloped. You know, that develops from antitrusting focused on cases and specifically defined markets. One advantage, I think of the White House is that we do have a lot of exposure, like it or not, to macroeconomic trends. So they're always sort of front of mind. And if not that we also have a broad perspective on entire industries and their relationships with other industries.

So we see how, you know, in the example of rail, we see when rail is having these challenges, we get a very visceral forms of feedback on how other industries are affected by that. I would say Justice or FDC don’t get that kind of thing, but we definitely are constantly in this point where we see things. And, you know, we also can see how other areas of policy effect things like trade policy, our own forms of new industrial policies, subsidization. That these all come into the picture in different ways, and I think that’s important.

So I just want to say that finally in closing what I think is also important about having the White House involved is the ability to motivate, coordinate prior ties, build capacity for the agencies when needed. And I don't want to use up all of our time, but I just want to say that, you know, this is new. I think there’s a lot of, you know, there’s always room for improvement. But the potential there, I hope the people in the audience can see for solving these sorts of problems is to use the tools of government including rulemakings, including legislation, including, you know, subsidizing the subsidies of certain kinds to tactical competition problems and have that perspective.

And, you know, as I said when I started this, I think one of the great things about this country is that we are constantly learning, facing new challenges, looking how we solved things before and, you know, this is an expert group. And I hope we can come together and try to figure out how we face these new set of challenges, which in fact, look like old challenges. But hopefully with a benefit of received wisdom. Thank you very much.

MS. AARONSON: Thanks, Tim. That was tremendous. If I could, I would like to just kick off with a few questions to expand on what you said or follow up in some places.

So the executive order on competition was very exciting for those of us who, particularly like me, who have likened both economic regulation camp and the antitrust enforcement camp. And to see the administration pushing this kind of whole of government approach.

You've talked about a number of the activities that are taking place kind of outside the enforcement agencies under the executive order and its mission. Where do you see antitrust enforcers as having the most to contribute to helping to address competition problems? Again, keeping with the theme of this event outside the tech vector?

MR. WU: Yeah, that's a great question. And I think -- well, first let me say there will always be a place for enforcement at least in the American system. I think it's an important proud tradition. We're happy to have been appointed to enforcement minded officials and John Kanter and Lena Kohn. And it's obvious that I think that they are complementary.

Let me talk about where enforcement seems to be the natural way of going. It seems to us that merger control, which ultimately is doing a lot of this macroeconomic work honestly if you think about the totality of years and years of merger control or noncontrol or how you set things. That seems like an obvious error that they're integral to stay in the providence of enforcement.

And, you know, there have been different periods of U.S. history where the President would decide by the challenged merger and not. But I think that we have all sensed that there's a lot of danger, ethical danger, involved in that and would like this all dedicated to maintaining very high principles to date. So that has to almost for the discretion reasons, ethics reasons has to be even though it's very significant.

I just want to say also that sometimes they're complementary. I mentioned -- and this is something we're really trying to build out is situations where you have sort of joint rulemakings and enforcement agendas going together. Now, we talked about meat processing and that's an example where we've had both a series of rulemakings but the Department of Agriculture cooperating with the Justice Department was bringing major packers and stockyards case using the Justice Department's lawyers who are as Nancy and Bill, a number of DOJ alumni here. We know how good the Justice Department's lawyers are.

And yes. So sometimes I think the program is also sustained by having joint programs.

MS. AARONSON: So we've heard a lot about the need for more assertive merger enforcement both in terms of tackling mergers that maybe haven't been as likely to receive challenges or

to think about more novel theories of competitive harm.

In taking just mergers as an example, but we could, you know, extend it to conduct as well. If we're thinking about trying to invigorate antitrust enforcement. There’s been this concern, I think by many that agency intent and willpower and even the terrific lawyers and the economists that they have within the DOJ, the antitrust position and the Federal Trade Commission might not be sufficient. And in particular, you know, there’s a body of caselaw that is increasingly hostile to certain types of enforcement actions. And at least the perception that there’s a lot of judicial skepticism of antitrust enforcement.

I wonder if the administration is thinking about getting more involved in the legislative debates that have been taking place about, you know, is what we have sufficient or do we need new legislation to sort of enable these types of shifts?

MR. WU: Yeah, that’s a good question. Let me make a point first about that is related to this. It is a challenging enforcement agenda we have and as talented as lawyers are, you need many of them. And they need the resources to work, and they need to be able to hire the best economists.

And one of the major challenges is that the agencies both the FTC and DOJ are underfunded in our view. The President was very clear about this so as Brian Deese, the Director of the NEC. When you think about the economic output increased by nearly half over the last decade. The annual number of completed mergers and acquisitions doubled. Yet appropriations for antitrust and FDC have been basically flat. And actually, in real terms have decreased. And, you know, it’s hard to bring tech into it. Well, it affects non-tech because the tech cases are particularly expensive. And, you know, an enormous drain against companies that are so extraordinarily well resourced.

So Biden, the President’s budget calls for boosting their funding. And we’ve, speaking of legislation involvement support in getting involved in the Merger Filing Fee Modernization Act.

Now, as for, you know, whether legislative. We haven’t taken any special position on any of the pending, I want to say not general antitrust bills. I’m not talking about tech antitrust, general antitrust. But I think we believe two things at once. Both that with good lawyering, good case presentation even a skeptical but ultimately fair judiciary with well-developed facts, we hope will rule in our way. I have people in this -- culminated lawyers know that, you know, you have to plead your cases

well. And a lot of that depends on that.

It's a common law system. Some of the precedent is adverse to us, but we do -- you know, we feel that the public sentiment has moved our way. And frankly, moved in the way of a pro-enforcement in the sense that we need a little more enforcement, and I think so has intellectual sentiment and that judicial sentiment will follow.

