

1 FEDERAL TRADE COMMISSION

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4 UNDERSTANDING MERGERS:
5 STRATEGY & PLANNING, IMPLEMENTATION AND OUTCOMES
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26 FEDERAL TRADE COMMISSION
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1 financial analysts in developing efficiencies. When I did
2 work on the outside and on efficiencies, I always had a
3 financial analyst involved, because an economist is not a
4 substitute for a financial analyst. In efficiencies, you
5 get into these issues about how costs are allocated and
6 other sorts of things, and you really need financial
7 expertise in doing that. You're usually not going to be
8 able to use your internal business people, because they
9 don't really understand the sort of analyses we are going to
10 have.

11 But to go back to what Chairman Muris said, we
12 think efficiencies of all kinds are important. We would
13 like to see better presentations. We don't think, as the
14 Chairman said, that there are many cases where efficiencies
15 are going to make the difference, but there are some. There
16 are more of them than we see, and I thank the panel for very
17 interesting presentations, which will be available on the
18 website. We also will get a bibliography of the articles
19 David Painter cited, and that will be available. The next
20 session won't start until 11:00, so thank you very much.

21

22 **PANEL 5**
23 **PRE-CONSUMMATION INFORMATION EXCHANGE AND INTEGRATION**
24 **PLANNING**
25

26 MR. SCHEFFMAN: We're coming to the last session
27 before we end, and we're running a little late. I want to
28 thank Paul Pautler, who created this whole conference, and

1 his secretary, Chrystal, who made a lot of the arrangements.
2 Stefano, up here, has orchestrated lots of things, the
3 Commission's IT folks, that have made everything work. So,
4 we appreciate the hard work of all the people and, again, of
5 all the panelists who have contributed all their knowledge.

6 There are a couple of things I want to achieve from
7 this final panel on gun-jumping. We learn from the business
8 literature, and you can look at Paul Pautler's paper, that
9 merger implementation is very important to success.
10 Obviously, there's a trade-off between implementation and
11 gun-jumping issues. I would like people to talk about that
12 trade-off so we understand it better.

13 Second, my experience as an outside consultant
14 working with a lot of law firms and companies convinced me
15 that outside lawyers and companies have very different views
16 about where the line actually is. Also, different agency
17 personnel have very different views as to where the line is.
18 Maybe I'm wrong about that. But if I'm right, I would hope
19 that this panel creates a record that would be a
20 stimulus which would move the two agencies to speaking with
21 greater clarity about where the line really is, and we get
22 more consistency across legal staffers of the two agencies
23 in identifying to people where the line is.

24 With that said, Alice Detwiler, one of our first-
25 rate lawyers from the Bureau of Competition, is the chair
26 of this panel. I'll turn things over to her.

27 MS. DETWILER: Thank you, Dave.

1 Good morning. As Dave mentioned, this is an area
2 where we as regulators have -- perhaps as great as any other
3 area -- a role in defining what the guidelines are and what
4 the constraints are. Therefore, it's especially useful for
5 us to hear from counsel who are involved in antitrust -- as
6 to their experience with real transactions and their
7 experience with the advice that they have been giving.

8 In the panels yesterday, a number of speakers
9 emphasized the role of integration planning as a key factor
10 enabling companies to realize their anticipated synergies.
11 In fact, several speakers went so far as to say that the
12 speed of integration planning and the number of crucial
13 decisions made in the early weeks after the announcement of
14 the merger would make or break the success of the merger.

15 Of course, in the business world, it's always
16 important to have fast, accurate decision-making, but our
17 panelists believed that this was especially important in the
18 post-announcement environment. Some of the top reasons they
19 gave were the need to retain human capital, competitors are
20 trying to pick off the top talent, and human capital
21 dissipates in the face of uncertainty. Customers are not
22 dealing well with uncertainty, and competitors are trying to
23 pick off the customers as well. The sheer number of
24 decisions that must be made requires that the merging party
25 use every day efficiently.

26 So, the business people have every reason to want
27 to proceed quickly and accurately, which they can't do

1 without information and participation from the other side.
2 Also, as we heard this morning, they may need to share
3 information and make decisions in order to back up their
4 efficiencies claims. Enter the antitrust laws.

5 As long as the merging parties are separate
6 entities, the Hart-Scott-Rodino Act, the Sherman and FTC
7 Acts and the Clayton Act each restrict the amount of
8 information that companies can share, the way they can plan
9 for integration and the joint decisions they can make.
10 These constraints are real, and one of the major jobs of
11 antitrust counsel during the pre/post period is to make sure
12 that their clients steer clear of conduct that could spark a
13 gun-jumping investigation. Hence, the need for today's
14 panel.

15 Some of the questions our panelists will address
16 include what are the legitimate needs of merging parties to
17 exchange information and plan for integration prior to
18 closing?

19 How should regulators distinguish between
20 legitimate and illegitimate exchanges of information and
21 integration planning activities, also known as gun-jumping?

22 What are the merging parties' incentives to share
23 or withhold information and how do those differ from
24 regulators' concerns?

25 What practical steps have companies taken to guard
26 against excessive information exchange and with what
27 results?

1 How does the need to avoid gun-jumping impact the
2 ability of the merging parties to realize their anticipated
3 synergies?

4 And how can regulators reduce uncertainty as to where
5 the line is?

6 Our panel today consists of antitrust and corporate
7 counsel, both inside and outside counsel, each of whom has
8 substantial experience with mergers and integration
9 planning. First we'll hear from Howard Morse, a partner at
10 Drinker, Biddle & Reath and co-chair of that firm's
11 antitrust group. He previously served as an Assistant
12 Director in the Bureau of Competition here at the FTC. MR.
13 Morse's recent article on gun-jumping should be available
14 outside. He will lay the ground work for our discussion
15 with a short overview for this topic.

16 James Morphy is the managing partner of the M&A
17 group of the law firm of Sullivan & Cromwell. He has served
18 as outside counsel to buyers, sellers and financial advisers
19 in a large number of acquisitions. He will give us a
20 corporate lawyer's perspective on integration planning,
21 trying to get the deal done and capture synergies within the
22 constraints of antitrust law.

23 Paul Bonanto is corporate counsel for M&A at
24 DuPont. He has been at DuPont since 1974, and for the last
25 eight years, he's headed the M&A core team of DuPont's legal
26 department. Having been involved in integration planning
27 from the inside, he will share with us his experience with

1 actual mergers and the impact of gun-jumping constraints.

2 Mark Whitener is antitrust counsel for General
3 Electric Company, a position he assumed in 1997 after four
4 years as Deputy Director of the Bureau of Competition here
5 at the FTC. Although he assures me that his time at the FTC
6 was the most fun he's ever had in a job, he actually
7 accomplished a number of things while he was here as well,
8 including helping to develop federal antitrust guidelines
9 for mergers, intellectual property and international
10 enforcement. While at GE, he's been involved in a number of
11 acquisitions, and he will discuss the challenges of due
12 diligence and integration planning in that context.

13 Finally, we will hear from Bill Kolasky. He's the
14 co-chair of the antitrust and competition practice group at
15 Wilmer, Cutler & Pickering. He recently returned to private
16 practice after a time as Deputy Assistant Attorney General
17 at the Department of Justice. He will discuss some of the
18 inherent tensions between the needs of merging parties and
19 the concerns of antitrust regulators, and he will highlight
20 some open issues in the guidance that is available on gun-
21 jumping.

22 This topic really lends itself to discussion, so
23 after the presentations, I will have a few questions for the
24 panelists, and I hope the audience will have questions as
25 well.

26 MR. MORSE: Thank you and good morning. I want to
27 thank the organizers of the event, but particularly Dave

1 Scheffman and Sean Royall for inviting me to participate.
2 It's an honor to be back at the FTC. I spent ten years
3 here, often in this room, sitting up at the table over there
4 trying to convince the commissioners to take enforcement
5 action. Now that I'm in the private sector, I still do
6 believe that occasionally enforcement action is appropriate,
7 just not when it involves my clients.

8 Seriously, I do appreciate probably more than when
9 I was here, the need for the government to send a clear
10 message in order to provide guidance to people in the
11 private sector. I hope that what we are doing today will
12 help the government to move in the direction of providing
13 greater clarity.

14 I've been asked to provide an overview and to set
15 the stage for the discussion to follow. For those of you
16 who want more detail, I refer you to my article published
17 earlier this year in The Business Lawyer [Mergers and
18 Acquisitions: Antitrust Limitations on Conduct Before
19 Closing, 57 Bus. Lawyer 1463 (2002)].

20 I want to start by noting two critical distinctions,
21 set forth on slide number two of the handout, that both
22 enforcers and practitioners need to keep in mind when
23 looking at this area. Confusion arises when these
24 distinctions are ignored.

25 The first distinction is between, gun-jumping and
26 exchanges of information. The term "gun-jumping" is used to
27 refer to premature integration, taking control, or

1 integrating before closing, before the Hart-Scott-Rodino
2 waiting period has expired. Exchanges of information may
3 take place for purposes of due diligence or other purposes.
4 Some people occasionally use the term gun jumping in talking
5 about information exchanges, and in my view at least, that
6 can cause confusion. Anticompetitive concerns may or may
7 not flow from the exchange of information, but it's
8 important to focus on it as exchange of information.

9 The second distinction is on the legal front,
10 between Hart-Scott-Rodino Act and Sherman Act or FTC Act
11 limitations. Different legal rules flow from the distinct
12 laws. They apply at different times. The HSR Act applies
13 only through the statutory waiting period, not up until
14 closing, and applies regardless of whether companies are
15 competitors. The Sherman Act, on the other hand, applies up
16 until the day of closing.

17 The Hart-Scott-Rodino Act, as slide number 3 of the
18 handout notes, establishes a pre-merger notification scheme
19 that allows the Government to investigate transactions
20 before they are consummated, avoiding the difficult task of
21 "unscrambling the eggs." That was the problem that the
22 Government faced before the Act was adopted in 1976 when the
23 government often found itself challenging closed
24 transactions.

25 The starting point for understanding the HSR Act, of
26 course, is the language of the statute, which is on slide
27 number 3. That Act provides that no person shall acquire,

1 directly or indirectly, any voting securities or assets
2 without filing and observing the required waiting period.

3 The problem that we all face in interpreting that
4 language is neither the statute nor the HSR rules
5 implementing the statute define the term "acquire," which is
6 what the statute says you are not allowed to do.

7 The HSR rules do give us some insight and help the
8 analysis through a somewhat circuitous route. As noted in
9 slide number 4, the filing obligation is imposed on an
10 "acquiring person," defined as a person who will "hold"
11 voting securities or assets. "Hold" in turn is defined in
12 terms of beneficial ownership. And that is the standard
13 that the agencies have looked to in enforcing the Act.

14 We have to go one step further to look at the Statement
15 of Basis and Purpose, which is the notice issued when the
16 HSR rules were first adopted.

