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OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS

WEDNESDAY, JUNE 9, 2010

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS,
Committee on the Judiciary,
WASHINGTON, D.C.

The Subcommittee met, pursuant to notice, at 2:04 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, Feingold, Specter, Schumer, Durbin, Klobuchar, Kaufman, Franken, and Hatch.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. Good afternoon to one and all. Today's hearing is the Subcommittee's first oversight hearing to examine the enforcement of our Nation's antitrust laws under this administration.

No topic could be more central to those who believe in the vital role played by antitrust policy to protect consumers. Vigorous and aggressive enforcement of our Nation's antitrust laws is essential to ensuring that consumers pay the lowest possible prices and gain the highest quality goods and services. And it is the Justice Department's Antitrust Division and the Federal Trade Commission whom we rely on to protect consumers from the excesses of monopoly, from industry concentration resulting from mergers, and from other anticompetitive road blocks to full and fair competition.

Assistant Attorney General Varney and Federal Trade Commission Chairman Leibowitz, we are pleased to have you both with us here today so we can fulfill our oversight duties and discuss the pressing competition issues that have such a profound impact on consumers' wallets.

Antitrust enforcement was sorely in need of revival, in my opinion, at the beginning of this administration. At our last antitrust oversight hearing in March of 2007, we observed sharp declines in antitrust enforcement at the Justice Department in both the number of investigations initiated and the number of merger challenges brought. Mergers among direct competitors in highly concentrated industries affecting millions of consumers were approved, and anticompetitive practices went unchallenged. This hastened the dangerous consolidation trend in many key industries. And we all saw the consequences of allowing firms to grow "too big to fail" during the financial crisis of 2008 and 2009.

Today we continue to hear calls from certain quarters that antitrust is not an appropriate tool to ensure competition in today's high-tech economy and that antitrust enforcement can chill innovation. While we must be balanced and fair in our approach, I believe antitrust is as essential to protect competition with respect to today's Internet and telecom sectors as it was to the railroad industry of more than a century ago. Without antitrust enforcement against IBM, would Microsoft have ever emerged? And without antitrust enforcement to prevent Microsoft from illegally maintaining its monopoly, would today's Internet and high-tech giants Goggle and Apple have thrived in the first place?

Time and again, antitrust enforcement has shown itself to be essential to breaking up anticompetitive road blocks and unfetter the marketplace to allow new competitors and new business models to emerge, all to the benefit of consumers. So it is my view that the present is not the time for Government to take a cramped or a limited view of antitrust enforcement.

I see no contradiction between support for antitrust enforcement and support for our free market capitalist economy. Indeed, viewed properly, antitrust is a free market alternative to governmental regulation. In the words of the Supreme Court, antitrust is "a charter of economic liberty."

So we hope that both of you, Ms. Varney and Chairman Leibowitz, always remember that your positions carry a special responsibility. Your positions are a public trust to ensure that competition may flourish and anticompetitive abuses are prevented. Millions of consumers depend on your efforts and your judgment to ensure that the economy is sufficiently vibrant to keep prices low and quality high. You both have inherited a proud legacy at the Antitrust Division and the FTC, and it is my sincere hope and full expectation that you will always strive to uphold this legacy in the years ahead. We are looking forward to your testimony.

Now I call on the Ranking Member, Senator Hatch, for his comments.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. And I welcome both of you. I have great fondness for both of you and appreciate the very difficult jobs you have. So I want to thank you, Mr. Chairman, for holding this hearing. I also want to thank our distinguished panel for coming to participate in these proceedings.

Oversight of Federal agencies is one of Congress' most important responsibilities, and given the state of our economy, I would say that oversight in these agencies is particularly important. That being the case, I hope we can have a through and productive discussion of the relevant issues today.

The Antitrust Division of the Justice Department and the Federal Trade Commission are charged with protecting competition in the American marketplace. This is a vital and important task. It is a fundamental American value that those who exercise creativity, innovation, hard work, and efficiency should be rewarded in the marketplace. However, these rewards can be reduced, stifled, or blocked altogether if there is not competition in a free and open

market. While some of us may disagree as to how the agencies should go about enforcing our antitrust and competition laws, I think we would all agree that competition is essential to maintaining a strong and a vibrant economy.

There are a number of issues that I hope we will get a chance to talk about in today's hearing. For example, the FTC has signaled its intention to pursue more antitrust and competition enforcement through Section 5 of the FTC Act rather than the Sherman and Clayton Acts. Quite frankly, I am concerned about this development. There is a long line of case law surrounding both the Sherman and the Clayton Acts which has provided businesses with substantial guidance in their efforts to comply with the law. Section 5 of the FTC Act, by comparison, has a much thinner jurisprudential record.

Some have argued that increasing the use of Section 5 particularly to address conduct that has traditionally fallen under one of the other antitrust statutes has the potential to create uncertainty, which is harmful to growth and innovation. It can also lead to abuse if it is not subjected to clear, specific standards and if the remedies that are sought are not appropriate to the conduct at issue.

These concerns are even more relevant when we consider that over the past few years we have been working to ensure that American businesses are not disadvantaged in foreign markets by poorly defined competition laws and lack of due process.

I look forward to hearing more about the agencies' efforts to address the problems of our Nation's businesses, and especially with regard to overseas markets. And in that same vein, I hope we can work together to ensure that our antitrust enforcement practices serve as a model for foreign governments as well.

I also look forward to hearing more about the efforts of the Justice Department in the antitrust arena. Since our last oversight hearing, we have seen a different administration take the reins. Many on this panel and a number of people who are now working for the Obama Justice Department had no shortage of criticism for the efforts of the Bush Justice Department when it came to antitrust enforcement. In fact, in many circles, including among some of my colleagues here in the Senate, it was considered common knowledge that the Bush administration was too lenient in antitrust enforcement and was too eager to give big business a pass when it came to anticompetitive conduct. And while I did not really share this view at the time, I am interested to learn more about what has changed since the Antitrust Division came under new management in 2009.

Finally, because I know that many who are present here feel strongly about this issue, I would like to just mention the issue of pay-for-delay patent settlements. There is near universal agreement on the need to eliminate settlements which are designed to harm consumers by delaying the entry of lower-priced generic drugs. These so-called pay-for-delay settlements are anticompetitive and wrong. They do nothing to promote the best interests of consumers, and they go against the fundamentals of our patent system and the laws in place to protect innovation. But I do not believe we should be working to eliminate beneficial patent state-

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ments that bring competition to the market years before they might otherwise become available to consumers. Imposing undue hurdles on settling parties could effectively discourage pro-consumer statements and create uncertainty among industry participants, their investors, and the public. And that uncertainty as to the duration of patent protection, ability to resolve good-faith disputes, and investment in new applications for existing medicines will have a significant adverse effect on innovation and the quality of health care in the United States.

Now, Mr. Chairman, these are just some of the issues that I hope to be able to discuss today. Once again, I would like to thank both Chairman Leibowitz and Assistant Attorney General Varney for being present at today's hearing. I have respect for both of you and will always show the utmost respect that I can. And I look forward to an open and honest discussion on these important matters.

Thank you for holding this hearing.

Chairman KOHL. Thank you very much, Senator Hatch.

I would now like to introduce today's distinguished panel of witnesses.

Our first witness will be Christine Varney. Ms. Varney was confirmed as Assistant Attorney General for the Antitrust Division in April 2009. Prior to her appointment, Ms. Varney was a partner at the law firm Hogan & Hartson and also served as a Federal Trade Commissioner from 1994 to 1997. Before becoming a Federal Trade Commissioner, Ms. Varney served as Assistant to the President and Secretary to the Cabinet during the Clinton administration.

Next we will hear from Jon Leibowitz. Mr. Leibowitz has served as Chairman of the Federal Trade Commission since March of 2009 and as a Commissioner since 2004. Before joining the Commission, he was Vice President for Congressional Affairs for the Motion Picture Association of America. Mr. Leibowitz was my chief counsel from 1989 through 2000 and the Democratic counsel and staff director of the Antitrust Subcommittee from 1997 through 2000.

We thank you both for appearing here, and we are looking forward to taking your testimony. Ms. Varney, we will hear from you first.

STATEMENT OF HON. CHRISTINE A. VARNEY, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. VARNEY. Good afternoon, Chairman Kohl and members of the Subcommittee. It is a pleasure to be here today with my colleague and friend, Chairman Leibowitz, whom I think has the home court advantage. And I am delighted that we are going to be able to talk to you about our work over the last year.

Competition is a cornerstone of our Nation's economic foundation. At the Antitrust Division, we use sound competition principles and antitrust precedent to evaluate each matter carefully, thoroughly, and in light of its particular facts. Our enforcement helps keep markets competitive, promotes consumer welfare, and spurs innovation. We appreciate this Subcommittee's active interest in—and strong support of—our law enforcement mission. We are particularly thankful that you and this Committee and Senator Reid,

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with the support of the Obama administration, led the effort to eliminate antitrust immunity for the health insurance industry.

At the DOJ we have two department-wide initiatives that complement the Antitrust Division's work. The first is the Intellectual Property Task Force, which is a department-wide effort focusing on the protection of IP rights. The IP Task Force works with the White House Office of Intellectual Property to improve the efficiency and effectiveness of IP enforcement both here and abroad.

The second effort is the Financial Fraud Enforcement Task Force, an interagency group led by the Justice Department with active participation from the SEC, Treasury, and HUD on the Steering Committee and the FTC as a very active partner. Established by Executive Order, the Financial Fraud Task Force seeks to strengthen the Government's efforts to combat financial crime.

Merger enforcement continues to be a core priority for the Division. We are committed to blocking mergers that will substantially reduce competition. For instance, we are litigating a case involving the Nation's largest dairy processor, seeking to restore competition so that schools, grocery stores, and consumers in Illinois, Michigan, and Wisconsin will pay lower prices for milk.

Our intent to challenge in Michigan Blue Cross/Blue Shield's acquisition of Physicians Health Plan led the parties to abandon that deal. If consummated, their proposed merger would have resulted in Blue Cross controlling 90 percent of commercial health insurance in Lansing. In both matters, we coordinated closely and successfully with the State Attorneys General.

We have also settled cases when our competitive concerns can be addressed. In the Ticketmaster settlement, the merged company will divest more ticketing assets than it gained through the merger and subject itself to tough antiretaliation and anticompetitive bundling restrictions. At the same time, I want to underscore that we are committed to quickly closing investigations of mergers that do not threaten consumer harm, such as Oracle's acquisition of Sun and Microsoft's joint venture with Yahoo.

In our criminal program, we continue to uncover and prosecute a number of cartels that inflict significant competitive harm. These efforts were recently enhanced by Congress' extension of the Antitrust Criminal Penalty Enhancement and Reform Act. Again, we thank you for leading the effort to extend that program through a 10-year reauthorization.

Our recent prosecutions have resulted in significant fines and jail time. In 2009, the Division obtained more than $1 billion in criminal fines.

Our civil non-merger program remains active as well. In addition to our ongoing investigations, which I cannot discuss, let me mention just two matters that we have settled. The first concerns the largest seller of electricity capacity in New York City. In that case, we alleged that Keyspan engaged in anticompetitive swap transactions that likely increased electricity prices. That settlement, now pending, includes a $12 million disgorgement payment.

The second case, which is also pending, enjoins a group of Idaho surgeons who organized a boycott of Idaho's workers' compensation system, essentially refusing to treat injured workers.

The Division has stepped up its efforts to strengthen markets and preserve economic freedom and fairness. Promoting competition principles through broad advocacy efforts and regulatory outreach is one of our highest priorities. As a result of our enforcement efforts, the Antitrust Division has gained enormous insight into the competitive dynamics of many industries. The Division works actively with a broad range of Federal and State agencies to promote competition across a number of vitally important industries in our economy, including transportation, energy, telecommunications, agriculture, and finance.

Mr. Chairman and members of the Subcommittee, my first year in the Department has been remarkable. Working with the Justice Department on Attorney General Holder's team and closely with the dedicated men and women of the Division, we are doing all we can to ensure that the competitive playing field is open and fair, giving consumers more and better choices. I look forward to year two and continuing what we have started.

That concludes my remarks. I have also provided a written statement that describes some of our matters in more detail. I am grateful to have the opportunity to speak with you, and I look forward to answering your questions.

[The prepared statement of Ms. Varney appears as a submission for the record.]

Chairman KOHL. Thank you very much,

Ms. VARNEY.

Chairman Leibowitz.

STATEMENT OF HON. JONATHAN D. LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, DC

Mr. LEIBOWITZ. Thank you, Chairman Kohl and Ranking Member Hatch and Senators Specter and Franken, for inviting me to testify today. As you already have my written statement, let me spend my allotted time talking about just a few of the interesting issues that we are focusing on right now.

As a starting point, let me note that after a several-year losing streak, we have won a handful of merger cases in a row. These deals include the proposed Thoratec acquisition of HeartWare, which would have combined the only two producers of critical heart devices used by patients waiting for a heart transplant. By challenging this transaction—it was abandoned by the parties after we challenged it—we ensured that patients would have more choices, prices would be reduced, and innovation increased.

We have been aggressive when we find mergers that we think will decrease competition. But just as important, we are not afraid to hold off when we think that a major deal is not going to cause consumer harm. A recent example of this is Google/Admob, which we investigated thoroughly but unanimously decided not to challenge. We are not perfect, of course, but I do believe we are striking a pretty reasonable balance to protect consumers, yet still allow businesses latitude to combine, when appropriate.

Right now the top competition priority at the Commission is to stop pay-for-delay agreements between brand name and generic drug makers. We estimate that these sweetheart deals cost consumers $3.5 billion each and every year. And by now you are famil-

iar with the story. Brand name drug companies sue generic companies claiming that the generic is violative of their patent, and then they turn right around and they settle these cases by paying off the generic not to compete. It is win-win-lose: win for the brand companies because they continue to get monopoly pricing; win for the generic companies because they collect a big fat paycheck from the brand; and a loss for the consumers because they keep paying high prices for their medicines. On all counts, it is a bad outcome. Since a few misguided court decisions in 2005, the problem has only gotten worse. Because of our enforcement efforts, there was not a single pay-for-delay agreement in 2004. Before those decisions, there were plenty of settlements. But last year, because of those decisions, there were 19 suspect settlements, as you can see from that chart.

Every single FTC Commissioner going back through the Bush and to the Clinton administrations has supported stopping these unconscionable agreements, and more and more others are coming around to our view. Under Assistant Attorney General Varney, the Department of Justice position has evolved considerably, and it now agrees that pay-for-delay settlements are presumptively anticompetitive. The Second Circuit recently encouraged plaintiffs in a pay-for-delay case to request en banc review of a previous ruling that would allow these deals. As members of this Committee know, circuit courts do this only rarely, and it is often a sign that they are ready to reverse a previous position. We will know that soon enough. But we also know litigation can take a long time, and it would be much faster and more direct to enact legislation to end this extortionate practice. We greatly appreciate the leadership of the Judiciary Committee to support this legislation, and I appreciate your remarks, Senator Hatch, because I know you are struggling with this, and you were one of the leaders of the Medicare Modernization Act provision in 2003 that gave us these deals to review.

Let me also discuss the Commission's increasing use of our Section 5 unfair methods of competition authority, which allows us to go beyond the ambit of the antitrust laws to protect consumers. Congress granted us this authority in 1914, and it balanced it by limiting the remedies available under Section 5. In recent years, Section 5 has been used sparingly since lower courts in the late 1970s rejected some applications of Section 5 when the antitrust laws were viewed much more broadly and I would say in some ways too broadly.

But since that time, the courts have restricted the range of antitrust to some extent as a result of the Chicago School, which, to its credit, has emphasized rigorous economic analysis as well as efficiencies, and to some extent in reaction to the costs of class actions and private treble damage litigation. But for whatever the reason, the result of these changes has been to limit Federal enforcement agencies, which have no treble damage authority, in our efforts to protect American consumers.

Section 5, carefully applied—and it needs to be—is practically tailor-made for this situation. It can effectively protect consumers, but it is not an antitrust law so it does not by its own terms create treble damage liability. So we have broad bipartisan support within

the Commission to use Section 5 in appropriate circumstances, and we are going out and re-using it.

For example, just today, the Commission filed a Section 5 case and reached a settlement with U-Haul in an invitation-to-collude case where a U-Haul executive asked Budget, its competitor, to fix prices on rental trucks, something that would affect everyday consumers directly and meaningfully. When the Commission sees conduct like this, we are going to go after it aggressively, and Section 5 is going to be an important tool in our arsenal, and our vote today was 5–0. It was unanimous and bipartisan.

