

18TH ANNUAL ANTITRUST SYMPOSIUM:
KEYNOTE PANEL DISCUSSION

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Panelists: *Jaffer Abbasi, Compliance Counsel, Competition Laws, Chevron Corporation*

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INTRODUCTORY COMMENTS

Jana I. Seidl: Thank you all so much for joining us. We are really pleased to have you here, and we are pleased to have with us members of the international antitrust community to discuss developments in global competition law. This event would not have been possible without the generous support of our sponsors, our title sponsor Freshfields Bruckhaus Deringer, and our sponsors NERA Economic Consulting and Orrick, Herrington & Sutcliffe. Thank you. I would also like to convey the *Law Review's* deep gratitude to the Law & Economics Center, without whose support and collaboration these annual events would not be possible.

I am excited to kick off today's discussions with what is sure to be a fascinating conversation with corporate counsel led by Terry Calvani of Freshfields. Prior to joining Freshfields, Mr. Calvani was Commissioner, as well as Acting Chairman of the Federal Trade Commission. Mr. Calvani is listed as a leading antitrust lawyer and was recently named one of the top twenty antitrust lawyers globally by Who's Who Legal. Please welcome Terry as he introduces our opening keynote panel.

PANEL DISCUSSION

Calvani: Well, my mother would have appreciated that introduction if she was alive. Nobody else would believe it. But at any rate, good morning, everyone, on this fresh, brisk wintery morning. I'm told by the organizers that at last year's conference the snow was so deep and the temperatures so low that people could not leave the speaker's dinner. The

Washington, D.C. people stayed at the hotel, the university closed, and the entire program moved to the hotel. Although it is not a very scientific two-year survey, I think that we can conclude that the weather is getting better.

I want to express the appreciation of my colleagues at Freshfields for being invited to sponsor this program this year. But the actual credit for the program belongs to the young men and women at *George Mason Law Review* who put together the program. I think all of us are indebted to them.

Sometimes when program organizers put together sessions that are devoted to global developments and competition law, they turn to attorneys in private practice and to professors in the academy. This ignores the men and women who have daily responsibility for protecting their clients' interests and insuring legal compliance for their operations around the globe, that is to say, those corporate legal executives holding competition portfolios. Organizers of this event saw that need in this keynote session, which is called "Conversation with Corporate Counsel." It features three very prominent corporate antitrust lawyers. Doubtless most of you in the audience know them, but for those that don't, I'll provide a very brief biography. There are more lengthy biographies in the materials.

In alphabetical order, Jaffer Abbasi is with Chevron where he is responsible for competition law. Prior to coming to Chevron, Jaffer practiced antitrust law at Hunton & Williams, the alma mater of Chevron's current GC, Hew Pate. Although Jaffer has not confirmed this, I strongly suspect that Jaffer was kidnapped by Hew to fill his current responsibilities at Chevron. In the event that there's somebody from San Ramon in the audience, I don't mean to suggest that one has to be kidnapped to bring him or her to San Ramon. It's actually a lovely city.

Joining Jaffer is David Blonder. David is with BlackBerry where he holds the competition law portfolio. Following his clerkship with Judge Brotman in the district of New Jersey, he was an Honor's Program attorney at the Antitrust Division in the telecoms section and later practiced law with Akin Gump.

And last, but certainly not least, is Aimee Imundo, who is with General Electric where she holds a large segment of the competition law portfolio. Previously, she was Associate General Counsel at GE Capital where again, she had

antitrust responsibilities, and before that she practiced at Arnold and Porter.

So, you didn't come here to listen to me, let's get started. I would like to first ask our panelists to take a few moments and visit with us about how the competition law responsibility is executed within their various legal departments. Legal departments vary in the way they're organized and in the way that they handle competition law. I personally would find it very interesting to learn how these three companies tackle those issues. David, why don't you lead us off?

Blonder:

Sure. First, let me thank everyone for the opportunity to be here among a very esteemed panel. It's a pleasure. So, BlackBerry, as many of you know, is a company in transition. I joined three years ago in April of 2012. My former colleague, Alden Abbott, is also present and we joined at a time of incredible upheaval at BlackBerry. The organization today does not look like it did when we joined. When we joined there were approximately 10,000 employees. We're now about 6,500 employees. We have reorganized. In the legal department we have about thirty-five lawyers that are spread out throughout Canada, Texas, Pleasanton, California, where our senior management sits, and also in the UK and some other distant locations where we have lawyers.

The business of BlackBerry had been reorganized when our new CEO, John Chen, took over in December of 2013. We have been reorganized into four separate divisions. One is enterprise services. One is devices. And let me put in a plug that our BlackBerry Classic launches tomorrow with AT&T, and then a week later with Verizon. So, you BlackBerry loyalists who need your QWERTY keyboard, there is a newer and better device waiting for you. We also have a messaging business, which is our BBM product, which has over eighty million active users worldwide. And we also late last year formed a division called BlackBerry Technology Solutions, which houses our patent portfolio of 44,000 patents in the wireless area, and also a lot of critical technologies related to security, network optimization tools—things that are really designed to enhance the user experience and network experience for our users.