17 In advising clients, one has to look to the source of
18 government statements in a sort of hierarchy, and evaluate
19 how much guidance one can get out of particular statements.
20 Some sources have a longer half-life. We go from the
21 statute to the rules, decisions of courts or the agencies,
22 and the statement of basis and purpose, which is a formal
23 announcement of agency policy, to consent orders,
24 complaints, and analyses to aid public comment and
25 competitive impact statements which accompany proposed
26 consent orders. Analyses to aid public comment don't even
27 end up in the FTC reports. They just sort of disappear into

1 the ether. Private counselors of course also carefully read
2 the speeches of senior agency officials, but they of course
3 carry the disclaimer that they don't represent the views of
4 the agency. As you go down that list, the precedential
5 value declines. To put it bluntly, a speech may be helpful
6 in understanding a current enforcer's thinking, but has
7 little impact after that official leaves office. Sometimes,
8 of course, that is a good thing, when you don't like what
9 has been said in a speech. If the agency wants to provide
10 lasting guidance, officials must do more than give speeches.
11 They need to consider issuing official interpretations or
12 modifying the HSR rules.

13 The Statement of Basis and Purpose, which is quoted
14 in slide number 4, tells us that the existence of beneficial
15 ownership is to be determined on a case by case basis,
16 focusing on what it says are indicia of beneficial
17 ownership. These include the right to obtain any increase
18 in value, the risk of loss of loss, the right to vote, and
19 investment discretion or the right to dispose of assets.

20 The early enforcement actions that the agency brought
21 largely focused on these issues. Those are the Arco/Union
22 Carbide and Arco/Sunseeds cases, involving devices to shift
23 antitrust risk. Those cases examined who had the right to
24 obtain increases in value, who held the risk of loss, who
25 got dividends, and the like.

26 More recent cases addressing gun-jumping still use
27 the language of beneficial ownership, but the real focus

1 seems to be on operational control. As reflected in slide
2 number 5, DOJ officials gave speeches addressing local
3 marketing agreements and time brokerage agreements used in
4 the radio industry. The DOJ said that if such management
5 contracts are adopted in connection with an acquisition,
6 there could be an HSR violation, but if companies enter such
7 agreements outside the context of an acquisition, no HSR
8 report is necessary.

9 In 1996, the FTC brought a case against Titan
10 Wheel, referenced on the same slide, where the agreement
11 transferred possession and operational control immediately
12 to the buyer with the effect, according to the complaint, of
13 transferring beneficial ownership.

14 That brings us to the FTC's Input/Output case,
15 referenced on slide number 6 of the handout, which is
16 perhaps not quite as clear-cut. The acquirer there didn't
17 take contractual control, but according to the complaint
18 integrated the personnel and operations and held out the
19 company as being integrated to the public. The complaint
20 details conduct such as personnel moving offices, using new
21 e-mail addresses and business cards, essentially holding
22 themselves out as being a single company which seems to be
23 what attracted scrutiny.

24 One of the difficulties in giving advice is that
25 when you look at some of these cases, some of the conduct
26 alleged to be problematic seems innocuous. The last line on
27 slide 6 says personnel consulted on other possible

1 transactions. It is not clear to me whether that standing
2 alone is something that the agencies should consider
3 problematic. The idea that you might consult with a company
4 that you are about to buy about another transaction you are
5 thinking about isn't necessarily that crazy of an idea.

6 The Computer Associates case, discussed in slide 7
7 of the handout, is the case that has attracted attention to
8 the gun jumping issue. It included both HSR and Sherman Act
9 counts. Focusing on the HSR claim, here the elements of
10 control were arguably simply aimed at preserving the value
11 of the company. One could argue they weren't integrating
12 and holding themselves out to the public as a single
13 company. But DOJ alleged Computer Associates exercised
14 unlawful control over Platinum, the company to be acquired.
15 The Justice Department said an acquiring company cannot
16 exercise operational or management control over the company
17 to be acquired without stepping over the bounds of the HSR
18 Act.

19 On the other hand, DOJ's Competitive Impact
20 Statement in the Computer Associates matter tells us that
21 customary provisions restricting actions that are reasonable
22 and necessary to protect the value of a transaction do not
23 violate the HSR Act. Unfortunately, what is reasonable,
24 what is necessary, and what is customary is a bit vague.
25 Justice gives us a list of certain things that are not
26 problems, restrictions on declaring dividends, mortgaging
27 property, things of that sort, but also things like

1 restrictions on new large capital expenditures. That, of
2 course, requires one to decide what is large.

3 Part of the problem may be trying to fit a square
4 peg in a round hole, as reflected in the quote from one FTC
5 speech, shown on slide 8 of the handout. The cases and this
6 quote use the language of beneficial ownership, because that
7 is the language in the rules, but the concern is on
8 operational control or control over key competitive
9 decision-making, which has nothing to do with who has the
10 right to obtain an increase in value or the risk of loss.

11 I want to turn now from the HSR Act to the Sherman
12 Act and the FTC Act and start again with the language of the
13 statutes, on slide 9 of the handout. Contracts,
14 combinations or conspiracies in restraint of trade, and
15 unfair methods of competition are illegal. Under these
16 laws, naked price-fixing, market division, and customer
17 allocations are per se illegal. But what if companies about
18 to merge engage in such conduct?

19 Slide 10 of the handout outlines the agencies'
20 positions. The Department of Justice, in Computer
21 Associates, took the position that the pendency of a
22 proposed merger does not excuse the parties of their
23 obligations to compete independently. The FTC, in speeches,
24 has said the same thing. Until competitors consummate their
25 transactions, they are separate economic actors who are
26 bound by the competition laws.

27 But the case law is a little bit less clear. The

1 Eighth Circuit in the International Travel Arrangers case
2 rejected the view that only formal consummation of the
3 merger precludes application of Section 1 of the Sherman
4 Act. The court left it to the jury to decide whether the
5 parties lacked an independent economic consciousness.

6 Two government enforcement actions that predate the
7 Computer Associates case are noted in slide 11 of the
8 handout. The Torrington case alleged one of the companies
9 refused to quote a customer in order to, as an official put
10 it, speed up the consolidation. That was challenged by the
11 FTC as a per se illegal customer allocation.

12 The Commonwealth Land Title Insurance case involved an
13 allegation of price-fixing, where there was a formal
14 agreement between companies to set prices pending a
15 transaction that had not yet taken place.

16 Slide 12 of the handout returns to the Computer
17 Associates case, which has attracted the attention at least
18 of corporate lawyers because it attacked conduct of business
19 covenants under the Sherman Act. There, DOJ alleged
20 covenants restricting conduct pre-closing violated the
21 Sherman Act. DOJ said agreements to operate in the ordinary
22 course consistent with past practice or general agreements
23 restricting conduct that would cause a material adverse
24 change are okay, but agreements on price, agreements
25 allowing one firm to approve the other's contracts or the
26 like are prohibited.

27 I will turn now to pre-merger information exchange,

1 which as I said at the outset must be analyzed separate from
2 gun jumping. Exchange of information does not implicate
3 beneficial ownership or operational control, and is not
4 considered per se illegal.

5 Three legitimate competitive concerns that have been
6 expressed about gun jumping are spelled out in slide 13 of
7 the handout. First is that companies that have no intention
8 of merging engage in sham negotiations. Some companies may
9 exchange information under the guise of merger negotiations
10 in order to collude. Second, one firm may be engaged in
11 predatory conduct and engage in merger negotiations just to
12 get information from the other. Those are legitimate
13 concerns, but they are very rare, and to establish rules
14 based on those concerns will inhibit procompetitive merger
15 discussions. The third concern is the one that seems to
16 drive the analysis, and that is that legitimate merger
17 discussions may lead to coordinated interaction if the
18 proposed transaction is not completed.

19 As seen in slide 14, the Supreme Court precedents
20 instruct that the rule of reason applies to information
21 exchanges, recognizing that there is a useful purpose to
22 such conduct, and therefore, one has to look at the
23 structure of the industry and the nature of the information
24 exchanged to decide whether it is OK. It is safer to
25 exchange historic information than to talk about current
26 conditions. One time exchanges are generally safer than
27 ongoing exchanges.

1 It is critical to recognize two legitimate business
2 justifications for information exchange pre-merger. One is
3 due diligence, both to determine and confirm the value.
4 That doesn't end on the day that a contract is signed, but
5 may continue up until closing. A second legitimate function
6 is planning efficient integration.

7 I used to think this was only important to my
8 clients in the computer industry who insist that they need
9 to be able to move quickly after the deal is consummated,
10 but it is now clear to me that companies in all industries
11 consider integration planning important. They are concerned
12 that uncertainty leads to personnel leaving the company and
13 business being lost to competitors, and are concerned that
14 delay will reduce projected efficiencies.

15 One of the key issues in the rule of reason balance
16 ought to be whether the firms have implemented precautions
17 and safeguards to reduce the risk of anticompetitive
18 consequences from information exchanges. These are spelled
19 out in slide 15 of the handout. A firm may restrict
20 distribution and use of competitively sensitive information,
21 who is going to get it, and what they can use it for. Firms
22 may also aggregate competitively sensitive information.
23 They also may delay the exchange of the most sensitive
24 information until late in the process when the transaction
25 is more certain.

26 One has to consider these sorts of precautions and
27 safeguards as well as the strength of competitive concerns

1 based on market structure in the rule of reason balance.

2 Slide 16 summarizes recent enforcement action
3 challenging information exchanges in the merger and
4 acquisition context. The Insilco case involved exchange of
5 customer-specific information, current and future pricing
6 plans, and pricing formulas. The FTC alleged in that case
7 that the transfer of such competitively sensitive
8 information in highly concentrated markets was illegal. I
9 am troubled by language in the analysis to aid public
10 comment that suggests that this kind of information exchange
11 would likely harm competition in any market. Under the rule
12 of reason analysis, market conditions are an important
13 factor. It is also noteworthy that there is no discussion
14 in Insilco of any safeguards. Presumably there were no
15 safeguards in place. Notably, while prohibiting direct
16 exchanges of information, the FTC consent order in that
17 matter allows the companies to use independent agents to
18 aggregate sensitive information.

19 Finally, as shown in slide 17, we are left with the
20 question as to whether the mere exchange of information can
21 violate the HSR Act? The quote here is one that I find
22 troubling. It suggests that exchange of information for
23 purposes of due diligence is permissible, but it rejects
24 planning integration as a legitimate grounds for exchanging
25 information. Therefore, it suggests that if an acquired
26 firm can not show that it would have provided information to
27 a firm other than the acquiring firm, then that might be

1 unlawful.

2 I hope that this overview of the law and recent
3 government enforcement actions sets the stage for comments
4 and what I know will be worthwhile insights from the other
5 panelists. Thanks very much.