I would also like to talk very quickly about another issue that we spend a lot of time on, and that is gasoline prices. When the price of gasoline hit $4 a gallon in mid-2008, every household in the country felt the impact. Everyone in this room did. And we realize how important it is for American consumers that petroleum markets are competitive. Unfortunately, as the members of this Committee know all too well, much of the price of gas is driven by the price of crude oil, which means that OPEC has a lot of control and there is not much we can do about it. But we have added to our arsenal by adopting a rule in the last year that prohibits the manipulation of wholesale petroleum markets and allows us to find violators.

Finally, very quickly, let me mention the revision of the horizontal merger guidelines. It is a very significant project. We work very closely with Assistant Attorney General Varney, who did a terrific job, to issue—and we just issued draft guidelines. It was a very transparent process, and we hope to issue final guidelines fairly soon.

From my perspective, the changes reflect common sense, smart economics, and solid antitrust policy. The Commission is doing a lot of other important work that I would be glad to discuss, including an initiative on the future of news. But at this point I think I will stop, and I am happy to answer any questions. Thank you.

[The prepared statement of Mr. Leibowitz appears as a submission for the record.]

Chairman KOHL. Thank you very much, Commissioner Leibowitz.

We will now have rounds of questions of 8 minutes.

Ms. Varney, one matter which disappointed some advocates of strong antitrust enforcement was the Justice Department's decision to approve the Ticketmaster/Live Nation merger subject to conditions rather than to challenge the deal in court. Your critics note that this deal combined the Nation's dominant live-concert ticket seller with the Nation's leading owner of concert venues which had recently launched a competing ticket business. They contend that the combination of these two companies will make it very difficult for any new national ticket competitor to emerge. So the question is: Given that great concern, which I think was fairly legitimate, why did you approve the merger?

Ms. VARNEY. Senator, we were equally concerned about that transaction, and we were absolutely prepared to litigate the transaction because we thought it did present potential anticompetitive concerns. The parties were aware fully of our intent to block the transactions and continually worked to address our concerns.

As you may be aware, there are essentially three components—and I would not say we approved the merger. I would say we were prepared to challenge and went ahead and settled on terms that dramatically altered the terms of the transaction.

First, Ticketmaster had to divest a very large ticketing asset. That is the Paciolan ticketing platform that will be going to a very large competitor that can and most likely, we hope, will enter the ticketing market.

Second, Ticketmaster had to divest its technology—not divest but license its technology in ticketing to create platforms for others to compete on ticketing.

And, finally, when it came to the venues and promoters, we were quite concerned that Ticketmaster might engage in anticompetitive bundling or retaliatory activity. When the parties came forward with what I believe are very tough divestitures, licensing, and remedies that we believed addressed our concerns and protected consumers, we believed the right thing to do was to settle the case based on what our concerns were.

I hope—I think—we got a good deal for American consumers. We would like to see a lot of competition in that ticketing space.

Chairman KOHL. All right. Ms. Varney, the Justice Department and the USDA have been conducting a series of workshops examining antitrust enforcement in agriculture, as you know. The next one is slated for Madison, Wisconsin, later this month to discuss the dairy industry, which I hope to attend if the Senate schedule permits. We are pleased about the emphasis you are placing on this issue. It is my view that we need increased focus on competition in agriculture to ensure that our farmers and our ranchers get fair prices for their products.

What have you learned from the workshops so far? Is there a lack of free and fair competition in agriculture? And if so, what can the antitrust enforcers at the Justice Department do about it?

Ms. VARNEY. Well, Senator, as you recall, this was a matter of great concern to many members of the Subcommittee during my confirmation hearing, and I committed to you that I would take a hard and careful and close look at that. And we have been doing that.

I went to Vermont with Senator Leahy and Senator Sanders and looked at some of the dairy issues in Vermont. I have been to upstate New York with Senator Schumer to look at some of the issues there. I would be happy to go to any of your States with you should that be appropriate. We will be coming out—we have done a very large workshop in Iowa with Senator Grassley and looked at some of the issues confronting the grain and seed industry there. We were recently in Normal, Alabama, where we spent the day with poultry farmers. And we are learning a lot.

There is a lot of consolidation in what we think of as the middle of the market between the farmer and the consumer. A lot of that has occurred over the last decade. Some of it has brought tremendous efficiencies to the market. At the same time, it may have reduced competition at the input level, at the production level.

So we are continuing these workshops. We will go wherever they lead us. I have not reached any conclusions whatsoever about what may or may not be anticompetitive in a particular industry.

However, as you know, we have challenged the Dean Food acquisition, and we believe that that was anticompetitive, and we will continue to challenge those practices or those acquisitions that we believe are anticompetitive.

Chairman KOHL. With respect to milk, is that Dean Foods challenge your response to my question about dairy farmers and whether they are getting a fair price for their product?

Ms. VARNEY. The Dean Foods is a challenge where we believe that the acquisition created an anticompetitive effect because there was too much concentration. Our view is always the more competition there is for farmers to deliver their milk, the better the pricing situation will be. So, yes, we will continue to challenge those either acquisitions or circumstances that we believe are anticompetitive.

Chairman KOHL. Chairman Leibowitz, for nearly a century, it was a basic rule of antitrust law that a manufacturer could not set a minimum price for a retailer to sell its product. This rule allowed discounting to flourish and greatly enhance competition for dozens of consumer products on everything from electronics to clothes. But in 2007, a 5–4 decision of the Supreme Court, the *Leegin* case, overturned this rule and held that vertical price fixing was no longer banned in every case.

I believe this decision is very dangerous to consumers' ability to purchase products at discount prices and it is harmful to retail competition. I have introduced legislation to overturn the *Leegin* case and restore the ban on vertical price fixing. We have ten cosponsors, and it passed the Judiciary Committee several weeks ago.

Do you agree with me on the principle that manufacturers' setting retail prices should be banned? Do you support our Discount Pricing Consumer Protection Act?

Mr. LEIBOWITZ. Well, there are a range of views on the Commission, but I certainly support overturning *Leegin*. I thought that the four-person minority had the more persuasive view and that *Dr. Miles* should not have been overturned. It had been the law for close to 100 years, so I do support overturning *Leegin*.

The place where we do have consensus at the FTC is that there is still room for RPM enforcement. We had an RPM investigation last year. It did not pan out. But we do support a higher standard, and we want to work with you going forward.

Chairman KOHL. In your case, at your confirmation hearing you said that there was room under existing law that the Justice Department pursue retail price maintenance cases. Do you still feel that way? Are you intent on moving forward on this? Where are you on this?

Ms. VARNEY. Absolutely, Senator. I believe retail price maintenance can be anticompetitive, and we work closely with the FTC, who generally takes the lead on these issues. We provide any support that we can to them. We work with the States on this. We think that absolutely RPM should continue to be enforced and prosecuted, and we will continue to devote the resources to do so.

Chairman KOHL. Is it fair to say that you are not a fan of the *Leegin* decision?

Ms. VARNEY. I tend to agree with the Chairman that I think the dissent was the stronger of the two positions.

Chairman KOHL. Thank you so much.

We turn now to Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Let me start with you, Mr. Leibowitz, Chairman Leibowitz. You mentioned in your testimony that you are actively pursuing two cases which you assert are pay-for-delay cases. Court papers recently filed by Watson Pharmaceutical's CEO—Paul Bisaro is his name, I believe—alleged that the FTC threatened to initiate an investigation of Watson if the company did not waive its exclusivity rights to a generic version of Provigil so that a foreign competitor could enter the market.

Now, the court brief includes the following allegations: "That the FTC obtained confidential information from the FDA and shared that information with Watson and Apotex."

The next paragraph, "That the FTC obtained confidential information from Watson and apparently shared it with Watson's competitor, Apotex."

And then one more: "That Markus Meier, Assistant Director of the FTC Bureau of Competition's Health Care Division, asserted that FTC's 'front office' would open an investigation of Watson if Watson did not relinquish its potential exclusivity rights."

Now, Chairman Leibowitz, what concerns me is that the FTC apparently did not deny any of these allegations. Were you aware of Mr. Meier's actions in this matter? And can you look into these allegations and provide me with more information about what happened?

Mr. LEIBOWITZ. We would be happy to do that, and the reason we have not responded to this yet is because that was a filing by a company, Watson, in the *AndroGel* case, and it is a filing in response to our insistence that we allow—that the CEO be subpoenaed. So it is one thing for a company to disagree with our case. You have a right to say this is not a pay-for-delay or a reverse payment case, and that is fine. It is another thing, as I understand it, not to even be deposed.

So we are going to respond in court papers. We are going to take a look at this. I am going to get back to you. Markus Meier is a very, very good and experienced litigator. He runs our health care practice, and I do not believe that he would ever breach a confidentiality. But we are going to take a look at that because I think that is important.

Senator HATCH. Well, I think you ought to take a look at it.

Mr. LEIBOWITZ. We will, absolutely, Senator.

Senator HATCH. I do not know what the case is.

Let me ask you, Assistant Attorney General Varney, as you know, many U.S. corporations have faced difficulty as they have interacted with foreign competition and enforcement and regulatory agencies. Many of these companies have expressed concern that the foreign agencies have used their authority specifically to disadvantage American businesses. And there have been questions as to whether the foreign agencies have provided adequate due process to American companies and whether they have applied sound antitrust principles in their investigations and enforcement proceedings.

Now, you have spoken about the need for greater convergence and transparency in the international antitrust enforcement. What problems do you see on the horizon resulting from the diverse and often disparate antitrust approaches throughout the world? And do you believe the concerns that some companies have had regarding due process with overseas agencies are legitimate?

Finally, can you tell this Subcommittee what specific steps the Department of Justice has taken in this area and whether there is a role for any other agencies in helping you to address these concerns?

Ms. VARNEY. Certainly, Senator. I have heard the same concerns that you have from many global corporations headquartered here in the United States that do business around the world, and obviously it is a great disadvantage to business to not have certainty, predictability, and transparency as they are doing business around the world.

It is something that, as you mentioned, I have spoken out about now quite frequently. In two international forums—the International Competition Network and the OECD in Paris—we, the United States, are leading an effort to inform jurisdictions around the world to create a dialog on what is due process, what is transparency, what is procedural fairness, what are the best practices so that we can create predictability and stability in an increasingly global world.

I believe it has to be an administration-wide effort. We are coordinating with the Federal Trade Commission, obviously, with the State Department, with the Department of Commerce, and with the USTR as we continue to push forward in our dialogue with our international colleagues.

As a matter of fact, Senator, at the Department of Justice we have, in an unprecedented move, hired a European lawyer to help us at the DOJ go not only to Europe but to other jurisdictions and work on these issues, and I think we have made tremendous progress in that effort. But we have a lot more to do.

Senator HATCH. OK. Thank you.

Mr. LEIBOWITZ. If I can just add, Christine, Assistant Attorney General Varney, is doing a wonderful job here leading our effort, and we have worked together also with the business community in different countries, too, to try to ensure procedural due process, because it is obviously very, very important to American companies. It is very, very important to any company.

Senator HATCH. Thank you. Let me go back to you, Mr. Chairman. As I mentioned in my opening statement, I have serious concerns about the FTC's decision to bring what are essentially antitrust cases under Section 5 of the FTC Act rather than under the Sherman Act. Now, you have answered that to a degree. You touch on this issue in your written statement as well.

My concern is that there is a breadth of case law under the Sherman Act that gives businesses clear guidance as to what types of conduct are lawful or unlawful. So given the proper legal guidance, a company is able to operate its business with general assurance that its conduct is lawful under the antitrust laws.

However, it does seem to me that with the FTC's decision to start bringing cases under Section 5 of the FTC Act, these compa-

nies may find themselves facing FTC complaints for conduct that they had good reason to believe was allowable under the law. Now, this is mostly due to the fact that Section 5 has an extraordinarily thin record of jurisprudence, giving the FTC extraordinary leeway to bring cases and to find on its own what types of competitive conduct are illegal.

Now, is this a legitimate concern? And should we not be concerned——

Mr. LEIBOWITZ. Well, I think——

Senator HATCH. Let me just finish the rest of it. Should we not be concerned that the uncertainty inherent in the FTC's use of Section 5 will prevent businesses from competing aggressively?

Mr. LEIBOWITZ. Well, I think it is a legitimate discussion for debate, and I am glad you raised it.

If you go back and you look at Supreme Court cases—and the last two times the Supreme Court has opined on unfair methods of competition—in the *Sperry & Hutchinson* case in 1972 in which the FTC was a party, and in *Indiana Federation of Dentists*—they recognized the breadth of unfair methods of competition, that it is a penumbra around the antitrust laws, at the same time with limited remedies. And I went back and I pulled—I only wish Senator Grassley was here, because I pulled a quote from Senator Cummins, who was a Republican of Iowa and was the lead author of the FTC Act. This is from the debate—and then he became the Chairman of the Judiciary Committee. And this is from the debate in 1914, and he said, "What is the concept of unfair methods of competition?"

Well, unfair methods of competition—and I quote, and I will put this in the record with a cleaner copy—"seeks to go further and make some things offenses that are not now condemned by the antitrust law. That is the only purpose of Section 5—to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law."[1] Because at that time I think the Congress was very concerned about the enforcement of the antitrust laws by the courts, and they wanted to give a new agency expanded jurisdiction, but, again, limited remedies.

I agree with you, though, that you need to have standards. You do not want—I mean, we have talked, and when I was on this Committee, we talked many times about the need for business certainty. So I think the conduct has to be unfair. It has to be something like deceptive conduct. There has to be harm to the competitive process.

In cases like the U-Haul case we brought today, I think everyone agrees it is an important gap filler. You do not want invitations to collude where one company invites another company to fix prices.

In cases involving other uses of unfair methods of competition, it can be a little dicey. I do not want to talk about any pending cases, of course, but we used the unfair methods of competition authority a couple of years ago in a case involving N-Data. Now, this involved a standard-setting case for ethernet ports. We all use ethernets when we are traveling and plug in our computers to go on the Internet. And one company had said to every company, "You

[1] 51 Cong. Rec. 11,236 (1914) (statement of Senator Cummins).

can use our standard or our patent and"—"You can use our patent, and we will not charge you any royalties." And everyone wrote to that standard. It was the new standard. They then sold the patent rights to another company, which then sold it to another company, which then said, "Pay us money." And at this point there had already been lock-in.

And so from our perspective, what we want to do is stop anticompetitive behavior. In this instance, there was not a monopolization claim because the monopoly power came long before the reneging on the commitment. And so, you know, we are taking this very carefully as we go forward. We have held a series of workshops. We are going to be writing a report on this issue. And we are going to use it carefully because we know that Congress can take away any authority it gives us. So we are going to try to use it judiciously. But we can keep on having this discussion, I think, and I look forward to it.

Senator HATCH. Let me just mention three things I am concerned about. Should we not be concerned that the uncertainty inherent in the FTC's use of Section 5 will prevent businesses from competing aggressively? Also, in your opinion, does the FTC have the authority under Section 5 to unilaterally establish new competitive norms? And what are the outer limits of Section 5, and who ultimately decides what those limits are?

Mr. LEIBOWITZ. Well, of course, ultimately it will be the courts that decide, because if we bring a case within the FTC, there is an appellate court that the case will ultimately go to. And if we bring a Section 5 case outside of the Federal Trade Commission and in court, it will be the district court and then an appellate court that will make that determination.

But, again, you know, we have——

Senator HATCH. Let me just interrupt you.

Mr. LEIBOWITZ. Sure.

Senator HATCH. Are you basically saying that the parties charged under Section 5 will have to go through a trial and appeal just to find out what the law is?

Mr. LEIBOWITZ. No, no, no. I do not think anyone—I just want to say this, and I know that there is some concern about our use of Section 5, and anyone has a right to raise that, and of course, when you were laying the groundwork for the Microsoft case, I think people were very concerned about what the Judiciary Committee was doing, and they had a right to do that, too.

