Public Roundtable on Anticompetitive Regulations
Thursday, May 31, 2018

TRANSCRIPT PART ONE

MAKAN DELRAHIM: Good morning. Good to see a lot of familiar faces, some friends, old colleagues here. This is our third, at least in this first series of competition and deregulation, round tables. We still are at a square table. We need some round tables.

And this is an interesting one. I guess I don't really have a favorite of the three, but this is one I care deeply about personally. And so I think this is really important. I really appreciate you all being here and adding to the debate and to our thinking.

I'm joined at the table by several of my colleagues. Some of you who have attended these in the past know Bob Potter is the Chief of our Competition Policy and Advocacy Section. He, along with Daniel and Doug in that section, have really been doing some great work, lots of time and effort put into the various aspects of this. Thanks for putting up with a lot of last-minute changes and musings from me. In addition, Rene Augustine, our Senior Counsel in the Front Office, has been helping us stay organized and keep the trains running on time here.

This roundtable will focus on the consumer costs of anticompetitive regulations. The costs are, no doubt, significant. The Competitive Enterprise Institute's annual publication on federal regulations, aptly called, quote, "The Ten Thousand Commandments", notes that federal regulations cost each U.S. household almost $15,000 per year. To illustrate the significance of that amount, CEI notes this is second only to housing in spending categories for American families. Today, we'll consider whether and how regulation has handcuffed the invisible hand of the free market.

At the beginning of our last roundtable, I recounted General Ashcroft's comment that the Department of Justice is the only agency in the federal government with a moral imperative in its name. Antitrust— and its role in protecting competition— has long been a central part of our nation's moral imperatives.

The very first Assistant to the Attorney General for antitrust, William Day, was appointed by the legendary “trust buster” Teddy Roosevelt. More than half a century later, Justice Black, in the *Northern Pacific* case, described the Sherman Act as, quote, "a comprehensive charter of economic liberty." Milton Friedman explained this in his 1962 work, *Capitalism and Freedom*, in which he wrote, quote, "the organization of the bulk of economic activity through private enterprise operating in a free market as a system of economic freedom and a necessary condition for political freedom."

These principles soon began to be applied in a wave of major industrial deregulation lasting at least two decades from around 1970. The deregulatory wave brought many benefits for consumers: lower rates and prices, more choice, and higher quality. It also brought greater innovation, entry, and opportunities for many to create new businesses and, indeed, new industries, driving economic growth and increased productivity. While the Department of Justice has accomplished a lot in the last half century of antitrust enforcement, there is still work to be done. And our sleeves are rolled up.

TRANSCRIPT PART ONE

The Administrator of the Office of Information and Regulatory Affairs at OMB, Neomi Rao, better known as the Administration's “regulatory czar,” recently conveyed that the Administration's current deregulatory initiative, quote, "is part of a larger effort to promote a more constitutional government and thereby to enhance individual liberty." She said, "[G]overnment regulation . . . can serve vital health and safety goals, and . . . Congress has ensured that we already live in a highly regulated society. But even against that backdrop, government intervention should still serve a purpose. It shouldn't be a solution in search of a problem."

Virtually every aspect of our lives is regulated in some fashion. I just read—I know some of you guys may have seen that in your news feeds—yesterday, somebody's lemonade stand was shut down because they didn't have the proper permits. I think these were six-year-old kids at the corner of their street.

Virtually every aspect of our lives is regulated. We eat food grown with chemicals subject to regulation, processed in regulated facilities, and sold with mandatory labels in stores subject to regulation. We live in homes and apartments for which their zoning, construction, and codes are highly regulated. Our children's schools teach material regulated by the state, sometimes the federal government, serve foods subject to regulation, and their playgrounds are certified based on government-mandated safety standards. As former federal judge Richard Posner observed, quote, "regulation is pervasive, embracing the whole of criminal, tort, contract, property, labor, securities, antitrust, and environmental law, and a great deal besides," end quote.

Twitter has an account exclusively devoted to amusing or absurd government laws and regulations. I haven't verified it, but according to this account, it is “a federal crime to sell earplugs if their noise reduction rating isn't written in Helvetica Medium,” or “to sell wine with a brand name including the word ‘zombie,’” or “to take home milk from a quarantined giraffe.” Let's hope there are reasonable safety justifications for these.

While certain kinds of regulation are necessary, this role was never intended to be without appropriate limits. Thomas Jefferson, at his first inaugural address, observed that, quote, "a wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."

Unfortunately, governments at all levels, encouraged by the success of appropriate areas of regulation, all too often encroach on other areas where unencumbered markets function best. John Stuart Mill observed: “Every function superadded to those already exercised by the government, causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers-on of the government, or of some party which aims at becoming the government.”

Former Antitrust Division chief economist and colleague on the Antitrust Modernization Commission, Dennis Carlton, and his colleague, Jeffrey Perloff, highlighted one example of the effects of unnecessary regulation. Until they were repealed in 2006, there were 310 separate rules, filling over 440 pages of federal documents, governing what goes on pizza. Yes, pizza!

Under these regulations, the U.S. Department of Agriculture concluded that Wolfgang Puck's pizzas could not be called pizza because they didn't have tomatoes on them, compelling a change in his recipe. He also changed his labeling because the, quote, "country sausage on his pizzas was not made in a location that conforms to the regulatory definition of a rural area."

More pernicious examples abound when state and federal policy makers have forayed into new areas of control. When special interests focus their influence on obtaining regulations that promote their own positions, they often do so at the cost of others. Self-interested regulations erect barriers that shut out new competitors and impose costs on existing competitors. As George Stigler put it in his influential article *The Theory of Economic Regulation*, "regulation is required by the industry and is designed and operated primarily for its benefit." Whenever regulations displace market-based free enterprise, others in the economy are likely to suffer.

Areas of our nation's economy can, no doubt, wither under regulatory burdens. The President has issued an ambitious series of executive orders to reduce them. OIRA is working across the federal government to reduce regulatory burdens. As Neomi Rao, the OIRA administrator, recently said: "Many regulatory burdens are often put in place by big business or by powerful interest groups. Because regulation often creates barriers to entry, it can limit competition, and when it does, it can raise costs of ordinary goods and services, and it can blunt and stifle innovation."

In keeping with the Antitrust Division's core function of enforcing the antitrust laws to preserve competition and protect consumers, it is important for the Division to identify circumstances in which regulations run counter to, or infringe upon its mission.

A familiar form of anticompetitive regulation can present itself in the form of occupational licensing. Back in 1971, Stigler found “evidence to suggest that [such] licensing exists not to protect consumers but to limit the availability of potential entrants to practice that profession.”

Forty-four years later, the Obama Administration, in 2015, issued a report on occupational licensing. It found that the share of U.S. workers holding an occupational license has seen a *five-fold increase* since the1950s. It concluded that “the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for that job.” The report further notes that “there is evidence that licensing requirements raise the price of goods and services.” It found that while “most research does not find that licensing improves quality or public-health and safety . . . the evidence on licensing's effects on prices is not refuted: many studies find that more restrictive licensing laws lead to higher prices for consumers. I'm sure the economists say duh. To take just two examples from the report, regulation of nurse practitioners “raises the price of a well-child medical exam by 3 percent to 16 percent,” and on dental hygienists “increases the average price of a dental visit by 7 to 11 percent.” Former Acting Chairwoman and Current Commissioner of the Federal Trade Commission, Maureen Ohlhausen, has spoken on this issue and has done a lot in this area as well. Their efforts at the Federal Trade Commission should be commended on this.

Just two months ago, the Antitrust Division filed a statement of interest in TIKD Services' suit against the Florida Bar, supporting the new entrant, TIKD, an innovative app to help people dispute traffic tickets. The Ticket Clinic, a private ticket-defense law firm, filed complaints with the Florida Bar. It claimed that TIKD was practicing law without a license or providing false or misleading information to its consumers. The Ticket Clinic also filed grievances against the lawyers who had represented TIKD customers, threatening to have them disbarred. The Board of Governors of the Florida Bar accepted a recommendation from a committee of lawyers backing up the Ticket Clinic's position.

The State bar asserted that it is entitled to protection against antitrust claims without having to satisfy either the “clear articulation” or “active supervision” requirements of the state action doctrine, notwithstanding the Supreme Court's most recent state action decision in *North Carolina State Board of Dental Examiners*. In that case, the Supreme Court recognized that when “a State empowers a group of active market participants to decide who can participate in its market,” there is a “structural risk” that they will pursue “their own interests” instead of “the State's policy goals.” We should be vigilant in making sure that the private-market participants don't use states as tools for their anticompetitive goals.

This is just one example of an innovator using new technologies to bring transformational change, facing opposition by incumbents pushing for regulation aimed directly at keeping out the innovator. Other notable examples are Certificate of Need regulations that hamper competition in health-care markets. Some of you may know what these CON certificates are, but they require health-care providers to get approval from state regulators before offering new services or building additional facilities, despite having been found to do so. And it allows the incumbents in those markets to object and not to approve such new additions to the health-care market.

Similarly, nearly every state regulates new car dealerships. All states but one protect dealers from competition by awarding exclusive territories, limiting or banning carmakers from selling directly to consumers, and limiting carmakers' ability to terminate franchises. These regulations have been shown to cause higher retail prices and higher distribution costs, at the expense of both consumers and manufacturers.

A particularly troubling example of how incumbents can work to craft regulations laser-focused on preventing entry took place in Michigan, home of the Big Three automakers. The state legislature brought up a bill, legislation, aimed at Tesla. The bill prohibited carmakers from selling, as the bill was drafted, quote, "any new motor vehicle directly to a retail customer other than through its franchised dealers," end quote. Tesla noticed that the language as drafted would still allow them to sell because they didn't have any franchise dealers in that state. Unfortunately for Tesla, as the bill worked its way through the process, the bill was amended with the word, quote, "its" removed from the language, thus closing this unintended loophole for the one carmaker at which the regulation seemed to be directed.