6 MS. DETWILER: Thank you. James?

7 MR. MORPHY: Good morning. As Alice said, I am
8 neither a regulator nor an antitrust lawyer. I'm one of the
9 guys that tries to get the deal signed and then leaves the
10 mess for everybody in this room to try and figure out what
11 to do with it. So it's probably appropriate that my remarks
12 will be brief.

13 As an M&A lawyer, I am not particularly troubled by
14 where we currently are with respect to the so-called "gun-
15 jumping" issue. The enforcement actions that have been
16 taken by the regulators, some of the cases that have been
17 mentioned previously, don't surprise or shock me. In fact,
18 when I look at the facts in those cases, I understand why
19 regulators did what they did under the circumstances. So,
20 I'm not troubled by what I see.

21 Sometimes what I hear, if it is indicative of
22 future actions, does trouble me. General remarks and
23 speeches by agency officials sometimes go further than what
24 I think the regulatory agencies have done in the specific
25 cases. I think as long as we all accept the "rule of
26 reason" approach and remember the purpose of the acts and
27 rules that you are enforcing, we can find common ground and

1 ways in which the objectives of the statutes and the
2 objectives of the business people and their lawyers can be
3 met.

4 The "gun-jumping" problem can be broken into two
5 basic areas: there is, first, the problems that can arise
6 in connection with the information exchange between
7 potential merger partners, and second, the post-signing and
8 pre-closing interactions between the companies.

9 I think most lawyers in this area would agree that
10 the procedures to be followed before exchanging information
11 are fairly standardized: everybody getting information has
12 to sign a confidentiality agreement. That's the first step
13 of the process. Speaking from the sell side, generally a
14 data room is created with documents that you would
15 anticipate the buyer would want to see. The data room is
16 gone over in advance by lawyers on our team. I would always
17 have an antitrust lawyer involved, but, in the beginning the
18 data room is mostly public information and not competitively
19 sensitive information. To the extent there are contracts
20 that we know somebody is going to want to see, they would be
21 redacted to the extent that they contain price-sensitive
22 information or other information that we don't believe that
23 they should have. So, that's how the process starts.

24 Starting off with a "clean" data room has the
25 advantage of eliminating an awful lot of the concerns about
26 who can see what, when, et cetera, early in the process.
27 You can allow a lot of people to see information relatively

1 quickly. You're not terribly troubled by what they're going
2 to have their hands on. A number of people may come through
3 and want to kick tires. At the end of the day, some are not
4 terribly serious, but they haven't learned very much from a
5 competitive perspective, and you haven't wasted a lot of
6 time. Obviously, as the process progresses, and you get
7 more serious with one or two buyers, and if you're lucky,
8 maybe more than two, the demands for detailed information
9 increase. At this point, logic and an appreciation for
10 antitrust sensitivities come into play from a corporate
11 perspective. When I hear from my client that Buyer A needs
12 to be provided with certain types of information, my first
13 series of questions is always, well, why do they need it?
14 What is it that they need to learn from that information
15 that is going to help you and this process? And do you
16 accept their explanation of what it is they need and why, or
17 are they just "mining" for information?

18 Then I ask, if you give the information to them and
19 this transaction falls apart, would you regret it? Usually
20 when you start to analyze things in those terms, the
21 businessmen almost always start to decide how to handle this
22 process for themselves, and you will find that they become
23 very much an ally. If it is decided that the request is
24 legitimate but we don't want to give them exactly what they
25 are asking for, the third question is generally, so how do
26 we go about giving them a substitute for this information?
27 Can we give them a proxy for it without divulging

1 information that you wouldn't want in their hands?
2 Generally a way is found to thread the needle. Aggregation
3 of data is one well recognized way to go about it. Coding
4 things and hiding names and changing information in a way
5 that still provides a sense of what the basic underlying
6 data is without giving them the underlying data, all of
7 these things are possible.

8 The other tension, though, that I throw out is, at
9 the end of the day, the seller also is trying to maximize
10 value. He or she is hearing from the buyer that without
11 this specific information I'm not sure that I can price this
12 appropriately or I'm not sure I can get you more value. So
13 undeniably there is a tension. It isn't easy simply to say,
14 forget it, you don't need this information. You do need to
15 work through a process. And, obviously, the nature of the
16 information, who is going to get it and when they're going
17 to get it all play into what we ultimately decide is the
18 right path.

19 There are transactions in which we have required
20 buyers to enter into "ring fence" agreements, where they
21 agree that only a certain group of select people within an
22 organization will be entitled to see the information. We
23 have each of those individuals sign a very explicit
24 confidentiality agreement that states what the purposes of
25 the agreement are and that they are not to use this
26 information for any purpose (or provide it to anyone else)
27 other than for purposes of analyzing the transaction.

1 Obviously, the positions of those people is terribly
2 important. Typically, they are not involved in operations,
3 in marketing, et cetera.

4 It is an iterative process and one in which you
5 work very hard to try to accommodate the need for
6 information balanced against the objectives of not providing
7 competitively sensitive information that can be used in a
8 way that regulators here would find objectionable.

9 So that's a snapshot of the pre-signing process
10 from my perspective. The post-signing/pre-closing
11 interaction process is one, as everyone knows, where deals
12 take a while to close -- sometimes thanks to the help of
13 some of the people in this room. Therefore, the buyer wants
14 some assurance that the value that it's agreeing to pay on
15 day one, and is agreeing to deliver 90 or 180 days later,
16 will be in exchange for an enterprise that is still as
17 valuable as he or she originally thought it was. Therefore,
18 restrictive covenants are written into the definitive
19 agreement, which are perfectly legitimate, and as long as
20 some sort of ordinary course business exceptions are
21 accepted as a way to allow this process to take place, I
22 think that's a fair compromise.

23 There are places, however, where the ordinary
24 course exceptions can bump up a little bit against some
25 issues. Let's assume a company, for example, has a capital
26 expenditures budget that the buyer has a look at and says,
27 gee, we really don't want you to do that. That's when you

1 must be alert to the issues.

2 I will pose three examples for the group which may
3 inspire some conversation or questions. In the first one,
4 for example, let's assume the seller is about to enter into
5 a long-term lease for its corporate headquarters, but it's
6 anticipated that one of the synergies of the deal is that
7 the seller's corporate headquarters is going to close, and
8 G&A is going to be reduced dramatically. People are going
9 to be consolidated into the headquarters of the buyer. In
10 that case, it makes no sense for the seller company to enter
11 into a long-term lease, and therefore, the buyer quite
12 naturally would not want them to do that.

13 I must say, and I will pose it and move on and see
14 if other folks have a view, that doesn't particularly
15 trouble me if I step back and look at the purposes of the
16 antitrust laws and what we're trying to achieve. Delaying
17 the decision to enter into a long-term lease for office
18 space doesn't seem to be something that should create an
19 issue. But let me go a little further and, assume the
20 capital expenditure budget of the seller calls for it to
21 spend \$5 or \$10 million to renovate a plant. Assume there's
22 surplus capacity, and it is anticipated that plant in
23 particular -- which, obviously if they're renovating it
24 isn't as efficient as it should be -- is one of the plants
25 that the two parties would close. Well, is it fine if the
26 buyer says, I don't want you to start to spend the money to
27 renovate that plant since we both agree that it's going to

1 be closed in 90 days? I have an answer for that. I'm
2 wondering what others will say.

3 The third scenario is one in which you have a
4 company that leases airplanes, and they are about to bid to
5 buy five Boeing 767s, and five Airbuses, if that's the right
6 term, and the buyer at the end of the day doesn't need or
7 want ten more airplanes. Is that an appropriate place for
8 the buyer to say, I don't want you to bid for those
9 airplanes. As I said, a little more trouble as we go up the
10 ladder here.

11 So, those are the places where I think you start to
12 see tension in terms of the buyer having legitimate
13 expectations about how the deal will unfold, what will be a
14 synergy and what will not be a synergy, -- all of which can
15 affect price for the seller and its stockholders. Questions
16 arise regarding the logic of continuing to go down a path,
17 if you assume the deal is going to close, doing something
18 that could be considered in some ways economically wasteful.
19

20 Every deal is different, every company is
21 different, and others here may have a different view. But,
22 in my experience, information systems are an area, in
23 particular, where if you can't put those things together and
24 have things up and running when a merger closes, you run
25 into tremendous problems for the business people trying to
26 integrate these businesses and make them work. So, I think
27 there are places, again, where there should be the ability

1 to allow integration planning to take place without
2 necessarily running into the "gun-jumping" issues that have
3 been raised as problems in this area. Clean teams are
4 something that people have used, with varying degrees of
5 success.

6 But at the end of the day, the antitrust rules are
7 going to prevent certain information from being able to pass
8 from one company to the other. At least in my experience,
9 most companies are able to live within those parameters, as
10 long as, again, it's a process of give and take, as long as
11 the regulators understand that there are also legitimate
12 needs for businessmen to be able to talk and to plan, and to
13 look at the specific facts under a rule of reason and say
14 that's acceptable "good faith" conduct, and we understand
15 why you did it the way you did.

16 So, from my perspective, I guess I would be happy
17 if we all just stayed where we are. The world, at least
18 this corner of it, seems to be working pretty much the way
19 it should. Thank you.

20 MS. DETWILER: Thank you, James. Now we will hear
21 from Paul, an inside counsel.

22 MR. BONANTO: First of all, to David and everyone,
23 thank you for the opportunity to come down and give a bit of
24 a business perspective, although you might wonder about
25 that. And of course, a preliminary comment, these views do
26 not necessarily reflect the views of DuPont, but they are
27 not my views either. This presentation, obviously, appeared

1 on my computer, and I'm just using it.

2 I think Howard already covered this distinction,
3 but just to set it up, what I am going to be focusing on
4 from our point of view are really three pre-closing
5 activities between the parties when competitive issues
6 exist. These are things we work with. As shown in the
7 slide on the top of the first page of my handout, these
8 categories are (1) exchange of information, (2) covenants
9 and provisions in the agreement of sale -- clearly Computer
10 Associates has gotten people focused on this if they weren't
11 before, but, as a practitioner you do worry about those
12 covenants -- and (3) preparation for startup (closing) and
13 integration.

14 What are some business needs at least that we would
15 like you to be thinking about? As seen in the slide on the
16 bottom of the first page of my handout, once announced, the
17 deal ought to go through. Embarrassment is a big driver for
18 corporate CEOs, along with other things, and when they
19 announce a deal, they want it to close. Just so you know,
20 this is even more important from the seller's point of view.
21 If we're in a competitive situation and we've announced that
22 we're selling business X and that deal doesn't close, there
23 is some inevitable competitive harm to that business.
24 People don't view you as committed to it. They don't view
25 you as reliable as a supplier. There are some inevitable
26 business issues that can't be avoided. So, if I'm a seller,
27 for sure, as well as a buyer, I want the deal to go through.