I also want to say at the same time that even if we do that we, you know, the right legislation, bipartisan legislation, to improve things that are obviously an improvement would be welcomed. But it has been the tradition of the antitrust law to be a common law tradition. And I think every era, the government probably complained that the cases weren't the way that they wanted to be one way or another, and I think that makes a hard challenge.

MS. AARONSON: Yeah. That may be possible, though even if you look at recent, you know, what I might have described as not out of the sandbox cases. You know, particularly in the vertical dimensions if you think about the recent FDC laws in the rail and the DOJ loss and United Health change.

You know, does strike me as it's easy to say we just need to bring more and, you know, maybe better cases. But it's been a long time.

MR. WU: I don't underestimate the challenge. I mean there's no (inaudible) here where I don't want to be blasé about this. You know, the administration has been expressed sore disappointment with many decisions that the judiciary has made. I don't think antitrust even ranks in the top five. But, you know, it's in there. Obviously, reproductive rights and environmental concerns are probably the top two.

One of the things that we've said and believe is important is not a short-term fix. It's also important that we appoint judges who are sensitive to economic issues as well. You know, I think that we have traditionally more focused on civil rights, social justice, economic justice also very important. I'm not saying they have to, you know, be a card-carrying member of the Louis Brandeis School of anything.

But you know, at least to have a fair look at the facts and not be predisposed against antitrust or other regulatory economic regulation. I mean there's challenges for the FCC and other agencies as well. I haven't even talked about administrative law challenges. So, yes, we're looking, in

fact, we're looking for -- I would hope people in this group would, you know, appointing of judges is always a question of names getting around.

And I would hope that, you know, for those of you who are sympathetic to the idea of antitrust enforcement and that we continue to generate and circulate names.

MS. AARONSON: That's a good challenge to those on the panel and those in the audience.

Let me just ask one final question maybe again. Refocusing on the activities within the department. It's around the antitrust agencies that the Competition Council and others are engaged in. And that is to come back to, I think a point that you made at the very beginning that we're all grappling with which is this sense that supply chains are fragile or broken. That we have many industries where we seem to have high prices and shortages, you know, maybe due to capacity limitations and where I think there's room for a healthy debate over whether past antitrust enforcement is a major contributor to those outcomes or not.

But given we are where we are, you know, it may not be that there's an antitrust solution to those problems. So I wondered if you could talk a little bit more. You briefly mentioned the meat processing industry. But talk a little bit more about ideas that the administration might be kicking around or has or has implemented for how to create incentives to investing capacity if we don't want all of those incentives to come through, you know, sky high prices when shortages appear. But we've got some alternative to that.

MR. WU: Thank you. That is a great question and a great point. And I appreciate you recognizing this as a kind of a joint challenge for everyone in this country.

There's no like hand waving solution to, you know, the failure of basic infrastructure and the failure of essential industries, you know, to say like well let's -- there's no breakup that's going to get the railroad going on time tomorrow. There's no, you know, deregulate everything is going to answer. It's a serious problem.

I think that one -- so I will say that we're interested, and I think in all areas as you alluded to. We do think that the lack of competition has significantly contributed to these problems. Now, maybe

these industries where it's not easy to have competition. I think rail classically is a kind of example of a fixed marginal cost kind of business. Starting, you know, as I said before the idea of laying an entire new network is a challenging, daunting starting point particularly for, I think, an industry that hasn't really -- people haven't thought as -- seen as a high return industry. That's changing a little bit.

I think one move direction is that we've clearly moved to and what we regard as essential industries is, frankly, the spending of money on -- to support the needs of the entire country. And all of this depends on certain essentials.

We've talked already about the seeding of new processing competition, which is not a huge amount, but it is some. But I think better example is semiconductors where, you know, I guess all things are new, but we're spending -- I don't want to get the number wrong, but I think $53 billion or so depending on how you count on subsidizing so that we have something that others depend upon.

And I don't know if that's the answer for all of it, but it shows that there's, you know, we're in an era where people are thinking about this. And then finally, there is as in the Ocean Shipping Reform Act maybe if we're not talking about returning to full utilize style regulation, we are trying to talk about rules, incentives that challenge the incentive to deliver that service per other businesses and make more money. You know, I know that sort of simplifies it, but -- and maybe in their hearts they want to provide good service. But the incentives are pointing in the wrong direction.

And, you know, in these industries others depend on having some mechanism for preventing discrimination among shippers or trying to figure out ways to make service reliable seems very, very important to us.

So that I don't -- I wish I could say I have all the answers. I think this is a daunting challenge and I think this is, you know, and people probably -- many academics here have written a boatload of papers on how to deal with the challenges of big tech. Well, how about dealing with the challenges of old school industries and common carriers, the essential industries which actually have such a significant role in the economy? That's what we need more attention. So thank you so much. Those are terrific questions. I really appreciate it.

MS. AARONSON: Thank you, Tim. This has really been tremendous. And I've really

enjoyed hearing from.

MR. WU: Yeah, and I look forward to listening to the panel. My screen may go off, but I am still listening.

MS. ROSE: Well, thank you. And with that we're going to turn to our distinguished panel. We've got a really all-star group as you heard at the beginning. And rather than repeat introductions, I'm going to jump right into today's topic which is thinking outside the digital box. Do we need new approaches to antitrust policy?

So we've heard -- you can't help but pick up a newspaper or a magazine or go online or Twitter depending on where you get your news these days to hear the concerns about dominance of a small handful of large tech companies. There are several monopolizations fees that could have been filed against Google by state AGs and the DOJ and others. You know, two states in the D.C. circuit against Facebook. A new California AG suit brought against Amazon filed just last week. And of course, a lot of congressional hearings on antitrust in the tech sector and proposed regulation.