Another significant area in which regulation can impact consumers is in real estate. Buying or selling a home is the largest financial transaction most Americans will ever undertake, and in many cases, the largest single investment. The Division has made it a priority to protect consumers in real estate markets in part because regulators have been aggressive in preventing new business models and protecting incumbents from entry. For example, the National Association of Realtors states on their website that they were key in securing a rider in the 2009

Omnibus Appropriations Act that imposes a blanket ban on financial institutions from entering into real estate brokerage and management businesses. The Antitrust Division's website on competition and real estate describes the Division's multifaceted work in this area—the next installment being our joint workshop—with the Federal Trade Commission next Tuesday to explore competition issues in the residential real estate brokerage industry.

Another regulated area that impacts competition and consumers is the nation's milk pricing and distribution system. There's a lot to read about milk and how it's regulated. It's dominated by an 80-year-old array of various price-regulation mechanisms only intended to raise the prices of milk from what otherwise would be a competitive price. There may be legitimate policy reasons for many of these regulations. I want to point out the market-distorting aspects and anticompetitive effects that these regulations could have and suggest we need to examine them to see if these regulations are justified.

The Department of Justice has played an active role in supporting administrative and legislative initiatives to open regulated industries to competitive forces whenever appropriate. The Division works to share with regulatory agencies and state legislatures its expertise in these markets and its rich economic-based analysis.

As Anne Bingaman, the former Assistant Attorney General of the Antitrust Division, said in 1995, quote, "[A]s we move forward with deregulating more industries— such as telecommunications and railroads— we should keep in mind that the goal of deregulation is to promote and protect competition, not to replace regulated monopolies or cartels with unregulated ones. The best way to achieve that goal is to provide a decision-making role in deregulatory process to the agency that is the competition expert—the Department of Justice." Little self-serving plug for us at the Division here, but that's a direct quote from Anne.

Through the Antitrust Division's competition advocacy, we will focus on regulations that hamper competition without offsetting public-health or safety benefits. The goal is to unleash, to the greatest extent possible, the creative energies of the American economy, by giving the greatest possible scope to economic liberty inherent in the free market.

We have assembled here today the thought leaders on these issues, representing a variety of viewpoints and industries. I look forward to the discussion we have of the factors that cause policymakers to displace competition with regulation and the impact they have on the consumers. I also welcome the public to bring regulations or new attempts to regulate or legislation to the Division's attention.

We have announced and we now do have a robust amicus program through our appellate shop. I see John Thorne in the audience there. I can personally tell you that probably 15 years ago, he single-handedly had more impact in this area. It was the Antitrust Division that had the impact, but his advocacy at the time, I think for the *Trinko* case, and his legal reasoning to support that had a lot to do with why the Supreme Court correctly ruled the way it did. That was not a formalized way, but that experience back then before I arrived in the Division taught me that we should be more robust and identify the proper cases that are finding their way through the courts—district courts, appellate courts. And we'll do that.

Likewise, in the regulatory area, where we find regulations before they're implemented and promulgated that have a market distorting effect, I think it's the Antitrust Division's responsibility to make sure that those policymakers know the impact and if there is a solution to them, a less market-distorting effect while still achieving the police goals it might have and health-safety goals. It's our job to do that, and we would encourage you guys to bring those matters to the Division's attention.

With that, let me turn it over to Bob Potter to help us conduct the day and introduce the folks.

ROBERT POTTER: Our first speaker today will be George Slover, who is representing Consumers Union, which is the advocacy division of *Consumer Reports*. George is an old friend, having been at the Division for a number of years. He also worked on the Hill. He is Senior Policy Counsel in Consumer Union's Washington office. George?

GEORGE SLOVER: Thank you. We very much appreciate getting invited to participate. Listening to Makan just now, I believe I agreed with essentially everything I heard him say. So if anything I'm about to say sounds like it contradicts any of that, it is not intended to.

Do I need to start over?

This roundtable is a mirror image of the first one, about displacing *antitrust*. And our answer is the same today. Competition and regulation work best when they work hand in hand.

We are strong supporters of antitrust, but we do not embrace unlimited business freedom. Our goal is a marketplace that consumers can trust to be safe, fair, and just. Competition helps, because giving consumers the leverage of choice can help align business incentives with consumer interests. But experience teaches that free-market forces do not ensure that businesses focused on their bottom line will always act in the interests of consumers.

So our advocacy goes far beyond supporting free-market competition. A free market is not going to ensure that products are safe, or that consumers are not cheated, or that privacy is not violated and exploited. It is not going to ensure that consumers are not left vulnerable because a business, in a rush to get to market and make the sale, cuts corners and takes undue risks. We need the FDA and EPA, the FCC and FTC, the CPSC and the CFPB.

To name just a few consumer protections: a ban on lead paint in children's toys; a ban on hazardous drop-side cribs; safety standards for meat and poultry; seat belts; the do-not-call list; prior consent before your cable company can collect and share your personal information; your right to see your credit report and correct it. Granted, the free market might eventually lead some businesses to offer some of these protections. But should we let a toy maker decide if it makes business sense to use lead paint?

We always want to find that sweet spot where the rules protect the public without unduly burdening business. Excessive burdens impose unnecessary costs, and divert productive resources, but inadequate protections lead to avoidable harm, and often to unjust enrichment. The businesses being regulated seem able to get their point of view across to the legislature, to the agency, and to the courts.

One factor can be whether a regulation would be anticompetitive, but let's be careful what we mean by that. In antitrust circles, we understand "competitive marketplace" in terms of a healthy rivalry among businesses. In the looser parlance of business circles, "competitiveness" is often understood to convey something different, like "strength," or "making bigger profits."

As to the antitrust understanding, the antitrust community and antitrust agencies have unique experience and expertise and credibility to offer. The antitrust agencies have provided valuable advice to Congress, state legislatures, and federal and state agencies on alternatives for achieving a regulatory objective without unduly restricting competition.

Sometimes it's about a direct barrier to entry, such as the joint DOJ-FTC advice to various states on certificate-of-need barriers for new or expanded hospitals, or the FTC's advice to Ohio in March on occupational requirements for dental hygienists and therapists. In those kinds of cases, an antitrust perspective can be quite useful -- recognizing that countervailing policy interests, like safety, may justify what might be viewed, through a strictly antitrust prism, as a restraint of trade.

Congress has the prerogative, as do states under state action, to decide a particular restraint is reasonable. When I worked at House Judiciary, we spent a good deal of effort stopping other committees from tossing an antitrust exemption into their bills as a sweetener. Of course, Congress enacted the antitrust laws, and can decide to create antitrust exemptions, but we thought the place to decide that was the Judiciary Committee, with its experience, expertise, and appreciation for antitrust.

By the same token, saying antitrust is not second class doesn't mean it's top of the heap, or that we retreat from regulation, on faith that the free market will protect us. And the further away we are from assessing direct effects on competitive rivalry, the less reason for the antitrust agencies to be advising the rest of government. Explaining how regulatory compliance costs can be harder for new and smaller companies to absorb is not an antitrust insight.

That still leaves lots of room where the antitrust community and the antitrust agencies do have something important to say.

Even with a direct restriction on competition, there's typically a safety or other concern at play. The question is whether a less restrictive alternative would still be effective. That's where an antitrust perspective can sometimes help, though maybe not always carry the day.

I was going to say something about telecom and media being in a highly specialized class by themselves, but I think I will leave that to John. Thank you.

ROBERT POTTER: Thank you, George. Next up, representing Public Knowledge, is John Bergmayer, their Senior Counsel specializing in telecommunications, media, Internet, and intellectual-property issues. Welcome back, John.

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JOHN BERGMAYER: Thank you. So Public Knowledge believes that regulation can promote competition and protect the public interest, but that changes in technology and business models require that regulations periodically be rethought. And in my oral remarks, I will focus on some areas in particular in the media and broadcast space where regulations are not serving the public interest before adding some general remarks.

The relationship between cable providers and broadcasters has been subject to FCC oversight for decades. And some of the assumptions of current FCC rules are that pay TV providers have leverage over broadcasters, that without FCC involvement they would be freed to pirate signals from wherever they chose, and that broadcasters provide local information not available elsewhere. And these are outdated assumptions.

Due to ownership deregulation, large broadcast chains have emerged. As the Department well knows, Sinclair Broadcasting is now even trying to get bigger through its purchase of Tribune. While I may have little sympathy for Comcast or Charter, there are many pay TV providers who lack leverage against broadcast chains of this kind. Increasingly, multiple stations within a market and across different local markets are grouped together during carriage negotiations, leading smaller providers in a take it or leave it negotiation where they would be significantly harmed if they allowed such a large number of broadcast stations to go dark on their systems.

So this points to one area where government's background rules negatively affect competition. Broadcast stations are designated by statute as the sole parties that can authorize carriage of their signals, even when they are not the copyright owners of the programming they carry. Over the years, a complex system involving compulsory copyright licenses and retransmission consent has been enacted to govern the relationship between cable and satellite TV providers and broadcasters. And these statutory categories tend to preserve the status quo and make new entry into the market by players with new business models more difficult.

Public Knowledge has therefore long supported the gradual elimination of the compulsory license and retransmission consent system for pay TV to be replaced with private negotiations and copyright licenses that most likely will resemble those that already exist for pure cable channels. However, in this case, a too-sudden deregulation would simply empower parties who benefit from the current skewed regulatory system, and in the interim, and then as part of gradual reforms, Public Knowledge also believes that the FCC should declare that certain acts in retransmission consent negotiations are *per se* bad faith and therefore unlawful, such as restricting online video and consumer device usage, ceding control over negotiations to third parties, timing blackouts to coincide with marquee events, and demanding per-user fees for nonsubscribers, and the FCC should establish a process for challenging anticompetitive demands on either side of the negotiation. And similarly, the FCC should interpret the statutory definition of multichannel video programming distributor to mean what it says and not to arbitrarily exclude new categories of technology.