When Alden and I joined, we joined as members of the patents and standards team, and several reorganizations later we are all part of legal, and, as I said, about 35 lawyers. I

oversee a group of attorneys and compliance specialists. In my area I handle all global antitrust matters, all global privacy matters roll up to me, as well as anything that looks, smells, or sounds regulatory, and that often involves export control matters. A lot of the technologies we have are implicated by CFIUS¹ and OFAC² and other areas, so we have a dedicated team to do that as well.

For antitrust-type matters, it really is a soup-to-nuts-type practice. Obviously, we have begun in our transition to do some acquisitions. We have purchased several companies as part of our transition.³ We often get swept up and have strategic business interests in a lot of the merger proceedings that are going on around the world, and conduct investigations that have occurred over the past several years, and so it's really a diverse practice.

I mentioned those four divisions. Each of those divisions has a divisional general counsel, and we are matrixed in such a way that privacy and regulatory interfaces with all of those particular divisions and provides routine counseling on matters around the world. As you can imagine, when we distribute our products around the world, a lot of issues like resale price maintenance come into play. And also we participate in standard setting activities, which also have been under the lens of the antitrust agencies.⁴ So, there is a wide variety of activities going on in the competition area. And I have to say, I enjoy now doing acquisitions again and a lot of stuff I did in private practice. So, that's been a nice thing to add back in.

Abbasi: Thanks for having me here today. I'll take advantage of some of the themes that were stressed there by David to point out what we have in common and what might be a little bit different at Chevron. What we have in common, and what I find I have in common with other in-house counsel that I've talked with, is that we are working on global antitrust compliance and global competition law compliance. That means we're interacting, and spread, throughout the

¹ Committee on Foreign Investment in the United States.

² Office of Foreign Assets Control.

³ See, e.g., Trefis Team, *A Look at BlackBerry's Deals and Acquisitions in 2014*, FORBES (Jan. 2, 2015), <http://www.forbes.com/sites/greatspeculations/2015/01/02/a-look-at-blackberrys-deals-and-acquisitions-in-2014/>.

⁴ See, e.g., Joshua D. Wright, *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 GEO. MASON L. REV. 791, 804 (2014).

world. At Chevron I work in the corporate headquarters in San Ramon, California, but I work with attorneys in our headquarters in Singapore for Asia-Pacific operations, in London and in continental Europe, and in several other locations around the world. And how we connect those things up is we have different streams of workflow that contribute to how you do compliance in a large organization.

So, we have training programs that are proactively reaching out to people, whether that's the materials that we develop and distribute by computers, whether that's the more targeted training programs where we work with business leaders and through our law function to identify those people who are in job responsibilities that need more detailed information about compliance around the world. We also get a large amount of our workflow from the screens that we have out there for the kinds of activities where we have set guidelines for people that say, "You can go forward with your activity, but you need to touch base with the law function for these kinds of activities or if you have these kinds of questions." And so I think many of you who have looked at guidelines know that guidelines are set to be very, very conservative, because the guidelines are about what we do not need to look at at all, or what we kind of move on from, or where we spare some of our energy in the case of enforcement agencies' guidelines. And, so oftentimes it's looking at people who are attending some sort of trade association event and need some guidance, or people are engaging in a joint-venture activity and need to understand what are the controls that need to be in place and some safeguards, and it's just an opportunity to touch base. Because we are in some eighty countries with some 60,000 employees—the majority of those not in the United States—we are supported by law firms that have presence throughout the world. And we have law firms that are providing us day-to-day advice. We also have the support of law firms that work with our transactional group on large-scale mergers and acquisitions.

In my compliance role, I also manage some of our interactions with the enforcement agencies around the world. Sometimes we are brought into investigations as a third party, where we have a way of being able to more directly identify the people who are going to be most helpful quickly and have those people talk to governments. So, it's a really wide variety of work streams.

And one thing I want to stress is that I talked a lot about lawyers there, but the vast majority of work you do is not with lawyers. And that's something that is actually unique about the in-house role, because I think a lot of people work in a community of lawyers or a community of lawyers and economists. And you work with every single kind of person when you're in-house, which means you have to learn to communicate with a wide variety of people. You have to learn to communicate all around the world. And also you have to develop specific communications that are actually going to be meaningful to those different kinds of audiences, and so it is a different kind of work.

Imundo:

I took some notes on what David said about BlackBerry having about 6,500 employees and about thirty-five lawyers. And just by contrast, GE has about 300,000 employees and a lot more than twenty lawyers, but only a few of them do antitrust law. So, the numbers are stacked against me in this organization.