I do not think any company would be surprised, and I have yet to meet a company that was surprised, by our application of unfair methods of competition to the conduct that we believe violates the FTC Act. And, again, ultimately we are not the arbiters of this. It is going to be the courts. But we want to stop anticompetitive conduct that could raise prices, that could reduce innovation, that could reduce choices. And it is extraordinarily important, I think, that particularly—and, again, what the Chicago School did—and I want to go back to this, because in the 1960s and 1970s, there was no need to use our unfair methods of competition authority or little reason to use it because the antitrust laws were read so broadly. Now we have seen those laws circumscribed, I think for some very good reasons, and, again, the Chicago School's emphasis on effi-

ciencies and rigorous economic analysis is a good thing. But having said that, you want us to stop anticompetitive conduct that harms consumers. That is what we are trying to do in an area where antitrust has been limited, particularly because of treble damages, which we are not able to get. It is appropriate, I believe, and I think the majority, a bipartisan majority of the Commission believes for us to use this authority on occasion. Not always.

Senator HATCH. Thank you.

Chairman KOHL. Thank you, Senator Hatch.

I will now call on Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. This is for the Assistant Attorney General.

Ms. Varney, as you may know, I am very interested and concerned about the potential merger of Comcast and NBC Universal, and I know that you cannot discuss the specifics of the Comcast/NBC Universal merger, but I want to talk to you a bit about my concerns and ask a few questions about the way the Department of Justice analyzes antitrust actions certainly in this field.

I have said this before, but I cannot say it enough. It matters who runs the media companies. The media are our source of information. They are the way we learn about the world and how we understand the world. So it is a problem when the same company—to me it is—It is a problem when the same company produces the programs and runs the pipes that bring us those programs.

Now, I was working at NBC when Fin-Syn, the Financial Interests and Syndication, Rules were rescinded. Fin-syn had existed to prevent a conflict of interest. Networks were not allowed to own more than a very small number of their own shows.

NBC promised at the time of the hearings about fin-syn that rescinding fin-syn would not change the way NBC treated other companies' programming. They said, "We are not going to choose our own programming over someone else's programming. Why would we do that? Our interest is in ratings."

My first question to you is: Do you know what happened after fin-syn was rescinded on the networks?

Ms. VARNEY. They relatively promptly favored their own programming.

Senator FRANKEN. Relatively promptly, like immediately. That is exactly right. And I say this as background so that you understand my inherent distrust of NBC's and Comcast's promises. It is just too easy for a media company that owns its own programming to favor that programming. That is a big problem for consumers who get less information and from fewer sources.

My experience has been that media consolidation creates more media consolidation. When fin-syn was abolished, it meant that these networks could own their own shows, and they started to. By 1992, over 50 percent of the shows on NBC were owned by NBC. Well, what that did was the studios just started buying networks, because now they had a place to put their shows. So Disney bought ABC. Viacom, which owns Paramount, bought CBS. NBC and Universal merged. Fox owns Fox. And I am worried that if the NBC/Comcast merger goes through, AT&T and Verizon are going to buy their own networks and Hollywood studios. And if that happens,

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we are going to have a serious impact on independent programming.

Now, independent programming is already declining. According to an analysis done by the Independent Film and Television Association, the percentage of independently produced fiction series on the national networks plunged from approximately 50 percent in 1989—these are independents, not Disney, not owned by the networks-50 percent in 1989 before fin-syn was rescinded to just 5 percent in 2008. Independent programming is critical. It is the way we get access to new information and new perspectives.

Ms. Varney, what I want to ask you is: What can and will the Antitrust Division do to ensure that competition is restored in the entertainment industry and that the barriers to distributing independent programming are diminished?

Ms. VARNEY. Well, let me assure you, Senator, we do not rely on promises. If a transaction is anticompetitive and violates Clayton 7s prohibition on substantially lessening of competition, we will block it. We will go to court and we will block it.

As I understand your concerns—and I have tried to follow—you have spoken publicly about this, and I understand your concerns in antitrust parlance to fall into two broad categories. You are concerned about the vertical integration that Comcast owning the pipes is going to favor its own programming and discriminate against other programming. And you are concerned about the horizontal overlaps in both instances.

Senator FRANKEN. Yes.

Ms. VARNEY. The way we analyze those type of mergers—and you are absolutely right, this is a vertical integration with horizontal overlap—we will use all of the existing tools that we have to understand what the competitive marketplace will look like post-transaction. And should we have the evidence that guides us to the conclusion that this is a transaction that will meet the standards set by the courts and set by the law, we will challenge it.

However, if the parties come back to us and adequately address our concerns that would be actionable, we would explore with them how those concerns could be addressed. They will not be addressed in promises. Should we get there—and I have not prejudged, and I would never speak on a specific investigation. But in any investigation, when we reach a consent with parties, those consents are binding orders of the court that we will enforce, and we will bring actions for violations of those orders.

The fine for violations can be as high as $10,000 per occurrence. "Occurrence" is defined very narrowly so that you can have a massive number of occurrences off any particular transaction. So, in general, that is how we look at these mergers when they are both vertical and horizontal.

Senator FRANKEN. OK. Thank you for your answer.

One of my other concerns about Comcast/NBC—and this impacts people in Minnesota and all over the country—is their cable bills. Now, it seems to me that the combined NBC and Comcast—and Comcast is the biggest cable carrier.

Ms. VARNEY. That is right.

Senator FRANKEN. And one of the biggest Internet providers, too, so that is the future. And NBC owns not just NBC's programming,

but all these other cable networks—Bravo, MSNBC, et cetera, et cetera, et cetera.

Well, NBC can start charging Comcast twice as much for its programming, and for Bravo and for MSNBC. And then that means every other cable station has to pay the same fee. But with Comcast, it is going from one pocket to the other, with Comcast/NBC. But for the other cable owners, it creates a tremendously unfair advantage for Comcast/NBC, and it increases the cable cost, the cable bills of every American.

So my question is: In a merger transaction involving cable companies, how do you analyze whether consumers' cable bills are actually likely to go up? And where does that figure into this?

Ms. VARNEY. So, again, without commenting on a specific transaction, which we cannot do——

Senator FRANKEN. Absolutely.

Ms. VARNEY. What you do, Senator, is you take all the documentary evidence, which will include both past pricing, future plans of pricing. You do econometric analysis. You run a number of both economic tests and look at direct evidence, and you attempt to determine whether or not there will be a significant non-transitory price increase that would be actionable under the antitrust laws.

If you find that evidence, that is certainly something you would consider when you try to determine whether or not you block the merger.

Senator FRANKEN. Thank you.

Thank you very much, Mr. Chairman.

Chairman KOHL. Senator Specter.

Senator SPECTER. Well, thank you, Mr. Chairman.

Comcast, as it is well known, is a major constituent of mine in Pennsylvania, and I introduced the Comcast officials when the hearings were held on a number of occasions. I have known the Roberts family for decades. They have been very good corporate citizens, and they have been very fair and equitable in their dealings.

Senator Franken has posed a number of theoretical questions, and I understand the propriety of your answers and the generalizations. You cannot deal with them until you really know exactly what is going on. And he postulates a concern that Verizon may make an acquisition, AT&T may make an acquisition, and I am sure that if that were to occur, the Antitrust Division and FTC would take a look at what is happening in the industry overall and would make a judgment if some additional factors were to occur in the future. But those would not be matters that you would consider now as to hypothetical situations which might arise in the future, but you would naturally await the events of the day, would you not, to consider what impact that would have on the overall market?

Ms. VARNEY. Senator, as we discussed, speaking not about a transaction but speaking about merger analysis generally, you take the transaction in front of you at the time given the market conditions at the time. The hypothetical that you reference that Senator Franken brought up actually has happened in the past in drug wholesalers, which Jon may recall. There were a series of consolidations in the drug wholesaling industry, and if I recollect cor-

rectly, Chairman, I think the first one was allowed and then the second one there was too much consolidation. And at the time that the second one was proposed, a third one was simultaneously proposed. Both of those were declined by the Federal Trade Commission in that industry at that time based on the facts, and I believe they were both upheld by the district court.

Senator SPECTER. So that if that were to occur in the future, you would have enough power and authority to deal with it as it did arise.

Ms. VARNEY. I believe in any industry we have the authority to examine each transaction in the context of the industry as it exists, always informed by prior learning, informed by what has been the result of previous transactions in the industry. We take everything into account.

Senator SPECTER. Senator Franken has postulated a hypothetical of gouging. If NBC raised its prices to Comcast, then NBC could charge other people the same amount of money using its market position to use the one-pocket-to-another analogy. Just speaking having known the Roberts and knowing Comcast, I do not think that is going to happen, but let us deal with hypotheticals. That is about all we are dealing with at the moment.

If that were to happen, there would be authority under the antitrust laws to move in using that kind of market position in a flagrant way, as Senator Franken has described it to take some remedial action at that time, wouldn't there?

Ms. VARNEY. Well, Senator, under Section 2 of the Sherman Act, of course, if a company enjoys market power and they are engaging in predatory acts, it would be actionable. I think it is important to recognize that there is a difference between the tests that you apply in a merger which looks at the ability of the company post-merger to inflict a significant, non-transitory increase in price, and then perhaps post-merger, your word, gouging of an enterprise might be something that would be more actionable under the consumer protection laws than——

Senator SPECTER. Well, in considering whether to approve the merger, you are not going to hypothesize dastardly conduct on the part of one of the parties so that in the future they may do something which is untoward. Wouldn't you await those events and exercise the power you have to deal with that as that kind of situation arose?

Ms. VARNEY. Dastardly conduct will be prosecuted, without regard to whether there is a merger or not a merger, wherever we find it and our jurisdiction reaches. And I would invite the Chairman to comment on that. He has slightly broader authority than I do in that regard.

Senator SPECTER. Well, it is good to establish the dastardly conduct doctrine so we——

Mr. LEIBOWITZ. Yes, I think we have established it here today, but it may not leave this Committee.

I would say this: When we look at an area in the context of a merger—say, for example, Google/Admob, which we recently approved—we do not just walk away. You know, we have acquired some expertise. We think about these marketplaces and we think about other—and sometimes it leads us to other problems within

the marketplace. So I guess I would add—that is the only comment I would add to Christine's——

Senator SPECTER. So what you are saying, Mr. Chairman, is that if that occurs, you have adequate power to protect consumers in futurum?

Mr. LEIBOWITZ. We do. Perhaps not under the dastardly conduct doctrine, but under the antitrust laws, yes.

Ms. VARNEY. You could combine that with Section 5.

Senator SPECTER. Moving to another subject, I want to associate myself with the comments that Senator Hatch has made about the generic issue and discouraging the settlements. Chairman Leibowitz, my question is: When a matter is in litigation and you have a settlement which is proposed and you have a concern about whether the consumers are being adequately protected, isn't it sufficient to have that settlement subject to court approval to see to it that the consumers are protected without having the FTC intervene?

Mr. LEIBOWITZ. Well, I would say this: You know, we certainly believe in settlements, and in the period before the 2005 cases that threw this area into some uncertainty, there were many, many settlements. They just did not involve money between the parties. And so, you know, at one level, if——

Senator SPECTER. I only have a minute left. Is it sufficient to have the court which has jurisdiction of the case protect the consumers interests in approving or disapproving the settlement?

Mr. LEIBOWITZ. Well, I think that can happen sometimes, but here both parties have an interest in making—if there is a pay-for-delay deal, both parties have an interest in making a settlement, but the consumers are not at the table. And I think in the Judge Newman decision—Newman, Parker, and Pooler decision in the Second Circuit in *Cipro* just a few weeks ago, I think that was one of the points they made in calling for an en banc review in the Second Circuit, is that the——

Senator SPECTER. Well, can't the court involve the consumer interests and hear those interests in making a determination as to whether to approve the settlement?

Mr. LEIBOWITZ. It is certainly conceivable, but I also think you want the FTC engaged in this issue so that if, in fact, there is a settlement that violates the antitrust laws, we can try to stop them subject to a court's determination——

Senator SPECTER. Well, I would like to have the FTC involved if they are needed. But if a court can protect the interests and has the case—let me move on to another point. I have just a short amount of time left.

There has been a concern raised by a constituent of mine, Cephalon, with respect to whether the FTC provided information to Apotex, which was confidential and impacted on Cephalon's ability to deal with its sleep drug, Provigil. Is there any factual basis to that?

Mr. LEIBOWITZ. Well, we know that there is a filing and a court case to which we will be responding, and Mr. Levitas over here, a former Committee staffer, is going to be involved in taking a look at this. But we do not believe there was a breach. I think that these companies talk amongst themselves all the time, sometimes,

we believe, for dastardly reasons. But we will get to the bottom of this, and we will be responding in court very shortly.

Senator SPECTER. So we will be hearing more about that?

Mr. LEIBOWITZ. You will.

Senator SPECTER. One last comment. Chairman Kohl has raised the issue of Dean Foods, and I would like to associate myself with his questions. The profit margins, as I understand it, have gone for Dean from some $30 million in 2008 to $72 million plus in 2009, a time period when farmers experienced record-low prices for raw milk and consumers saw little or no decline in retail prices. I would urge you, General Varney, to take a look at that. That touches a very sore subject with my dairy farm industry. Thank you very much.

Thank you, Mr. Chairman.

Chairman KOHL. Thank you, Senator Specter.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. I thank both of you for coming. Attorney General Varney, thank you for coming to upstate New York, Genesee County, Batavia, where we actually talked about the issue of Dean Foods, and she heard testimony from farmers about that problem. I, too, associate myself with your good questions, Mr. Chairman, and I thank you, Chairman Leibowitz, for the good work you have done most recently on subprime lending. Countrywide was excellent work, excellent settlement, which I have been very interested in.

First I would like to talk to Chairman Leibowitz about privacy issues and social networking. As you know, a number of us on this Committee—Senator Franken, myself, as well as others, Senator Bennett, Senator Begich—have talked about our concerns about privacy and social networking, and particularly Facebook sort of changing the rules in midstream. I cannot ask you to comment on Facebook in particular, but I do want to get some general concepts and general thoughts out on this issue.

Now, in 2004, the FTC's Director of Criminal Protection said, "It is simple. If you collect information and promise not to share, you cannot share until the consumer agrees. You can change the rules, but not after the game was played."

Do you agree with that statement?

Mr. LEIBOWITZ. Without respect to any particular case, I absolutely do. And, in fact, last year, in 2009——

Senator SCHUMER. I am just going to write you down as a "yes" so I can——

Mr. LEIBOWITZ. Write me down as a "yes." Go ahead.

Senator SCHUMER. OK. To put it in slightly different terms, do you agree that when a company changes its terms of use or privacy policies, it would be best to require consumers to opt in to any new information sharing?

Mr. LEIBOWITZ. Yes, and that is precisely the public guidance that we have made as a Commission last year.

Senator SCHUMER. Good. In what circumstances is consent necessary before the sharing of information with third parties? When should consent be necessary?

Mr. LEIBOWITZ. Well, I think the best practice is always to get consumers' consent, and this is a roiling issue, you know, in the

work that we do. And we have tried to take a two-track approach here. One track is we prosecute malefactors, people who engage in unfair or deceptive acts or practices. We had a major case last year against Sears for data mining. They did not do anything with the data, but they were taking data without consumers knowing. And the other thing we were doing is we set up a process to think through these issues, because obviously it is a complicated marketplace. We are going to write a report in the fall, and we will have something to say there.

Senator SCHUMER. Good, because that was my next question. Generally, I guess, then you agree there is currently not sufficient guidance and regulation about how consumer data should be protected on social networks. That is a fair thing, and I guess you are saying you are going to come out with some guidance maybe in the fall.

Mr. LEIBOWITZ. I mean, there is the guidance in the sense that you cannot engage in unfair or deceptive acts or practices, but we have certainly found companies that have gone beyond what we think is appropriate, and then in this area, we really do think that there is a lot of uncertainty, and we can try to help push companies in the right direction. And social networking is——

Senator SCHUMER. Right, and you are having these roundtables now to sort of flesh this out.

Mr. LEIBOWITZ. That is exactly right.

Senator SCHUMER. But the guidelines that you will issue will not be binding or enforceable against social networking sites, they are just guidance. Right?

Mr. LEIBOWITZ. They are just guidance. That is exactly right.

Senator SCHUMER. So if these guidelines will not be enforceable, what tools does the FTC have to pursue social networking sites that are not adequately protecting their users' data?

Mr. LEIBOWITZ. Well, I would say that we have the enforcement authority that Congress has given us——

Senator SCHUMER. Section 5?

Mr. LEIBOWITZ. Section 5. It is unfair or deceptive acts or practices, and we will not hesitate to use this. Obviously, we have your very good letter in the Facebook context. We have a petition about Facebook. So without confirming an investigation—we do not do that—we are taking a look at all of this, both at the micro and macro level.