Regulations giving broadcasters special protections in the law should generally be eliminated, at least for a large broadcast chains. A few years ago, led largely by now Chairman Pai, the FCC, on a bipartisan basis, eliminated the sports blackout rule. And this rule gave cable and broadcast companies a way to use the FCC to enforce their private contracts. These rules served no legitimate public purpose, and the predictions of doom from the broadcast industry that attended their elimination have all proven false.

It is time for the FCC to finish the job and eliminate similar protections such as rules against distant signal importation and syndicated exclusivity. Then-chairman Tom Wheeler proposed the elimination of these rules in 2015, but according to industry reports pulled back the proposal after significant congressional pressure. Indeed, many of the special protections for large broadcast chains that continue to exist do so because of congressional champions on both sides of the aisle. This does not mean that they are sound policy.

Having specific rules about specific business arrangements has contributed to the rigidity of the video marketplace. Regulations that guarantee exclusivity enforcement means that broadcasters do not have to bargain as hard for it. And during a time of broadcast consolidation and general deregulation, it simply makes no sense for the FCC to step in and give large broadcast chains legal tools and leverage not available to other media companies. Eliminating them might produce more alternatives for viewers and, to the extent that pay TV providers would gain the new ability to obtain lower cost programming from these sources, lower bills.

Also— and this one surprises people— but the Commission's basic tier buy-through rules require that cable operators include broadcast stations in all of the programming packages they offer. That means that full a la carte offerings by cable providers, whether or not you think they would be a good thing or not to provide, are actually illegal. The FCC's rules go further than the statute requires, and they needlessly restrict a la carte. There's no reason why viewers who wish to subscribe to cable service should be required, as opposed to having the option, of paying for over-the air programming that they could get for free with an antenna. And obviously this critique does not apply to stations that are carried without charge, such as public broadcasting.

In other cases, Public Knowledge believes that some rules should not be eliminated but modified to promote competition or other values. The retransmission consent regime mentioned is one example of an interim step. Another area is media ownership rules generally.

Currently, different broadcast stations that operate essentially as a single enterprise through joint sales agreements count as different companies for the purpose of ownership rules. To the extent that the FCC expressly allows collusion between competitors in the local marketplace, they may be immune to antitrust review. Local stations no longer have to have their main studio in the community they purportedly serve. Multiple stations in a single market may share a common owner, and large broadcast chains such as Sinclair are transforming what were once local broadcast stations into something more like a national broadcast network or a national cable-news outlet.

It's time for a broad rethinking of broadcast policy that is informed by the function broadcasters are intended to perform. If the purpose of broadcasts is to ensure that viewers have access to free TV, then the FCC's rules should be updated accordingly. If the purpose of broadcasts is to ensure that local communities have access to programming tailored to their specific needs, then broadcast rules should also reflect that, preferably through a structural approach.

So Public Knowledge is typically seen as an organization that is generally in favor of different kinds of media and communications regulation, and I would not dispute that characterization. And there are plenty of areas where I think that the solution is not deregulation but more rules or stricter enforcement of the existing ones. But I can leave those for another day, because well-run regulatory systems don't just have a lot of rules but the right ones. In many cases the rules around the broadcast industry, and in particular the carriage of broadcast signals by pay TV providers, no longer provide the right balance.

And the specific example cited here are far from the only instances where regulations either stand in the way of competition or should be updated to promote it. But I believe that they are illustrative examples that can inform policymakers in many contexts. Thank you.

ROBERT POTTER: Thank you, John.

Our next speaker is representing the U.S. Chamber of Commerce, Gail Levine. Nice to see you again, Gail. She joined Uber as their Head of U.S. Regulatory Affairs, and now she's Uber's Director for U.S. Competition. Prior to working at Uber, Gail was Vice President of Public Policy at Verizon and previously worked as an attorney advisor to the chairman of the Federal Trade Commission and a trial attorney in the Federal Programs Branch here at the Department of Justice. Gail?

GAIL LEVINE: Thank you. It's great to be back. Thank you very much.

I'm delighted today to be the invited guest of the U.S. Chamber of Commerce. But of course I speak today on behalf of Uber.

In the earlier part of my career when I was at the Federal Trade Commission, I helped set up roundtables like this, so I want to say thank you. I know how much work goes into creating these events, and I am grateful to you guys for putting together such an impressive panel today, in fact for all three of these panels, and for the vision of starting this issue and taking it on. I just think it's a tremendous effort. So from one who's done it on the other side of this table, I thank you for what you're doing here today.

ROBERT POTTER: Thank you.

GAIL LEVINE: Look, before turning to the costs of regulation, which is today's subject, I thought it might be helpful to sort of give a reminder of the benefits of private companies' entry into highly regulated markets. And maybe, given where I sit, using Uber as an example of that would be helpful.

So Uber, as you know, provides a software app that operates an Internet-based platform that connects passengers with drivers in real time. You've all used Uber, right? Good.

Our innovations have created huge value for drivers, for riders, for users, sometimes in the face of strong regulatory initiatives or in a tough regulatory environment. So let me just sort of explain some of the benefits of new entry into highly regulated spaces for us.

TRANSCRIPT PART ONE

Affordable, reliable rides at lower prices, right? The price of a basic UberX tends to be considerably lower than taxi or limo pricing. Wait times are lower. Our app can get the driver to where the rider is in a minimum of wait time.

We've got an expanded geographic availability of service. Our platform originates trips where the rider is. And that is not always necessarily where a hotel is or where an airport is. We've been able to expand our service into sometimes underserved corners of the community that didn't have those transportation options before.

In New York City, for example, we have really good service to the Bronx, Queens, Staten Island, Brooklyn, places where, traditionally, taxi was not serving those areas well. The 538 blog analyzed our data and found that in a three-month window in 2014, 22% of New York City Uber rides originated outside of Manhattan; 14% of yellow and green taxi rides originated outside of Manhattan. And our own internal data shows that over half of our trips in New York now originate in the outer boroughs. That's compared to 5% of yellow taxi trips which originate in those areas. So in other words, we're delivering rides to corners of the city where there really hadn't been effective access for on-demand transportation before.

Our basic technology just allows for more-efficient matching than other transportation services. And more efficient even than that is Uber Pool. Uber Pool is a service that puts more than one rider from more than one origination point in the same car going in the same direction.

In 2017, drivers served 35 million riders in Pool trips. If those riders had gone by themselves, we would have been talking about an additional 314 million vehicle miles and another 82,000 metric tons of carbon dioxide exhaust.

Uber and businesses like us, other TNCs, transportation network companies (as in telecom, everything in my industry has a three-letter acronym as well; TNC is the acronym used to describe our service). With TNCs available, vehicle registration has gone down. In 2015, 9 million cars fewer were registered as vehicles to drive. That's a statistically significant figure of 3.4% United States-wide.

We partnership with transportation agencies as well. As consumers figure that they don't need their own car, they can use a TNC to get around, they also recognize that they may want to use public-transportation services a little bit more too. So we have been partnering with public-transportation agencies to help fill empty seats on buses and trains, especially when it comes to first-mile and last-mile solutions-- getting you to the metro, getting you home from the metro, etc.

So, for example, we expanded our Uber Pool coverage in DC when the Metro a couple of years ago was operating on SafeTrack, having those rolling closures that didn't allow for full service. And just this month we sponsored late-night Metrorail service after the Caps game so that fans could get home safely.

We are the new late-night option when bars close. Demand spikes for Uber in Pittsburgh at 2:00 AM, which is when the bars close. And in Chicago, we get a disproportionate number of weekend late-night Uber requests from companies that have liquor licenses. About half occur during the sort of peak closing times of 10:00 PM to 3:00 AM. So we just offer a safer opportunity to get home.

We have increased security for both riders and drivers. When you're riding in our cars, your app lets you know who picked you up; lets your friends know who picked you up; lets your friends know, if you click on the option, where you are; lets you share your location; lets you share your estimated time of arrival with your friends so they can see where you are. And we've also provided drivers with new earnings opportunities and flexible hours to earn them.

And George Mason University economist Tyler Cowen summarized the consumer benefits of one of our services a couple of years ago with a quote I just have to read because it's delightful. "For a typical dollar spent by consumers on UberX, they receive $1.60 worth of gain. That's an unusually high amount of consumer surplus. UberX produces daily social value of about $18 million. That is comparable to having an excellent French impressionist painter produce a beautiful work a day and give it away for free."

In the past, local transportation regulations have restricted entry or controlled price or limited innovation. Sometimes you see regulations that cap supply. Think about a requirement that transportation providers have to have one of a fixed number of medallions bolted onto the hood of the vehicle. Other regulations regulate prices, like rules that require taxi meters that charge fixed prices to all users.

And new entrants, like us and like others, have to sometimes thrive in a challenging regulatory environment with this kind of legacy regulation. Sometimes it's at the behest of the incumbents. So for example in 2015, in St. Louis we challenged a set of regulations from the St. Louis Metropolitan Taxicab Commission. They made it, as a practical matter, pretty much impossible for Uber to operate in the city. About half the commission was made up of active taxi-industry participants. And the regulations that the commission promulgated required TNC drivers to get a taxi cab or livery permit and made only a severely limited number of them available. They were on a lottery system. Just 20 new permits in 2014, 26 new permits in 2015.

Other times we have regulations that are just as harmful but indirectly proposed. So for example in 2013, the trade association of local transportation regulators drafted a model regulation that proposed rules like you can't charge a lower price than taxi's charging, or your rides have to be prearranged in advance of the trip. And municipalities picking up on that proposal would typically identify that as being something like 30 to 60 minutes ahead of time.