You know, while tech is undoubtedly important to the economy. And these companies are huge in the capital markets that does leave the rest of the economy out of the discussion. And as Tim Wu has just, you know, raised our attention to. There's a lot in the rest of the economy to be concerned about. But apart from a few selective sectors, meat processing we've heard about, shipping by land or sea, baby formula, healthcare has gotten a lot of attention in recent months.

There's been much less attention paid to antitrust outside the tech sector. Though there has been, I would say, general criticisms about increasing concentration in broadly defined industries and perhaps the failure of antitrust enforcers to do enough to stop that.

So let's just start with this panel. And I'll kick off with Edith and Bill. As former leaders of the enforcement agency, how do you view the enforcement landscape outside of the tech space? Have we been underenforcing against antitrust competitive activities? Whether that's mergers or conduct? Start there and just, Edith, maybe I'll ask you for our views and then we'll go to Bill.

MS. RAMIREZ: Sure. Let me start, Nancy, by saying that I'm really delighted to be here with you and with Bill and Howard and of course to have had the opportunity to listen to Tim.

I'd like to start by emphasizing the point that Tim made because I think it's important to highlight the issue of resource constraints, right? We can't, you know, purport to grade the agencies in thinking about the impact that they've had when they're so severely resource constraint. We've heard a lot recently from their leadership at both the FDC and the DOJ about the challenges that they've had keeping up with the historically high level of HSR filings.

And that's only the reportable transactions, right? How many other transactions that the agency may never -- the agencies may never become aware of? So I really think it is important to emphasize the fact that the jurisdiction is so broad of these agencies and it's really challenging for them to be monitoring so much activity across the U.S. economy when they really have resource -- such significant resource limitations and that's been a perennial issue.

I think another challenge is also the one that we've already touched on which are the courts. The agencies are faced with, in some areas in particular, like conduct matters with law that is very restrictive, and it makes it very difficult for the agencies to bring cases.

At the same time, I think it's really incumbent on the agencies to ensure that when they pick cases that they have persuasive, strong evidence when they do bring a case in court and when they litigate. And so, that again just adds to the challenges that the agencies face. So I think we could certainly spend more time in talking about some recent losses that the agencies have had and the impacts of that because no question that resources again plays an issue.

And when I was heading up the FCC, I remember the effort that it would take to pull in resources to be able to litigate and that includes not only extraordinary effort by staff but also figuring out how to pay for those very high expert costs. I also want to emphasize the need for the broader discussion that we need to have whenever we talk about competitiveness and dynamism of the U.S. economy.

I don't think that -- I think a debate has been awfully narrow of late in laying so much at the feet of the two antitrust agencies. I mean antitrust can only go so far and I think that President Biden should be commended for such a broad executive order. And I'm really, you know, delighted that there's a White House competition council and that Tim is in a role where the administration can have broad

impact across the government to promote competition because there is simply too much to be done and the two agencies cannot do it all.

MS. ROSE: Bill, your perspective on this question?

MR. BAER: Well, first of all, I do share Edith's thoughts about funding in particular. You know, the question invites us to admit to errors under enforcement. And I don't think anybody is going to do that too willingly.

I do think if you look at the eight years of Obama era enforcement, at the Federal Trade Commission, at the antitrust trust division, the cases that were brought were important cases. A decent percentage of them were won in the merger context or deals were abandoned. And I think increasingly, there was focus on structural relief rather than conduct remedies. So I think there's a good track record there.

At the same time, there are areas of antitrust law where it's very difficult to bring cases and have a level of confidence. You're never going to be 100 percent sure of winning, but there are areas where the courts just aren't sympathetic. Potential competition is one area. The subset of that the acquisition of nation competitors. Courts see as, you alluded to Nancy, pretty hostile to merger cases and willing to accept promises or assurances that will continue to compete vigorously despite the fact that we may gain market power and have the incentives and ability to exclude rivals.

So, you know, I think the fact that many judges have bought into a pretty cribbed, narrow view of what consumer welfare entails. You know, focus solely on price effects. Pretty much showing a lack of sympathy to monopocity power. A willingness to embrace efficiency claims as inevitable even if not well demonstrated, well documented. And the effect of all of that I think has been to read some of the plain language of Section Seven of the Clayton Act out of many judicial decisions.

So you combine that with a Chicago school view that if we're going to err anywhere, it's let's err on avoiding type one errors of overenforcement. That we do have a situation where the enforcers are not able to do all that they think might be done. And I think it's important that the leadership at FDC and DOJ antitrust today are taking a hard look at merger guidelines. Incorporating merger and vertical to take a look at effects. I think they're going to have a challenge in not trying to reach too far in maintaining

judicial respect for the merger guidelines.

So there's some encouraging signs out there, but I do think the problems in our economy that are reachable by effective antitrust enforcement particularly in the merger and acquisition area. The enforcers are able to do less than they would like to do because the courts have shown limited sympathy for the cause.

MS. ROSE: So let's focus on mergers especially since, you know, I plan to follow up with my favorite theme when I begin to talk about antitrust enforcement anywhere which is enforcement resources. And, Edith, I think has very eloquently already elevated that issue and set it out for us.

But let's turn to mergers because, you know, frankly even with these important conduct cases and monopolization cases, there's just an enormous amount of agency resources that are devoted to merger review and merger litigation and in part because these mergers, you have a very limited time to -- you can either intervene during the HSR period and challenge the merger and attempt to block it. Or you take the consummated merger down the road, which is, you know, not only difficult to litigate but also may be impossible to really undo.

So let's key up this discussion of mergers. Howard, you wrote a really interesting paper with Carl Shapiro comparing merger litigation in the 10 years before the 2010 guidelines to the decade following it. And, you know, what the implications of that might be. So thinking about HHI threshold both in the 2010 guidelines but maybe also now in this merger revision process.

And I have to say, I was stunned is probably not an overreaction to some of the results that came out of your analysis. I wonder if you could share what you found and then, you know, what implications you think that it has for merger enforcement as we look forward?