Senator SCHUMER. Is Section 5 sufficient or might you need other authority to deal with this issue, which is a——

Mr. LEIBOWITZ. I think in this issue, in this area, I would say that our statute is sufficient. I would say this: As you know, and as I know Senator Durbin knows, and Senator Kohl, right now in the financial reform legislation, there is a debate—the House has given us expanded fining authority, which is something that the bipartisan majority of Commissioners support and Caspar Weinberger, when he was the Chairman of the FTC, supported. I do think in cases involving identity theft or spyware, you know, expanding fining authority would be very, very helpful. But for this particular area, this discrete area, I think we have the authority we need.

Senator SCHUMER. Good. So get to work. You have the authority, get to work.

Next is on debt settlement, a different issue. Senator McCaskill and I introduced the Debt Settlement Consumer Protection Act in April. It is the first comprehensive proposal introduced in Congress to address these abuses. I am also aware and commend you for the efforts the FTC has had to combat deceptive and abusive practices in this industry.

One thing missing, though—the FTC has some proposed rules. That is good. One thing missing from the FTC's proposed rules, however, is a cap on fees that debt settlement companies can charge. I understand that under current law the FTC's hands are tied. But given your extensive work on this issue, I want to get your opinion, not criticize you for not putting it out.

Our bill provides a strict cap on fees, 5 percent of the amount the consumer saves as a result of any settlement negotiated by a debt settlement provider. They have been just taking people to the cleaners on this. They come in and say, "We will settle your debts," and then they charge such a fortune that you wish they had not even helped you some of the time. And so we also ask that the debt settlement provider can only collect its fee actually after it settles the debt. They are busy collecting now ahead of time, and then they do not settle the debt. And these are poor people often who are preyed upon.

So the questions are two. First, would you agree that a fee cap is a vital tool that would help stop dishonest and predatory debt settlement companies from ripping off consumers? And do you support prohibiting a debt settlement company from receiving any debt settlement fee from a consumer until the company has provided the consumer with documentation that a debt has, in fact, been settled?

Mr. LEIBOWITZ. So let me answer your second question first, if I may. We have a pending rulemaking. The proposed rule would ban advance fees because, as you point out, this is an industry that is just riddled with deceit, and there are callous instances—and, of course, this is true, and you have done such great work in the mortgage area. This is true in the foreclosure rescue area as well. They take the money, 95 percent of the company is in sales, 3 percent is in re-working loans, and so obviously loans are not helped. And so I cannot comment on that except to say, you know, our pending draft rule, which we are in the process of finalizing, after consulting with the other members of the Commission, so it is very closely related to the solution to your second question.

As to the first question, there are some States, as you know, that have placed caps. It is an idea that has been proffered in the context of our proposed rulemaking as well, at least in some of our roundtables earlier on. I want to go back and talk to our other Commissioners about that, but having said that, I commend you for your leadership here because this is an area that is just rife with abuse.

And one more very quick anecdote, which is: I was driving with my daughter to a soccer game 2 weeks ago. She is 14 years old. We heard on sports radio someone saying, "And we are a Government-approved debt settlement company." And so she said, "Dad,

I am going to call them up," and she called them up, and she said, "I am having problems with"—she probably should not do this, but she said, "I am having problems with my loans. What can you do for me?" And they said, "Well, we can help you out. We have 98-percent effectiveness." And she said, "Are you Government-approved?" And they said, "Yes, we are Government-approved." And she said, "Well, what does that mean?" And the person on the phone said, "It means we are approved by the Government," which, of course, they are not.

So we are well aware of these problems, and I think they permeate even down to teenaged children.

Senator SCHUMER. It seems like you have a budding junior commissioner there in your car.

[Laughter.]

Senator SCHUMER. So we will put you down as in favor of—at least personally, in favor of——

Mr. LEIBOWITZ. Strongly supporting looking at that idea.

Senator SCHUMER. Yes. I was going to say in favor of not collecting the fee before they actually solve the problem, and in terms of a cap, interest in checking with your Commissioners.

Mr. LEIBOWITZ. I would say on the first one, strongly in favor of moving through a very strong rule. You will see the rule very shortly, in the next month or two.

Senator SCHUMER. Great.

Thanks, Mr. Chairman.

Chairman KOHL. Thank you, Senator Schumer.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Over the past 2 years, we have seen what happens when the Government turns a blind eye to risky and self-serving activities on Wall Street. The small businesses on Main Street and ordinary citizens are left holding the bag. And while much attention has been paid to the consequences of this approach in the banking and the financial sectors, the hands-off regulatory ideology was also pervasive in other areas during the previous administration, such as the enforcement of antitrust laws. In fact, in September 2008, a majority of the FTC, including the current Chairman, whom I welcome here today, sightly blasted a DOJ antitrust report as "a blueprint for radically weakened enforcement of Section 2 of the Sherman Act."

The FTC Commissioners further described the DOJ report as being "chiefly concerned with firms that enjoy monopoly or near-monopoly power and prescribes a legal regime that places these firms' interests ahead of the interests of consumers. At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders."

Fortunately, as I urged, the current administration withdrew this flawed report. I have been impressed by the change in approach that properly makes farmers, other small businesses, and consumers the focus of antitrust protections, and I am going to focus today on competition in Agriculture, and especially dairy. But I want to note that I think this change has been seen across the board. It is particularly heartening that after years of hearing con-

cerns from dairy farmers in my listening sessions and pressing for scrutiny of anticompetitive practices and enforcement of antitrust laws in Washington, there is finally a serious collaboration between the Justice Department and the Department of Agriculture as is shown by the upcoming joint USDA-DOJ workshop in Madison, Wisconsin, on June 25th. This is a great start, but the farmers and consumers I talk to remind me that this good policy and interagency cooperation needs to translate into fair competition and strong enforcement on the ground as well.

So I am glad to have this opportunity to talk to both of you, and, Assistant Attorney General Varney, let me first take a moment to talk about this upcoming workshop on dairy in Madison. I know Senator Kohl mentioned it. I was very pleased when this workshop was announced, both because of the important topic and because you chose to hold this in our home State of Wisconsin. As I mentioned, at these town meetings in all 72 counties, this is the type of feedback we get along these lines of encouraging public participation. I recently suggested that the workshop have additional sessions for public comment throughout the day instead of just at the end of the day, similar to what was done at the poultry workshop in Alabama.

Can you confirm the Department is planning on having two public comment sessions?

Ms. VARNEY. I can confirm that if they were not, they are now.

Senator FEINGOLD. All right. That is good to hear. One of the best things about these workshops is they are an opportunity for the Department to hear the unvarnished comments of farmers and cheese makers and other Wisconsinites who think we should be doing more to protect family farms and restore competition in the dairy industry. And I think it is frustrating sometimes for people to come from long distances and then just hear all of our wonderful political speeches, but I think you need to hear from the farmers. I think you know that.

I have been a strong proponent of the need for enhanced Federal agency collaboration and communication with respect to dairy competition over the last several years. It is a very complex industry. It is often unclear which agency has jurisdiction and who should be taking the lead to resolve competition problems. For example, when I was a State Senator, I had a chart on my wall that showed the farmers' share of retail spending on dairy products and how the farmers' share had been shrinking over time. This trend seemed to roughly correspond to consolidation at the cooperative processor and retail levels. Unfortunately, the farmers' share has continued to shrink, and many farmers and other dairy industry observers suspect that someone between the farmer and the consumer is taking a much bigger slice of the pie than they really deserve. Although the Agriculture portion of the system is regulated by the Antitrust Division, retail distribution is controlled by the FTC and price discoveries at the CME, which is prone to manipulation and is under the jurisdiction of the CFTC.

The bottom line is that I am encouraged by the collaboration between the USDA and DOJ with these Agriculture workshops, but I hope it is only the beginning.

So, Ms. Varney, can you tell me what the Department is doing to increase outreach and collaboration with the other agencies on these complicated dairy and agriculture antitrust issues? And, Chairman Leibowitz, how is the FTC pitching in here? For example, is the FTC planning on being part of the USDA–DOJ workshop on margins where I hope many of these cross-agency issues will be discussed? Ms. Varney.

Ms. VARNEY. First, Senator, let me start with thank you for all the support that all of you have given us on these Agriculture issues. You impressed upon me how important it was to you during my confirmation hearing, and one of the first things that we did was reach out to USDA, who was extremely receptive to collaborating in a way that has never been done before.

As you know, Attorney General Holder and Secretary Vilsack have both been to all the workshops and will be in your State next.

It has been an unprecedented collaboration. The first thing that we have done is we have started up a task force of DOJ lawyers and USDA lawyers to look exactly at where the overlap is between our two jurisdictions. As you may know, the USDA administers the Packers and Stockyard Act, although the Department of Justice does some of the prosecution under that.

So we have a group of lawyers who are now working very closely, who are talking to each other daily. We are creating a centralized office location so they can physically sit together and trade information as we are vigorously pursuing investigations that may have been dormant for several years.

The next thing that we are doing is reaching across agencies and consulting with our colleagues at the CFTC. I would hope that the FTC will weigh in on our margins workshop. They have a lot of expertise there. So we are continuing to try and pull the Government effort together.

At the same time, we are trying to gather as much evidence as we can in the field. To my knowledge, that has not been done before. I cannot tell you how much I learned when I went to Vermont and upstate New York, when I was in Normal, Alabama, the other day, when we were in Iowa, and I am looking forward to the same thing in Wisconsin.

When you talk to the individuals who are the farmers on the ground and they can tell you what is happening to them on a day-to-day basis, you come away with an entirely different understanding of how the industry works, which I think makes us more rigorous in our analysis of what the intersection is between agriculture and competition policy.

I have not prejudged anything. We have not reached any conclusions or any results. We are going to continue this and take it to wherever its logical conclusion is.

Senator FEINGOLD. Thank you.

Mr. Leibowitz.

Mr. LEIBOWITZ. Yes, just following up, Senator Feingold, I am always, as you know, delighted to find any excuse to go out to Madison, Wisconsin, particularly during the summer. So I am sure that, if invited, we will be glad to have a presence there, and if I can do it, I absolutely will.

You know, one of the reasons that we get along so well is that we work with each other and we also defer on expertise. So here we are happy to help out with your initiative and play a role. And, again, on the pay-for-delay settlement issue—and I apologize because now that I look at it, it does look like a large wheel of cheese when we say $3.5 billion a year, but which we do believe is costing consumers $3.5 billion. We took the lead on this in a brief we wrote to the Second Circuit. We did it jointly and collaborate together. So we will be glad to collaborate with you in this area as well.

Senator FEINGOLD. When the competition workshops were first announced, several farmer cooperatives expressed concern that the process would somehow try to demonstrate that cooperatives are anticompetitive. I do not think this was the intent of the workshops, and I have been a strong supporter of cooperatives. I believe they often help small farmers to negotiate better prices with large suppliers, middlemen, and processors. I realize that all cooperatives are not perfect, but, Ms. Varney, do you generally agree that cooperatives can have a positive balancing influence on agricultural markets?

Ms. VARNEY. Absolutely.

Senator FEINGOLD. I thank you and I thank the Chair.

Chairman KOHL. Thank you very much, and I will give Senator Hatch a chance to ask a question.

Senator HATCH. I just have one further question. Then I have to go to the floor. I think most everybody is aware of my concerns about the Bowl Championship Series in college football. I believe that the BCS system is patently anticompetitive, and I believe that there are serious questions as to whether it is legal under the antitrust laws.

Now, I have taken some criticism from people who believe that the college sports are simply too trivial to be receiving Government attention. Yet with just the BCS, we are talking about hundreds of millions of dollars every year, billions over time. All told, college athletics yearly is a multi-billion-dollar enterprise for the schools, for the conferences, for television networks, and others. It affects students, athletes, and consumers throughout the country. Now, it is my understanding that the Justice Department is looking into the BCS matter, and I will not ask you to comment substantively on that inquiry.

It is also my understanding that the Department is looking into the NCAA's rules regarding athletic scholarships. We are also hearing news reports about conference expansion and even consolidation among the bigger conferences, which could have enormous impact on the competitive and commercial landscape of college sports and could have a negative impact on the schools that are left out of the shuffle. Now, I would expect at the very least major movement in this area would get the Department's attention.

Now, my question to you, General Varney: Do you believe that college sports are too trivial for the Antitrust Division's attention. To put that another way, would the fact that these issues revolve around college sports keep the Justice Department from bringing a case if the conduct was found to be anticompetitive? Then I would appreciate hearing your view on those two questions, too, Mr. Leibowitz.

Ms. VARNEY. Senator, my view is that sports are business. They are a big business, whether they are in college or out of college. And so far as I know, the only enterprise that enjoys antitrust immunity is baseball. Other than that, all of these enterprises are subject to the antitrust laws.

Senator HATCH. Right.

Ms. VARNEY. We will obviously investigate, thoroughly pursue, and bring the appropriate action against any enterprise, whether it is sporting or otherwise, that is in violation of the antitrust laws.

Mr. LEIBOWITZ. I guess I would just add to this that when Senator DeWine and Senator Kohl took over the Antitrust Subcommittee in, I think, 1997 and I was one of the staff directors, the first hearing we did was on the BCS, the Bowl Alliance. And, you know, at that time it seemed to us—and you know this—that it was a bunch of big, large competitors who got together—they were universities—and excluded some of the little guys.

Now, my understanding is that the rules have changed a little bit, I think in part thanks to prodding from this Committee——

Senator HATCH. Not much. Not much.

Mr. LEIBOWITZ. Not much? But I know that this issue is ably being looked at by our sister agency.

Senator HATCH. Well, I appreciate it because, you know, this is a nutty thing to me. This is very, very important, and what I call the preferred conferences have tremendous advantages in all ways over the unprivileged conferences. And that is just not fair in this country. And so I would appreciate your really giving that every thought.

Thank you, Mr. Chairman. I thank my colleagues for letting me ask one more question.

Chairman KOHL. Thank you, Senator Hatch.

Senator Kaufman.

Senator KAUFMAN. Thank you, Mr. Chairman, and thank you for holding this hearing. And I want to thank the two witnesses for their long and good service to us all. We are very much advantaged by your service.

Ms. Varney, I am concerned about the language in the Senate financial regulatory reform bill that could eliminate in-depth antitrust review of certain large financial mergers. Are you aware of the problem? And if so, do you share my concern?

Ms. VARNEY. Senator, the administration is working closely with the conferees as they are going into conference, and I believe the administration is largely committed to making sure that all laws are consistent with antitrust principles and application of the laws.

Senator KAUFMAN. Can you give me any kind of formal assurance that the administration supports this fix? The conference starts next Tuesday.

Ms. VARNEY. I can check for you, Senator. I do not know that the administration has a position on any of the specifics as they are going into conference.

Senator KAUFMAN. OK. Could you get back to me on that?

Ms. VARNEY. I will. I will report back to you. Yes, I will.

[The information appears as a submission for the record.]

Senator KAUFMAN. I am also concerned in the same bill of the increased concentration in the financial industry along with bail-

outs and other subsidies for banks that are too big to fail undermines competition by making it tougher for smaller, more conservative institutions to compete. What is your feeling about that?

Ms. VARNEY. I think, Senator, that we are keenly aware of bottlenecks in competition in any industry, including in financial industries. So as we continue to look at the competitive forces in the industry, we will be shining a spotlight on barriers to competition. If there are enterprises that have market power that are imposing barriers to competition, we will certainly vigorously enforce our laws.

Senator KAUFMAN. Great. The Patient Protection and Affordable Care Act, the health care bill, calls for the creation of insurance exchanges to help individuals purchase affordable health insurance. What role do you see for the Federal antitrust laws and competition policy in making sure that there is adequate competition among these exchanges?

Ms. VARNEY. A very vigorous role, Senator. We are working with the administration, with HHS right now, giving our input into how we ensure the exchanges are designed in a way that is as competitive as possible.

As you may know, we, I want to say, forced the abandonment of a transaction in Michigan where Blue Cross/Blue Shield was trying to acquire another enterprise that would have left them with a significant market share. And we are aware around the country of the significant concentration that can exist, so we are committed to ensuring that the exchanges foster and promote competition in insurance in order to expand coverage and get lower costs for everybody.

Mr. LEIBOWITZ. If I could just——

Senator KAUFMAN. I was interested in your comments.

Mr. LEIBOWITZ. Yes, if I could just add that I agree with everything that the Assistant Attorney General said. You know, I would also say that, at least from my perspective, I am supportive of modification of McCarran-Ferguson.

Senator KAUFMAN. Great.