The problem isn't unique to the United States. Think about our situation in Greece, for example. In Greece, taxi-drivers associations went on strike this spring and argued that new entrants were creating unfair competition at the expense of licensed drivers. So they pushed and got some legislation that does things like require every ride share to begin and end in the fleet partner's garage. So I can't pick up you and then pick up you and then go home to the garage. I need to go back to the garage each time. Or that every ride-share ride must be three-hours long.

These rules are just so burdensome that we had to force some of our business to a halt in Greece. And I know it will get better. I know we're working actively on a cooperative relationship, and I'm optimistic for the future. But in the meantime it leaves our local partners, our local riders with fewer options.

Other troubling stories have happier endings, like Seattle. In Seattle, the city council a few years ago passed an ordinance under which independent drivers would be collectively bargaining for terms, including price, in their contracts with Uber. But price fixing is illegal. And the Chamber of Commerce joined us in suing to block the ordinance.

And let me give a big thank you here to the Department of Justice’s Antitrust Division who, with their colleagues at the Federal Trade Commission, filed a supporting amicus brief with us in the Ninth Circuit. They wrote that— you wrote that the collective bargaining by independent competing drivers in that situation would be price fixing and that that was plainly unlawful and that the state of Washington hadn't clearly authorized the city to suppress that kind of competition.

You know better than anyone that just this month that advocacy bore fruit and the Ninth Circuit agreed and said the state did not authorize and wasn't actively supervising that kind of restraint on competition. So thank you not just for what you've done for us in that one instance but what you have been doing for all of us as not just economic actors in the market but as consumers to promote competition in spite of barriers to innovation and to competition.

So unfortunately there's more work for your agency and for all of us to keep doing, more opportunities to engage in competition advocacy, and enforcement of the antitrust laws to eliminate anticompetitive regulation. Two thoughts as I close about thinking where to deploy your scarce advocacy and enforcement resources.

First, on the harm side, local-government restrictions on competition are especially pernicious. You cannot outcompete local-government regulations. And that's a reminder that the scope of the state action doctrine really matters. As you, the Antitrust Division, said earlier this year in your Supreme Court brief, public entities are not owed special solicitude under the state action doctrine, that the anticompetitive regulation is only permitted for genuine exercise of the state's sovereign power. Your advocacy makes a difference in the real world. So I appreciate what you're doing on the first point.

Second point on benefits: the benefits to consumers from removing the regulatory competition barriers are huge. A couple of years ago, the Senate Appropriations Committee, when they were talking about local transportation and smartphone apps, said that removing public restraints on competition, as this three-part workshop is focused on today, is the ideal sort of low-hanging fruit to be going for.

Antitrust advocacy and enforcement is particularly important because we are just at the beginning here of new markets. We are seeing an extraordinary pace of innovation to improve safety and transportation and reduce costs. An extraordinary amount of capital worldwide being invested in new transportation technologies. Significant cost reductions are expected in the near future. And we're only just beginning to penetrate the addressable market for the kind of transportation solutions that companies like mine provide.

So thank you for what you're doing to help consumers, help riders, help drivers by removing those public restraints on competition and innovation. Thank you.

MAKAN DELRAHIM: Thanks Gail. And I think the Ninth Circuit case is a good example of not just that particular case in Seattle. That was, I think, a test regulation in one municipality or locality where had they, if they're successful— and I guess that still they could technically [INAUDIBLE] up to the Supreme Court, and who the heck knows what happens there? But let's assume that the court properly ended the misguided aspects of that regulation.

Had that been successful, that would have not been the last city where we would have seen bad regulation. It would have been popping all over the place. That's why it's really important to try to address these, address them early when they're popping up.

What I would love to see would be a Twitter account or some kind of a blog of the international kind of silly regulations that relate to this because whether it's international or local regulations, the more that is subject to, I think, sunshine the better it would be not only for debate but probably puts a restraint on some of the new localities from putting in things that are not supported by, I think, the police powers of safety and health and others but it's just purely intended to protect an incumbent.

GAIL LEVINE: Thank you.

ROBERT POTTER: Thank you, Gail.

The next speaker is representing the National Diversity Coalition. It's Steven Sugarman. He is a Senior Adviser and Chief Counsel to the Coalition. Steve began his career as a management consultant at McKinsey & Company and Lehman Brothers and has extensive experience in finance and management law, including community development and service to minority communities, including the National Asian-American Coalition. Steve, welcome.

STEVEN SUGARMAN: Thank you very much. Thank you for this opportunity to speak today. I wanted to use the time to talk about something really important to us and our members, which is consumer welfare and the Antitrust Division's approach and support for a flexible and dynamic consumer-welfare standard that's equipped to face threats to competition that not only exist today but over time.

Today, the standard is premised on the idea that the consumers benefit from free-market competition because it increases economic efficiency, often in the form of lower prices or increased output. Courts and agencies of the United States have traditionally analyzed consumer welfare based on whether restraints or mergers may raise prices or reduce output.

The National Diversity Coalition agrees with this approach. However, too often, traditional antitrust analysis listens to the voice of scholars, academics, statisticians in lieu of consumers.

Ironically, this can leave consumers, especially disaffected and underserved communities, feeling voiceless in a process purporting to determine effects on consumer welfare. In fact, it can appear that some historical processes for assessing consumer welfare go to significant lengths to avoid direct consumer engagement. Current jurisprudence likewise can favor centralized analysis sanitized from direct consumer interaction and input over a broad consumer perspective on the marketplace.

Today, the National Diversity Coalition seeks to speak for the simple proposition that the voice of consumers must, as part of antitrust oversight and enforcement, is inalienable from an assessment of consumer welfare. It is necessary to incorporate evidence gathered directly from consumers into antitrust analysis in order to unlock the power of efficient markets.

We're emboldened by the Division's increased openness under this system attorney general to include the voices of consumers and their advocates in its work. For instance, we commend the division and the staff for including us in this discussion, and also we acknowledge that the division has recently recognize the need to consider ways to increase the voice of the consumer in antitrust analysis. For instance, we support the division's recent call for academics and enforcers to consider whether tools such as Net Promoter Score and similar benchmarks are useful for measuring quality as a byproduct of competition.

As that example from the division notes, there's a search for incorporating the voice of the consumer into the antitrust product. We support quantitative inputs like these assessments into ways to assess consumer welfare on such things as a merger's impact on product quality. However, we also believe that such statistical approaches must not be misunderstood as a substitute for direct-to-consumer engagement.

Currently, we are concerned that there can be a disconnect between academic and academics and enforcers on the one hand and consumers on the other. Increasing direct engagement with consumers remains essential. Consumers play an immutable role in the efficient functioning of markets that can't be replaced through discussions, at least discussions in their absence.

Likewise, their voices must be prioritized when determining the consumer impact from certain mergers and restraints of trade. As an example, the National Diversity Coalition recently visited with a large telecom company who indicated that there was no place in the enforcement process for consumers to be involved. This raises the specter that there's a misunderstanding of what an antitrust enforcement process seeks to undertake. And there is a confusion about whether large corporations, technology companies, retailers should be building large staff in offices in DC to interact with the government or invest similar resources to interact with consumers that are affected by acquisitions, mergers, and such behavior.

We've recently visited and had good discussions with many of these larger corporations, and we found that the voice of the consumer is often absent from their organizational structures. The interactions and the effects of competitive behavior and mergers and acquisitions often addresses academics, regulators, enforcers, but not disaffected communities and those communities most at risk of harm.

To that end, we offer the following recommendations for consideration. First, that the antitrust division should seek to ensure that the consumer voice is properly part of all three phases of antitrust oversight-- assessment, enforcement, monitoring. We recognize that there are ways for consumers to impose themselves on the process. However, there still continues to be confusion amongst the main participants of what the consumer role is.

We would recommend a consumer advisory board that helps the division consider consumer impact from a broad range of consumer voices in the assessment phase. In the enforcement phase, we would recommend the division, through its word, help clarify that consumers are an important part of antitrust considerations and to provide clear public guidance to that effect.

Additionally, we would recommend assessing other regulatory regimes that play a crucial role where the consumer voice and consumer welfare is important. We would highlight the California Public Utility Commission, which has provided a forum where consumers can directly engage in concerns during that regulatory process to ensure that no harm comes. We would also look to some of the processes in financial services and banking that exist.

And then lastly monitoring-- so post-transaction where the corporation, whether without enforcement or postenforcement makes certain promises, representations, and commitments on how they will implement their business in a way that it will not have an anticompetitive effect. There's limited monitoring or role post-transaction for the consumers. And what we found in different sectors is oftentimes promises made during an application or during a submission are not promises kept as soon as the deal gets approval and closes.

And the consumer can play a really important part in monitoring, tracking. Unfortunately, they tend to be the least well financed of all the stakeholders in the antitrust process. So there tends to be very little postclose monitoring where the consumers can be engaged based on the power of financial wherewithal.

The second thing-- well, with those recommendations, we believe that corporate actors and enforcers and all market participants could feel comfortable and can have clarity that they really need to think about the impact on consumers, and in particular minority, low-income, at-risk consumers that these transactions will have. And it's not about financing centralized academic studies. It's about really engaging and that that will have a transformative effect not just during a merger but during their decisions throughout the lifecycle of the company.

Again, we're encouraged by the outreach efforts from the division, really appreciate it, and its recent support for greater ways to measure consumer welfare based on the actual voices of consumers. We believe that the proposals we make can make for a stronger, more durable, and also more flexible and dynamic because antitrust and the implications change over time, even for the same business that goes through its business life cycle. And the best way to understand what's really happening in a dynamic fashion is to get ongoing and dynamic impact from those who are touched directly, which tends to be the consumers. So thank you.

MAKAN DELRAHIM: Thank you. You might also be pleased-- I don't know if you-- it probably gets lost in a lot of the noise we make here at the division recently is the announcement of the creation of the office of decree reinforcement, which will be just dedicated to proactively enforcing the commitments of various parties to mergers or other behavioral decrees that exist. We're doing an overall review of all of our consent decrees. But in addition to that, we have created just a new enforcement office that will be monitoring and following up to make sure rather than waiting around for the accidental discovery of violations of decree [INAUDIBLE].