Just to give folks an idea of the breadth of the kinds of things that we cover, General Electric considers itself an infrastructure and technology company, so that makes us active in a lot of emerging economies, in oil and gas and the equipment that it takes to help customers like Chevron, and in other infrastructure including medical technology, rail transportation, power generation, water purification, as well as financing, and some consumer goods. Your dishwasher might be a GE dishwasher. I really hope it is. If you flew here, you might have flown here on a jet powered by GE engines. If you take a helicopter out to an offshore oil platform, you may be flying in a helicopter that's financed by GE Capital, for example. So, there's a lot of breadth.

We're active everywhere, and so what you have is a legal organization that can cover the globe. Regardless of the number of lawyers, it's how are you going to do it? And we are a matrixed legal organization, meaning that specialists like me are on the General Counsel's staff. And we are organized like a set of specialty boutique law firms, if you will, around areas like litigation, environmental, tax, antitrust, and labor and employment, for example. And we do operate like a law firm in a way with a very dedicated client base—too dedicated, in fact. Because of our size, we wind up becoming lawyers' lawyers, so a little bit in contrast with the Chevron model. Of course we have plenty of contact with business people. But one of our jobs we think

is to try and sensitize the lawyers in the businesses so that they can help spot issues early.

The other thing I would say about antitrust law, especially for the students here, is that I want to make a plug for this as a specialty. It's a specialty that encompasses mergers and acquisitions, and my company is very active in mergers and acquisitions right now. Over the past six months, I have probably worked on about twenty billion dollars of transactions, including dispositions. Those are signed. The ones that didn't get signed, maybe it would go up to twenty-five billion dollars' worth of deals. So, the company's number one priority is M&A activity as we refocus the portfolio.

Another part of the specialty is price fixing and criminal law. So, in that practice you get to focus on these behaviors all over the world; both preventive law and also managing when things do happen, doing internal investigations if you have a suspicion that something is happening, making sure that people are aware of the rules. So, given the landscape right now in terms of international prosecutions, that's absolutely the number one priority of the company. So, those are two number one priorities.

The third piece of it is business counseling. That's where you get involved with the business people. And if you're doing a good job, you get integrated early in the process, because they see that you're going to add something to the way that they're thinking about new products and new projects. The first question that I always ask is, "What are you trying to accomplish here?" Then the floodgates open. I don't know if you find this when you counsel, but the floodgates open and then you get to hear, "I did this because of tax." "I did this because of this regulatory thing." "I did this because of privacy." "What I really want to accomplish is this." So, it's a little bit like the joke about the camel being a horse that was designed by a committee. So, how can you get it to be more like a horse and help navigate some of the complexities around that? And if you're a large company with large market share in some areas, then you can really trip yourself up around abuse of dominance⁵ or Section 2⁶ kinds of law. And those are the areas where

⁵ Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326) 47 (defining and prohibiting the abuse of dominance or abuse of a dominant position).

⁶ 15 U.S.C. § 2 (2012).

it's a lifelong project if you get into litigation or an investigation with an enforcer. Those are the "bet-the-company" kinds of fines that get imposed. Those are the things that grab the headlines. So, absolutely it's the number one priority to get that right.

So, if you want to have three number-one priorities, if you enjoy having your head that close to the buzz saw, you will always be very valuable to your clients, and so I would plug it as a specialty where you will never be bored.

Calvani: Thank you very much. That was very interesting. I want to shift the focus for a moment to thought leadership and the appropriate role of thought leadership in legal departments. Let me explain what I mean.

The other day I was with a very senior lawyer of a large Business Roundtable member company where the lawyer is responsible for global competition law. The lawyer was complaining about some regulations that emanated from COMESA. For those unacquainted with COMESA, it is the Common Market for Eastern and Southern Africa, and it has an antitrust authority that's designed to be much like DG Comp⁷ in Europe.⁸ At any rate, this person was complaining about some new developments in COMESA, and I asked the question, "Have you thought of getting involved in the International Competition Network?" For those of you that may not be familiar with the ICN, it's really a trade association of all the competition law enforcement agencies around the world, and they have nongovernmental advisors.⁹ So, I said, "You might want to get involved in this organization, because you might have an effect on policies that you think are misguided." The lawyer responded by saying, "That's not in my portfolio. I don't have the time nor the resources to work on those kinds of things—that's why we pay dues to the Business Roundtable, the U.S. Chamber, and various trade organizations. They do that. I manage our legal compliance obligations and put out fires when they arise."

⁷ Directorate-General for Competition of the European Commission.

⁸ See *Fiona Schaeffer's Interview with George Lipimile, Director of the COMESA Competition Commission*, ANTITRUST SOURCE (ABA/Section of Antitrust Law, Wash. D.C.), June 2014, at 4, http://www.americanbar.org/content/dam/aba/directories/antitrust/jun14_lipimile_intrvw_6_17f.pdf.

⁹ See *About*, INT'L COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/about.aspx> (last visited Aug. 13, 2015).