Mr. LEIBOWITZ. And then due to a 1980 law—we like to think it is antiquated and someday it will be changed—we cannot even write a report—and we have a terrific Public Policy Office. We cannot even write a report on health insurers without the permission—I think we will get it ultimately—of the majority of members of the Commerce Committee. So we used to have the authority to write reports. Apparently, some people did not like—I can tell you I suspect we know who did not like some of the reports we wrote in the 1970s, and we no longer have that authority. We would love to have it back someday.

Senator KAUFMAN. Great. I think that is——

Mr. LEIBOWITZ. And we are also working, obviously, with all of the entities and stakeholders to try to ensure that health care reform works for everybody.

Senator KAUFMAN. Yes, this is really key, and I think competition is key, and I think what happens in the exchanges is key. So both of you being involved, that would really be helpful.

Ms. Varney, I believe that generic competition is vital to many of our markets, and this includes the market for crop seed. Some people charge that some leading seed manufacturers manage ever-

green or extend the patents on their products by asserting dubious patent claims designed to thwart generic competition. Is that a problem you are aware of? And if so, what can we do about it?

Ms. VARNEY. Senator, we have confirmed publicly that we have an investigation into the seed industry, and we are very aware of your concern. Certainly any practice like that that was anti-competitive would be something that we would be interested in.

Senator KAUFMAN. Chairman Leibowitz, have you run into this evergreening problem?

Mr. LEIBOWITZ. We see it to some extent in the pharmaceutical area where, for example, in the quintessential case—I do not know that this has ever happened—would be if you changed a pill to a tablet to extend your monopoly or your patent longer because you would have a patent on the new way to—you would not have a patent on the core substance of the medicine, but you would have it on the way in which it is disseminated into the human body. So we have some concern about evergreening. I think the State Attorneys General had a case several years ago involving evergreening of patents and got a settlement, and we are going to keep an eye out for this.

Senator KAUFMAN. Good, and I would like to yield my time back to the diligent Assistant Majority Leader.

Chairman KOHL. Senator Durbin.

Senator DURBIN. Let me thank the Senator from Delaware. I appreciate that. I tried to shame him into a good work.

[Laughter.]

Senator KAUFMAN. Half worked.

Senator DURBIN. Half worked. Thank you very much. And, Mr. Chairman, thanks for having this hearing, and because the Federal Trade Commission is in the loving arms of the Financial Services Subcommittee of Appropriations, which I chair, and we recently held a hearing—I am going to spare Mr. Leibowitz today from questions, but I would just like to direct a few to Ms. Varney, who is here. Thank you very much for joining us.

Let me first ask you a hypothetical question. You remember these from the highly regarded Georgetown Law Center.

Ms. VARNEY. I do.

Senator DURBIN. If Coca-Cola said in one of their stores that was selling Coke, "You cannot offer a discount for the sale of Pepsi in this store," and Pepsi said the same thing about Coke, would that be a restraint of trade?

Ms. VARNEY. Hypothetically speaking, Senator, if that existed, we would almost certainly investigate it to determine whether or not there was a restraint of trade that violated the Sherman Act; and if there were, we would prosecute.

Senator DURBIN. So right now, beyond the hypothetical into another area, Visa and MasterCard each sets of operating rules that they impose on everyone who accepts their cards for payment. Visa has a rule that says if a merchant accepts Visa cards, the merchant cannot offer a discount to encourage a customer to use a competing network, MasterCard. MasterCard, lo and behold, has a similar rule. The card companies penalize merchants who offer a discount in violation of these rules.

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Now, a few years back, in 1998, the Justice Department brought a lawsuit against Visa and MasterCard charging they had conspired to restrain trade by prohibiting member banks from issuing American Express and Discover cards. The court found that Visa's and MasterCard's rules were a substantial restraint on competition in violation of the Sherman Act. In that litigation, the trial court found, and the Second Circuit agreed, that Visa and MasterCard had market power within the card network services market. "Market power" has been defined by the Supreme Court to mean the power to control prices or exclude competition.

In general, when companies have market power, do they deserve extra scrutiny to ensure they are not acting to diminish competition?

Ms. VARNEY. In general, when companies have market power, they have an obligation to obey the law as laid down by the Supreme Court in *Lorain Journal*, *Microsoft*, *Aspen Skiing*, and any predatory acts they engage in will be investigated.

Senator DURBIN. For the record, the Visa/MasterCard duopoly controls about 80 percent of the credit card market. I have been concerned about their market dominance and the existence of competition within their marketplace. And I have addressed the interchange fee system that they have created.

Visa and MasterCard set the interchange fee rates that merchants ultimately pay to card-issuing banks whenever a card is used or swiped. Every bank in the network receives the same fee rate under the system. This means that banks do not compete with one another to lower their fees by managing their costs more efficiently. It also means that merchants cannot negotiate with banks or comparison shop to reduce their fees.

Now, it troubles me that we have a system where Visa fixes the price for a fee that a merchant must pay to a bank. You can see how the banks would have incentive to collude within the card networks to keep the fees high.

It also troubles me that Visa and MasterCard can use their market power to prohibit merchants from offering certain types of discounts to their customers. I tell the story of going out to the Washington National Airport, and the lady in front of me at the cash register put a package of chewing gum on the counter and handed over a credit card. And I said, as she left, to the cashier, "Now, is that the lowest amount you ever put on a credit card?" She said, no, 35 cents was the lowest amount that she could remember.

It goes without saying that most merchants will lose money on that transaction after they have paid the basic swipe fee and interchange fees and obviously for the cost of the product. But they are prohibited currently by the rules established by both credit card companies, both credit card giants, from offering discounts for cash, offering discounts for those who will use debit cards, or favoring one card over another, which I mentioned earlier.

It has been reported in the press, Ms. Varney, that the Justice Department is conducting an investigation of the credit card networks, including Visa, to see if they are engaging in anticompetitive practices. Can you confirm the Justice Department is indeed conducting such an investigation?

Ms. VARNEY. Senator, we have publicly confirmed that we have an open investigation into the credit card industry.

Senator DURBIN. Well, I understand your limits in speaking about that investigation, and I respect them very much. I might also tell you that in the course of having passed this amendment, much to the surprise and chagrin of the credit card companies, there is now a full-court press to try to change it, which is their right. But it appears to be a very coordinated campaign. These two great competitors coordinate in many, many ways. I have written to them and said that I think that it is permissible for companies to work together in advocacy. I was concerned that the advocacy is leading to conduct, and specifically my concern is this: Under the amendment, which passed the House of Representatives in financial reform, we provide that the interchange fees that are charged for debit card transactions will be judged by the Federal Reserve as to whether or not they are reasonable and proportional. And we draw a line, and the line is a financial institution issuing a card with assets less than $10 billion. It does not apply to hometown banks, smaller-city banks, or credit unions with assets less than $10 billion, any provision of what I am suggesting. And that would mean that literally three credit unions in the United States would be affected by my amendment and about 80 or 90 banks. And so now we are being told from reliable sources that many of these credit unions and banks are being warned that if the Durbin amendment is not rejected in conference, whatever hit they take on the interchange fees from the largest banks, they are going to pass along to the smaller banks that are not covered by the amendment. They have that market power. They can just do it almost unilaterally.

This to me is way beyond free market and competition, and I am not going to go any further or ask you to comment because you have said that this matter is under investigation. But it is the reason I wanted to take the time, wait my turn, and come today so that it is a matter of record for my colleagues and also for these two major credit card giants that their activity is such that it should be carefully scrutinized considering their market positions.

Thank you for being here today.

Ms. VARNEY. Thank you, Senator.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman KOHL. Thank you very much, Senator Durbin.

We now turn to Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you, both of you. We had a Commerce hearing, and I just came over from there. We got some good work done in marking up some bills.

I first wanted to start, Mr. Leibowitz, with a case that I have asked you about before, and this really came out of a hearing, a Commerce hearing, when I brought to your attention a drug that is used to treat children's hearts, that went suddenly from $36 per vial to $500 per vial, and I wanted to talk to you about the status of that case with Ovation. I know that closing arguments were heard. I brought it to your attention. The FTC brought a lawsuit, and this came to my attention from doctors, children's doctors, and patients' families all over Minnesota. And I want to thank you

again for taking on that case, and I wondered what the status of it is.

Mr. LEIBOWITZ. I think—and let me just check with my staff. We are awaiting decision on that, right? Yes, I think that we are awaiting a decision, and I have to say this was one of the most—I thank you for your work on this because it was one of the most important cases we have brought in the last year. For those of you who do not know about it, it involved a company, Ovation, that manufactured a drug, one of only two drugs used for infants born with premature heart conditions, heart defects. And then they bought—under the Hart-Scott-Rodino threshold, they bought the only competing drug, and then they raised prices exactly in the manner you describe, from—we used a different calculus, but we can use yours. It is the same. From, we would say, $100 to $1,500 per use or per treatment, but the same at 36 to 500.

And so we went to trial. They would not settle, and we are hoping to get money back to all of the people—and the insurers, quite frankly, but not always insurers—who paid skyrocketing prices. And, again, you know, the only two drugs used—it tells you what happens when a company has monopoly control over a vital product. We think it violates the Clayton Act, that it substantially lessens competition, and we hope that the judge will agree.

Senator KLOBUCHAR. Well, very good, and I had actually in another health care area asked you a question or wrote you a letter about this in the past, and it is the issue of pharmacy benefit managers and their relationships with large pharmacies. As you know, PBMs are involved in the reimbursement of most prescription drug claims, and in 2007, CVS and Caremark merged. Since the merger, consumers have reported difficulty accessing their drugs as a result of restrictive plans that steer them away from their local pharmacists to CVS, which may be miles away in another town. Consumers and non-CVS pharmacies have also complained that the merger has imposed harsh and unfair administrative requirements on the non-CVS pharmacies. In some cases, patients who do not elect to fill prescriptions through Caremark's mail-order business are charged higher co-pays.

Could you talk about any work being done in this area and your reaction to this? And if you want to add anything, Ms. Varney.

Mr. LEIBOWITZ. Yes, I would be happy to. I can say this because the company has already acknowledged it. We have an open investigation of CVS/Caremark. It is one of those rare investigations—hopefully, it will be less rare in the future—where we have people from both our Bureau of Competition and our Bureau of Consumer Protection working on this. I do not think I can say much more other than that we have—I have personally met with CVS/Caremark as well as a number of family pharmacists or local pharmacists, and we are in the process of receiving documents. We are going to work through this. Thank you.

Senator KLOBUCHAR. Thank you.

Do you want to add anything, Ms. Varney.

Ms. VARNEY. Ongoing investigation. I will leave it at that.

Senator KLOBUCHAR. Very good. Pay-for-delay, I know Senator Kohl has mentioned this, and I want to thank him for his leadership—I am a cosponsor—that would make these pay-for-delay

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agreements between pharmaceutical companies and generic companies to get generic drugs to staff the market rather than offer low-cost alternatives that would make them presumptively illegal. It is a step in the right direction.

Do you think that this will—will this be enough to halt these types of settlements, or is there more work to be done?

Mr. LEIBOWITZ. Well, if we pass the legislation that Senator Kohl introduced with Senator Grassley and that you are a cosponsor of, I think that would go a very long way to stopping the worst abuses. As you can see, in 2005, when there were a couple of decisions that allowed these—very permissive decisions that allowed these deals, the number went from zero in the previous year, and it has only continued to be the way—not for every pharmaceutical company because some of them frown on this behavior, but the way that some pharmaceutical companies have been doing business. And, of course, it is win-win for the companies; it is lose-lose for consumers. And you can see that the number has gone up from zero in 2004 to three right after the tamoxifen insuring decisions to 19.

Obviously, we are hopeful that Congress can pass a legislative solution. The President supports it. It was part of his health care bill. The House has passed legislation. The Judiciary Committee has reported out legislation.

And then the only other point I would make is that in a major decision in the Second Circuit that our agencies worked on together, along with the Solicitor General's office, the Second Circuit, which had a very permissive rule, just about 6 weeks ago called for an en banc—said that they disagreed in an en banc—in a per curiam decision said that they disagreed with the previous standard enunciated by the Second Circuit and called for an en banc review. So we are hopeful that the tide is turning not only in Congress but also in the courts, and, again, for us this is a huge issue, $3.5 billion a year back to consumers' pockets.

Senator KLOBUCHAR. Ms. Varney.

Ms. VARNEY. As the Chairman mentioned, that is the *Cipro* case in the Second Circuit where the United States has filed in favor of a presumption, a rebuttable presumption but a presumption, against such payments. We are anxiously awaiting to see if it will go en banc, and it would require the Second Circuit to overturn *Tamoxifen*, which we believe is the right result, but it remains to be seen whether en banc review will be granted and what the en banc court will do.

Senator KLOBUCHAR. OK. Very good. I was frustrated—I know many of us were—that this should have been part of the health care bill also. Obviously, I would have liked to have seen the reimportation as well as allowance for negotiating under Medicare Part D, and we are just going to have to keep pushing for that independently. I think all of those things would help with the pricing of pharmaceuticals.

The last thing I just wanted to mention was just I have been working a lot on innovation—it is the Subcommittee I head up—and I really believe it is the key to bringing ourselves out of this economic rut and exporting. And I know that the FTC is involved in a lot of investigations in the high-tech area, and I just would like to know how you balance that with your mission to protect cus-

tomers and consumers and the need to allow for innovation in our country, and then also to prevent anticompetitive conduct.

And I guess I would also add to that, if a company is taking, even outside of the high-tech field, if they are taking steps to address problems that some competitors may feel are anticompetitive, do you take these measures into account when determining whether to investigate a company that is even beyond the high-tech area? Mr. Leibowitz.

Mr. LEIBOWITZ. So usually our antitrust enforcement and our support of innovation are complementary because one of the best ways to ensure innovation is to have competition. So there is not usually a tension. And just going back to the pay-for-delay issue, what we have found and what we strongly believe is that the companies that are most likely to pay off—the brands that are most likely to pay off the generic competitors are the ones who have the weakest patents. And so it really does discourage innovation if you have these payoffs that prevent people from innovating around patents.

Was the question do we listen to—the second one, do we——

Senator KLOBUCHAR. When companies are clearly trying to do something about what may be perceived or is anticompetitive conduct, they are taking measures on their own, do you take that into account when you decide whether to investigate?

Mr. LEIBOWITZ. I think it might depend on the circumstance, but the answer is, you know, we always talk to stakeholders. We always try to survey to determine the market. We listen to competitors sometimes in the merger context. Sometimes they have self-interested things to say, and sometimes they have legitimate things to say, and sometimes it is both. But I would say just recently, you know, we did a very extensive investigation of Google's acquisition of Admob, and part of the determination from the Commission's perspective to let that deal go forward without challenging is—because we had been inclined, I think, to challenge it—was the things that Apple was doing on a different platform and the changes it made in its terms of service.

So I think under appropriate circumstances we do look to see what the marketplace is doing. That is part of the way you determine, for instance, in a merger context, whether a deal may substantially lessen competition, which is the standard we apply and the Antitrust Division applies.

Senator KLOBUCHAR. Ms. Varney.

Ms. VARNEY. So if I understand your question, Senator, do we take into account if an alleged anticompetitive action has ceased when we are determining whether to open an investigation. Generally, every matter is unique, but generally not in the determination as to whether or not to open. If we believe that there is anticompetitive action or practices that are restraining trade or diminishing competition and we have a credible basis for that belief and it has an effect on the economy and on consumers, generally we would open an investigation.

Now, if the company in question, if it was an aberrant decision, if it was something done in good faith that they did not realize was——

Senator KLOBUCHAR. My question was specifically about taking account for measures to address it, if it was something that they realized they did wrong or would be perceived or have an effect that they did not——

Ms. VARNEY. So what we would generally do as a matter of practice is we would look at every investigation, once we have opened it, and while we want to give good actors credit for doing the right thing, we also balance that against what I would call a recidivist problem. So I think we cannot give an absolute answer.

Obviously, when you have good corporate citizens that are trying to do the right thing, that will factor in to what your ultimate remedy is. At the same time, you want to make sure you have the right ongoing protections for the American consumers. So it is always a balancing. It is always on the facts at hand.

Senator KLOBUCHAR. Exactly, and just again the promise with some of these innovations that we want to promote, I am sure it is always a balancing act. But I am hoping that you will consider that. You know, when I look at things like delaying the entry of generic drugs, that seems to me pretty obvious it is not a good thing. But some of these things I know are fuzzy lines, so I appreciate you taking that into account.