STEVEN SUGARMAN: Well thank you for that.

ROBERT POTTER: Thank you.

Next speaker representing the American Bar Association's Section of Antitrust Law is Tom Zych a partner and chair of the emerging-technologies practice at Thompson Hine. Tom has over 30 years of private-practice experience in data protection, intellectual property, consumer protection, social media, competition, and last but not least, antitrust.

THOMAS ZYCH: Thank you. As with others, I want to express my appreciation for the invitation to be here to be participate in this roundtable. My partners always hasten to remind me, I do not speak for them necessarily or our clients, and I cannot speak on behalf of the entire American Bar Association. But in my role as an officer of the Section of Antitrust Law, by way of gratitude not just to come here, as we do, asking things of the division but to offer, and that is our continued support, as we have articulated repeatedly, on the efforts of the division to protect competition and to protect consumers as well.

And in that regard-- and we can skip over this part of the discussion so easily-- is that we want to express our continued support to the division and your colleagues in the federal agencies in the efforts to preserve the antitrust laws from inroads, from nibbling at the ankles at attempts to reduce the effectiveness and the application of the antitrust laws through regulation, legislation, or otherwise. And so it will continue to be the section's point of view that preserving the corrective role of antitrust laws means supporting the division and the commission and other enforcers' ability to effectively make sure those laws are carried out and implemented, both directly and indirectly, from policy to budget. So that's something that the section has long supported the vision and we will continue to do so.

That being said, I think it is a timely discussion, but when I say that, I note that probably in my lifetime there's never been a time it was not a time of discussion to speak about the role of competition and regulation. And while we are not an ideological body-- we do not have a specific ax to grind other than supporting the competition laws and the consumer-protection laws, and we're mindful of the limitations of our brief. That is we rarely are in a position within our mission to advocate for or against a specific regulation. Understanding the discipline of competition and understanding the discipline of consumer protection, I think we can provide and would urge a certain structure, a certain way of looking at the regulations so that we measure the costs, as we can do empirically as best we can, and then weigh them, as George and others have advocated. There's a way of doing so that is less ideological and more, as we believe the competition laws are, data driven, fact specific, and reality based.

So there are many ways to slice the picture, but we suggest one. And that's to think of maybe three buckets for regulations. And we can calibrate our skepticism and indeed sometimes presumptions that can be applied to the regulations.

There are those that have been mentioned already that are directly and honestly aimed at changing the structure of a market. And that is we go back to the failed experiment in this country of fair-trade laws. I think of the first Afghani consumer-protection law a number of years ago where our section was asked to comment upon when it came to price regulation and how we advocated that the imposition of static rules on dynamic competition in the long run would help nobody.

So when you look at regulations that are aimed explicitly to change the structure of a market by manufacturers, distributors, or others, there's a healthy skepticism because I believe both the academic and real-world experience is that it's hard to find justification for those. We dealt with, as far back as the '80s, the motor-vehicle-dealer statutes that Makan mentioned that limited the ability of a car manufacturer, an automobile or truck manufacturer or farm-machinery manufacturer to get product to consumers in the most efficient way. This is even pre-Internet. This is just basically affecting the structure.

And when you had states prohibiting online price advertising, online distribution, you see that it's not hard to find the evidence quite quickly that that distortion of the market is hard to justify. And there's almost a presumption that one can apply, not for ideological reasons but simply because we've got the experience with these markets and know what happens. And so I think there's a role that we can all play.

And we cannot say there's no structural intervention that is justifiable. That, I think, would be a bridge too far. But we can say that in that instance the level of skepticism has to be quite high because of the problems of static regulation in dynamic markets and the political reality of who benefits from these. It's not hard, for example, in 1970s to look at motor-vehicle-dealer statutes and find where those laws originated from. If doesn't take much of a political genius to get that. So if you look at both motive and effect, there's a level of skepticism for those direct structural reorganizations that provide an approach.

Kind of in between is those laws that are aimed at protecting consumers, purchasers of goods and services based upon the source of the goods or services. I live near the Cleveland Clinic. I am happy, probably. I haven't used their services yet, but the cardiothoracic surgeons at the Cleveland Clinic have a certain level of expertise that is demanded before they can crack open my chest.

We understand that there is in that area, in that arena a role to play. However, again, this is a problem of static regulation of dynamic markets. And certainly in the health-care market we see that. And so this skepticism is one that needs to be applied over time so that assumptions that are made about capability of market entrants can be reviewed analytically and to see.

We've used the word nurse practitioner already. That's a category of health-care practitioner that's gone from almost forbidden to being protected and in between. My physical this year was provided by a nurse practitioner, perfectly fine. I did not need the MD for my physical.

And so if we look at these over time as training, as education develops, as certification develops, we can look and see, that's something that is an ongoing review to make sure. Because, again, there is political protection for them.

And in all honesty, I come from a regulated profession, right? I'm an attorney. I had to go to law school. I had to pass a bar. If I'm going to go to certain states, even at my advanced age I've got to pass the bar again.

Now if I'm a capital defendant in a criminal case, it's probably a good thing that the person standing next to me is a skilled advocate and can keep you from the death chamber if I don't deserve it. At the same time, as we have new services that are designed to bring legal help to those who cannot afford it that our distribution model doesn't serve, we need to look at anachronistic regulations that may get in the way of that.

So even when there's a situation where we see that the barrier to entry of licensure may be justified, it doesn't mean any barrier is justified. So again, the competition analysis and the data disciplines we can have can help us make those decisions even in the face of countervailing beneficial societal ends that are being served. So the economics, again, and the antitrust discipline provides a helpful approach.

The third— and I think George may have mentioned it. And it's one where there may be less of a role and that antitrust humility is called for but not antitrust abdication. Again, to be anecdotal, my office looks on the Cuyahoga River. It was unfairly pointed out in the 1960s, but it was true that the river caught fire. It was not the only one. And the pictures on TV actually are of Pittsburgh, not Cleveland, but that's an old problem.

You have a toxic river that is no longer toxic. And one can eat perch that is fished from Lake Erie. Four per week probably maximum is what's advertised. But at the same time what we have is the effect of the Clean Air and Clean Water Act. We no longer have sulfur dioxide sunsets in Cleveland. They were pretty, but they were toxic. And so we can look at these, and I would challenge anyone to say that the Clean Water Act was a net harm to society.

At the same time, that doesn't answer the question. If there are regulations that affect fewer than all of the product or service substitutes, then you can have a competition concern in the implementation of the law.

If you look at one set of controls without consideration of others that may be more market based, you may not have a fully nuanced and fully appropriate regulatory scheme that is both sensible over time and that won't be running against the tide of economics every single day. People make consumer decisions, and you take this into effect. So

Even in those where the humility of the antitrust laws would be, this is not necessarily our brief, there is a role to make sure that whether it's through the private-litigation mechanisms, through government enforcement, or advocacy, wherever you are in those weapons, that there's a role to play even in we've got noncompetition and one would say largely noneconomic.

The Afghani experience is another one. It was a consumer-protection law aimed at preserving consumers from fraudulent advertising. There was to be a prohibition on comparative advertising. It was thought to be bad taste and in that culture something one did not do.

Our point was simply that while protecting consumers with regard to pricing information, key to economic activity, that if you act to deprive consumers of information, they're likely to make the best decisions, so the law ought to favor more information in the hands of consumers rather than less. That's an experience of the United States law and our economy. And we've pass it on to the Afghanis who were grateful for the advice.

And so we can look even in those regulatory schemes that are not competition based that would not seem to be within the antitrust division's initial purview. There is a role for the antitrust in competition advocacy, and I would say even consumer-protection advocacy with regard to consumer welfare. So I think if we take kind of a disciplined approach to this and less ideological and view the antitrust laws as fact based and data driven, that the rule of reason is there for a reason, I think we can approach this in a useful way and maximize the impact that we can have.

And the final comment I'll make out of personal privilege is I thank staff for doing this in an order other than alphabetical by surname, as I sometimes face. But thank you.

ROBERT POTTER: Thank you.

MAKAN DELRAHIM: Professor Yoo.

ROBERT POTTER: Our next speaker is Professor Christopher Yoo, the John H. Chestnut Professor of Law, Communication, and Computer and Information Science at the University of Pennsylvania. His research focuses on how the principles of network engineering and the economics of imperfect competition can provide insights into regulation, particularly in electronic communications industries. Professor.

CHRISTOPHER YOO: Thank you to Makan Delrahim and the Division for organizing this roundtable. I also thank you for not just ordering it by surname or by institution, because either way I'd be last or darn near last.

I think that Makan's opening speech set the perfect tone by emphasizing that there's a proper province for regulation. It's appropriate sometimes, but it also has a cost. In short, Makan's advice is to think in terms of balance, and to me, that's a term that's often lost.

There's a tendency sometimes to romanticize regulation. I actually think all legal interventions have there limits, and something we've learned as lawyers is that just because we see a problem and we want to fix it, the law does not necessarily make it better. We've learned that's not always the case. The fact that the proposed fix is always imperfect as well means that we really have to engage it as a problem of comparative second bests and to try to really understand this better.

What strikes me is that those of us who actually spend a long time thinking about the history of regulation realize that past efforts weren't always so great after all. I'm going to focus my remarks primarily on traditional economic regulation of price, which has probably been the most interventionist approach and has the most impact for antitrust. I find that there's a tremendous romanticism of price regulation. We forget that in the '80s and '90s, for example, the FCC and NTIA had enormous proceedings to talk about how the traditional rate-regulation system was failing and why we needed to fix it. That history has been lost to much of the debate.