I want to contrast that if I can with a view taken by Ron Stern, Aimee's former colleague at General Electric, who was vice president and chief competition counsel until he retired not long ago. Ron devoted significant time to the International Competition Network where he was very active in various working parties, made comments on proposed legislation, and the like. Ron took the view that it was worth his time and effort, and the time and effort of his colleagues at GE, to spend time on thought leadership issues that have nothing to do with current compliance or fighting fires. He was looking forward to how he could influence the development of competition policy. So, we have two different attitudes towards the role of thought leadership inside a legal department, and I thought maybe it might be fun to ask our guests how their individual companies address this topic. I'm going to start with Aimee, because she can correct me if I have misstated the GE program.

Imundo:

I'll correct you and say that Ron was my former boss and not just a colleague. It is true that he is viewed as a leader, and still is even though he has retired from GE. He has been very active with the ICN from the beginning. It is a trade association.¹⁰ It's an educational association.¹¹ It's a wonderful chance for regulators to be together and share best practices and compare notes, especially for those in young regimes. In the past ten or fifteen years we have gone from just a few competition law regimes to 100 or 110—a lot.¹²

It's always been an expectation at GE that we would get involved at a policy level, so I do and my colleagues do as well. It's tremendously valuable. It's not because we have an egotistic goal of influencing the dialogue. It is because the regulators and practitioners view us as having something to offer. And so if we show up to participate, we find that there is a lot of demand for what we can contribute.

¹⁰ See *id.*

¹¹ See, e.g., Cartel Working Grp., Int'l Competition Network [ICN], *Anti-Cartel Enforcement Manual*, at 1 (Mar. 2012), <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf> (discussing that the intent of the chapter is to be an educational "reference for competition agencies that are seeking new methods of cartel awareness, outreach and compliance").

¹² See, e.g., Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address at the 7th Annual Global Antitrust Enforcement Symposium 2 (Sept. 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf.

What we can contribute is the sheer breadth of experience. From these introductions we just realized that we're all active in multiple countries. For the regulators, their responsibilities end at the border. Also I find that the regulators are very curious about what happens inside companies in the way that we think about problems and the way that we go about things. For example, in M&A I may find that cartel prosecutors get very curious about the M&A process and the due diligence process. It just might not be in their experience, or, if it is in their career experience, they might be curious about how it's done today. And the more that curiosity can be fed, we find that we can really dialogue—if you believe in good faith that regulators in new regimes just want to get it right. And we just want to see it done right, because we live with the consequences. And where you have inconsistency across the regimes, then it poses a high cost to business, and might not be what is intended by the regulators. So, participating is very valuable on the merger side.

On the cartel enforcement side, there are real opportunities to elevate the discussion to get out of the punishment realm—how should you be punished? How much? What should go into the punishment equation? And instead have a dialogue with the regulators on the policy level around things that we really have in common—prevention, detection. I think we get a lot of credibility when we come in and say we're interested in preventing, just like you are. I'd rather never have to come into your office to have a sentencing negotiation. Never. But I want to be here to talk to you about how we can best prevent this from ever happening.

Abbasi:

There are a couple of things that I would like to say about the International Competition Network. One of them is just some history as it relates to our company. Our general counsel is the former head of the DOJ Antitrust division. He hired me out of Brussels, but I actually worked for him in D.C. When he hired me, he was making his trips out to Brussels after he moved away from the DOJ, because this was a project that he was deeply invested in. He was deeply invested in the amount of cooperation and the opportunity for dialogue between enforcement authorities and getting the International Competition Network off the ground.

One of the things that the network has done is taking this moment in time where enforcement authorities from around the world were coming into increasing prominence

in regulating how companies are merging and reviewing transactions—where you couldn't say to other countries or other entities that are being affected by transactions, "You don't have a role to play in this. Somebody was here first."—and saying, "If people really have a legitimate interest in these transactions, you want there to actually be processes that can work together." And one of the things that I have found to be effective and really powerful about what the ICN did was it focused a lot on the procedural elements of how you go about looking at a merger effectively across jurisdictions and left some of the substance, in terms of how you do the evaluation to national authorities.¹³ I think that helped contribute to its influence.

In follow-up work to that, Chevron has participated for several years in the Merger Streamlining Group, which is a collection of several different companies that are large international companies that have the possibility of being reviewed by multiple authorities.¹⁴ What they have largely committed themselves to is the implementation of some of the finer details of the best practices that ICN sort of kind of announced (saying, "This is something that can work") and which are being implemented by national authorities throughout the world and saying this is more in line with those best practices or this is the practical implication of that from the business side in a way that just informs procedural goals and coordination that serves the broader community.¹⁵

Blonder: I don't really have much to add here. BlackBerry doesn't participate in ICN. But as a small company focusing on turning around the business, I think we tend to appreciate the work of other companies who have more resources to carry the water for us. We're certainly aligned on some of the issues that Aimee just mentioned about having con-

¹³ See, e.g., Press Release, Fed. Trade Comm'n, International Competition Network Adopts Guidance on Investigative Process to Enhance Procedural Fairness in Competition Cases and Cooperation in International Merger Enforcement (May 1, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/international-competition-network-adopts-guidance-investigative> (discussing the ICN Merger Working Group's proposed practical guide to international enforcement cooperation and other initiatives of the ICN related to merger investigation coordination across multiple jurisdictions).