1 Second, values need to be maintained in the interim
2 period but also captured, and again, I would think from a
3 regulatory point of view, that's reasonably important to
4 you. Third, startup should be smooth, effective. I've
5 lived through some startups that were not effective, and
6 they are really, really horrible. As you can imagine, when
7 we announce, oh, there's going to be a merger, and gee,
8 customers, there's going to be all kinds of great things,
9 aren't you really happy? And they're all sitting back, boy,
10 here we go again. They're going to lose my order, and they
11 won't know what they're doing. The customers are very
12 concerned about it.

13 So, if you don't start up well, that's another
14 thing that it's very, very hard to recover from. If you
15 call me up and ask where's the order, and I tell you, gee,
16 we have to call so and so and find out about it, that's not
17 comforting. So, the startup, especially the first 30 days,
18 is very, very critical. From our perspective in business,
19 it's essential to make the startup happen the way you want
20 it to happen, which is effectively.

21 Let's talk about the first of the three we
22 mentioned, due diligence and integration. As indicated in
23 the slide on the top of p. 2 of my handout, the process of
24 due diligence (value confirmation) and integration (value
25 capture) is really one continuous process. That's the way
26 we plan for it; that's the way we implement it. The team
27 that is doing due diligence is also the integration team.

1 They are in there initially to confirm value, but they are
2 also identifying what needs to be done for a successful
3 startup and integration. Isn't that logical? If I'm Joe or
4 Sally and I'm finding out about this for this purpose, I'm
5 also thinking about, how are we going to make this company
6 run together after closing? You don't have two separate
7 teams. So, it is an integrated process. It continues until
8 closing. Obviously, the emphasis shifts from value
9 confirmation to value capture. My point is, and it's been
10 made already, a buyer's need for information continues until
11 closing, and in fact, in my experience after closing.
12 You're always learning more, but it's very, very important.
13 The due diligence, the integration, the planning, the value
14 capture, it's all one process.

15 Okay, with that background, how do we look at these
16 three issues? First of all, exchange of information. As
17 shown in the slide on the bottom of p. 2 of my handout, yes,
18 traditional rule of reason applies. My experience is that
19 practitioners are comfortable and experienced in dealing
20 with these issues, both as a buyer, and as a seller --
21 everyone sees it about the same way. Yes, this is
22 information you can have, yes, this needs to wait until
23 later, this maybe has to go to a special group, this will be
24 done differently, this needs to be redacted.

25 From my experience, this is something that is done
26 pretty well. People almost always see the same issues, and
27 they deal with them in a similar way. So far, I've never

1 had a question from either agency, the Department of Justice
2 or FTC, looking at a transaction saying, gee, what were you
3 doing here? That doesn't mean we're perfect, but I think we
4 see it pretty well. I don't think it's an area where
5 guidance is needed, again, with that caveat we talked about.
6 I think people are dealing with it reasonably well.

7 Now, you have your own perspective, which I can't
8 comment on, but this is what I have seen. People understand
9 these issues, because we deal with them in a lot of areas
10 other than mergers. Maybe you want to do a joint
11 development agreement with someone. There's all sorts of
12 competitive issues that arise under the Sherman Act, and
13 we're used to dealing with information. So, I think there's
14 a fair amount of experience out there.

15 The second one, covenants and provisions in the
16 agreement of sale, is referenced in the slide on the top of
17 p. 3 of my handout. I'll give you a few perspectives. I
18 told you the seller especially wants to know that the deal
19 is going to go through for a lot of reasons, not just
20 because of the competitive harm if it doesn't. Maybe the
21 chairman has called up Ellen and said, Ellen, I really want
22 this money in the second quarter, I am going to get it,
23 aren't I? And that can be pretty powerful living within a
24 company. It should be important for the same reason to you
25 all, that a deal that's approved closes. If you say, yes,
26 overall this should close, then you wonder why if it doesn't
27 close. If there's competitive harm, dislocation -- that's

1 a negative from your point of view as well. So, for the
2 seller, the agency, depending on your point of view, closing
3 is a positive. You should want it to happen.

4 Looking at Computer Associates and recognizing that
5 the seller wants certainty, I would say, first of all, an
6 ordinary course of business covenant doesn't do it for us,
7 because it's not very clear. Remember, Ellen has been told,
8 you have got to get this thing closed, and so anything
9 unusual that happens, what do they do? They call me up.
10 They say, Paul, if we do this, are we going to close?
11 That's a nice thing to have to answer day to day, isn't it?
12 You have got a pretty good argument, et cetera, et cetera.

13 The other I guess safe harbor talked about in that
14 case, is if it won't have material adverse effect. This
15 may not be clear, depending on how you define it. You know,
16 conditions of closing are not a substitute. You can go to
17 the other extreme and say, seller, you run your business
18 however you want until closing, and then I, buyer, can take
19 a look, and if it's changed in a way I don't like, then I
20 won't close. Well, again, that shouldn't meet your needs or
21 the seller's either.

22 My point is lack of specific covenants may cause
23 less competitive vigor rather than more. Now, this is only
24 a hypothetical. I'm certainly not recommending it, but
25 suppose you said, you seller can cut your prices 10 percent
26 below list but no more, but as long as you're only doing it
27 that much, that's not going to foul up closing. We'll

1 consider it in the ordinary course. We won't consider it a
2 material adverse effect. Now, Ellen wants to cut prices 8
3 percent. Hey, Paul, is this okay? No problem. Suppose you
4 don't have that provision and she says, hey, what happens if
5 I cut it 8 percent, well, there may be an issue. Well, I'm
6 not going to do it.

7 So, I'm just saying a lack of certainty does not
8 necessarily lead to competitive vigor on the part of the
9 seller, depending on their motivation. I'm not trying to
10 dig a hole for myself, but that's just the reality. That's
11 where they're living. So, to some extent, certainty or a
12 little more specificity in covenants can be pro-competitive,
13 it just depends. I'm not advocating that one. That's an
14 example.

15 So, I'm just urging the Government to consider the
16 underlying business reality. Those covenants very often,
17 certainly if it's against someone such as this panel, are
18 heavily negotiated. Sellers and buyers don't have a
19 unanimity of interest, so they really are arm's length.

20 The starting point should not be, I wonder what
21 these turkeys are up to. Just say, this represents two
22 thoughtful people on different sides of the fence trying to
23 come up with something. Let's at least look at it from a
24 neutral point of view and see what we think. Certainly I
25 would think at a minimum, if we're going to go to a safe
26 harbor, and that's a question for you guys, we ought to at
27 least say that the material adverse effect could have a

1 quantity specified, so that, if it doesn't change in an
2 amount exceeding X, a set dollar value, then it would be all
3 right.

4 Now, at a minimum, the seller is going to need some
5 basis to evaluate it meaningfully as to what it might do to
6 closing.

7 Preparation for startup is addressed in the next
8 slide, on the bottom of p. 3 of my handout. Some people
9 have touched on this, but I think activities prior to
10 closing to facilitate an effective startup should be allowed
11 unless they raise real anti-competitive issues.

12 I recognize we do have the jurisdictional
13 imperative of Hart-Scott-Rodino and you can't give up your
14 rights to have all this sort of stuff taken care of. The
15 pivotal case, which my colleague touched on, is Information
16 Systems. But suppose on day one, we now have the merger,
17 and somebody is calling up, Joe Blow, a real customer, and
18 he says, I want to order something. How do you place it on
19 the plan? How do the computer systems talk to each other?
20 How do you cut an invoice? Can you really track it when he
21 calls up a week later and says, when am I going to get it?
22 They want to know that they are going to get it in the next
23 week, what day, what hour, when is it coming in? What
24 train's it on? When is it going to arrive? Those things
25 you won't be able to do unless you have done a heck of a lot
26 of planning ahead of time. That means in due diligence in
27 this area, for example, you find out what computer system

1 they have, what software they have, what licenses they have,
2 and does it run well? Also, how is that system and yours
3 going to be integrated? How on day one is it really going
4 to work? And if you don't start until after it closes, you
5 will have a nightmare, an absolute nightmare. How are you
6 going to have shipping and tracking? You have got railroad
7 interfaces between the parties. Without going into the
8 litany list, it's just a whole host of pragmatic issues, few
9 of which are tremendously right in the heart of anti-
10 competitive concerns, that need to be done.

11 Clearly I'm not advocating that we share pricing at
12 individual accounts and have the sales reps talk to each
13 other a month before closing. But in many of these other
14 areas, there's an awful lot of pragmatic cases such as
15 information systems, plant operations, purchasing and how
16 you're going to get the raw materials in a more effective
17 way, et cetera, that I would just say is a positive that
18 should be allowed. And again, as we talked about, if you
19 have a very bad startup, there is some actual economic loss
20 that in our experience is never going to be made up. So,
21 that's just a few perspectives from our point of view.

22 Thank you.

23 MS. DETWILER: Thank you Paul. Now we will hear
24 from Mark, an inside counsel.

25 MR. WHITENER: Good morning. Nice to be back.
26 When I was at the FTC, I was present at the creation of some
27 of the cases that Howard talked about, so not surprisingly,

1 I'm not going to spend too much time criticizing any of the
2 actual cases the FTC brought. I do think some of the
3 guidance, some of the speeches that have followed have
4 complicated things a little bit, although I find myself
5 largely in agreement with James and Paul, especially on the
6 bottom line, which is that I don't see a crisis here. I
7 think that as Paul said, people who counsel in this area
8 have figured out how to accomplish virtually all of the
9 legitimate business needs. But I think there is at the
10 margin some hyper-caution in the guidance that comes from
11 the ambiguity that's been introduced by some comments made
12 outside the context of the actual enforcement actions.

13 So, I'll address that and try to give you my
14 perspective, especially from my last five years at GE, in
15 terms of what we actually try to do, how we do it, and how
16 we interpret the cases and the guidance that come out of the
17 agencies.

18 The first slide of my handout lists the main points
19 that I will make today. First, the business environment
20 that we and other companies operate in today is making all
21 of these issues we are talking about even more important.
22 That is to say, all business activities are under even
23 greater scrutiny, certainly including merger and acquisition
24 activity -- which deals are selected, at what price, and
25 whether they are ultimately successful.

26 For a company like GE that does a fair number of
27 deals, the marketplace is evaluating us, and it's important

1 that we be able to say, credibly -- to the marketplace, to
2 investors, to regulators -- that we have a track record for
3 choosing deals well and for actually implementing them
4 effectively.

5 The second point, which I think everybody agrees
6 with in principle, is that there are legitimate business
7 needs here -- for thorough due diligence, rapid deal
8 integration, and preservation of the seller's business in
9 the interim between signing and closing. These legitimate
10 business needs have to inform the regulatory analysis, and I
11 think they do, but the more that we focus on the details of
12 these business considerations, the better informed the
13 regulatory analysis will be.