Thank you.

Chairman KOHL. Thank you, Senator Klobuchar.

Ms. Varney, railroad antitrust, one of the very few industries to enjoy an exemption from antitrust is the freight railroad industry, as you know. Because of this exemption rail shippers have been victimized by the conduct of dominant railroads, and they have no antitrust remedies, as you know. Higher rail shipping costs are passed along to consumers which result in higher electricity bills, higher food prices, and higher prices for manufactured goods, as you know. So I have introduced a bill that abolishes obsolete antitrust exemptions for railroads. The bill has passed the Judiciary Committee by a 14–0 vote. Companion legislation has passed the House Judiciary Committee.

At your confirmation hearing, you indicated that you supported this legislation, and we have repeatedly asked you for a letter of support, and we have never received one. I assume you are very busy and you have not chance to read the letter——

[Laughter.]

Chairman KOHL.—and that we are going to be getting a letter of support from you very shortly, or do I misunderstand?

Ms. VARNEY. Senator, I read your mail immediately, so I think we have corresponded. I am working hard inside the administration. They are aware of your request for a statement of administration position on that legislation, and I will continue to try and get that.

Chairman KOHL. Is it fair to say that you do support repeal of that exemption and to the extent that you are in a position as the Assistant Attorney General to do something about it?

Ms. VARNEY. Well, Senator, as you know, antitrust is generally allergic to exemptions, and we were very pleased to work with you and Senator Leahy and others trying to remove the exemption for insurance companies in McCarran-Ferguson. And it is with the

same vigor that I am pursuing getting a statement of administration policy on your legislation.

Chairman KOHL. All right. Mr. Leibowitz, the newspaper industry has been under tremendous pressure. As you well know, in the digital age, more and more consumers as they abandon traditional print newspapers in favor of online sources of news, advertisers have followed. Newspapers ad revenues have gone into a sharp decline, according to an FTC staff report released last week that newspaper advertising revenues have fallen over 45 percent in the last decade, as you know. Declining fortunes of the newspaper industry is distressing to all of us who care about newspapers and believe that the in-depth reporting is so very important in our country.

The Federal Trade Commission has been holding a series of workshops regarding the problem of the newspaper industry. Some have argued for, among other things, a relaxation of antitrust requirements so that newspapers can jointly require consumers to pay for access on the Internet. And there are other proposals that have been suggested.

What is your view on this? How important do you think it is that we find a way, if we can, to allow newspapers to remain viable?

Mr. LEIBOWITZ. So let me answer the last part of that question first, which is, as Assistant Attorney General Varney noted, we have a very strong allergy toward any exemptions from the antitrust laws. And I would think that that would not be something that the Commission would endorse.

There have been some other ideas that have been proffered in our workshops including taxing electronic equipment to subsidize newspapers. I think that is a terrible idea. But I do think this is a really important initiative because, you know, cable news, network news, and newspapers have clearly seen a dramatic erosion of viewership or readership. And we all know newspapers are absolutely vital—newspapers and news media are absolutely vital to our democracy and for a democracy to thrive.

And so we have been examining how all this change affects consumers. We are going to do a roundtable next week. We are going to release a report, and hopefully we will have something for policymakers to think about in the fall.

I will just make one other comment, which is I was in Chicago a couple of months ago, and I went and I visited something called the Chicago News Co-op. It is a startup formed by former Chicago Tribune reporters. It is the only startup I have ever visited where the average age is about 65. But it is a startup, nevertheless, and they are trying to develop a vibrant news organization. And their idea is to have three people covering Cook County, three people covering City Hall, and three people covering the State House in Springfield. If they do that, they will have more people in each of those bureaus than the Chicago Tribune will. And that was just an astonishing fact to me about how things have changed.

I went back and I talked to the Small Business Administration because I thought here is a great startup, they are struggling for money, maybe the SBA can help them. And so it turns out they are ineligible to get SBA loans. It seems to me that regardless of platform—this happens to be an online platform. And I am speaking

only for myself. We have not made recommendations from the Commission. You know, people who want to startup a news organization regardless of platform, regardless of, you know, their political beliefs, they ought to be eligible like other small businesses for loans.

So we are looking at this. It is an interesting issue. We will keep this Committee involved.

Chairman KOHL. Ms. Varney, there have been two major airline mergers since 2008—first Delta and Northwest and now the currently pending United/Continental. Merging airlines argue that these deals are necessary due to the poor economic conditions and high costs in the industry. We all recognize the tough times endured by the industry in the last decade, including things like terrorist attacks, fuel spikes, as well as the recession.

Some smaller airlines, however, some competitive airlines, are concerned with their ability to compensate against the large national legacy carriers because the smaller carriers do not have the international route structures, huge networks, and the expansive frequent-flyer programs enjoyed by the legacy carriers. Smaller airlines are also worried about their access to airport slots and gets at important airports like New York La Guardia and Washington Reagan National.

I know you cannot comment on the pending United/Continental merger, and I am not asking you to, but what are your views on the state of airline competition generally. Are you concerned at all about the challenges facing smaller and startup carriers trying to compete with the larger carriers?

Ms. VARNEY. Absolutely, Senator, we are concerned about the airline industry. We are concerned about the competition in the airline industry which leads to lower prices for consumers generally.

We have been very active, particularly with the Department of Transportation. As you know, we have filed twice on applications for global immunity when it comes to the alliances that they are putting together. We have been very active in the proposed slot swap, which is now moving through the system. And I think our views are fairly well known, and that is, we want to see competition, and we want to see competition in city pairs, in airport pairs. We want to see competition for slots. We want to see competition at the gates.

So any merger that we are looking at, we will use our traditional tools to examine whether or not the merger is likely to substantially lessen competition, and we will seek to block the merger or seek appropriate remedies should the parties want to remedy any anticompetitive issues as they go forward in a merger.

If I can comment for 1 second on the newspapers, you may know that recently the Associated Press came to us and asked for a business review letter to allow them to set up a collaboration consistent with the antitrust laws that would allow a lot of the print newspapers to effectively and efficiently in a pro-competitive manner license their copyrighted material to a variety of sources. We have worked closely with the AP, and we have provided them the guidance and approval they need. They think it is a very important step for them and their members to continue to compete in this changed world.

We have also, under the Newspaper Preservation Act, been charged with enforcing the law permitting the joint operating agreements for newspapers around the country, and we have seen a lot of change in those markets, and we have worked closely with the enterprises in those markets to try and help them find solutions that can remain competitive and supportive of the news function as we move into a new age.

Chairman KOHL. Thank you so much.

Senator Klobuchar, do you have any thoughts or questions?

Senator KLOBUCHAR. Well, just a little follow-up. I was listening actually to the newspaper issue. I grew up in a newspaper family, and there is a similar operation in Minnesota called MinnPost, which is an online newspaper where it has a lot of retired reporters, including my Dad, Chairman Kohl, who wrote every Monday after each Viking game in the fall, reporting on, of course, Brett Favre. A detail that——

Chairman KOHL. I am sorry. What is that?

[Laughter.]

Senator KLOBUCHAR. But in any case, I have grown to appreciate some of the online newspapers, and also I appreciate what you said, Ms. Varney, because I do think that paying for contents, those kinds of things are going to be critical as we go forward. And I appreciate the Justice Department working on this.

Another issue that I understand was raised when I was at the Commerce hearing on your agricultural competition workshops, so I understand you already answered that we do invite USDOJ and USDA personnel to come out to Minnesota. We are the No. 1 turkey producer in the country. You could, like I did, take a tour of the Jennie-O turkey processing plant, and half an hour later eat a turkey burrito with the CEO, if you can do that, if you are ready for Minnesota. But we obviously would like to help in any way. It is a very important industry in our State.

And I just wanted to end with one question on something I care a lot about, and that is the cell phone marketing, Mr. Leibowitz, and what is going on there. I have a bill, along with Senators Webb and Feingold and Begich and others, to pro-rate the early termination fees for cell phones. It has come out now that in a recent study two out of three Americans have seriously considered switching cell phone providers but ultimately decided to stay with their current provider because of a cancellation fee. Obviously, we are working with the FCC on that, and they have started to open that up. But I have found it to be not good for competition, the fact that people cannot move around, and there are these outrageous fees. They move somewhere, their cell phone service does not work. But as far as the FTC involvement, there is still bill shock going on. People do not understand what is on their bills. And I wondered if the FTC has involved itself at all with any of the cell phone advertising issues about service areas and things like that.

Mr. LEIBOWITZ. Well, it is a great question, and I actually had lunch with the Chairman of the Federal Communications Commission yesterday, Julius Genachowski, who is obviously working very, very hard on this bill shock issue. Unfortunately, those phones are considered to be common carrier-regulated, so we do not have jurisdiction over them. But I can certainly say that any efforts—and

Senator Kohl had a pricing initiative last year on this matter. Any efforts to move forward on consumer protection and competitive pricing I think would be really appreciated by the consumers in your State and consumers in America.

Senator KLOBUCHAR. Thank you very much. I appreciate it.

Chairman KOHL. Well, we thank you so much for being here. Oversight is an important part of our job, and you have been very forthcoming today. I think you have shed a lot of light on important issues, and in that sense, what you have done here is really important. Thank you.

Ms. VARNEY. Thank you, Senator.

Mr. LEIBOWITZ. Thank you.

[Whereupon, at 4:03 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Chairman

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

I am pleased to respond to the written questions from Members of the Committee on the Judiciary, following up on my June 9, 2010 testimony before the Subcommittee on Antitrust, Competition Policy and Consumer Rights on "Oversight of the Enforcement of the Antitrust Laws."[1]

Questions from the Honorable Herb Kohl

Question 1: From time to time, we hear calls that the old rules of antitrust don't apply to the so-called "new economy," especially with respect to high-tech industries. Some argue that antitrust law is outmoded and retards innovation. Supporters of antitrust enforcement, on the other hand, argue that antitrust has proven time and again to be just as crucial to competition today as yesterday. They argue that antitrust principles remain sound, and are flexible enough to take into account conditions in new industries. What's your view? Are the concerns of those in the high tech industry regarding what they view as overzealous antitrust enforcement chilling innovation warranted? Do new high tech industries require a different framework of antitrust enforcement or are the existing antitrust doctrines sufficient?

Answer 1: The antitrust laws have the flexibility to be applied in all industries and in all market settings, including "high tech" industries and markets. The antitrust statutes themselves simply set out standards, for example, prohibitions against unreasonable restraints of trade, anticompetitive conduct leading to monopoly, and acquisitions that may substantially lessen competition. These general prohibitions are applied only after fact-intensive investigation tailored to the particular characteristics of the markets implicated by the conduct being assessed, whether the markets are in industries of long standing or new and high tech. The Commission

[1] As with my responses to the Committee's questions at the hearing, these answers present my personal views and do not necessarily represent the views of the Federal Trade Commission or of any other Commissioner.

has been in the forefront in considering the application of the antitrust laws to high tech industries. Among other activities, the Commission, under former Chairman Pitofsky, held a series of workshops that carefully assessed the applicability of antitrust principles to new industries.[2] The resulting report concluded that high tech industries do not require a different antitrust enforcement framework. Nor have I seen any evidence that antitrust enforcement in high tech industries has been "overzealous" or chilled innovation. To the contrary, antitrust enforcement recognizes the importance of and seeks to promote innovation.

Question 2: Google has attracted increased antitrust scrutiny in recent years. It has grown to become a dominant player in Internet search and Internet search advertising. For a majority of consumers the key point of access to the Internet is to perform a Google search. This gives Google enormous power over the entire Internet economy. Some commentators are concerned whether Google searches are truly neutral, and there have been accusations that Google's search algorithm favors its own e-commerce sites as well as Google's other niche sites and services. Is there a basis for the Antitrust Division and FTC to ensure "search neutrality" under antitrust law, especially considering the massive amount of information and multi-billion dollars of e-commerce that flow through the Internet? Or should we just trust Google's promise to operate a purely neutral search engine? More generally, how will you scrutinize allegations of anti-competitive behavior by Google in the Internet sector in the future?

Answer 2: We are aware of allegations regarding Google's search algorithm. Although I cannot comment on any specific allegations, I want to assure you that because of the importance of the Internet, the Commission has devoted considerable resources to both competition and consumer protection issues raised in Internet-related industries. With regard to search engine neutrality and Internet advertising in particular, the Commission recently investigated two proposed mergers involving Google, *Google/DoubleClick*[3] and *Google/AdMob*.[4] In each instance, after intensive investigation, the Commission closed its investigation after concluding that the facts ascertained by staff did not provide reason to believe that the transaction would be likely to injure competition.

Internet-related markets evolve quickly, so we continue to closely monitor this sector, and we will investigate any circumstances that threaten competitive harm and take enforcement action as appropriate.

Question 3: We've also recently heard concerns expressed about Apple, and its growing share of mobile devices such as the IPhone and IPad. Apple is now placing new requirements on

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[2] Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (May 1996).

[3] Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[4] Statement of the Federal Trade Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), *available at* http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

applications developers for these developers that restrict the use of tools which allow developers to write apps to different devices. To some these restrictions resemble the conduct that Microsoft engaged in during the 1990s to exclude competitors from its platform. Do you have any concerns about the competitive implications of Apple's new restrictions on applications developers?

Answer 3: Consumers have come to depend on mobile devices to meet their communication and other needs, thus competition in mobile device markets is very important for consumers. Although I cannot comment on any specific allegations, I can assure you that the FTC recognizes the great importance of competition in these markets, and will carefully examine any credible allegations of exclusionary conduct that harm these markets.

Question 4: One issue that has long concerned us on the Antitrust Subcommittee is the state of competition in the cable and pay TV industry. Each year for the last decade and a half, consumers have suffered from continual annual cable rate increases at a rate of nearly triple the rate of inflation. These rate increases are occurring when the prices consumers pay for most other telecommunications services – such as local phone service and Internet access – has hardly increased at all. Are these cable TV rate increases a "red flag" showing us that there is a failure of competition in the cable TV industry?

Answer 4: Price increases alone are not necessarily indicative of a competitive problem. For example, during this period, cable offerings also have evolved, with number of channels, available services, and quality also often increasing. Moreover, basic cable rates are regulated by local franchising authorities. Further, while many consumers have access to only one cable provider, increasing competition from broadband video content providers increasingly offers consumers additional high-quality viewing options. In addition, the increasing availability of high-definition programming via broadcast TV has drawn some consumers back to broadcast TV. Certainly, if we see indications of anticompetitive mergers or conduct, we would vigorously pursue them.

Question 5(a): Recently we have been studying the emergence of video over the Internet. Millions of consumers now watch a wide variety of TV programming using broadband Internet connections. Some consumers – known as "cord cutters" – have dropped their pay TV subscriptions entirely and view TV programming over the Internet. The number of cord cutters today is estimated to be 800,000 and growing. Do you agree with me that video over the Internet has the possibility to develop into a strong competitive rival to traditional pay TV services such as cable and satellite? And how can antitrust enforcement ensure that competition flourishes and these new entrants are not stifled are retarded by the dominant pay TV players who might view this competition as a threat?

5(b): We have recently heard reports that cable companies were demanding that programmers keep programming off the Internet as a condition of the cable company carrying that programming. Programmers – who need cable distribution of their programming – have no choice but to comply. Does this concern you? And, more generally, would you be concerned by obstacles placed by pay TV companies to prevent Internet distribution of programming?

Answer 5: Consumers have choices for the delivery of their favorite programming – but for that to be most meaningful, programmers need access to those delivery vehicles so that they can reach consumers. Video over the Internet is emerging and may become an effective rival to cable and satellite television and other delivery systems. Enforcement of the antitrust laws will be an important means of ensuring that consumers have access to all of these technologies at competitive prices.

Although I cannot comment on any specific allegation, the FTC would be concerned about any situation in which a cable operator with market power threatened to deny or denied programmers access to its system as part of an effort to reduce the value of alternative delivery systems, and we would welcome additional specific information about any such conduct.

Question 6: During last February's Winter Olympics, NBC showed thousands of hours of Olympics events, much of it live, on its Internet Web site, NBCOlympics.com. But to view much of that content, a viewer first had to have a subscription to cable or satellite pay TV services. On February 27th, I wrote to NBC CEO Jeff Zucker stating "it is our view that video over the Internet has the potential to become a significant competitive alternative to traditional pay TV subscriptions, and it appears policies such as [NBC's] may have the effect of limiting the prospects of such competition."