¹⁴ See Letter from A. Neil Campbell, McMillan, to Mateusz Blachucki, Office of Competition and Consumer Protection (Aug. 23, 2011), http://www.mcmillan.ca/Files/140973_MSG%20Letter%20to%20Polish%20Agency%20-%20August%202011.pdf (summarizing the work and participants of the Merger Streamlining Group).

¹⁵ See *id.*

sistency and having an ongoing dialogue with regulators so that you're not going in when you just do something bad—that you build that trust and credibility. And every time you touch the government in an investigation or something like that, it's so important to maintain a very good dialogue with them. Educate your business people to treat this process as very serious. We're in a turnaround, but we could be in a merger situation one day where we're doing filings all over the world. So, thank you for bringing consistency to the world.

Calvani: Thank you for your comments. I see in the audience Liz Kraus from the FTC who has been exceedingly active and very important to the ICN exercise. And I saw her taking notes during your remarks, because I think she is going to come up and see all three of you afterwards to lure you into assisting her and her colleagues in the ICN.

I want to switch the topic again. This time I would like to ask each of our guests to talk about any particular area of the U.S. competition law landscape which they believe today poses particular difficulty and which merits some reexamination by either the Congress or the enforcement agencies. Jaffer, why don't you take the lead there?

Abbasi: Sure. I think one thing that is not going to be a new development, or something that should come as a surprise to a lot of people, is that Chevron has a history of being in marketing in terms of retail gas stations in the United States.¹⁶ It still does that to a certain extent mostly on the west coast.¹⁷ It also is involved in the distribution of petroleum products.¹⁸

Actually the area, for me, that is of much interest is less federal law and more to the extent that you still have a fairly strong legacy of state competition laws or state unfair practice laws that take differing views and sometimes contradictory views on how you're supposed to interact with your suppliers, how you're supposed to interact with your distribution networks, and to a certain extent are hard to reconcile with federal law and actually place people in a

¹⁶ See, e.g., *Leading the Way*, CHEVRON, <http://www.chevron.com/about/history/1876/> (last visited Aug. 13, 2015).

¹⁷ CHEVRON, UNITED STATES FACT SHEET 5 (2015), <http://www.chevron.com/documents/pdf/UnitedStatesFactSheet.pdf>.

¹⁸ *Id.* at 4.

position of not being able to act purely from the perspective of “what’s in our unilateral economic interests,” or “our best way to compete,” or “our best way to serve the market.”¹⁹ And I think an excellent example of this is you have the issue of price gouging laws in the event of an emergency.²⁰ It’s not to say that you want to harm a situation that’s in an emergency, but often in that situation you’re being told to set an artificial cap on prices instead of on a competitive basis.²¹ And that can sometimes mean the supply doesn’t get to the area as quickly.

There are other considerations. It’s not to say that there aren’t valid places for regulation to peak around the edges, but I think particularly in the distribution side of it, we just have a variety of things that don’t necessarily reconcile within our broader law scheme.

Imundo: Since I practice globally, I guess I would say that for the most part the U.S. laws are pretty well settled and transparent, and a model in many ways. So, I don’t have many complaints. But I thought about some active areas where there is some lack of clarity that would be nice to clean up a little bit.

In terms of cleaning up items, I think about Section 5. Section 5 is a catch-all provision in the FTC Act²² that allows the agency to go after unfair competition.²³ There is a lot of criticism around the open-endedness of the statute.²⁴ What’s unfair competition? With that said, I don’t think it’s been abused at all by the FTC. But I know that there is a

¹⁹ See, e.g., CAROLYN L. CARTER, NAT’L CONSUMER LAW CTR. INC., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

²⁰ See, e.g., *Price Gouging Law in Effect Following State of Emergency Declaration*, OFF. ATT’Y GEN. ST. LA. (Aug. 26, 2012), <http://www.ag.state.la.us/Article.aspx?articleID=622&catID=2> (reminding “citizens and businesses that Louisiana price gouging laws are in effect following the state of emergency declaration”).

²¹ ADAM VANN & KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RS22236, GASOLINE PRICE INCREASES: FEDERAL AND STATE AUTHORITY TO LIMIT “PRICE GOUGING” 3 (2011).

²² 15 U.S.C. §§ 41-58 (2012).

²³ 15 U.S.C. § 45 (2012) (granting the Federal Trade Commission the power to prevent the use of “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”).

²⁴ See Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1287-88 (2014).

drumbeat for more clarity and guidelines around that.²⁵ It would be nice to see that resolved.²⁶ I suppose there is room for abuse although there has not been. That probably doesn't rise to the level of an actual complaint.