So what does this history teach us? First, there's a problem with regulation raising rivals' costs, a strategy with which we're all familiar. To say simply that regulation can raise costs isn't sufficient. We have to go back to the notion of balance. We must note that there's actually some potential benefit to regulation as well. We have to think of it that as a tradeoff.

There's also an enormous literature on how price regulation facilitates collusion, which I think has largely been lost. It standardizes products. It makes price visible. It limits firms' ability to engage in unsystematic price discrimination, which breaks down cartels. It actually allows competitors to challenge rates for deviating from preset levels. And it actually creates a cartel enforcer who actually will create enforcement of prices.

And interestingly, under the filed rate doctrine, regulation does not just set maximum prices. It also sets minimum prices. And so we think of rate regulation as putting ceilings on prices. Price regulation actually sets floors as well. And anyone in the antitrust business knows that something that makes sure prices stay up is inherently suspect.

Second, we forget that traditional price regulation raised huge problems by creating disincentives to conserve on expenses. Most price regulation schemes were cost-plus regimes, which are inherently inflationary. We had this idea of price caps that would solve all the problems, but they didn't.

We also had the Averch-Johnson effect, which is something that's rarely discussed, but is critical to anyone who studies price regulation. Simply put, all regulatory schemes create biases. And we actually see that there's an enormous history here that there's problems associated with price regulation.

There's also the general notion that price regulation hurts innovation, because innovators gain no real upside for the risks they take. They have to telegraph all of their innovations. There's a literature that's explored whether that's good or bad for consumers.

The other thing that's fascinating to me is the whole notion of partial deregulation under the filed rate doctrine can actually leave consumers without any remedies at all. If an industry is partially deregulated, but not fully deregulated, it's still in that world where regulation dictates the exact price. And so you still end up deferring to the rate as the entirety of the contract even when the provider promised someone a lower price in bad faith. You have to go to the regulated rate even when the provider promised a price that was 10% lower. Too bad. Regulation displaces everything. And what's striking is that unlike for state regulation, in the federal context, there is no clear articulation requirement for regulation to displace competition. There is also no active supervision requirement. So you can end up having practices evade all scrutiny, either by the antitrust authorities or by the regulatory authorities.

The last thing that's kind of really striking to me is how the shadow of regulation can actually affect antitrust law. What I have in mind in particular is merger clearances. The example I gave in my prepared remarks that struck me the most is the impact of the statute that authorizes the FCC to set a cap on the percentage of the country that a cable operator can reach nationwide. The FCC has twice tried to set the national cap at 30%. Each time the FCC failed to justify its decision in court, and courts struck the FCC’s orders down as arbitrary and capricious. Yet the shadow of a failed regulation that could not withstand judicial scrutiny continues to affect every merging party in the cable industry. They to divest resources to below this failed 30% guideline. So even though the regulation isn't legal, it still has an impact.

In fact, you see this constantly. If people are working in areas that have traditionally been regulated, they're afraid of the impact on antitrust scrutiny, regardless of the strict letter of regulation. That's not a direct effect but clearly a consequential effect.

The focus of my remarks has been on economic regulation. A lot of the other comments have focused on health and safety regulation. I will say that is an important province of regulation and, in fact, will remain so even in the advent of competition. I will note that in most cases, the remedies for health and safety regulation are informational, like the CPSC, the Food and Drug Administration, and the like. Informational remedies actually don't conflict with antitrust laws in the same way as price regulation and don't raise the same sort of problems. There are some other forms of health and safety regulation that potentially do, such as OSHA and the minimum wage, but they rest on a slightly different footing. But at least we can narrow the scope of potential conflicts between regulation and antitrust considerably.

I'll close by actually mentioning a framework that I've actually grown to like a lot that was encapsulated nicely by Howard Shelanski. As most of you know, Howard is the former Chief Economist of the Federal Communications Commission, former Director of the Bureau of Economics of the FTC, and the former head of OIRA. He emphasized the importance of framing the regulatory decision as a second-best analysis in that we shouldn't pretend regulation is costless. If you're comparing unregulated monopoly with regulated monopoly, unregulated monopoly performs so badly that we should regulate, and the balance tips that way. But as we shift from monopoly to oligopoly, eventually the market performs better--never competitively, never perfectly, but better. And there's a number at which point the costs of regulated oligopoly cause it to perform worse than unregulated oligopoly. Different commentators may pick a different number at which point there are enough players that unregulated oligopoly performs better than regulation. It's hard to know what that number is.

Howard has a number. He has said it in this article in the *Yale Journal of Regulation* that his number is three. Once you get three competitors, the government should get out of the business of price regulation. Now you can quibble over that. That said, Howard is not a kneejerk deregulatory person by nature. He's also a very good scholar, and I take what he says seriously. But whatever anyone thinks is the right number, Makan's point is that there is a number. And when regulators think about intervening, we should remember that unregulated markets actually do provide a certain level of protection for consumers, and we should think about this in a more dynamic, supple way that has consumer welfare at the center.

MAKAN DELRAHIM: Thank you. I'm surprised that Sprint and T-Mobile have not brought his paper over to us yet.

[LAUGHTER]

Such a magical number.

CHRISTOPHER YOO: I'm not in a position to discuss matters currently pending before the Division.

[LAUGHTER]

ROBERT POTTER: Thank you Professor.

Our next speaker representing the American Antitrust Institute is Rick Brunell. Welcome back Rick. He's AAI's General Counsel. He previously practiced in the chairman's office at the Federal Trade Commission, litigation department at Foley Hoag in Boston, and the Massachusetts attorney general's office, and here at the Antitrust Division as well.

RICHARD BRUNELL: I want to reiterate our thanks for being invited and thanks for holding these roundtables. Not only is that topic quite important but the way in which the panelists have been invited with a great diversity of viewpoints I think is quite commendable.

AAI itself is a frequent competition advocate before regulatory agencies. And we're frequently involved in airlines and telecommunications and energy. And we've been critical of many of the things that the Division has been critical of, including some of the points that Makan mentioned--unjustified occupational-licensing regimes, dealer-protection laws that limit the ability of innovative car manufacturers to distribute directly to consumers, and certificate of need laws. So there's a lot of consensus about problematic areas.

On the other hand, we think we need to be mindful that regulation that restricts competition may be fully justified to correct market failures or may involve legitimate tradeoffs that antitrust enforcers should respect. Moreover, regulation can also enable competition in ways that the antitrust laws cannot. And so we suggest a few principles to consider in defining the Division's role as a competition advocate.

First, one of the concepts previously mentioned is this idea of antitrust humility or competition humility, which we think is important. And it's important, I think, in the current environment involving the criticism of the antitrust enterprise and the criticism of antitrust’s focus on consumer welfare where the claims are made that antitrust really should take into account other values such as the welfare of workers, inequality, democracy, privacy, and community welfare, among other things.

If antitrust enforcers are to resist such calls as beyond the ken of antitrust, I think they must avoid the perception that they reject such concerns altogether. So when regulators do tackle social problems with regulations that have the effect of restricting competition and make tradeoffs that reflect a reasoned balancing of interests, antitrust enforcers should be circumspect, I think, in challenging those tradeoffs.

Which is not to say the Division doesn't have a role in identifying the costs of the tradeoffs-- by nature, that's what a tradeoff is. But in terms of how you value protecting, let's say, workers versus consumers outside of the antitrust world, there should be some humility.

One example that Gail isn't going to like is the issue of collective bargaining by gig-economy workers as a way to protect labor. And of course folks have written about the gig economy and what happens when everybody is working as an independent contractor and they have no benefits; are they put behind the eight ball? We can debate whether such bargaining would constitute an unreasonable restraint of trade among independent contractors. Perhaps it does. But states could enact laws that would authorize such conduct under the Parker doctrine.

In the Seattle case, the state of Washington did not. We can question whether allowing collective bargaining by gig-economy workers or drivers is worth the cost to consumers and perhaps whether the competition by platform companies is sufficient to protect workers. But this isn't an instance, at least as far as I'm aware, where you're talking about incumbent firms excluding or regulating rivals. It's about the division of the surplus between labor and business.

It's perfectly fine, in our view, to argue that, under the state action doctrine, the state was not clear about its intent to regulate in the way that the city of Seattle wanted to regulate. And that's within the traditional role of antitrust advocates. But on the policy question of whether allowing collective bargaining is a good or bad thing, I think we would urge some circumspection to avoid the perception that antitrust doesn't really care about workers.

Second, the Division should continue to recognize the importance of regulation in promoting competition. Regulation has been an essential enabler of competition in network industries like telecom, electricity, and natural gas that involve elements of natural monopoly or bottlenecks. And open access and unbundling requirements imposed on incumbent network operators have facilitated the development of vibrant competitive ancillary markets. A global regulatory solution to the access problem is often preferable to piecemeal antitrust remedies that target particular instances of anticompetitive discrimination. We could debate net neutrality and whether that kind of regulation is preferable to antitrust enforcement when talking about discrimination in content.

Third, the Division should be the advocate and avatar of vigorous antitrust enforcement in deregulated industries. Makan mentioned this earlier. One of the lessons of deregulation is that deregulation without vigorous antitrust enforcement fritters away the gains to consumers. And we would argue that perhaps that occurred in the airline industry where deregulation has provided great gains, but the merger enforcement policy in the industry has, we believe, frittered away some of those gains.

Wholesale electricity markets subject to market-based rates is another example of a deregulated market that requires close attention from antitrust enforcers, among other things, to ensure that we don't have this gap in enforcement where the filed rate doctrine prevents antitrust enforcement, but yet there's no real regulation of prices.

Fourth, the Division’s amicus advocacy with respect to regulation should focus on exemptions and immunities. Historically, the Division has been a strong advocate for limiting antitrust exemptions and immunities. We are pleased to see this advocacy continue in its recent filings. We would suggest caution, however, in investing scarce resources to file briefs in support of invalidating anticompetitive state regulations on other grounds, such as perhaps the dormant commerce clause or substantive due process. Those are controversial waters, not themselves within the competition expertise of the Division, and we think it may weaken public support for the Division's core mission to wade into those waters.