> Does this type of policy of requiring consumers to purchase pay TV subscriptions in order to view programming on the Internet concern you? If widely adopted, could such policies prevent the Internet from being a true competitive alternative to traditional pay TV services?

Answer 6: The Internet supports a broad range of business models, and consumers can purchase premium content via many platforms, including over the Internet. Innovators with new technologies often charge premiums for access to those technologies, but that standing alone does not necessarily indicate that an antitrust law violation has occurred. In the absence of anticompetitive conduct, competition is likely to continue to push providers to reach consumers with new and exciting programming/platform.

Question 7: The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to unfortunate conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

> What are your agencies doing to resolve clearance disputes in a more effective way? Are you, as the Antitrust Modernization Commission suggested in 2007, developing a new merger clearance agreement, or do you believe Congress should act in this area, revising the Hart-Scott-Rodino Act to require more effective resolution of clearance disputes?

Answer 7: The vast majority of matters resolved through the clearance process are handled in a

timely and efficient manner and, to the best of my knowledge, concerns about clearance problems by the antitrust defense bar appear to be a thing of the past. In most instances, one or the other agency will have the greater expertise in the industry of potential concern, and clearance is quickly given to that agency. Nevertheless, the agencies continue to work to update clearance procedures and policies to be more efficient and effective. For example, the agencies have reduced the layers of review to which a contested matter is subjected. As a result of this and other reforms, matters are more readily resolved without resource-intensive high-level review, and remaining contested matters are brought to the ultimate decision-makers more quickly and efficiently.

There is always room for improvement, of course. We are in discussions with DOJ to further streamline clearance procedures by eliminating those that have proven ineffective, and to implement improvements to reduce disagreements and delays even further. We believe that procedural improvements to the Clearance Agreement are best implemented through such negotiations, rather than through statutory means.

Question 8: In April, the Justice Department and FTC jointly published for public comment a comprehensive revision of the Horizontal Merger Guidelines, a document that guides the agencies in reviewing mergers, and guides private parties in determining whether and how to structure mergers so that they are more likely to pass government scrutiny. Among other things, the proposed new Guidelines downplay the focus on market shares, concentration, and market definition. The proposed new Guidelines also increase the HHI thresholds – a measure of market share -- that might suggest a merger could be problematic, and omit the reference to a two-year standard for "timely" entry into a market.

> Do these revisions signal a change in enforcement policy at the agencies? Should merging companies and the lawyers who advise them now feel as if there is an even larger safe harbor in merger enforcement?

Answer 8: The proposed revised Guidelines that we made public last April are still undergoing revision in response to public comments, thus the final product of this important effort to bring the Guidelines up to date is not yet available. However, I can assure you that the revised Guidelines will not signal a change in enforcement policy. The agencies' goal in revising the Guidelines is simply to make the Guidelines better reflect actual agency practice. The current Guidelines do not provide a "safe harbor" for mergers that may be likely to injure competition, and the revised Guidelines similarly will not provide any such safe harbor. We dropped the two year standard because some judges saw it as a virtual safe harbor.

Question 9: The proposed revised Horizontal Merger Guidelines released in April states that "these Guidelines reflect the Congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." Should these Guidelines be adopted, how will you interpret them so that they address competitive problems "in their incipiency"?

Answer 9: The Guidelines have always reflected the Congressional intent that competitive problems be addressed in their incipiency, and the revised Guidelines will continue to reflect that

intent. Mergers that likely will injure competition should be prevented or undone without waiting for competitive harm to be fully realized. Indeed, the agencies devote substantial resources to preventing the consummation of mergers that may substantially injure competition, even though that competitive harm may occur at some time in the future.

Question 10: Recent events have highlighted the importance of technology companies acting responsibly to ensure the privacy of users. Among other things, breaches of user privacy surrounding the collection of wi-fi data have generated a lot of interest from regulators around the world. One alternative to address this issue is through regulation, but some believe that competition policy and assuring a competitive market is preferable to regulation as a mechanism to address some or all of these concerns. Competition in these markets can incentivize firms to compete more on privacy protections. Does the FTC consider whether the lack of adequate privacy protections is a symptom of a lack of competition in search or other online markets? Is this something you can address?

Answer 10: The FTC previously has noted that competition and consumer protection policies reinforce one another with respect to securing personal privacy.[5] The quality of seller privacy protections may influence consumer choice among competing products and services. As a result, sellers may be induced to compete in tailoring their privacy practices to satisfy, and thereby attract and retain, consumers. Consequently, anticompetitive conduct could in some instances reduce sellers' incentives to maintain or enhance privacy protections. In investigating potential anticompetitive conduct, we are alert to that possibility.

Online privacy has been one of the agency's highest consumer protection priorities for more than a decade. Our primary tool to protect consumer privacy online is enforcement: we have initiated almost 30 law enforcement cases challenging business practices that failed to adequately secure consumers' personal information. We also educate consumers and businesses about privacy and online security, and promote privacy and security initiatives here and abroad. Over the past nine months, the FTC hosted a series of roundtables on privacy[6] with a wide variety of stakeholders, and we plan to publish privacy proposals later this year for public comment.

Question 11: Some competition advocates believe that consolidation in the retail sector has led to monopsony or oligopsony buying power among food retailers, and that this in turn drives concentration in the meatpacking and food processing sectors. What is your view? Do you believe retailer concentration and buying power may be playing a role in driving the consolidation of agricultural markets? And, if you believe this is a concern, is there anything antitrust enforcement agencies can do to make the retail market more competitive?

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[5] FTC Comment Before the Department of Commerce National Telecommunications and Information Administration Concerning Information Privacy and Innovation in the Internet Economy (June 2010), available at http://www.ftc.gov/os/2010/06/100623ntiacomments.pdf

[6] More information about the Privacy Roundtables can be found at http://www.ftc.gov/bcp/workshops/privacyroundtables/ .

Answer 11: The FTC has taken numerous actions to ensure that consolidation in the food retail sector does not create or facilitate the use of market power, for example by preventing or undoing supermarket mergers that are likely to injure competition. In 2007, for example, we sued to block Whole Foods' acquisition of Wild Oats, its competitor in premium natural and organic supermarket markets. Ultimately we obtained divestitures of stores and intellectual property to maintain competition in this sector. The FTC has also taken numerous enforcement actions to preserve competition in a variety of food and beverage manufacturing markets.

The FTC has not studied consolidation in agricultural markets. We note that the Antitrust Division of the Department of Justice and the Department of Agriculture are holding public workshops to explore competition issues affecting these markets, including questions relating to buyer power (monopsony). We will carefully assess any new information pertaining to food retailers and manufacturers and take action as appropriate to protect competition in these industries.

Question 12: As you know, for many years the Antitrust Subcommittee has investigated the activities of hospital group purchasing organizations (GPOs) over allegations that their contracting practices exclude competitive medical device manufacturers from the hospital supply market. Although many of the nation's largest GPOs agreed to issue voluntary codes of conduct intended to forbid anti-competitive business practices, the Subcommittee continues to receive allegations from device manufacturers alleging that anti-competitive practices continue. More than 15 years ago, the FTC and Justice Department promulgated joint Health Care Guidelines enacted an "antitrust safety zone" protecting from governmental antitrust scrutiny much GPO conduct in Statement 7 of these Guidelines. Some believe that this "antitrust safety zone" should be re-examined and perhaps repealed. What is your view? Will you commit to reviewing the antitrust safety zone in light of current market conditions?

Answer 12: The FTC and the Department of Justice reviewed the antitrust safety zone set forth in Statement 7 during hearings convened in 2003. The agencies' 2004 report, *Improving Health Care: A Dose of Competition,* explains that this safety zone does not shield anticompetitive contracting practices by GPOs; rather, the safety zone addresses only *the formation* of joint purchasing arrangement among health care providers.[7] With regard to the conduct of a GPO, the report expressly states that Statement 7 "does not preclude Agency action challenging anticompetitive conduct – such as anticompetitive contracting practices – that happens to occur in connection with GPOs." Any such practices, the report explains, will be assessed on a case-by-case basis.[8] Thus, the safety zone does not in any way preclude antitrust enforcement against anticompetitive conduct by GPOs, and we continue to monitor this, and other aspects of health care markets, to prevent injury to competition.

We are considering a workshop on GPOs next year at which these issues can be revisited.

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[7] Report by the Federal Trade Commission and the Department of Justice, *Improving Health Care: A Dose of Competition* (2004) at IV:46, available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[8] *Id.*

Questions from the Honorable Russell D. Feingold

Question 1: Many companies seeking approval of a merger argue that delay in approving the merger will result in jobs being lost. Do you think this is a legitimate concern? In your experience, don't most mergers, especially between competing companies, result in lay-offs in the short to medium term?

Answer 1: Antitrust analysis of proposed mergers focuses on the likelihood that adverse price, quality, or other effects in a relevant market may arise if the merger goes forward. Employment concerns typically are outside of the scope of antitrust review. As you suggest, employment reductions may be a short-term consequence of any given merger; however, I know of no evidence supporting the contention that the length of the merger review process results in lost jobs. The Commission adheres closely to the deadlines imposed for premerger review by Congress in the Hart-Scott-Rodino Act, and at all times the agency performs its review as expeditiously as practical. We certainly have a very good record in deciding merger review cases in a timely manner.

Question 2: The Department of Justice recently reached a settlement that allowed the Ticketmaster and Live Nation merger to go forward. The settlement contains conditions that prohibit retaliation, forbid anticompetitive bundling, establish ticketing firewalls, and permit portability of customer information. Does the FTC also have a role in ensuring that the company is living up to these terms? Are there dedicated staff at the FTC that are focused on this issue and improving competition in the ticketing and concert industry? Are you aware of any claims of retaliation or anticompetitive behavior following the settlement?

Answer 2: The Department of Justice, rather than the FTC, is authorized to enforce the final judgment against Ticketmaster, including the provisions designed to promote competition after its merger with Live Nation. If the FTC were to obtain information suggesting that Ticketmaster was violating the terms of the final judgment, FTC staff would pass that information on to the Antitrust Division, as we do with all other information that we believe that the Department of Justice should review.

The FTC has, however, issued its own order against Ticketmaster to settle charges that Ticketmaster and its affiliates used deceptive bait-and-switch tactics to sell event tickets to consumers. Ticketmaster has agreed to pay refunds to consumers who bought tickets for 14 Bruce Springsteen concerts in 2009 through its ticket resale Web site TicketsNow.com, and has also agreed to other order provisions designed to protect consumers. For example, the order prohibits Ticketmaster from failing to disclose that a consumer is being redirected to a resale Web site or that the tickets on the resale Web site often exceed the original ticket price, and from misrepresenting the status of tickets on a resale Web site (i.e., if the ticket is in-hand and ready for delivery or whether the reseller is making an offer to procure the ticket for the consumer). The FTC will take action to enforce this order if needed, and to protect consumers in the ticketing and concert market against unfair or deceptive acts and practices. To that end, FTC staff has sent warning letters to a number of other ticket resale companies discussing the Ticketmaster settlement and the FTC's concerns about specific ticketing practices. In the letter the FTC strongly recommends "that you review your own company's Web site to ensure that

you are not making any misleading statements or failing to provide material information to prospective purchasers of tickets listed on your site."

Question 3: Over the past several years, there has been significant controversy over the potential for Internet providers to prioritize their own or an affiliated company's content. This concern about "net neutrality" has led the FCC to propose some open Internet principles and issue a notice of proposed rulemaking. To what degree can the FTC using the antitrust laws also constrain this kind of discriminatory behavior? Is the FTC looking at this issue?

Answer 3: The FTC has long been interested in the privacy and content policies of Internet service providers. In 2006, the FTC set up an Internet Access Task Force to develop guiding principles for our consumer protection and competition work in this area.

When FTC staff completed its report, *Broadband Connectivity Competition Policy* in 2007, I agreed with the bulk of the analysis, but highlighted two continuing concerns.[9] The first is that a broadband provider with monopoly power in a local market might use that power to block or degrade some applications or content, and that a 'rule of reason' antitrust analysis would prove to be inadequate for stopping this type of conduct after the fact. My second concern is that broadband providers, as 'gatekeepers,' could impose unreasonably high prices for developers to reach customers with their new content – the very thing that makes the Internet such an exciting platform for consumers.

I still have those concerns about Internet access and discriminatory service. As long as there are areas in the country with only one or two choices for broadband Internet service, the FTC will be concerned about the freedom of consumers to access content they like and the freedom of content developers to reach those consumers with new and exciting content, and we will continue to be active in this area.

Questions from the Honorable Orrin G. Hatch (for both Chairman Leibowitz and Assistant Attorney General Varney)

Question 1: Today we expect hospitals and healthcare providers to work more closely to improve upon efficiency and quality in delivering healthcare and in doing so, lower the cost of care both to patients and to the federal government. However, according to many care providers, a lack of clarity in the administration and enforcement of our antitrust laws has created confusion that has prevented greater clinical integration.

In the 1990s, the FTC and the Justice Department produced the "Statement of Antitrust Enforcement Policy in Health Care" and, at that time, acknowledged that further

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[9] Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: "Broadband Connectivity Competition Policy," (June 27, 2007) *available at* http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf

guidance would be necessary as health care continued to evolve. More than a decade has passed and providers are still waiting on that further guidance so that they can more effectively collaborate to improve the delivery and provide a real reduction in health care costs.

Do you intend to produce user-friendly guidance on clinical integration? If so, is there an expected timetable? If not, can you please explain why not?

Answer 1: We appreciate the desire for further guidance on clinical integration. I have met with the American Medical Association and the American Hospital Association to hear their views, and FTC staff is continuing to discuss issues surrounding antitrust and clinical integration with various interested parties and to explore ways in which we might expand and improve our existing guidance. As I recently announced in a speech to the American Medical Association, the FTC will convene a public workshop this fall to address antitrust policy as it relates to new models for delivering high quality, cost-effective health care. This workshop will examine arrangements known as "accountable care organizations," which will involve clinical integration among providers of care.[10]

Let me emphasize that our existing guidance concerning antitrust analysis and clinical integration is by no means limited to the 1996 *Statements of Antitrust Enforcement Policy in Health Care*. Since the Statements were issued, the FTC has provided further guidance in several other forms, including four advisory opinions, a 2004 report following public hearings, and a 2008 workshop, as well as various speeches by agency staff.[11] In addition, Commission statements in connection with various antitrust enforcement actions also address how the FTC

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[10] http://www.ftc.gov/speeches/leibowitz/100614amaspeech.pdf.

[11] *See, e.g.*, Letter from Jeffrey W. Brennan, Assistant Director, Bureau of Competition, Federal Trade Commission, to John J. Miles (February 19, 2002) (MedSouth, Inc.) (available at http://www.ftc.gov/bc/adops/medsouth.htm); letter from David R. Pender, Acting Assistant Director, Bureau of Competition, to Clifton E. Johnson (March 28, 2006) (Suburban Health Organization), available at http://www.ftc.gov/os/2006/03/SuburbanHealthOrganizationStaffAdvisoryOpinion 03282006.pdf); Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Federal Trade Commission, to Christi J. Braun and John J. Miles (September 17, 2007) (Greater Rochester Independent Practice Association, Inc.) (available at http://www.ftc.gov/bc/adops/gripa.pdf); Letter from Markus H. Meier, Assistant Director, Bureau of Competition, Federal Trade Commission, to Christi J. Braun (April 13, 2009) (TriState Health Partners, Inc.) (available at http://www.ftc.gov/os/closings/staff/090413tristateaoletter.pdf); Report by the Federal Trade Commission and the Department of Justice, *Improving Health Care: A Dose of Competition* (2004) at II:36-41, available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf. ; *Clinical Integration in Health Care: A Check-Up* (May 29, 2008), available at http://www.ftc.gov/bc/healthcare/checkup/.

considers clinical integration claims by parties.[12] We will continue to explore additional ways in which we can provide useful guidance regarding clinical integration and will work with the Department of Justice as we consider these issues.

Question 2: As you may know, I have had a keen interest in our domestic and international intellectual property laws. On May 26th, the FTC, the Department of Justice, and the Patent and Trademark Office held a workshop to discuss the interface between antitrust, intellectual property, and standards. This week, at the Organization for Economic Co-operation and Development meetings, it is my understanding that the member nations will examine many of these same issues. Further, the World Intellectual Property Organization recently held a workshop on this same subject matter and has plans to continue to explore them going forward.