Another area where it would be nice to see things settled a little bit more is the Foreign Trade Antitrust Improvement Act ("FTAIA").²⁷ That is the law about the extra-territorial application of Section 1,²⁸ the price fixing law.²⁹ So, how far outside of the country does it reach in terms of reaching activity? This is very active right now. Motorola is seeking certiorari at the Supreme Court on this question.³⁰ And that is an issue that has international ripples. How far outside of the U.S. can the Justice Department reach? Pretty soon you're reaching into somebody else's territory, and then you have these questions of multiple prosecutions that are always an issue in the international landscape right now.

I guess the third thing, that is kind of a cleanup item, is there was a bill floating around the Congress, which I don't think we need, and that is a whistleblower bill.³¹ It passed the Senate last year and it's been sitting quietly.³² I think that it would really make a mess of the efforts by companies to foster strong cultures of compliance and self-

²⁵ See, e.g., Statement of Commissioner Joshua D. Wright, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 1-2 (June 19, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolycystatement.pdf.

²⁶ Several months after this panel discussion, on August 13, 2015, the Federal Trade Commission issued a statement describing the enforcement principles for applying Section 5. FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION ON THE ISSUANCE OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf (reflecting the views of Chairwoman Ramirez and Commissioners Brill, Wright, and McSweeney). However, the dissent of one FTC Commissioner may foreshadow that the issue is not fully resolved. Dissenting Statement of Commissioner Maureen K. Ohlhausen, Fed. Trade Comm'n, FTC Act Section 5 Policy Statement (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf.

²⁷ 15 U.S.C. § 6a (2012).

²⁸ 15 U.S.C. §§ 1-7 (2012).

²⁹ 15 U.S.C. § 1 (2012).

³⁰ J. Taylor Kirklin & Deirdre A. McEvoy, *Supreme Court Surprises the Antitrust World with Denial of Cert in Motorola and AU Optronics*, ANTITRUST UPDATE (June 15, 2015), <http://www.antitrustupdateblog.com/blog/supreme-court-surprises-antitrust-world-denial-cert-motorola-au-optronics/>.

³¹ Criminal Antitrust Anti-Retaliation Act of 2013, S. 42, 113th Cong. § 1 (as passed by Senate, Nov. 4, 2013).

³² *Id.*

reporting, which can only happen when employees are incented to report internally. And that's the perennial debate with whistleblower bills, so it's not specific to antitrust.

Blonder: In thinking about this, an area where I see congressional activity, agency activity, and global activity is really in the area of intellectual property right now. We are in a second chapter of patent reform in Congress. And there is a bill currently that did not pass in the last Congress that is currently before the current Congress.³³ The FTC has taken an interest. They are doing a 6(b) study, which is a market study on patent enforcement.³⁴ BlackBerry participated in filing comments supporting that study at the time specifically focusing on potential scenarios that could implicate antitrust.³⁵ So, we're curious to see how the FTC study comes out, also in conjunction with some efforts that are going on in the Congress with respect to patent reform. So, that's an area that we're watching closely.

In 2006 BlackBerry was almost shut down by a patent assertion entity and paid about 650 million dollars because NTP³⁶ had obtained an exclusion order from the ITC.³⁷ We have always had a good number of patent cases against us by patent assertion entities. So, it will be interesting to see how that landscape evolves along with what the PTO³⁸ is doing on their own initiatives.

Calvani: I guess we could take this topic and occupy the next two or three hours. I was struck by Jaffer's comments on the importance of state competition law. I'm reminded of a transaction I did about a decade ago where the FTC took a consent order, but refused to incorporate into the FTC order a consent order entered by the State of California. The FTC

³³ Ashby Jones, *Patent Reform Bill Rises Again in Congress*, WALL ST. J. L. BLOG (Feb. 5, 2015, 12:42 PM), <http://blogs.wsj.com/law/2015/02/05/patent-reform-bill-arises-again-in-congress/>.

³⁴ Press Release, Fed. Trade Comm'n, *FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition* (Sept. 27, 2013), <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>.

³⁵ See Google Inc. et al., *Comments of Google, BlackBerry, EarthLink & Red Hat to the Federal Trade Commission and U.S. Department of Justice on Patent Assertion Entities* 11-18 (Apr. 5, 2013), <http://www.justice.gov/atr/public/workshops/pae/comments/paew-0049.pdf>.

³⁶ See Joe Mullen, *Will the ITC Become the New Troll Hangout?*, AM. LAW. (Jan. 13, 2009), <http://www.americanlawyer.com/id=1202427452507/Will-the-ITC-Become-the-New-Troll-Hangout?slreturn=20150610231410>.

³⁷ United States International Trade Commission.

³⁸ United States Patent and Trademark Office.

staff took the position that the state order was anticompetitive. So, I think you have hit on an issue of longstanding importance, and that is not only federal law, where we focus an awful lot of attention, but also state law, which can become exceedingly important to clients.

I understand that the Law & Economics Center here at George Mason now sponsors programs for state enforcement officials, which I think is a most welcome development.