MR. SHELANSKI: Sure. Thanks, Nancy. And I'm very pleased to be here with everybody.

What Carl and I found was that there was no material difference, really no difference in the level of HHI at which the agencies actually went to court to block mergers in the 10 years before the 2010 guidelines and the 10 years after. I'm not sure that that in a vacuum was something that surprised us. It was actually something that we sort of thought was the case. You know, would likely be the case.

What was surprising about the result, what was interesting about the result was that a number of people had articulated more or less its fact that the change in the thresholds in the 2010 guidelines would lead to drift that would weaken enforcement and lead the agencies to challenge less frequently or possibly challenge only the sort of the three to two or merger to monopoly level.

I think that what we were able to show was actually there was even a dip in the mean HHI at which you got enforcement. Now, look a couple of caveats about the study. We think the study is very important because it puts to rest sort of something that was being articulated at least in some quarters as sort of a fact as not being a fact. That there was not reduced enforcement against mergers. There was actually, if anything, in terms of going to court strengthened enforcement. There were more cases. The HHI level had not drifted off.

I think what was more interesting and more meaningful was to see where there was success in those cases. And this is where I really think that an overemphasis on the particular HHI threshold in the guidelines is somewhat mistaken. You know, there had not been meaningful enforcement at the 1,800 and, you know, between 1,800 and 2,500 HHI levels in the many years before we revised the guidelines in 2010.

Those thresholds have sort of been taken as a screen that led to an interesting result. And one that you have identified, Nancy, in I think some of your work and some remarks that I know that you have made, which is exactly right. The sort of below 1,800 became almost a de facto safe harbor for transactions in the intermediate level of market concentration. Was considered sort of a green light zone. And I think that the goal in 2010 and, you know, to Bill's point, I think it's fair to question whether those goals have been achieved and to revisit and reconsider guidelines every decade or so.

But to say, let's go to the level of which we think enforcement is more likely to happen. Let's go to a level at which we think the intermediate zone, you know, 1,500 to 2,500 is a zone at which there will be some serious guidance for actually looking seriously at that. It's a yellow light. It's not a green light. And let's also move away from those HHI thresholds as being the centerpiece of the horizontal merger guidelines.

And I think that that was a big part of our effort. Shore them up, bring them to a level at

which we'll take them seriously. But also, let's take the spotlight off of them a little bit. So you'll notice that in addition to slightly raising the thresholds to a way that we thought provided more realistic and somewhat binding guidance. There was a lot of development of tools in that guidelines that said, look, what we're interested in is not HHIs and market definition of market shares.

What we're interested in is detecting competitive effects. And I would just show three areas which I think the 2010 guidelines made a market departure from those of 1992. And by the way for which the guidelines were roundly criticized by many commentators when they came out.

Most notably were unilateral effects. I think if there was one thing that we wanted to fix going into that guideline process was delaying what I will call the legacy of Oracle Peoplesoft whereby the courts were effectively saying that if it was not a merger to monopoly levels, you know, something over a 65 percent market share coordinated effects are really not going to be accepted by the court. And we thought that was a terrible mistake. And it made it very hard to bring unilateral effect cases.

So there's whole development and a new technology that is put into those guidelines that, you know, Carl Shapiro, Joe Farrell and others I think really, you know, should be credited as the intellectual, you know, foundation for that work over a number of years. Whereby, sharper and better techniques were brought into the guidelines for how to detect unilateral price effects in mergers quite apart from what your HHI was.

You know, how you define the market. And I thought that that was a really good innovation that paid off big time in a number of cases that Carl and I talk about in that article where district courts rejected specifically Oracle Peoplesoft and said, for example, in the H&R Block and in other cases. The government has met its burden of showing unilateral effects even if we accept that the merger was less to monopoly. You don't need that standard or just some kind of section two level monopoly share.

So I thought that the guidelines added machinery and technique and methodology that was very pro-enforcement, very sophisticated when it came to unilateral effects. I think if you look back at the commentary that followed the 2010 guidelines, there was serious criticism about this will go too far. It will lead any merger to be challenged. You know, it's undisciplined. There's upward pricing pressure in every merger. It's an untested method. The guidelines were bold in that regard.

And I think people who turn around and called the 2010 guidelines weak or not enforcement minded, or conservative don't know what they're talking about, you know, when it comes to economics or the intellectual history of the guidelines.

The second area -- and I just want to -- I'll go through very quickly was coordinated effects. Coordinated effects needs a lot more work, but if you do read the coordinated effects section. What we were trying to say is you don't need collision. You don't need contract combination and conspiracy in restraint of trade. It is enough to go back to Judge Posner in the 1980s in the mental hospital case. You know, can have passive collusion and oligopoly behavior. And we don't want mergers that are going to lead to a more likely oligopoly equilibrium. There was an effort to build that back in.

And the third was an effort to take a somewhat more rigorous approach to having innovation on its own feet, on its own apart from price being an effect that was tractable and merger analysis and could be considered.

So, you know, I think just to come back to your question. I think that the paper shows two things. It shows that the HHI change didn't have much of an impact, but that those other changes in the methodology and the machinery of merger enforcement had pay offs in cases that the government was able to win after 2010 that it couldn't win before 2010.

MS. ROSE: I should have been a little more precise. I wasn't shocked at the fact that there wasn't an upward drift.

I guess what shocked me and I think comes back to what I see as the enforcement resource debate was that you have this table two in your paper that shows the average post-merger HHI of litigated cases. And to Howard's point about the downward shift. It is true that post-2010, the average post-merger HHI decline in litigated cases. But a decline from 6,500 to 5,800.

MR. SHELANSKI: Yes.