14 The third point is that when we talk about planning
15 for effective post-closing integration -- Paul made this
16 point, and I believe others did yesterday in the efficiency
17 discussion -- we are not talking about getting a jump, in
18 some sense, on closing. It's not about, "well, we think
19 it's a good deal, so it must be good to integrate it sooner,
20 before we're cleared and closed."

21 Clearly that's not the legal and regulatory
22 environment. You can't actually integrate the business
23 until you've been cleared and closed the deal. The point
24 here is simply that deals succeed or fail based in large
25 part on whether they're effectively integrated, and
26 effective integration requires fast integration. It
27 requires, as others have said, that a lot of things happen

1 in the first hours, days, weeks and months after the deal is
2 actually consummated.

3 The next point -- and again, I'm echoing what
4 others have said - is that the current regulatory
5 environment works reasonably well. People have found ways
6 to structure due diligence, integration planning and
7 ordinary course contract provisions so that businesses can
8 do most of what they need to do. But I will talk about some
9 of the ambiguity at the margins of the agencies'
10 articulation of the policy in this area that might be
11 effectively addressed.

12 What can the agencies do differently? I think it's
13 a question of how you interpret and explain the policy and
14 the enforcement actions you take. Again, I don't have much
15 to quibble about in terms of case selection. The question
16 is what is the gloss on that case selection, and what is the
17 proper legal analysis under Section 1 and Section 7A, which
18 I think have to be viewed as distinct analyses, as I will
19 discuss.

20 Then finally, I don't want to give practitioners --
21 outside or inside counsel -- a complete pass on this. Some
22 people give very good and practical advice. But some
23 practitioners resort to a cookbook approach. You can get
24 very simple guidance, and it can be over-restrictive. Or
25 you can spend all day every day, as I'm sure Paul has found,
26 answering specific questions on a case-by-case basis. You
27 have to find something in between where you can guide the

1 process without spending 24 hours a day on it, and without
2 resorting to categorical do's and don'ts that might miss the
3 mark in some cases.

4 I put the legitimate pre-closing needs of
5 businesses that are parties to a deal agreement in three
6 categories. First, let's talk about due diligence, which is
7 referenced in the slide on the top of page 2 of my handout.
8 The fundamental premise that good information is vital to
9 deal evaluation and integration planning is not something
10 people would disagree with. Efficient markets require good,
11 timely information. M&A markets are no different. But
12 sometimes the counseling in this area unduly restrict the
13 information to what's "necessary" or "reasonably necessary"
14 in order to accomplish a business objective. That's
15 probably a good working concept, but the problem is that I
16 often find that I'm looking at information where I can
17 clearly see that there is a legitimate reason for the
18 information to flow from the seller to the buyer, even if
19 some of information may be competitively sensitive. That's
20 really the problem -- some of that information could well
21 have a legitimate pre-closing purpose, and it may be hard to
22 draw a clear line around what is "necessary." And of
23 course, it can be hard to draw a clear line around what is
24 competitively sensitive.

25 But the next point I think is something that's
26 important to say, which is that this line-drawing is
27 typically not a big problem in the current regulatory

1 environment. It's understood in the antitrust legal
2 community, at least, and I think in the M&A legal community
3 generally, that you have to take steps to keep competitively
4 sensitive information out of the hands of the wrong people.
5 Through a process of identifying the information, and
6 identifying the people, you establish processes to make sure
7 that if there's a need to know, you know *who* needs to know
8 it, and you prevent the information from flowing to
9 operational people in the buyer's organization who compete
10 with the seller. Those are steps that can be and typically
11 are taken, and I think that these steps are fairly simple
12 and widely used.

13 But in the due diligence area, I think it's
14 important to confine the analysis -- as noted in Howard's
15 terrific article and looking at the cases and speeches -- to
16 Section 1. It's a Section 1 rule of reason issue. There's
17 an established legal analysis for that. It's not the
18 clearest legal analysis in the antitrust world, but there is
19 one. It's not a 7A analysis. When I come back to
20 integration planning in a moment, I will talk about that a
21 bit more.

22 The rule of reason really is the proper approach to
23 information sharing, setting aside the sham situation, which
24 as Howard said and which in my observation is extremely
25 rare. I have never seen deal discussions that I thought
26 either party was entering into in order to mine competitive
27 information without a legitimate interest in doing a deal.

1 I'm not saying it's never happened; I've just never seen it.

2 The second legitimate need is integration planning,
3 which is discussed in the slide on the bottom of page 2 of
4 my handout. I've already made the first point, which is
5 that the business need is not about getting started with
6 actually integrating the acquired business before closing.
7 It's about being ready to quickly take the vast majority of
8 integration steps within the first 30 to 60 days after the
9 deal is closed. Keep in mind that for most deals, before
10 they are signed and announced, there's a fairly small group
11 of people in both organizations who know about the deal.
12 Often there are very strong legal and practical reasons to
13 do it that way. So, the buyer and seller organizations may
14 have hundreds or thousands of employees, but most of those
15 people are completely separate from the deal process until
16 the day that it's announced.

17 So, there's a hell of a lot to do at closing --
18 Paul made that point. My view is there's a lot of
19 preparation that can be done pre-closing, as long as
20 competitively sensitive information isn't shared among the
21 wrong people, so that at closing, we can come as close as
22 possible to pushing a button and having the IT systems
23 integrated, for example. Now, anybody that knows about IT
24 systems would laugh at that, because they know that that's
25 almost never possible, even with smaller integrations, much
26 less large ones. But that's the goal, and that's a good
27 example, I think, of a fairly competitively benign area

1 where there are business imperatives.

2 The next point is that there are difficult
3 questions about information flow, often related to the
4 integration planning process. When antitrust lawyers think
5 about this issue, we typically begin by thinking about due
6 diligence and sharing information, what kind of information
7 needs to be shared for valuation purposes, et cetera. Then
8 we think about integration planning as largely a gun-jumping
9 issue. Did the buyer exercise improper control over the
10 seller? Did they get in there and operate the business
11 prematurely?

12 But to me, one of the key areas and sometimes one
13 of the most challenging areas is a combination of the two
14 issues: What is the information flow necessary for
15 integration planning? Paul made a number of very useful
16 observations, one of which was that due diligence and
17 integration planning are not really two operations, they're
18 one. The information flow that is supporting due diligence
19 also needs to be plugged into the integration planning
20 process. And often there's even more of a legitimate need
21 for operational business people from the buyer's
22 organization to be involved in the integration planning
23 process, because they are the ones who are knowledgeable
24 about the businesses to be integrated.

25 When you're talking about pre-signing due
26 diligence, you can do some of that with non-operational
27 business people. Obviously, you may include operational

1 people for some purposes, but you can reasonably segment
2 them from a lot of the information. When you talk about
3 integration planning, by definition, you're talking about
4 how business X and business Y fit together, and that has to
5 involve, to a significant degree, operational people from
6 the buyer's organization.

7 So, it's a little more difficult at that point to
8 say, well, we'll take all the necessary information in, but
9 we'll just keep it within this deal team that is limited to
10 outside consultants and finance people and lawyers and
11 business development people. You have to include some of
12 the buyer's business people in the integration planning
13 process, so you have to then be more rigorous about keeping
14 from them competitively sensitive information from the
15 seller that they shouldn't have. That is something that we
16 focus on a lot.

17 Again, I'm not arguing here for a different policy
18 or different guidance from the agencies. I'm just trying to
19 convey the business context. If the agencies encounter an
20 example where somebody is seeking to justify information
21 flow on the grounds that it was needed for integration
22 planning purposes, I don't think you should say, well, wait
23 a minute, we look at information flow as a due diligence
24 issue. I don't think it's quite that simple.

25 The final point on this slide is that when any
26 responsible antitrust counselor is trying to help their
27 client get a deal done, the ultimate goal is to get it done

1 quickly and effectively. The overhang here, if you will, is
2 some of the more aggressive speeches by agency officials
3 about what constitutes gun-jumping. The reality, which is
4 much clearer to me since leaving the FTC and going to GE, is
5 that if you're well counseled you will try to avoid getting
6 anywhere near the gun-jumping line, because the last thing
7 you want is for your deal to be held up when the litigation
8 staff decides that they've got to focus on a 7A issue in
9 addition to the core Section 7 clearance issues.

10 It's a failure, by definition, if your deal review
11 is delayed by weeks or months because somebody thought you
12 went too close to the line on a gun-jumping issue. So,
13 there's a cautionary cushion that's often built into the
14 advice in this area, and I just think it makes it more
15 important that the agency guidance not be too aggressive,
16 because when that happens some efficient business practices
17 can unnecessarily be deterred.

18 Ordinary course conduct provisions in deal
19 agreements, discussed in the slide on the top of page 3 of
20 my handout, is really the interesting issue these days, I
21 think, because of the Computer Associates case. Effective
22 contracting requires that key terms be reduced to writing,
23 be fixed as clearly as possible, and one of those key terms
24 is the value of what's being acquired.

25 There are a lot of contractual ways to deal with
26 changes in the value of a seller between signing and
27 closing. Ordinary course operation clauses are not the only

1 way to do that, but they are an effective way to address the
2 issue. The important point here is the second one on the
3 slide, and that is that there are clearly some reasons why
4 sellers and their employees might act differently after a
5 deal is signed than they ordinarily would behave. There
6 really are reasons that don't have anything to do with
7 limiting competition why a contract may legitimately need to
8 deal with the fact that the seller's incentives and conduct
9 may change after the deal agreement is signed.

10 People may have an incentive to make themselves
11 look better in the eyes of their prospective buyer by
12 artificially pumping up their apparent sales revenues
13 through non-competitive or unprofitable transactions, where
14 the profitability of those sales is difficult to discern
15 until well after the deal is closed. Employees may seek to
16 ingratiate themselves with managers, customers or others in
17 a manner that they would not do but for the pending merger.
18 They may have incentives to act in a way that they wouldn't
19 act in a normal competitive situation.

20 So while it's widely recognized that ordinary
21 course contract provisions are common and legitimate,
22 James's triage of issues was very interesting to me. One
23 issue I would add is the one at the bottom of this slide,
24 which is a question I've asked a few people, some of whom
25 are in this room. What if the Computer Associates' facts
26 were different than alleged? What if the facts were that
27 the seller's discounting was far in excess of anything that

1 the seller had ever done before? What if a provision were
2 chosen for the contract that built in a cushion and said,
3 okay, the seller's ordinary discounting is 10 percent, and
4 the maximum discount the seller has ever granted is 30
5 percent, so discounting in excess of 50 or 60 percent will
6 be regarded as outside the ordinary course and therefore
7 will not be permitted.

8 There are some legitimate justifications for that
9 provision under those facts. I understand that there are
10 also some legitimate concerns about provisions in a deal
11 agreement between competitors that relate directly to
12 competitive pricing. But I don't think you can fully assess
13 that kind of provision under those different facts without
14 considering the fact that there is a legitimate reason to
15 allow the buyer to agree to acquire, at a fixed price, a
16 business that's operated in a certain way, and for the buyer
17 to be able to require that the seller maintain its business
18 as is for a period of time while the deal is being cleared
19 and then closed.