Focusing on Aimee's comment about FTAIA and the need for clarity there. I must confess that every time I confront an FTAIA issue, I have to diagram the language of the statute. And even then I'm never really sure whether I understand what's going on. So, really interesting topics that we could discuss for some time.

I'd like to turn now to actual compliance efforts. We touched on this very early at the beginning of this session about what your companies are doing to ensure competition law compliance. I remember many years ago where companies basically focused on sales and marketing, because that is where the rubber hit the road. Then cases like *Todd versus Exxon*³⁹ reminded companies that you could have antitrust problems even in the HR function.⁴⁰ Competition compliance became much more universal within companies. And some companies actually did audits of particular divisions from time to time.

I would like to take a moment and ask our guests if they would comment on how their companies do that. Jaffer, do you want to start the discussion?

Abbasi:

Sure. One of the ways that we do that is we're constantly proactively training people. And in terms of dealing with this as a global issue, we have made a real effort to try and move away from a model of—okay, we have this familiarity with U.S. compliance and now we're just going to use that as model for the world. Part of the reason for that is that you would be wrong. The rules here don't apply elsewhere and also aren't the predominant rules that apply in a lot of other jurisdictions, particularly in the distribution context. There are more similarities between European Un-

³⁹ *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

⁴⁰ *See id.* at 195.

ion laws and laws that we encounter in the Asia-Pacific region.⁴¹

And so one thing that we are focusing on is really making it a competition law training program rather than the idiosyncratic antitrust law training program. We have regular trainings for our law function on substantive topics, not just antitrust and competition laws, for attorneys around the world to go and be able to use that with their clients. And we also have just different programs that are structured to the different kinds of businesses that we have. So, for our sales and marketing function, that has historically been a focus of a lot of enforcement and also has a lot of diffuse people you need to reach, we have had a very strong global dedicated training initiative where our downstream function has gone out, and just last year we held over fifty in-person trainings with some 1,400 people in countries on every corner of the globe. That way we can have a dialogue and supplement that.

There are also corporate compliance functions that are not within the law function that run risk screenings that basically say, “Are you engaging in these kinds of activities that traditionally may have more need for close scrutiny, and are looking to see if you have a control? What is your process in place that actually makes sure these things are reviewed?”

On top of that, you also have a system of sort of self-referral—we have hotlines out there where we do invite people to come and report these kinds of problems, or if they have an issue or have concerns about it, that way they can be investigated.

So, you have a number of ways that you are reaching out. And you have specialty programs. You have specialty programs for trading functions. You have specialty programs for manufacturing. You have specialty programs for people in HR. For example, *Todd versus Exxon* was a case that was in the oil industry about what your benchmarking practices were for petro techs and other personnel who are common in the oil industry.⁴² So, there is a lot of attention

⁴¹ See, e.g., *Competition Law Developments in East Asia—October 2014*, NORTON ROSE FULBRIGHT (Nov. 2014), <http://www.nortonrosefulbright.com/knowledge/publications/122989/competition-law-developments-in-east-asia-october-2014> (“A review of the draft guidelines reveals European Union competition law concepts as a major source of influence [in the Hong Kong competition laws], in particular with respect to discussions on the approach to horizontal agreements.”).

⁴² *Todd*, 275 F.3d at 195-97.

paid to actually walking people through how you do that appropriately, because it's something that we're very sensitive about, and because it's important for our relationship with our employees, too.

Blonder: Certainly compliance requires a very multifaceted approach, and it depends on who your audience is for that particular compliance issue. Globally, we, like many other companies, have a code of conduct. We call it the BlackBerry Standards and Principles⁴³ that every employee must certify every year that they have read and understood, and taken some training modules associated with the various areas of the law. It could be privacy. It could be antitrust. It could be gifts policy and things like that—what you would normally find in a corporate handbook.

In terms of competition law, clearly we have an antitrust module that we give as part of our training that addresses the typical types of hardcore cartel-type offenses: price fixing, market allocation, bid rigging, etc. But, for instance, in our standards organization, we will often give counseling for when our engineers go to standards meetings and where there may be issues about selecting technologies, because a lot of issues come up about boycotts and things like that. As a matter of fact, ETSI, which is the European Telecommunications Standards Institute, was sued by a company called TruePosition, because they claim they were excluded in a boycott by competitors.⁴⁴ So, there is that type of targeted specific compliance counseling that occurs similarly with our corporate development people in the creation of documents. I always tell people it's a tension between advocating to the board that you want them to accept your deal and being measured in your approach—avoid the deal cheerleader language, as I say.

So, there is a lot of day-to-day counseling with some training materials that go along with that. Similarly, we also have screens in place when we do vendor selection. That is principally for anticorruption purposes, but often, as people

⁴³ BLACKBERRY, BLACKBERRY CODE OF BUSINESS STANDARDS AND PRINCIPLES (2014), http://us.blackberry.com/content/dam/bbCompany/Desktop/Global/PDF/Investors/Governance/Code_of_Business_Standards_and_Principles.pdf.