MS. ROSE: So we're talking about, you know, the average litigate case is a merger to (inaudible) essentially, right? Or basically, the post-merger structure would have been equivalent to symmetric firm. And, you know, I guess from my perspective, if that doesn't say resource constraint then it's surprising to me that enforcers would not think mergers to the equivalent of three remaining firms or

many firms are problematic. That's not this entire compromise 28 months inside DOJ that people thought, you know, we don't have to worry as long as there are three surviving competitors.

So I interpreted that more the signal that the agencies had been resource constrained for quite some time but before the 2010 guideline and after.

MR. SHELANSKI: And I'll just make a quick comment about that. I think you're right. I mean I do think going back to things that Bill and Edith have said. There is a lot of enforcement that occurs, you know, prelitigation.

MS. ROSE: Sure.

MR. SHELANSKI: And so, I think a lot of those transactions that you're talking about were ones where the parties just in the end said, no, we're not going to give you the remedy that you want or where the remedy was rejected.

But there are a lot of these other transactions that came in that were four to threes or five to fours that were remedied. Now, that's a whole separate discussion and there's a very different view today on remedies. And I think that's worthy of conference in and of itself. But at least it was enforcement in that the mergers that came out of the end of pipeline of the review process were different than the ones that went in.

You are right on the resource constraints. These cases are as Edith said, you know, very expensive to bring. You have to have your experts. You try to use in house experts. You're over matched by a whole team from very good consulting firm. And then, you know, you have to hire from the outside. And when you lose a couple of seemingly just like, how could we possibly lose these cases? It's very sobering.

I mean those of us who emerged, you know, with the scars of LabCorp and Limbach, you know, still sort of are stunned at, you know, how those cases, you know, how the district courts found the way, you know, to finding for the defendants in those cases. You know, they were very careful about devoting six months of staff resource and millions of dollars of expenses. Unless you've got a real winner which does bias you towards the, you know, three to twos or mergers to monopoly as you say.

So, you know, more resources I do think would have made those events a little bit less

deterring and would have led to maybe a bolder approach on some other cases.

MS. ROSE: Deterring in this case, the agency from action rather than the firms from proposing those mergers?

MR. SHELANSKI: Yeah, that's right. If we just lost that one, you know, yeah. Exactly.

MS. RAMIREZ: And just to follow up on that litigation point. I think it is an important one. And we certainly don't want the agencies to be litigation adverse. And I assure that I certainly do not feel that we were litigation adverse during my tenure at the FDC.

But at the same time, you do need to look very closely at what losing a case might do to the enforcement program as a whole. And those are tough calls to make. I'll note that one of the toughest losses and one of the more disappointing losses for me during my tenure was the Stairis (phonetic) Energy case in the potential competition arena.

And I want to echo what Bill said. I think that's one of the hardest areas for the agencies to litigate. You're trying to predict what's happening in the future and in that area in particular. I think the standards the courts set are awfully high and there is this question about what is the right standard so that you're not speculating about what may happen, but at the same time I think there has to be some sliding scale that factors in the significant harm that may come about. And so, there needs to be some accommodation to that. And I don't think courts are doing that under the current law.

But there's no question that that is something that you do need to think about because of the fact that it can have really, you know, losing a few can really create issues in the long run.

MS. ROSE: Sure. And not just agency aversion but precedent that makes it difficult than even a good case.

MS. RAMIREZ: Absolutely.

MS. ROSE: So let's turn to that because, you know, I think potential competition gets talked about a lot. There is concern that it's very difficult to successfully challenge a merger of a potential or a (inaudible) competitor or, you know, even actual competitiveness is very small presence in any market. And so, there's not much of a delta in terms of the competitive outlook.

And I guess my question for those of you who have spent careers in antitrust thinking

about this. Do you have advice in terms of, you know, are there kind of more tools that could be laid out? Or approaches to analyzing that that could be laid out in the merger guideline revision process that the agencies might consider? Or is that something were moving us off, you know, some really, I think very limiting caselaw might require legislative intervention to make a real difference in a finite time? Bill, maybe we'll start with you and then –

MR. BAER: Sure. You know, I've testified about this and written about this a little bit. I think at the end of the day it's going to be a challenge to get the courts to move as far under current law as they would need to move in order to make enforcement in that area as effective as it needs to be.

At the same time, you know, moving legislation through these Congresses in these partisan times is really difficult. So I think my sense is the agencies are -- leadership is trying to do two things. One is provide additional guidance to the court about how the agencies see these sorts of potential competition issues. Talk about the facts that matter and that, you know, in Howard and Carl's article is that that was part of the goal of 2010. And I think that can be reinforced.

The other thing that I think is going on is not quite articulated as policy, but this notion of trying to communicate to antitrust advisors that things are going to get much closer to scrutiny in that space than they did in the past.

And this notion of deals that never should have gotten out of the boardroom, trying to encourage folks who are in a position to provide sound antitrust council that maybe you get your deal through at the end of the day but it's a long day before the day ends. And you need to factor in. And if you're a seller, you maybe need to reexamine a risk allocation and that in terms of gray area mergers, vertical potential competition and others. That may, I think in the hopes of the agencies, produce a more cautious approach to acquisitions particularly by dominant firms and nation competitors, that sort of stuff.

We'll see whether it works, but the combination of those two things seems to be reading the tealeaves to be a part of the new leadership's approach to enforcement.

MS. ROSE: And, Edith, you know, you mentioned the Stairis decision. And, you know, for those of us who have our hearts with antitrust enforcement that was, you know, a really bleak day when that came out. There was a lot of mourning over it, your sister agency.

Thoughts for, you know, either how the FTC thought about moving forward from that decision? You know, either choosing or advice where they're choosing the next potential competition cases with an eye to particular facts? Although, I thought the fact that there was pretty compelling.

Or the same question keyed up for Bill. Like advice for, you know, is there anything that can go into the merger guideline revision that might help with this?