20 The slide on the bottom of page 3 of my handout
21 deals with current guidance from the agencies. The point
22 here is simply that while the enforcement actions have I
23 think been largely well chosen, and seem reasonable on their
24 face, as Howard noted there has been a tendency to blur the
25 analysis between Section 1 and Section 7. For example, some
26 have described information exchange as a 7A issue, which I
27 think is pretty aggressive.

1 Another question is, where does the burden lie? Is
2 it essentially on the parties to justify why they did
3 anything differently from how they would have done it absent
4 a deal agreement? Is that the baseline? I don't think it
5 should be.

6 Or is the proper way to proceed to ask, what are
7 the specific elements of a Section 1 violation? What are
8 the elements of a 7A violation? If those elements exist in
9 a given case, then the public interest requires that you
10 take some action. But if they don't, we should try to keep
11 this from becoming an overly regulatory process in which
12 conduct that is not unlawful is discouraged, but rather one
13 that is focused on whether there is evidence of a discrete
14 law violation.

15 I don't want to finish without coming back to the
16 role of practitioners. Most of the advice that I get, and
17 that I hope I give, is something in between the second and
18 third items listed in the slide on the top of page 4 of my
19 handout. It's not simple do's and don'ts, although
20 businesses constantly clamor for that. Sometimes I think
21 bad advice results from giving the client exactly what they
22 ask for, which is often "just tell me exactly what I can do
23 and not do." If that's the question, then the advice is
24 going to be somewhat more conservative than it would be if
25 you took the time to ask the client, well, what is it
26 exactly that you want to do, and why, and let's take the
27 time to look into it.

1 So, as indicated in the slide on the bottom of page
2 4 of my handout, there is no crisis in this area. I think
3 it's very useful that you're having this session to think
4 about these issues. And I agree with Paul, I don't think
5 it's a question of needing more guidance. I think it would
6 be useful for everyone to stick to the principles that have
7 been articulated in the enforcement actions and in the law.

8
9 In particular, I think that Section 1 rule of reason
10 cases should be evaluated under a real rule of reason
11 competitive analysis, not a kind of regulatory, scale
12 analysis that I think has crept into some of the speeches.

13 And then, in Section 7A, the analysis should focus
14 clearly on the beneficial ownership question. I don't see
15 this as a huge issue for businesses, because I don't think
16 we have an interest we need to vindicate to go out and start
17 influencing sellers pre-closing. But I also think the legal
18 analysis gets muddy when you start talking about "influence"
19 over the seller's business amounting to beneficial
20 ownership. So, it might be useful to focus more on what the
21 HSR Statement of Basis and Purpose says about what it really
22 means to "acquire" or exercise beneficial ownership over a
23 target before consummation.

24 Thank you very much.

25 MS. DETWILER: Okay, Bill.

26 MR. KOLASKY: Good afternoon. I don't have any
27 slides.

1 I am going to start off just with respect to due
2 diligence and integration planning, echoing what I think all
3 of the other speakers have said. I do not think that this
4 is an area where we have a particular problem right now. I
5 think that there are two main lessons that could be gleaned
6 from the cases that have been brought, and they're the same
7 lessons that others have already mentioned, and that is that
8 neither Section 1 nor Section 7A, as they have been applied
9 to date, should interfere with legitimate due diligence and
10 integration planning, and I don't think they have.

11 The enforcement actions that have been brought to
12 date have all involved conduct that goes well beyond
13 ordinary due diligence and integration planning. To the
14 extent there's any problem at all, it arises, as others have
15 said, from some of the more absolutist positions taken by
16 some former FTC officials in speeches. But I don't think
17 that those speeches reflect actual agency practice. I do
18 think it might be helpful to clarify that in future
19 speeches.

20 Second, I think with respect to due diligence and
21 integration planning, as you can tell from the presentations
22 that have already been made, the general guidelines are very
23 well understood. But I would also agree with Mark that
24 companies need good antitrust counsel for specific questions
25 of the type that he and James Morphy identified. My
26 experience, when I was back in private practice, is that
27 there is a great deal of nervousness on the part of in-house

1 counsel with respect to how the Section 1 and Section 7A
2 will be applied to due diligence and integration planning,
3 and that there are lots of questions that come up in the
4 course of a period prior to closing of a merger.

5 What I want to talk about today is something that I
6 think the other speakers really have not focused on very
7 much, and that is what some of the companies that are not as
8 well counseled as GE and DuPont have tried to get away with
9 in this area, and the type of conduct that I think does
10 violate Section 1 or Section 7A.

11 In particular, I want to talk about what I think is
12 perhaps the single most difficult issue, and that is to what
13 extent does the pendency of a merger agreement constrain
14 joint conduct in the market of a kind that might be engaged
15 in even absent the merger. That's something that's received
16 very little attention in public speeches by the enforcement
17 agencies since the radio merger wave several years ago, but
18 is the focus of some pending investigations. Obviously, I
19 don't want to talk about those investigations, but it is a
20 matter of some legitimate concern.

21 The other thing I want to mention before I turn to
22 those issues is that there are some other legitimate reasons
23 I believe for exchanging information during the pre-closing
24 period that I don't think the other speakers touched on.
25 The most important one is, of course, securing regulatory
26 clearance. In addition to due diligence and integration
27 planning, the other thing the merging parties are focused on

1 during the pre-closing period is how to get clearance for
2 their transaction.

3 That in itself requires sharing a great deal of
4 potentially competitively sensitive business information.
5 Obviously, information on sales in order to calculate market
6 shares, information on prices and margins sometimes in order
7 to do critical loss analyses or other types of econometric
8 work, and detailed information that allows one to put
9 together a verifiable efficiency story. But again, I think
10 that those who counsel in this area have developed a good
11 understanding of what safeguards need to be in place with
12 respect to the exchange of that type of information, the
13 need to go primarily to outside consultants and lawyers, and
14 to have the number of people in the two companies who are
15 involved in that process limited and subject to
16 nondisclosure agreements.

17 So, I don't think the issues are any different from
18 those raised by due diligence or integration planning, but I
19 think it's something that's worth keeping in mind as we
20 think about what the legitimate reasons for exchanging
21 information are.

22 Turning then to the areas where I think companies
23 have in the past stepped over the line and where I think the
24 agencies have legitimate concerns. The first is, of course,
25 the area of operational control, cases like Computer
26 Associates, where the buyer had veto power over certain
27 customer contracts and discounts beyond a certain point. I

1 think Mark raises a very good point as to whether or not
2 that would have been a violation had the discount level been
3 set at a level beyond what was ordinary course of business.

4 A second thing which, obviously, comes up in some
5 of the cases that have been brought, is occupying premises
6 of the other company, taking possession, starting to
7 exercise control. That might be done, for example, through
8 a management contract, and that's where the LMA, Local
9 Marketing Agreement, situation that I alluded to earlier
10 with respect to the radio merger several years ago came up.
11 The reason why a management agreement that might not be
12 unlawful absent a merger agreement would become unlawful in
13 the presence of a merger agreement is, as I think one of the
14 other speakers mentioned, that the merger agreement itself
15 transfers some of the indicia of beneficial ownership. The
16 management agreement then serves to transfer additional
17 indicia of beneficial ownership, thereby taking you over the
18 line and creating a Section 7A violation.

19 Another more subtle way of exercising operational
20 control is not by physically occupying the premises, but by
21 basically exercising influence through e-mails and telephone
22 calls and the like, where the two parties to the merger
23 actually start talking with each other on an ongoing basis
24 about current business decisions. I think all of us would
25 recognize that that's a violation, and yet some companies do
26 that.

27 Another one would be having the executives of the

1 buyer attend business planning meetings of the target.
2 Believe it or not, I have had clients ask me whether they
3 can do that. So, there are clearly ways in which companies
4 can try to exercise operational control prior to closing
5 that would step over the line and generate enforcement
6 interest.

7 The second area where companies have stepped over
8 the line, and where the agencies have legitimate concerns,
9 is with respect to coordinating marketing activities pre-
10 closing. There are some legitimate reasons why companies
11 might want to exchange information about their current
12 customers and perhaps even plan which party is going to
13 approach which customers in order to tell them about the
14 benefits of the merger and get them on board to support the
15 merger itself. The danger is when it goes beyond that and
16 the parties begin actually coordinating their marketing or
17 sales efforts, and this is something that we've seen in some
18 of our investigations.

19 One example would be where the companies actually
20 allocate customers and decide which company will pursue
21 which customers during the period prior to closing of the
22 merger. Even short of that, though, you can imagine
23 situations where one company's salespeople may represent,
24 even if it's not true, that the other company's salespeople
25 are going to be serving a particular group of customers or a
26 particular sector of the market post-closing and that,
27 therefore, the customer should do business with them rather

1 than with the other party to the merger. Even if there is
2 no such agreement, making such representations to customers,
3 obviously, creates the appearance that there is.

4 Another related activity that plainly I think goes
5 over the line would be for the parties pre-closing to
6 discuss the terms that they are going to offer to customers
7 post-closing, prices and other material terms of doing
8 business. There, there would clearly be a spill-over
9 concern that might affect the terms that they're currently
10 offering to customers. Even more egregious, of course,
11 would be if the parties to a merger did, in fact, start
12 talking about what terms they were going to offer customers
13 during the interim prior to the closing of the merger.

14 That then brings us to the difficult situation of
15 when there may be legitimate reasons to engage in some joint
16 commercial activity pre-closing. One situation is joint
17 bidding where you quite often have the situation where one
18 of the reasons why the parties are merging is that they
19 don't feel that either of them has critical mass sufficient
20 to be able to win particularly large and complex contracts.

21 In those circumstances pre-merger, there may be a
22 legitimate business reason for the companies to team in
23 order to pursue those particular contracts. I think the
24 antitrust analysis there would be basically a Section 1
25 analysis, where you would look at, A, has the fact of the
26 teaming arrangement been fully disclosed to the customer, B,
27 is there a legitimate need for the parties to team in order

1 to pursue that contract, and, C, does their teaming actually
2 lessen competition or enhance competition by giving them a
3 better chance to compete for a contract that they
4 individually would not have been able to compete for
5 effectively?

6 A similar situation is joint purchasing. We heard
7 this morning that one of the efficiencies that parties have
8 often expected to realize through mergers are procurement
9 efficiencies or procurement savings. There's a debate
10 about whether these are efficiencies or just pecuniary
11 savings, but again, I have seen situations where parties to
12 a merger have agreed to engage in some joint purchasing
13 activity prior to the closing of the merger, and I would
14 say, again, that the analysis that one engages in those
15 circumstances ought to be the standard Section 1 analysis
16 where you ask whether the joint purchasing would be lawful
17 absent the merger, and if it would be, it's hard to see why
18 the pendency of the merger should constrain the ability of
19 the parties to engage in otherwise lawful conduct.