Finally, we urge the Division to increase its competition advocacy before federal agencies. In industries like electricity, natural gas, telecommunications, and airlines, the Division has particularly valuable expertise to offer federal regulators. And that has been a core function of the Division for many years.

And looking at some of the numbers of the filings before federal agencies, for some reason it appears that the number fell during the Obama administration. So we would urge the Division to take up that avenue of advocacy with more vigor.

So I look forward to elaborating on these suggestions and participating in the discussion.

ROBERT POTTER: Thank you. One thing I'll mention about the numbers is we often do a lot of work behind the scenes without filing. So don't take the numbers as necessarily representative of the efforts.

Our next speaker representing the Open Markets institute is Lina Khan, Director of Legal Policy. Welcome back, Lina. Lina has experience representing homeowners against financial institutions and worked with the Consumer Financial Protection Bureau.

LINA KHAN: Thank you. And thanks to the Antitrust Division for inviting Open Markets and for organizing these terrific discussions.

I'll start by underscoring the call for competition humility. Open Markets believes that, in select instances, it may be appropriate for the division to identify those public regulations that serve private interests at the expense of both competition and the public interest, but that at this time the division should focus its efforts and resources on antitrust enforcement and that devoting resources to critiquing the work of public regulators generally should not be a priority at this time.

We believe this for three reasons. First is that the U.S. political economy is currently seeing historically high levels of merger activity alongside signs of persistent and prevalent market power. I believe companies have spent over $2 trillion in merger and acquisition activity already in 2018, and both the pace and volume is kind of set to outdo previous records.

This means that the antitrust division's tools and resources are critically needed to block anticompetitive mergers and to investigate, remedy, and deter anticompetitive conduct. The focus should be on identifying exercises of private power that violate the law rather than exercises of public power whose policy judgments the division may question.

Second, the institutional mandate is to enforce the antitrust laws. We worry that engaging in competition advocacy would take the division away from its core mission. And indeed playing competition advocate risks putting the division in the position of making policy judgments more suited for a legislator or a regulator than a law enforcer, a hazard that Assistant Attorney General Delrahim has warned about in other contexts.

Third, we think the concern about the costs of public regulation may also serve to distract from the costs of private regulation. Dominant actors with market power are often able to set the terms within a specific marketplace, thereby dictating outcomes for other businesses. Such unilateral exercise of private power is also very much a form of regulation. As legal scholar Robert Hale wrote, "There is government whenever one person or group can tell others what they must do and when those others have to obey or suffer a penalty."

Especially in digital-technology markets, certain dominant firms now exert regulatory control over the terms on which others can sell goods and services. These private regulations established by functional sovereigns and the costs that they impose on different sets of customers I think invite closer attention from antitrust authorities, and they suggest potential abuse and maintenance of market power.

I'd like to follow up with a couple additional points. First is, I think given the framing of this topic, it's worth discussing a little bit the relationship between markets and regulations. Open Markets believes that markets are created and structured through law. There's no such thing as a market free from government intervention. In fact, government is a precondition for a functioning market. Markets can't function without property rights which government defines and enforces. And markets also rely on state authority to settle disputes through contract law and other tools. For this reason, I think looking at regulations and competition as opposite misses the fact that markets aren't freestanding organic entities and that regulations can also play a critical role in promoting competition.

There are at least four types of procompetitive regulations that we'll discuss briefly and that we expand on in our written comments. First are separation rules which place limits on business activity. And by limiting forms of integration, these ease barriers to entry in adjacent markets. The second is common carriage rules requiring carriers to treat all customers equally and transparently. Third is rules that reduce switching costs. The FCC's number-portability rule is one example of this. And interoperability requirements generally are another example. The fourth is price-transparency regimes. Requiring firms to display all fees upfront helps promote competition on the merits. This is something that we've seen in airline markets as airlines have been required to show all of their pricing and fees at the point of sale. Described as competition catalysts, these regulations have traditionally been applied in network industries or sectors where a small number of private actors have captured control over an essential input or critical infrastructure.

I think a final example of procompetitive regulation that I'll touch on briefly is the USDA's GIPSA rules, the Grain Inspection, Packers, Stockyard Administration rules. These were proposed in 2010 following joint national workshops held by the antitrust division and USDA. And the rules would have helped redress the buyer power that packers and processors enjoy over farmers and ranchers.

As the antitrust division's own record of the workshops show, there are significant monopsony issues in agriculture markets, especially in poultry. And given the decision not to pursue enforcement action, the GIPSA rules would have been important in helping mitigate the effects of that monopsony power.

Last year a few days before the rules were set to go into effect, USDA decided to withdraw the rules. We see this as an instance where the division's competition-advocacy work, insofar as it's going to engage in competition advocacy, should have encouraged it to publicly support the GIPSA rules as being procompetitive. We described in our written comments how the division should also focus on certain private regulations that we think suggest market power and are distorting market outcomes.

So just to close, I think insofar as the division engages in competition advocacy, we would encourage you to look at promoting procompetitive regulations, especially given that there is a broader deregulatory agenda that the administration is pursuing through other means. And we think targeting market power will also help the division identify anticompetitive forms of private regulation, which is at the core of the Division's mission. Thank you.

MAKAN DELRAHIM: Thank you. I remember one of my favorite sayings, which I 100% disagree with, was the great old professor Jonathan Kenneth Galbraith who said, "Antitrust is for the weak of the mind." He did not much like antitrust enforcement. He preferred regulation. You might recall in the FDR administration, he was credited largely with the Office of Price Administration. And fortunately one of my great heroes in that same administration, Robert Jackson, who was the head of the Antitrust Division but worked in that same office, and he won in the intellectual debate about whether the Price Administration should continue on or should we have strong antitrust enforcement and let the markets decide.

So it's a good history to go back. And there was another young guy in that same little cabal by the name of Thurman Arnold, who was actively involved in those debates back then. And thank God Robert Jackson won.

ROBERT POTTER: Our next speaker representing the Cato Institute is Ryan Bourne, the R. Evan Scharf Chair for the Public Understanding of Economics. Ryan?

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RYAN BOURNE: Well, thank you. It's great to be here. And thank you to the Assistant Attorney General and the Antitrust Division for this invitation.

The Cato Institute and libertarian scholars generally have long been concerned with anticompetitive regulations and their effect on consumers. And one of the reasons why is kind of a flip side to our general skepticism also of antitrust, which is that we believe that markets tend to be incredibly dynamic, and entrepreneurs and market forces work over time to undo monopoly or cartel-like behavior, but anticompetitive interventions imposed by the force of law can prove much more enduring.

That said, I think before we look purely at the cost of regulations in order to assess whether they truly undermine competition and harm consumers, it's first necessary to remember their purpose. And most regulations are justified in economic terms as efforts to correct perceived market failures. In economics textbooks, market failures are said to occur when the level of transactions are not efficient, lowering net social welfare.

And this can theoretically arise for a number of reasons. We've heard about externalities from trade, natural monopolies, a good being a public good in the sense that it's nonrivalrous and nonexcludable, or the existence of significant asymmetries of information between buyers and sellers. So most proponents of regulation start from the premise that the market in question fulfills one of these criteria. They then propose a government regulation to correct for it, taking us to some form of socially optimal level of consumption or production.

Now if that were true and the government was all knowing about the external effects of all transactions, that would be the end of the story. But there are good economic reasons, some of which we've already heard, to think that the market-failure paradigm itself has major problems. Markets fail to deliver public goods much less often than the invokers of regulation or government provision suggest.

As I've alluded to, entrepreneurship has a tendency to eliminate many inefficiencies over time, meaning regulators are often backward looking. The government can miscalculate the scale of taxes and regulations and itself fail. Regulatory agencies can be captured by vested interest groups. And almost all activities have external consequences, meaning that correcting for externalities really is carte blanche for almost unlimited amounts of intervention.

So what I'd urge is rather than just looking at the cost to consumers of regulation, we really need to make this a two-pronged question when considering regulation. Is there a market failure in the first place, a robustly defended accusation of market failure? And then secondly, does the regulation in question actually deliver in solving that market failure? And I suggest across a number of industries and in many cases these concerns about market failure tend to be overblown. And as such, most regulation tends to be more redistributive and lowers economic efficiency rather than being market-failure correcting.

Now there are two types of anticompetitive regulations, very broad types of anticompetitive regulations-- those which control price and entry, including the structure of the industry or whose licensed to operate in the industry on the one hand; and then also as we've heard from Professor

Yoo, those which impose significant kind of compliance costs with the unintended consequences of creating barriers to entry and affecting industry structure.

So I'll talk about a few different examples and then wrap up. Now one area where state and local governments regulate extensively with the aim of solving market failure is in the childcare sector. Most states impose staffing-qualification requirements and minimum ratios of staff to children in formal care, infant-care settings. And they do that on asymmetric information and quality grounds. The idea is that the more staff we have per child and more staff per number of children, the more interactions you'll get, the better child development, which has strong social benefits, and likewise from staff being highly qualified.

In fact, this is an example of a regulation which doesn't consider the market as a whole. It considers the formal care sector but it doesn't envisage the other care options for people tend to be parents looking after their own children, having informal types of care, perhaps daycare and whatnot. And when you look at the academic evidence in the sector, there's good evidence that actually far from raising the overall quality of child care that the children themselves face, these regulations can actually lower quality by pricing out particularly poorer consumers from being able to afford formal care in the first place.

Even modest relaxation, for example, of staff-child ratios has been estimated to lead to annual savings for annual infant costs of around $500 a year or more. Not only does that affect the price that consumers face, which is the direct effect we're talking about, but lots of these regulations have broader economic impacts. And in this case, obviously making it more difficult for people to find affordable care for their children makes poorer households much less likely to move into the labor market in the first place. It can reduce job mobility as well, so a double negative.