MS. RAMIREZ: Yeah, I'll say that was a case where we certainly thought that the evidence was quite compelling, and we were quite disappointed to see the Court not agree. I think the Court standard is a very challenging one.

I think that -- my hope is that the new guidelines include new learning that highlight the harm when potential competition is undermined because I think unless we had Congress to change the standard. And I think the standard at the court there applied was essentially whether or not the likelihood of new technology having entered the market and be absent of a transaction was probable. And I think by that the judge meant more likely than not.

That can be a tough standard to meet. Again, I thought we met it, but there's certainly going to be cases when it's challenging to meet a more than 50 percent more likely than not standard. So I think there either has to be a change in the law, which given what's happening in our Congress is unlikely in my view.

So barring that and I think we need to -- that any new -- the new merger guidelines need to spend time, I think showing the economic learning. Showing the harm that comes about as a result of this. And suggesting some kind of sliding scale standard that would be more appropriate when you're in this particular terrain.

MS. ROSE: So we know that there's certain types of horizontal merger theories of doing harm that are tough to litigate, potential competition is one. Edith, you and Bill, you had both mentioned several others.

But let's turn to vertical because that strikes me as, you know, while we might highlight certain types of horizontal mergers that are tough to litigate. It feels like all vertical mergers remain extremely difficult for agencies to prevail. And, you know, should we be worried about this? You know,

the ongoing losses in this space? Is there a sort of dramatic change in strategy that the agencies ought to consider? You know, how do we move forward in that space? And maybe, Howard, I'd turn to you to kick off that discussion.

MR. SHELANSKI: Sure. Look, I do think that for a long time there was a just sort of a sense that vertical mergers were not of terribly great interest. Not really worth the resources of the agencies to investigate because not only were you unlikely to win sort of on the precedent. But I think a lot more importantly you're unlikely to get a social welfare payoff because of the ambiguity, the perceived ambiguity and the ultimate effects of vertical mergers.

And, you know, if you think about it there's a lot of intuitive -- there's a lot that's intuitive about vertical mergers because you can actually look at them and see that, well, in a way they're sort of in an incentive alignment here between the parties and consumers. And you don't have that in horizontal mergers.

You know, two competitors joining together, they'll tell you about all the consumer benefits. Sometimes, there may even be some consumer benefits, but there's naturally the structure of that deal is to give you more control over consumer choice and the terms on which consumers deal.

So you need something to sort of counter veil those. Vertical mergers were always different, right? You're either going to squeeze profit margins out of the chain or you're going to reduce transaction costs and therefore make even a monopoly price lower because, you know, the costs are going to be lower. And you're going to have a better monopoly equilibrium.

So almost no matter what the circumstance was, a vertical merger there was just much more of sense that it was possibly beneficial, and it was harmless. I think people started to realize that that's not the case. And I think as we've moved into particularly something that is not the topic of this day. You know, digital industries, but let's just say information driven agencies.

So there are a lot more concerns now about the kind of foreclosure effects. You know, ability to gain large, you know, share of strategic data. If that is a strategic competitive asset. So I think there's a lot more concern now about vertical mergers, about vertical foreclosure. And we're also starting to see larger and larger entities be the ones that are doing these downstream acquisitions. And

suddenly, they don't look so benign, right?

So let's say that -- you know, I'm going to say you're hypothetically a large pharma company. And you're now acquiring a critical biotech tool. That might have looked benign back in the day. A way of accelerating the use of that tool, but if you have fewer large biotech firms that are out there competing and a critical tool for, you know, development of future therapies. You could imagine a situation where you're saying now that's actually -- even if we don't see an immediate foreclosure risk. Is that a way of ring fencing or preventing some future entrant? Or even some current small, you know, developer out there in the same market from getting a critical tool?

And now, you know, we suddenly start to worry about sort of the hording of key downstream technologies or complementary kinds of products in a way that makes, you know, entry harder and harder. And we're more concerned about that entry now for two reasons.

One is as we see sort of network effects and multilevel entry and the cost of entry getting higher in some industries. We worry about vertical transactions as a way of increasing those barriers. And we see the monopolies as where the market power is being potentially a lot more durable.

And so, unlike sort of, you know, the mid-1980s where Frank Easterbrook could tell us that doctrine is more durable than monopoly. Well, maybe the lesson that we've learned is doctrine is pretty durable. Courts evolve slowly and agencies don't challenge. You know, don't bring cases where the doctrine is hostile. So it's not tested and pushed and changed.

And a monopoly maybe proving more durable and vertical mergers in ways that we might not have appreciated. Maybe increasing the durability, raising barriers to entry and there is the entry we never see. So we're kind of missing something. We've been missing something by focusing on the transaction cost efficiencies, the double marginalization elimination and things like that.

So I guess I come back to saying that we do need a rethink in vertical mergers. And I think a number of us, you know, not for today, have some thoughts on how one might rethink those. Or there's some interesting things we could do to shore up merger enforcement. But we're coming out of a tradition and a body of judicial doctrine that is not hospitable.

So I guess what I would say to the agencies is, you know, bring thoughtful, careful

vertical cases where you can really tell a very good story because you're going to have to evolve the doctrine in an era when legislation is unlikely, and the monopolies are durable.

MS. ROSE: So I think this question that Howard raised earlier in the context of which ones get litigated, which ones get settled and the settlement remedies. It comes, you know, first and foremost in vertical mergers.

So I think, you know, maybe a sign of the skepticism towards vertical mergers that have emerged during the Obama administration was agencies' willingness to investigate vertical mergers and then to insist that if they were to go forward to go forward with remedies that were, you know, largely conduct remedies or behavioral remedy agreements, not to engage in particular behavior that concern the agencies.

We're seeing that, you know, even if we just look at the recent United Health change litigation where United Health said, look, we'll put a firewall up between the data that change has and us. And, you know, that should take care of any of your concerns about this exploitation of your information advantage. But the division refused to, you know, accept that remedy and decided to litigate instead.