20 More generally, the parties may have other types of
21 competitive collaborations that they would like to engage in
22 during the period prior to closing. One example might be
23 where you have two parties whose motivation for merging is
24 that they have mutually blocking IP, intellectual property,
25 positions, and they want to capture the efficiencies they
26 expect to realize from the merger by entering into, say, an
27 interim cross-license agreement so that they can begin

1 marketing a combined product that they wouldn't be able to
2 have marketed absent that cross-licensing agreement.

3 There, too, I think you'd apply the standard
4 Section 1 analysis, look at whether there was any
5 justification for the facially competitive collaboration.
6 If there is a facial justification, then you look to see
7 whether it's likely to cause competitive injury, and if it's
8 likely to cause competitive injury, then you have to look at
9 whether it's reasonably necessary to achieve the legitimate
10 objectives.

11 Here, I think the role of counsel becomes
12 absolutely critical, because one of the things that counsel
13 needs to do is to look at whether or not there are less
14 restrictive alternatives that would serve the same benefits
15 and accomplish the same objectives with less anti-
16 competitive injury.

17 The final area I want to touch on, and again, it's
18 one that the other speakers have not mentioned, are stock
19 purchases. Now that the thresholds have been raised to \$50
20 million, I think this is going to be less of a problem than
21 it might have been in the past, but one way in which a party
22 may sometimes jump the gun, if you will, is when it is
23 contemplating an acquisition, especially if it may be an
24 unfriendly takeover, it might want to accumulate a sizeable
25 stock position in the company prior to starting the hostile
26 takeover.

27 I think both agencies, but particularly the FTC,

1 has provided very clear guidance over the last dozen years
2 or so that in those circumstances, the company does not
3 qualify for the investment-only exemption, that if you are
4 seriously contemplating a possible acquisition of the
5 target, especially if the target is a competitor, you do not
6 qualify solely for purposes of investment exemption,
7 because, obviously, you're not making the acquisition solely
8 for purposes of investment. You're making it in order to
9 gain an advantage with respect to a possible takeover.

10 I would emphasize, of course, that we're not
11 talking about somebody waking up in the middle of the night
12 and saying, gee, it would be nice to acquire Joe. We're
13 talking about a situation where the company is actually
14 seriously contemplating a possible acquisition and perhaps
15 takes some affirmative steps to pursue it.

16 But, again, these are some of the areas that I
17 think the other speakers didn't touch on where companies do
18 step over the lines, but, obviously, not the companies
19 counseled by my fellow panelists. Thank you.

20 MS. DETWILER: Thank you, Bill. So, I'm glad to
21 hear that the agencies have spoken with one voice and
22 everything is crystal clear to practitioners.

23 Just to start off with the list of conduct that
24 Bill mentioned, which was a fairly specific list, did
25 anything on that list strike anyone else on the panel or in
26 the audience as a close call or was there any disagreement?

27 MR. MORSE: I'll jump in on that one, at least a

1 little bit. I think as Bill was talking, we all had in mind
2 situations where there is a competitive overlap between two
3 companies, and the concern is can a company do these things
4 when it is about to merge with its competitor? But what do
5 we do in the situation in which there is no overlap? I
6 think this comes back to needing to be careful to
7 distinguish the rules under the Sherman Act and under the
8 Hart-Scott-Rodino Act, because if Chase Manhattan Bank is
9 funding a management buy-out by someone and filing under the
10 Hart-Scott-Rodino Act, assuming it does not already have an
11 interest in other companies in the same business, I'm not
12 sure that I have a problem with Chase Manhattan Bank sitting
13 in on a business planning meeting or sitting down and
14 discussing post-closing prices, but Bill said you can't do
15 that.

16 MR. KOLASKY: Howard, I think you're absolutely
17 right, and I should have been clear about that, that I'm
18 talking about situations of horizontal acquisitions.

19 MS. DETWILER: Another thing that struck me, I must
20 have heard the word "reasonable" any number of times during
21 the presentation. But it also occurs to me that there are
22 situations where the rule of reason would not apply, and
23 some of the conduct that we were discussing would involve
24 discussions between buyer and seller, and there you would
25 have an agreement, and could we be in per se territory? Is
26 there any uncertainty as to when the rule of reason applies
27 versus when the per se Section 1 territory would apply?

1 MR. WHITENER: Well, I addressed that point a bit.
2 I think the per se situations would be quite hard to imagine
3 -- obviously, it's possible that parties could decide to fix
4 prices or allocate customers in the meantime, but it was a
5 bit unclear as to how that would have been pleaded in court
6 in Insilco. Howard pointed to the part of the analysis that
7 said this would be a problem "in any industry" or something
8 along those lines, but I don't think there is much in this
9 area that would be potentially per se.

10 My point was, you will typically have sufficient
11 business justifications for whatever it is we're looking at,
12 to take the conduct out of a per se analysis. Certainly the
13 vast majority of what's been discussed today were activities
14 in which I think you'd start off with an efficiency baseline
15 that would take you out of the per se rule. One could, of
16 course, imagine huge screw-ups where you're dealing with per
17 se behavior, but I don't think that has a lot to do with
18 what we're talking about today.

19 MR. MORSE: I think the Commission allegations in
20 the Torrington case I mentioned are essentially a per se
21 allegation, where the companies had a discussion and
22 essentially said, during this interim period, one would not
23 sell or quote to customer X. Again, I think there may be
24 some uncertainty in the law as to whether the mere existence
25 of a merger agreement arguably may take that out of the per
26 se category, but I think in dealing with cases at the
27 Commission or at the Justice Department, that you can expect

1 per se treatment to a mere market allocation agreement pre-
2 closing.

3 MR. KOLASKY: If I could add just one thing to
4 that, I would agree with what both Howard and Mark said,
5 that it's very unlikely that even an agreement between the
6 parties to a merger as to which ones will sell to which
7 customers pre-closing would be per se unlawful. You might
8 be able to construct a sufficiently facial justification
9 that you would get yourself out of the per se doctrine. But
10 I do think that if the evidence were to show that the
11 justification the lawyers advanced post hoc was a
12 pretextual one, that you might be able to attack the
13 agreement as per se unlawful. But even if it does not fall
14 within the per se category, I think this is a category where
15 the quick look approach to the rule of reason has a great
16 deal of merit. Well, obviously, the type of information
17 exchange that you have for due diligence or integrational
18 planning deserves a full rule of reason analysis.

19 There are other types of conduct during the pre-
20 closing period that I think could be, as Phil Areeda would
21 say, found to be unlawful in the twinkling of an eye,
22 because the anti-competitive effects are so obvious and the
23 proper justification so weak.

24 MS. DETWILER: Were there any reactions or
25 questions from the audience?

26 MR. MORSE: Can I jump in and make one comment
27 before we turn to the audience, particularly given the fact

1 that, as I understand it, a number of people in the audience
2 are from foreign countries. I want to mention one issue
3 that we have not discussed today. I've been on a number of
4 conference calls with my client and lawyers in various
5 countries around the world in which we discuss what can be
6 done during this pre-closing waiting period. I know some
7 of the other people up here have more experience than I do
8 on international deals, but in my experience the rule of the
9 most restrictive standard is what most companies will
10 permit, because if the U.S. says one thing is OK and the EU
11 says something else and Canada says something else, you are
12 going to be cautious to do the least which you can do
13 without getting in trouble, at least with those countries.

14 I'm not really too scared about rules from those
15 countries, but we've also seen merger filing schemes in lots
16 of other countries. I have a fear on a going-forward basis
17 that there are countries around the world that will read
18 some of the loose language that we have been talking about
19 and come up with rules and say you violated our gun-jumping
20 rule by doing X, and therefore, you owe us a \$3 million
21 fine.

22 So, as we talk about this issue, and as we've said the
23 rules are generally reasonable in the United States, we also
24 have to think about the implications on a worldwide basis.
25 I'd like to throw that out and see if based on the other
26 panelists' experience they agree or disagree.

27 MR. KOLASKY: I've talked enough.

1 MR. WHITENER: Me too.

2 MR. BONANTO: I think from at least DuPont's
3 perspective, fortunately or unfortunately, we have legal
4 offices around the world. Sometimes we have to follow due
5 diligence differently in different parts of the world, we
6 have to do integration differently in different parts of the
7 world. As you know, under the community directives, EC,
8 European Commission, privacy is a different issue than it is
9 in the United States.

10 What data can actually lawfully be made available
11 to the buyer in Europe is different from what can be made
12 available in the United States. So, I think you probably
13 have a good point there. There is a lot of complexity. I
14 suppose as a practitioner we can look at that as an
15 opportunity for us, but it is a challenge. I would say that
16 we would look at certainly the EC practice and the U.S.
17 practice as complementary but not always the same, and we
18 would try and deal with them appropriately when we need to.

19 MS. DETWILER: Questions from the audience?

20 NEW SPEAKER: Something from the European
21 Commission. You know, I just wanted to follow up on what
22 Bill Kolasky mentioned about securing international
23 clearance, because I think that's a situation we have
24 sometimes in the EU where parties tell us we have difficulty
25 gathering the information you are asking us. I wanted to
26 ask you in concrete examples what kind of difficulty you may
27 have faced in the past and what kind of problem this gun-

1 jumping issue may raise? For instance, will you be
2 incapable of presenting arguments to the regulators, in
3 particular, in relation to efficiencies claims?

4 MR. WHITENER: I'll take that one first. When Bill
5 said that, it registered with me that that was an issue we
6 hadn't touched on and probably should have. My other
7 thought was that I haven't viewed that issue as a particular
8 problem. That clearance process is and has to be guided by
9 counsel, and so if it's done right, there won't be an
10 inadvertent mistake.

11 To me it's just a question of proper management,
12 and as long as it's managed by counsel, it shouldn't be
13 difficult to decide what is it that the business people
14 really have to know.

15 They can probably frame arguments pretty
16 effectively without having the current competitive details
17 of the other business that many of you in this room would be
18 uncomfortable with them having. Frequently, when there are
19 meetings with the agency staff, sometimes you want both
20 companies there. A lot of times you don't. And the typical
21 deal agreement will provide for the companies to cooperate,
22 but it's always done in a way that's sensitive to these
23 issues. So, I haven't had a particular problem with this,
24 because I think that fundamentally it's something that's
25 managed by antitrust lawyers.

26 MR. KOLASKY: If I can just add a couple of
27 thoughts to that, the way we typically manage this in the

1 United States is by having, in addition to the standard
2 nondisclosure/confidentiality agreement between the parties,
3 a joint defense agreement which the parties and the lawyers
4 sign. Obviously, the retainer agreements with outside
5 economic consultants and accountants have similar
6 confidentiality provisions in them.