⁴⁴ TruePosition, Inc. v. LM Ericsson Tel. Co., 844 F. Supp. 2d 571, 597 (E.D. Pa. 2012).

know, where there is FCPA-type⁴⁵ activity, there is potential antitrust activity as well—that could be present.⁴⁶

The one thing I think I'm thankful as an attorney for is both my chief legal officer and my deputy general counsel are former federal government officials. My deputy general counsel was the deputy at the White House for several years. And my chief legal officer was a DOJ attorney and a former federal prosecutor. So, it's a culture, and it comes from the top. It really does. So, I think that really helps me, because they get what I do and what others at BlackBerry do on those types of compliance issues. So, it's really good to have the support on that front.

Imundo: Compliance is a big umbrella. There is the training piece of it, the prevention piece of it that is hard to do in a complex international environment. We did some measuring. I think we've got about twenty or twenty-one policies that we want all employees to understand. We have all these training modules, and we stepped back and took a look at it and we saw that just the entry-level training for employees to get all twenty policies—privacy, FCPA or anti-bribery, fair employment practices, and environmental, just for example. It amounted to twenty or thirty hours of training just to bring the employees onboard—the baseline. So, this is employees that are working in call centers or don't have front-line competition-related responsibilities at all. There is a whole industry around instructional design that has emerged working with companies like ours. Shockingly enough, the instructional design firms say that you really need to give instruction to people in very small bites. Then you get the challenge of how are you going to train in all these areas in bites that match the average attention span. You guys may know. What is it, seven minutes or twelve minutes or something? People can digest only so much content at once and you cannot give a forty-five-minute baseline training. It's got to be a twelve-minute training. So, remember what I said earlier about the top three priorities. You have twelve minutes. Go. So, you have to think

⁴⁵ The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (2012) (“FCPA”).

⁴⁶ See generally Gary R. Spratling, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Address at the American Conference Institute's 7th National Conference on Foreign Corrupt Practices Act, International Cartels: The Intersection Between FCPA Violations and Antitrust Violations (Dec. 9, 1999), <http://www.justice.gov/atr/public/speeches/3981.pdf>.

about your training in tiers like that. So, your baseline training, sure, I can do it in twelve minutes. No problem. But then you have to have other bites or other opportunities to get to people who need to go deeper for their particular job responsibilities.

I think for an organization that has a lot of diversity, you have to do some of the things that my colleagues were talking about, which is be responsive to what you're hearing. We know from the cartel enforcers that self-reporting leniency programs are the way that most cases get developed at an agency.⁴⁷ Internally, I also view employees as the best source of finding out where there are questions. And even if it's not hardcore cartel kinds of questions, I pay very close attention to questions that do bubble up through the system.

A complex area that I've been thinking about lately a lot involves distribution. Distribution can at times be very complex because there are third parties involved. And sometimes those third parties might also compete with you or not, or those third parties might also sell on behalf of competitors. Not surprisingly, people would have questions about that. So, if I begin to see questions arising across a number of businesses—really just questions that show a lack of awareness or a lack of clarity on the guidelines, then that will get onto my agenda for proactively developing training materials around that.

Abbasi: I just wanted to follow up on a couple of things you said about short attention spans, or how much time you have to get things across and how you keep trying to address that. One of the things that we have done, and this also goes to reiterating the messages around global enforcement, is we went through and collected the examples of international enforcement in the oil and gas industry over the last twenty years; that way we had a really deep supply of one-slide positions that we could put in front of people, and remind them, "This is how people get in trouble. Yes, people get in trouble in your area, too. Every corner of the world." So you can see where it's reaching every aspect of the business and "this is the sort of really prominent enforcement that goes on here." So you can put it in very quickly.

⁴⁷ See generally Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address at the ICN Workshop on Leniency Programs, Cornerstones of an Effective Leniency Program, (Nov. 22-23, 2004), <http://www.justice.gov/atr/public/speeches/206611.pdf>.

The other sort of opportunity that we have, and I think one of the things that we have as a company that makes it easier to get it across—because I was asked, “How much resistance do you encounter from the business folks?”—and following up with what you said about the leadership from top executives on some of this, Chevron has a very, very broad safety culture. When you work in an industry where things can explode, where you’re working with volatile compounds, our performance metrics for every employee incorporate large amounts of metrics around safety, the bonus pools are dictated around safety, every meeting begins with an OE moment on doing things the right way. And that creates a series of opportunities that you have to start a discussion or open a meeting and have the interjection of a couple of minutes of, “Hey, be on the lookout for these kinds of things,” “Do this the right way,” or “Remember the process,” and gives you a number of times to get those messages out there in very brief formats.

Calvani: Thank you very much. I would like to continue this discussion for some time, but the hour is drawing to a close. I want to ask all of you to join me in thanking our panelists for a truly excellent presentation.