I wonder, Edith and Bill, for people who have had to be in the position of the leadership role at an agency and making that tough call of, you know, do we accept a remedy? Maybe one that we don't think is perfect, but we can get versus litigating and possibly getting a loss and maybe not -- the company may not even be committed to the remedy if it wins the litigation.

You know, should agencies -- but recognizing that the current leadership has said, you know, we don't want settlement maybe at all. How do we think about this? So should the agencies be more willing to invest in thinking hard about remedies in vertical mergers given the difficulty of prevailing in court? Or is there another strategy that they might pursue to try to block problematic vertical acquisitions?

MS. RAMIREZ: I do think you need to be very thoughtful, right? I don't think it's enough to have an enforcement policy position where you're skeptical of -- and of course, the agencies are skeptical of behavior remedies. But if the incentives align in such a way that the remedy seems like it will be an appropriate remedy that will address the competitive concern then absolutely. I think the agencies

should consider that.

I think what makes United Health interesting is not only because of the behavioral remedy issue, but that case also tested this new skepticism that we're also seeing from the agencies, and DOJ in particular, about divestiture remedies, right? So the DOJ had a challenge. You know, the parties put DOJ to the test on a litigating affix, a divestiture remedy. And it also put it to the test because the proposed buyer for that divestiture was a private equity buyer, right?

So the agency had to defend several enforcement policy views and clearly did not persuade the Court, right? So I don't think it makes sense for the agencies to simply have general concerns. They have to be thoughtful. It has to be evidence that -- economic evidence that supports the concerns that they're articulating. And I do think they need to be thoughtful about what cases they decide to litigate.

MS. ROSE: Bill?

MR. BAER: I'd add just two points to that. The first is once again I think updating the merger guideline and talking in more detail about where problems occur. Relying on past history of vertical mergers that appear to actually have resulted in bad effects.

Behavioral remedies that didn't work. You know, the FTC has had to reopen -- rather the DOJ had to reopen Ticketmaster wide nation thing. That appeared to have been a case that DOJ might have litigated and choose instead to come up with a fix that it turned out the incentives were such that taken a national wide nation didn't honor the commitments they had made. So articulating more wholesomely the ways in which vertical mergers can harm is one point.

The second is, and the FCC is doing this, to develop better data on what's happening in markets where vertical integration has -- PBMs is the classic example -- has led to just three integrated firms and potentially created an enormous market power. We'll see how that study comes out, but that's the kind of work that FTC uniquely can do that will inform the guideline and hopefully inform the Courts.

MS. ROSE: Let's turn to conduct. We saw some mergers which I think, you know, reflects again the importance of merger and merger policy. Not just because there are a lot of mergers that happen, but because often we can prevent a problem from emerging if we have effective merger

control and it's very difficult to or perhaps impossible with a reference to passive collusion Howard mentioned that, you know, we can't really reach passive collusion in most cases once it's occurring. But it would be great if we blocked mergers that increase its probability.

But I want to turn to conduct. Edith, you were the FTC chair when the DOJ and FTC released their 2016 antitrust guidance to HR professionals. You know, ostensibly that was in part to explain a policy that would be pursued going forward where anticompetitive practices in labor markets would be investigated criminally at least in the context of making wage fixing and no coach cases.

But I think it was also, you know, maybe designed to educate the public. I wonder if you could say more about that action? And you know, we've seen much more emphasis, or we've seen a lot of emphasis on labor markets in the last few years in an antitrust context. But I wondered if you could say more, you know, how you saw that as part of the developing agenda for antitrust enforcers?

MS. RAMIREZ: Sure. I mean first and foremost it was an opportunity for us to highlight the fact that workers and labor markets were a priority for both agencies. And of course, it allowed us to emphasize them harm to workers whenever companies enter into no coach and other types of agreements that undermine that vigorous competition to recruit and retain employees.

But of course, it also in the lead up to that. And Bill can certainly speak more to this. There were three high profile cases that DOJ had, of course, brought in involving no coach agreements in the tech sector. And those cases had been brought as civil antitrust violations, but the 2016 guidance -- DOJ announced, right, that the naked wage fixing, or no coach agreements would potentially be prosecuted as criminal violations.

And that certainly caught people's attention. I'll note that I think those guidelines were -- that guidance was quite impactful in the counseling work that I've done. There is no question that companies paid very close attention and still, you know, go back to that guidance. So in my mind, it was both important just to highlight the importance that the agencies were paying to the labor markets, but also to emphasize, right, the fact that there could be criminal penalties that attach and that certainly made everyone pay attention.

MS. ROSE: So let's turn to criminal. Bill, as the head of the antitrust division, you were,

of course, overseeing the criminal prosecutions that the division engaged in as well. And DOJ has now brought a number of criminal filings for labor market collusion.

But in the first two to go through a jury trial, DOJ lost. So they did as the Attorney General Kanter frequently reminds us, the Courts recognize this as an actionable charge, but under the antitrust laws but the juries refused to convict. Although, I will say one of the defendants was convicted for obstruction in the FDC's wage fixing investigation.

In this kind of -- I don't know if you would call it a setback because it's the first two. But is this to be expected in the early days of a policy change like this? Or does it portray in your mind difficulty in extending greater antitrust protection to workers particularly in the criminal domain?

MR. BAER: I'm going to think it's more in the setback rather than a trend that's irreversible. One of the reasons is that as you noted. Two district court judges denied motions to dismiss and on the grounds that these could not be persuade per se and could not be persuade criminally. So there is law out there that these are legitimate uses of the criminal power of section one of the Sherman Act.

But I think there is an adjustment that goes on with judges and with juries. I think in one of those two cases, there was some real question about some of the jury instructions that went out. So I think it's an evolving process, but my sense is, as Edith noted, that the counseling community understands that this is important that there will be a significant to turn effect from the pronouncement and the fact that there were some prosecutions even if they did not -- the government did not prevail. So my sense is that this is here to stay.