We've already talked about some of the examples of regulations affecting industry structure--car-dealership laws, for example. It's not entirely clear these days, even on my first question, what market failure they're aimed to solve, particularly with the proliferation of internet-based services.

Occupational licensure is a much more difficult and thorny area in some cases where one could envisage substantial harm from bad-quality practice. But in lots of sectors in which there's extensive occupational licensure, it's not clear what these big, harmful costs would be. And in many cases it appears that regulators are seeking to replace consumers in making the price-quality tradeoffs that they would otherwise like to make. And again, that tends to hurt especially poorer consumers who often value more affordable products as opposed to products which are perceived by others to be high quality for them.

I just want to put on record, it's worth remembering that some of the most egregious anticompetitive price and regulatory policies occur in trade policy. It might be beyond the scope of our discussion today, but it's important given recent events.

Now clearly other regulations, environmental and health and safety legislation, is more difficult. There are clearly external effects that must be considered in many instances. But what I just note here is that often regulatory approach goes against best practice, and the existence of things like grandfathering arrangements suggests that certain firms or industries can capture that process of the imposition of a regulation rather than this kind of economically pure market-failure-correcting regulation being imposed.

So I'll stop there. There are broader historical examples, whether it be natural monopolies or public-goods provision, which again suggests that market failure tends to be overblown. But I'll just conclude by saying I think that thinking through this from first principles and actually trying to identify, first of all, is there a clear and obvious market failure we're trying to correct, and then secondly, really analyzing in detail whether the specific regulatory intervention can solve that to any meaningful extent without this big harm to consumers is this the right way to think about this from an economic perspective before we get on to the question of what to do about it.

ROBERT POTTER: Thank you. Our last speaker for the opening will be representing the Association of Corporate Counsel. It's Mary Blatch. Welcome, Mary. She's the Director of Advocacy and Public Policy there. Before that, Ms. Blatch worked on regulatory advocacy and compliance issues for Deloitte Tax and was an associate at McKee Nelson and Hogan & Hartson. Mary?

MARY BLATCH: Thank you. And ACC also thanks you for your efforts in organizing the roundtable and inviting ACC to participate.

ACC is a global bar association for in-house counsel with more than 40,000 members who work for more than 10,000 organizations in 85 countries. Our members work for businesses of all sizes across all industries. And as in-house counsel, our members are often charged with maintaining corporate compliance with antitrust rules and providing proactive advice on business transactions and acquisitions in order to avoid antitrust violations.

Many of our members' companies are affected by anticompetitive regulations, both positively and negatively. We solicited our members for comments to share at today's roundtable, and I have the following experiences to relate.

The first experience comes from the alcohol industry. Most states maintain a three-tiered system of alcohol regulation that prohibits cross ownership between retailers, distributors, and producers. This particular member's company was applying to the state alcoholic beverages board for a distribution license, but the application was denied because the member's company is owned by corporate conglomerate that also owns a very small company that is an alcohol retailer in that state.

This is an example of an outdated regulation where the regulation of the alcohol industry has not kept pace with the increasingly complex corporate structures that are present in today's businesses. This state no clear percentage threshold for when ownership in a different tier will result in a regulatory problem. In this case, it's not the idea of regulation itself that is problematic but rather the fact that the regulation has not been modernized and results in potentially inconsistent and absurd results when applied in its current form.

The second experience I'll share is from the health-care industry and addresses federal regulations of the Centers for Medicare and Medicaid Services, or CMS, relating to procurements for Medicare Administrative Contractor services-- another acronym, MACs.

In 2010, CMS instituted a contract award limit policy for its procurement of services from MACs across a variety of jurisdictions. The policy directs that, with limited exceptions, CMS will not award more than 26% of the national MAC workload to a single corporate entity and will not award more than 40% of the workload to any single set of affiliated companies. The policy is anticompetitive and unnecessary and results in qualified, proven, successful MAC contractors being passed over arbitrarily.

CMS's statutory authority to administer the Medicare program derived from the Medicare Prescription Drug Improvement and Modernization Act of 2003, or MMA, requires that CMS employ full and open competition with contracting. The workload caps imposed by the policy contravene the statutory mandate and result in competitive injury to MACs seeking to win these contracts.

CMS justifies the workload caps as addressing the agency's concerns about maintaining a dynamic competitive marketplace and avoiding overreliance on a single MAC should a disaster event occur. CMS cannot use the procurement process to regulate competition in the MAC market for future procurements unrelated to the government's current needs and based on speculation and guess work about how the government can optimize competition down the road.

Even assuming that the workload caps are necessary to prevent a scenario in which only one or two MAC contractors compete for future work, the Competition in Contracting Act, CICA, expressly provides agencies with a mechanism by which to increase or maintain competition or to assure the continuous availability of a reliable source of supply. But that mechanism does not allow for workload caps.

Instead, CICA, in part six of the Federal Acquisition Regulation, or FAR, authorizes an agency, under limited circumstances, to exclude an offerer from a specific procurement. FAR part six specifically directs, then, an exclusion made in order to increase or maintain competition or to ensure the continuous availability of sources shall not be made on a class basis. These workloads caps are an exclusion made on a class basis. They apply to any offerer across all MAC procurements that may exceed a specific workload threshold. The workload caps violate CICA and FAR part six and are an impermissible anticompetitive restriction."

So those two prior experiences were related on an anonymous basis and represent the views of two of our members. But on the other side of the spectrum, we have a member who is a staff attorney with the National Association of Boards of Pharmacy, and she had the following statement to share.

"The topic of anticompetitive regulations and regulatory barriers to entry is a subject I and my organization--" I'm sorry, did I say that she is with the National Association of Boards of Pharmacy? That would be very useful information if I didn't.

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"This topic is a subject I and my organization are very concerned about as it relates to health care and patient safety. NAPB's main mission is to assist our member state boards of pharmacy for the purpose of protecting public health. Occupational-licensing reform and the elimination of barriers to employment is inherently a worthy endeavor from a purely economic standpoint. However, there are downfalls to applying this approach too broadly.

Global application of this approach across all licensed occupations, with sweeping reforms that eliminate state regulations, could pose high risk to consumer safety. Regulatory reforms must be careful and precise. Professions such as doctors, nurses, and pharmacists need to have the education, experience, and knowledge to help assure that a patient or a consumer is not irreparably injured or, much worse, killed by uneducated actions taken by those professionals.

State regulations and occupational licensing verify through the licensing process that before a doctor, a nurse, or a pharmacist interacts with a patient or a consumer, that professional will not cause the patient or consumer harm. Consumers rely on their state regulations and licensing to protect them from individuals that don't have the ability to correctly treat the consumers in a way that will not injure or kill the consumer. Through state regulations and licensing, the consumer has confidence when they're being treated by a doctor, nurse, or pharmacist that the professional has been verified by the state.

A risk-based analysis needs to occur prior to eliminating regulations and licensing of a profession. That analysis must determine the amount of necessary training and expertise that is required in a profession compared to the level of risk or potential harm to the consumer if the regulation or licensing is eliminated. Therefore, if there is a low level of risk or harm to the consumer, then the regulations and licensing should be reduced or eliminated.

There are other occupations where state regulations and licensing are a barrier to entry and which are not necessary for public safety due to the low risk of injury to the consumer. NAPB agrees that these types of reforms to reduce the barriers to entry should be appropriately applied in the case of a profession where the services provided do not pose a high risk or potential of harm to a consumer."

So ACC's own position on anticompetitive regulations focuses on the regulation of the legal industry, and it's explored more fully in our written submission for this round table. Our position stems from the unique situation of in-house counsel as providers of legal services and clients of legal services. They are affected by legal-industry regulations both as a regulated professional and as consumers of legal services.

And our members' experience as corporate legal providers and consumers has led us to the conclusion that within the legal industry, there are two primary regulations that stifle competition and increase the cost of providing legal services. Those are the prohibition on the unauthorized practice of law, or UPL, and the prohibition on nonlawyer participation in investment in law firms. Although both of these prohibitions are meant to protect the public from harm, their continued application has not adjusted to the realities of the modern world or the critical need for affordable legal services for individual consumers.

A restriction on competition should be justified by a valid need such as protecting the public interest and also be narrowly tailored to minimize its impact. It is questionable how much these restrictions protect the public interest. And at least as applied to the consumption of legal services by the sophisticated businesses for which ACC's members work, these restrictions are clearly not narrowly tailored.

Taking a broader view, starting the process of reform in the legal industry with services that are provided in the corporate legal market could give the legal industry an opportunity to experiment with new rules for the profession in a way that presents virtually no downside for individual consumers. For example, state bars could design a regime that provides for lawyer mobility by eliminating UPL violations for licensed attorneys and start by applying this regime for sophisticated business consumers within the corporate-legal-services market before later applying it to the individual-legal-services market. Getting regulators comfortable with new rules and modes of regulation in the corporate-legal-services market can open the door to further reforms that more directly benefit the market for individual legal services.

In closing, we want to thank the Department of Justice for its active practice of commenting on the anticompetitive implications of regulations within the legal industry. We hope someday soon that the regulators of the legal industry will begin to consider how to welcome competition within the industry to better serve all consumers of legal services. Thank you.

MAKAN DELRAHIM: Thanks. I'd also question whether we need seven years of education to do what we do. In most other parts of the world, civilized world, you can get an LLB and practice law. The newest justice on the Supreme Court during his confirmation hearings raised yet another example, which was the representation of children and families in IDEA cases for special needs and whether or not the requirement of somebody who has a law degree as opposed to somebody's who's an expert in that makes any sense.

Thank you. Those were very helpful. And I'll go back to Bob.

ROBERT POTTER: So I want to thank everybody for their opening statements. I think, due to the time, what we'll do is a 10-minute break now and then come back for approximately one hour worth of discussion. Thank you.