7 We will quite often have levels of confidentiality
8 so that there's some information that you can share with a
9 small group of employees of the company who are working with
10 you on the regulatory presentations, but there may be a
11 higher level of confidentiality of information that can only
12 go to the outside advisers and not to people within the
13 company.

14 What I haven't thought very hard about is to what
15 extent a problem exists in Europe where the Commission has
16 taken the position that in-house counsel are not entitled to
17 assert the attorney-client privilege, because as an outside
18 lawyer, I would find it nearly impossible to navigate the
19 regulatory clearance process without being able to share a
20 great deal of confidential information with the in-house
21 counsel.

22 MR. BONANTO: Let me just say briefly, I think with
23 the development of Form CO, DuPont's practice changed. As
24 you know, just to over-simplify, in the United States, you
25 make a rather limited filing initially, and if there's not a
26 second request, limited information is turned over. In
27 Europe, those of us who have worked on Form CO have found

1 that a rather daunting and exhausting task, and it clearly
2 needs to be done in connection with the other side.

3 I would just say that the issues we do in the U.S.
4 to limit certain information to counsel and other outsiders
5 is followed in Europe. We have not found the preparation of
6 Form CO to be an issue in information exchange any
7 differently than it is in the United States. It is just a
8 factor to consider in the timing and what you want to do in
9 the U.S. versus Europe.

10 Now, obviously, it's a document. The first
11 question from DOJ or FTC is, oh, you made a filing, let me
12 see Form CO. So, I would suggest -- and we have seen recent
13 discussions -- anything that can be done between the
14 Commission staff and the regulatory staff in the United
15 States to kind of harmonize things and help things along
16 will be positive.

17 As far as the other issue you mentioned, it is
18 awkward in not allowing in-house counsel in Europe at times
19 to see documents that in-house counsel in the United States
20 can see. It's probably inefficient for getting the deal
21 done. This is an old chestnut that's been argued forever in
22 Europe, so I'm sure you're aware of it, but it has a
23 negative impact in trying to get the transaction done
24 efficiently. Typically the business attorney in France or
25 Germany or wherever will know an awful lot more that's going
26 to be helpful in preparing Form CO than will outside counsel
27 or the outside economist.

1 MS. DETWILER: Other questions or reactions?

2 Yes?

3 MR. DUCORE: Hi, I'm Dan Ducore from the FTC. I
4 wanted to follow up a point that Mr. Morphy made that I'm
5 not sure we've heard made frequently. That is, that
6 especially the selling side gets advised that it should keep
7 in the back of its mind at least that the deal could not go
8 forward, and it should be concerned about things it might do
9 and information it might give over to the buying side with
10 that in mind. In other words, that if the deal didn't go
11 through, you could regret having revealed this information
12 or having made a joint decision.

13 My question is, do you give that advice differently
14 or does the advice change as the particular deal works its
15 way through the regulatory review process, or is that sort
16 of a blanket kind of caveat? And if so, anybody on the
17 panel, would that be the basis for some kind of guidelines
18 or guidance by which the agencies might review what has
19 taken place? In other words, as a deal gets closer to
20 potential consummation, are you proposing that maybe the
21 agency should take a different view of information exchange,
22 or should it be sort of one side of the line versus the
23 other, either a deal is going forward because Hart-Scott has
24 closed out or it's not?

25 MR. BONANTO: Well, I guess I'll take the first
26 shot at it.

27 As I explained, I actually use it as a tool to

1 elicit information that I probably don't have, and that is
2 the first question of putting it to the business person to
3 say, what is it that you would not want them to have? And
4 to the extent they say to me, well, what they're looking for
5 I can get on the internet, it's available in various
6 industry sources, et cetera, obviously, the degree of
7 concern about that goes down. To the extent they come back
8 and say, this is actually the keys to the kingdom, if they
9 had this, they would be able to look inside and figure out
10 how we price, et cetera, the answer is, the alarm goes off.
11 Obviously, that's not something that we're going to be
12 prepared to give them. The businessman knows we're not
13 going to be prepared to give it to them. The entire
14 exercise at that point is turned to, well, how do we find a
15 way to provide some reasonable degree of information,
16 achieve some objective, without giving them that?

17 I agree with others who say that there shouldn't be
18 an artificial distinction between the due diligence phase
19 and the post-signing phase. I try to look at that, and I
20 think most people do through the entire process, that you
21 never know what could happen to a deal. It's a sliding
22 scale of what information you just shouldn't put across the
23 table under any circumstance.

24 Then the question is, what intermediaries can you
25 use -- at some point there is sensitive information that
26 isn't the keys to the kingdom, that may be necessary. You
27 hold off until the very end, and then you decide whether

1 that's dealt with through a third party who will aggregate
2 the information and provide data or it's dealt with through
3 a small group or siphoned off. So, again, it's a series of
4 judgments, and I still think it's hard to put that in the
5 form of guidelines. When you said everything is crystal
6 clear, the evidence is not, it's as clear as mud. But in
7 many ways, we all know what the mud is, and if you try to
8 make it too clear, there is a very high probability that you
9 will interfere with a process that actually kind of works.

10 I don't know if I've answered your question.

11 MS. DETWILER: Yes, Rick.

12 MR. DAGEN: This is Rick Dagen from the FTC. I
13 guess a comment and a question on unrelated subjects. The
14 comment is, it was suggested that IT, information
15 technology, was one of the prime issues that would be up and
16 running after the HSR period ends. There was never a
17 discussion concerning the deals that are done that don't
18 have any HSR waiting period, so they get negotiated and you
19 don't have this 90-day or year period. Presumably the IT
20 problems are much greater in those circumstances where a
21 deal gets negotiated in a week, you have got this limited
22 number of people that are involved, and the next day, it's
23 announced, and you don't have any IT coordination that's
24 possible. So, I don't think that was really addressed. I
25 think the HSR period would suggest that there are planning
26 opportunities that aren't present when there is no reporting
27 requirement. So, I'd be curious about that.

1 The second question relates to a suggestion by Paul
2 that there would be some degree of certainty with more
3 concrete ordinary course provisions. If you could set 10
4 percent as an allowable discount, then people might do the
5 discount or they might do discounting of 8 percent if they
6 knew that there was a 10 percent cap. Without an express
7 provision governing the level of permissible discounting,
8 there might not be any discounting. I don't know if that
9 made any sense. I think Mark's position on the other hand,
10 and perhaps another panelist, was that the ordinary course
11 provision really has no teeth. So, there seems to be some
12 tension between those two positions. If an employee is
13 afraid of breaching the ordinary course provision, that
14 would suggest that there is some teeth, but I think Mark's
15 position suggests that just by having an ordinary course
16 provision, people would not know what they could and
17 couldn't do, and there would be no remedy for the acquirer.

18

19 MR. WHITENER: Let me go first and try to clarify,
20 and then Paul can comment. I wasn't saying it had no teeth.
21 When I listened to what he was saying, I was, again, in
22 violent agreement. The issue of a generalized ordinary
23 course provision is ambiguous. It has in terrorem effect,
24 that was one of Paul's points. It, in fact, can and
25 probably does condition the seller's behavior, but not in a
26 way that's predictable. It may condition their behavior --
27 again, I think Paul's point -- more so than if you had a

1 defined provision that said, okay, this is specific conduct
2 that is deemed beyond the ordinary course.

3 So, what I was trying to say was fully consistent
4 with what Paul was saying, in that from the perspective of
5 the agency trying to preserve the maximum competition pre-
6 closing, you may in some cases be better off with specific
7 ordinary course provisions, rather than a general catch-all
8 that says we're going to leave it to whatever the seller
9 thinks it means and whatever the buyer decides it means and
10 whatever the two of them might later discuss and agree that
11 it means.

12 MR. BONANTO: Yeah, that's right. I think my point
13 only was if the seller was under a lot of pressure to make
14 sure this transaction closes, which sometimes they are for
15 financial or other reasons, ambiguity can cause the seller
16 to be less aggressive in the marketplace than if it had
17 greater clarity. It depends on the circumstances, but if
18 they say, Paul, this thing absolutely has to close, if we do
19 thus and so, what's it mean under the agreement? Lack of
20 clarity can cause more timidity at this than it might not.
21 It won't be true in every case, but it's possibly true in
22 that case.

23 On the other hand, I think it's also true, just to
24 state the other side to make sure it's balanced, as the
25 seller, I'm also always aware that the deal may not close.
26 In fact, First Chem, which was announced and finally did
27 close after we got through the second stage of regulatory

1 review, we were the acquirer in that case. Recently, just
2 before closing was scheduled, their plant had an explosion.
3 So, it always happens, you go to sell the house and
4 something doesn't work.

5 So, from the seller's point of view, too, I'm also
6 saying in these covenants, we are concerned about closing,
7 but as the seller, I'm also recognizing it may never happen.
8 So, that does create a certain degree of rigor in doing
9 things that from an agency's point of view you'd want us to
10 do as well.

11 MR. KOLASKY: Rick, if I can just address your
12 first question very briefly, I think the problem is, you're
13 absolutely right. If you don't have to go through the HSR
14 period, if you schedule a closing two weeks or a month after
15 you sign the agreement, you may not have your IT integration
16 in place. But the point is that on any large transaction,
17 the greater the delay from the time you sign the purchase
18 agreement or the merger agreement and the time that you
19 actually have the businesses integrated and up and running
20 is -- the worse it is for your business, and frankly, I
21 think the worse it is for the customers.

22 So, if you are anticipating a lengthy regulatory
23 clearance process, it's very important that you proceed with
24 your integration planning and especially the IT planning in
25 parallel with that so that you're in a position to hit the
26 ground running once you do get clearance.

27 MR. MORSE: To throw in my two cents worth,

1 enforceability and interim effect I don't think are
2 necessarily inconsistent. In fact, I want to tie that back
3 into something that Dan Ducore said. We usually think of
4 the restrictions on giving of information as protecting the
5 seller in an acquirer/seller situation, and the seller not
6 wanting to give up its crown jewels. One of the things that
7 has surprised me is on the buying side, companies saying,
8 sometimes, I don't want my business guys to have that
9 information. We've got a confidentiality agreement in
10 place, and the confidentiality agreement says you can only
11 use it for purposes of doing the deal, and you can't use it
12 for business purposes.

13 Well, what happens if this deal doesn't go through,
14 and we're actually a competitor of that guy, and my business
15 guy has gotten the information? I know that what's in his
16 head, he can't segregate. So, once he's got that
17 information, I don't know what I'm going
18 to be able to do. So, even on the buying side, you get the
19 concern, I don't want the information, or I don't want the
20 wrong guy to have the information.

21 MS. DETWILER: Are there any more questions or is
22 everyone getting a little bit hungry?

23 Well, thank you very much to our panel.

24 **(Whereupon, at 1:00 p.m., the hearing was adjourned.)**