MS. ROSE: That's good news. So while we could talk a lot more about conduct, I recognize that we're almost at the end of our time together.

And I did want to kind of turn us back to the beginning to Tim Wu's remarks at the beginning where he highlighted the importance of building a kind of whole of government focus to protecting, promoting and persevering competition.

And, Howard, you have a particularly unique set of experiences as head of ORA during the Obama administration. You had a front row seat for federal regulatory activity. You also have

extensive experience at the FTC. And I wonder if sort of wearing those few hats, you could share with us your thoughts on kind of what the potential is for the executive order on competition to make a real difference to competition in kind of these broad swaths of the economy. Maybe even beyond the particular few sectors that Tim mentioned.

MR. SHELANSKI: Sure. I mean I think there are two broad ways of a whole governmental approach could really be effective. I think the most effective way is to get the regulatory agencies to look at their various regulatory powers. Some of which might be somewhat under used or dormant to improve competition in various marketplaces over which they have statutory jurisdiction.

And I think that one must realize that agencies have a limited capacity to issue regulations. Regulations take a long time. Secretaries come in with different sets of priorities. And so, ongoing rule makings might be downplayed in favor of new initiatives that are, you know, a higher priority for a particular president or a particular cabinet secretary.

So you always have to prioritize those competition rules very deliberately if you're going to get them to emerge from an agency given all of the other kinds of regulations that agencies have to make. And so, I think that the -- President Obama had a presidential memorandum encouraging this. It’s not always easy and there can be conflict as, you know, Bill certainly knows when it comes to, you know, airport slots. And, you know, the FAA regulations and, you know, DOJ enforcement on airline mergers. So this can be quite complicated.

But I think without a clear directive from the Chief Executive, from the President, you don't necessarily get those initiatives prioritized and you lose that combined ability if the antitrust agencies and the regulatory agencies to improve competition. So I do think that the Competition Council and the executive order are a meaningful step in telling agencies, you know, much the way President Obama told the EPA, prioritize, you know, stationary source greenhouse gas emissions. Biden saying, well, do that. But also prioritize competition.

The other thing that’s tricky, the other way that agencies can affect competition, non-antitrust agencies is by looking more at the effects of other regulations that they're passing. Not those that are directly geared towards competition, but those that are geared towards other things. And say,

what are the effects on competition? Or how might I be locking in a particular incumbent technology through this regulation in a way that defeats competition?

That is actually in the executive orders that govern ORA and in the directives by OMB to agencies about what they should think about when they issue rules. But, you know, rules are multifaceted. They have many effects. And if you're going to get sort of quieter snowmobiles in national parks really quickly but that might lock in a monopolist.

You know, honestly the Secretary of the Interior might be a lot more interested in just getting those quieter, less polluting snowmobiles in national parks more quickly and not really that concerned about the monopoly structure that might create for the snowmobile industry. That's actually a real case. A real regs from the Obama era.

So the other thing that you need to do is to get agencies to be more competition minded to get the people at ORA to make it more of a criterion. And again, it's going to vary from administration to administration, but I think it has promise and can definitely help.

MS. ROSE: So I know, Bill and Edith, you both had extensive experience with that type of competition policy advocacy within some cases other parts of the federal government in some cases. Either state regulators or folks with oversight I think in particular some of the FTC hospital initiatives.

But rather than ask you sort of what else might be on the wish list for this. We've got three minutes left. So if you have 60 seconds to share your wisdom on, you know, are new approaches needed to sort of enhance competition outside of the digital space? You know, is there any particular insight that you would like this audience to take away with them as they leave today's event? Bill?

MR. BAER: So two things. First, the Obama executive order is huge. And it is having significant effect across the executive and the independent agencies of the government. And the reason is there's follow up. We've got Brian Deese chairing the competition council. You've got a guy like Tim Wu there. And I'm seeing more interaction, cooperation between FTC officials and DOD officials and many, many other agencies.

So it is a very encouraging development. And it's making progress because the White House has shown its commitment. It's just not a press release. It's an ongoing process.

Second quick point is just to reiterate. I do think we're at a critical time for competition enforcement policy and I do worry that the current traditional trends if they're not modified are going to make it much harder for any trust enforcers to do their job. In that we may need a legislative alternative.

MS. ROSE: Edith?

MS. RAMIREZ: Just briefly. I also just agree that the Biden executive order is tremendously important. I'll just highlight one recent rule change as an example of that, which is the rule that -- the FDA rule change allowing the sale of over-the-counter hearing aids. That was an issue that I worked on when I was at the FTC and that is one rule change that is going to impact millions of Americans who before would not have been able to afford hearing aids.

And we know that hearing loss can contribute to cognitive decline. And that's just one example. And so, I think the potential benefits are enormous for the government as a whole to be thinking about in competition and being competition minded.

MS. ROSE: Howard?

MR. SHELANSKI: We're in a moment of experimentation and rethinking. And moments of experimentation and rethinking are good things. But I also think that it is my hope and prayer that the agencies and the commentators and the people working on them will be mindful of maintaining rigorous analysis, careful attention to the facts. Rethinking experimentation, stronger enforcement is a good thing. Enforcement for its own sake is not always a good thing.

So I hope there's not just a focus on how many actions are being brought, but your careful attention to the underlying rigor and principles and developing those in parallel.

MS. ROSE: Thank you. So I want to thank each of you for the extraordinary contributions you've made to public service during your careers. For contributing your time and expertise to improving the quality of our national debate on antitrust both inside and outside digital markets. And to participate in today's panel.

And my thanks to Brookings for hosting today's event. And thank you all to those of you in the audience for giving us your time and attention to these important issues. Thanks, everybody.

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CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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