Given the emphasis the U.S. government has placed on protecting intellectual property rights around the world, and given the challenges we face in China and other countries where foreign governments have been known to try to force outside innovators – including American innovators – to transfer their intellectual property on non-commercial terms, how are you managing the dialogue on these critical issues at home and abroad? For example, when U.S. antitrust officials make statements that "patent hold ups" and "royalty stacking" are widespread problems without citing empirical evidence, doesn't this invite or provide cover to foreign governments to use their own antitrust laws and remedies to restrict intellectual property rights, potentially disadvantage American inventors and innovators – not to mention American jobs – and ultimately undermine U.S. efforts to get foreign governments to protect intellectual property rights?

Answer 2: The FTC has consistently highlighted the importance of strong intellectual property protection in working with foreign jurisdictions. The 2007 joint FTC-Department of Justice Report on "Antitrust Enforcement and Intellectual Property Rights" ("2007 IP Report"), widely cited in speeches to foreign audiences, emphasizes, at page 1 and in later discussion, that the intellectual property laws share with the antitrust laws "the same fundamental goals of enhancing consumer welfare and promoting innovation."[13] This positive portrayal of intellectual property rights is echoed in later papers presented by the FTC and the Justice Department to the Competition Committee of the OECD. For example, the agencies' 2010 OECD Submission explained that "the collaborative standard setting process can produce substantial benefits" and that "competition that centers on a particular standard may be very socially beneficial and this reflects the general nature of standard setting in the United States" (paragraph 9). While acknowledging the possibility of after-the-fact "hold ups" by firms engaging in anticompetitive manipulation of standard setting, that submission described in detail "policy guidance [provided by the FTC and the Justice Department] *to the private sector* regarding actions firms engaged in standard setting might take *ex ante* to avoid competitive problems associated with hold ups" (paragraph 25). The agencies will continue to stress the importance of strong intellectual

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[12] *See, e.g., In re North Texas Specialty Physicians*, D. 9312 (November 29, 2005), http://www.ftc.gov/os/adjpro/d9312/index.htm, *aff'd sub nom. North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir.2008).

[13] *Available at* http://www.justice.gov/atr/public/hearing/ip/222655.pdf.

property rights protection in presentations overseas.

Question 3: The Internet has obviously become a core part of the nation's infrastructure, driving growth, innovation, and information flow. I am interested in learning more about any concerns your agencies have with regard to any potential anti-competitive activity online. During the past few years, we've seen multiple investigations into the search and online advertising markets. As you know, the online search market is continually becoming the primary navigation tool for online consumers and an important channel for the distribution of content and information. Obviously, there are very few significant competitors in this market. Many have argued that this will have a negative impact on consumers.

> What, in your view, is the state of competition in these markets? Are you concerned with anything that you are seeing in terms of anti-competitive activity or dominant players that could harm competition online? What do you think the focus of policy-makers should be in order to preserve competition and limit barriers to entry of the online markets?

Answer 3: The Commission scrutinizes conduct in dynamic, fast-paced markets with the same level of antitrust scrutiny as conduct in other markets, taking into account changing facts that can occur during the course of the investigation. For instance, the Commission recently completed a six-month investigation of Google's acquisition of AdMob.[14] The Commission noted that Google and AdMob currently compete in this market, and that the competition has spurred innovation and benefitted both consumers and mobile publishers who create new applications and content delivered over mobile devices. But the Commission also observed that due to the recent launch of its iAd service, Apple is poised to become a strong competitor in the mobile advertising market, and that a number of other firms appear to be developing or acquiring smartphone platforms to better compete against Apple's iPhone and Google's Android. After assessing all the evidence, the Commission did not challenge the acquisition, but committed to continue to monitor the mobile marketplace to ensure a competitive environment and protect consumers.

The Commission also investigated a range of competitive issues when Google purchased DoubleClick in 2007, examining both horizontal and vertical theories of harm raised by the deal. Although we concluded that the acquisition was unlikely to harm competition, I issued a concurring statement noting that the merger presented important and complex questions about potentially anticompetitive vertical behavior by Google.[15] That statement reflects my more general concerns about Internet services and related markets, and the Commission will continue to actively monitor those markets carefully, using the traditional core antitrust concepts of preventing/remedying collusive anticompetitive behavior, exclusionary conduct, and mergers that substantially lessen competition.

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[14] Statement of the Federal Trade Commission Concerning Google/AdMob, May 21, 2010, available at http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

[15] Concurring Statement of Commission Jon Leibowitz concerning Google/DoubleClick, December 20, 2007, available at http://www.ftc.gov/os/caselist/0710170/071220leib.pdf

Questions from the Honorable Charles E. Grassley

Question 1: In 2005, I joined Senators Rockefeller and Leahy in requesting that the Federal Trade Commission look into the practice of authorized generics. We asked that the Federal Trade Commission study the impact of authorized generics on competition in the drug market and on the price of drugs, as well as on the viability of the generic drug industry. We still have not received the FTC findings on this important matter.

1(a): What is the status of this study?

1(b): When can we expect to receive the study and any recommendations you may have on this issue?

Answer 1: Although many factors contributed to the delay of our Report, including delays in OMB approving subpoenas, I share your concern about the unacceptable delay. Shortly after I became Chairman, in June 2009, the Commission released an interim report, presenting the first set of results from our study of the effects of authorized generic ("AG") drugs on competition in the prescription drug marketplace.[16] The Interim Report provides factual information and economic analysis of the short-term effects of AGs on competition during the 180 days of marketing exclusivity that a generic may be awarded in certain circumstances under the Hatch-Waxman Act. Our initial analysis suggests that consumers benefit, and the healthcare system saves money, during the 180-day exclusivity period when an AG enters the market, because additional competition from the AG leads to greater discounting by the generic. Additionally, the data indicate that AG entry significantly decreases the revenues of a first-filer generic company during its 180-day exclusivity period.

The FTC staff is continuing to perform an extensive analysis of data relevant to the long-term competitive effects of AGs. The agency hopes to complete its analysis and issue a final report as soon as possible.

Question 2: As you are well aware, Senator Kohl and I have been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. We have introduced a bill, the Preserve Access to Affordable Generics Act (S. 369), that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible.

2(a): Do you agree that these "pay for delay" agreements harm consumers?

2(b): Are these kinds of agreements still a problem?

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[16] "Authorized Generics: An Interim Report," FTC Report (June 2009), *available at* http://www.ftc.gov/os/2009/06/P062105authorizedgenericsreport.pdf.

2(c): Do you believe that the Kohl/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as soon as possible?

Answer 2: Absolutely. Agreements in which brand drug companies pay generic drug companies to delay market entry of generic drug products deprive consumers of the ability to choose lower cost medications – often for many years – and impose enormous costs on consumers. FTC economists analyzed data from settlements reported to the FTC during FY 2004-2008 and calculated, using conservative assumptions, that pay-for-delay patent litigation settlements cost drug purchasers roughly $3.5 billion a year.[17]

Entry into these agreements have become a common industry strategy. FTC staff's analysis of settlements of Hatch-Waxman patent litigation shows a steady increase in the number of agreements containing both a restriction on market entry by the generic drug maker and compensation from the branded drug firm to the generic drug company – from zero in FY 2004 to 19 in FY 2009.[18] These agreements currently protect at least $20 billion in sales of branded drugs from generic competition.

By declaring that pay-for-delay arrangements are presumed illegal and requiring clear and convincing evidence to overcome that presumption, the Kohl/Grassley bill should help to deter drug companies from entering into anticompetitive patent settlements. I greatly appreciate the work that members of the Judiciary Committee have done to advance this legislation and hope that the Senate will approve it this year.

Questions from the Honorable John Cornyn

Question 1: Are there any cases that the FTC has brought under the other provisions of Antitrust law over the past decade that could not have been brought under Section 5?

Answer 1: No, all Commission non-merger antitrust cases are brought under Section 5 of the FTC Act because the Commission does not have authority to enforce the Sherman Act.[19] However, any conduct that violates Sherman Act principles also violates Section 5.[20] Most Commission nonmerger antitrust cases, though filed under Section 5 of the FTC Act, allege conduct that would violate either Section 1 or Section 2 of the Sherman Act, and rely on Sherman Act principles and precedent.

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[17] Federal Trade Commission Staff, *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions* (January 2010) at 8-10.

[18] *Id.* at 1.

[19] In merger cases, the FTC brings actions under Section 7 of the Clayton Act.

[20] *See* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986) (Section 5 "encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws").

Question 2; If Section 5 exists to reach conduct beyond that conduct prohibited by other provisions of Antitrust law, would the FTC ever bring a case under Section 5 alone?

Answer 2: As you know, Congress enacted Section 5 to be broader than the antitrust laws; that is to reach anticompetitive conduct that is outside the ambit of the other antitrust laws, and the Commission has brought several cases under Section 5 in recent years against conduct that would not have violated the Sherman Act. For example, over the past twenty years the Commission has investigated at least seven situations in which one firm invited a competitor to join it in an illegal price-fixing agreement. These "invitations to collude" did not technically violate the Sherman Act, because the Sherman Act does not prohibit unsuccessful attempts to collude.[21] So the short answer to your question is: yes.

Question 3: Has the FTC brought any cases over the past decade under the other provisions of Antitrust law that, in your view, should have alleged a violation of Section 5 but did not?

Answer 3: As noted above, all of our cases are brought under Section 5. There are, however, some cases that I believe should have been reached by Section 5 theory, even though the conduct challenged might have been deemed lawful under the Sherman Act. This situation may arise where there has been clearly anticompetitive conduct and consumer harm, but where there is also a potential weakness in a primary Sherman Act theory. A prominent recent case of this sort was the Commission's case against *Rambus*.[22]

The *Rambus* case involved a technology firm that allegedly deceived a standard-setting organization about the patents it held, with the result that the organization unwittingly adopted a technical standard that exposed the entire industry to demands for patent royalties. The FTC complaint alleged three violations – monopolization, attempted monopolization, and unfair methods of competition. However, FTC staff only litigated the Sherman Act principles during the trial before the administrative law judge. I disagreed with that omission, and wrote a separate concurrence to point out the benefits of expanding the theory of liability to include unfair methods of competition for future actions.[23] Eventually the D.C. Circuit reversed the Commission's finding of monopolization and held that Rambus's conduct, even if deceptive, did not diminish competition.[24] I do not agree with that conclusion and reasoning but, in any event, I believe that this undesirable outcome could have been averted if the Commission had challenged Rambus's deceptive conduct solely as a form of unfair competition without restricting itself to proving each of the Sherman Act elements.

Question 4: Are there any cases that the FTC did not bring over the past decade on the grounds

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[21] *See* U-Haul International. The case documents are available at http://www.ftc.gov/opa/2010/06/uhaul.shtm. *See also* Valassis Communications (FTC Dkt. No. C-4160) (Mar. 14, 2006); Quality Trailer Products Corp., 115 F.T.C. 944, 945 (1992).

[22] Rambus, Inc., Dkt. No. 9302 (Aug. 2, 2006).

[23] *Available at* http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

[24] Rambus v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

that the alleged conduct involved did not violate other provisions of Antitrust law, but that could have been brought under Section 5?

Answer 4: I am not aware of any case in which the Commission's investigations uncovered conduct that we believed to be anticompetitive where we refrained from bringing a case because the conduct would have violated Section 5 but not any other provision of the antitrust laws.

Question 5: What objective criteria are used by the FTC to determine whether or not to file suit under Section 5?

Answer 5: The Supreme Court has described the general criteria for an action under Section 5.[25] Although it has long been confirmed that Section 5's bar on unfair methods of competition extends beyond the reach of the Sherman and Clayton Act, cases under Section 5 also would involve harm to competition.

Section 5 cases would look to factors considered by courts in assessing Sherman Act cases such as the likelihood of anticompetitive harm and the potential for procompetitive efficiencies. The Commission has held a public workshop to discuss the standards and applications of Section 5.[26] We are planning to issue a report on the workshop with our conclusions and supply further guidance through that vehicle.

Question 6: Will the FTC consider issuing Section 5 guidelines so that companies can conform their conduct to Section 5's requirements?

Answer 6: As noted above, the Commission has held a public workshop to discuss the standards and applications of Section 5. We are planning to issue a report on the workshop with our conclusions, and that report will certainly provide additional guidance to companies seeking to conform their conduct to the law. But importantly, substantial guidance is available now, including the case law listed in my response to the previous question and statements by various Commissioners, such as my own concurrence in *Rambus,* as well as the floor debate from the FTC Act in 1914[27] and, most importantly, the plain language of the statute ("unfair methods of competition").

Question 7: Has any Commissioner argued that Section 2 was insufficient to reach Intel's alleged conduct?

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[25] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986).

[26] *See* "Section 5 of the FTC Act as a Competition Statute," *available at* http://www.ftc.gov/bc/workshops?section5/index.shtml.

[27] The legislative history of the FTC Act clearly shows that Section 5 was not enacted merely to mirror the Sherman Act. Rather, as Senator Cummins, one of the bill's main proponents, squarely stated on the Senate floor; "[t]hat is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not be punished or prevented under the antitrust law." 51 CONG. REC. 12,454 (1914).

Answer 7: Because a complaint has been issued in *Intel*, I will confine my response here to statements that are already a part of the public record.[28] At the time of the complaint, Commissioner Rosch and I issued a joint explanatory statement, which discussed our views of the Section 5 counts and their relationship to other antitrust principles in the following terms:

> Despite the long history of Section 5, until recently the Commission has not pursued free-standing unfair method of competition claims outside of the most well accepted areas, partly because the antitrust laws themselves have in the past proved flexible and capable of reaching most anticompetitive conduct. However, concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a "free pass" under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason, we have seen an increasing amount of potentially anticompetitive conduct that is not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5. It has been understood for many years that Section 5 extends beyond the borders of the antitrust laws, and its broad reach is beyond dispute. Indeed, that broad authority is woven into the very framework of the Commission itself. When Congress passed the Federal Trade Commission Act in 1914, it specifically decided to create an agency that has broad jurisdiction to stop unfair methods of competition, and it balanced that broad authority by limiting the remedies available to the Commission.[29]

Thus, we did not express an opinion on the application of the two statutes, but did express a belief that it would be appropriate to consider both.

Question 8: You mentioned an alleged agreement between U-Haul and Budget to fix prices as an example of the sort of conduct that requires the FTC to exercise its Section 5 power. If there were an agreement to fix prices, why couldn't the other provisions of antitrust law reach that alleged behavior?

Answer 8: Our complaint and consent with U-Haul illustrates the value of Section 5, because it addressed conduct that was an *invitation* to collude, as distinct from an actual completed collusive agreement.[30] Had U-Haul and Budget actually agreed to fix prices, that would have violated the Sherman Act, as you suggest.

Question 9: While I recognize that this hearing is about antitrust enforcement, not privacy, I am interested in your views on whether there is a possible nexus between a company having

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[28] The Intel matter has been withdrawn from the Commission Part III calendar for consideration of a settlement.

[29] Available at http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf.

[30] *See* http://www.ftc.gov/opa/2010/06/uhaulshtm#content.

dominant market power in search and related Internet markets and the appropriate level of scrutiny that such a company's privacy policies should receive. Those who oppose privacy legislation often argue that we should rely on the market to gauge the right level of online privacy and correct missteps in individual cases. But if a company has dominant market power, it could arguably adopt abusive privacy policies without a meaningful market check. Does the Commission believe that distinct privacy oversight might be necessary for dominant firms on the Internet? Does the Commission believe it has the necessary legal authority to engage in such oversight?

Answer 9: Firms can compete over a number of areas that are important to consumers, including both price and nonprice factors. One area of rivalry could be over privacy, and a monopolist would not face that competition. The Commission would certainly take that into consideration. Under the FTC Act, the Commission guards against unfairness and deception by enforcing companies' privacy promises about how they collect, use, and secure consumers' personal information. Under the Gramm-Leach-Bliley Act, the Commission has implemented rules concerning financial privacy notices and the administrative, technical, and physical safeguarding of personal information, and it aggressively enforces the law to prevent pretexting. The Commission also protects consumer privacy under the Fair Credit Reporting Act and the Children's Online Privacy Protection Act. In addition, the FTC uses education and outreach as cost-effective methods to prevent consumer injury, increase business compliance, and leverage its law enforcement program.

Although large or dominant firms have the same obligations as other firms to safeguard consumer privacy, large and dominant firms are likely to attract public attention more often because of the scope of their businesses, and their leadership will be needed to establish policies that protect consumers online. The Commission has moved to encourage best practices from them. For instance, BCP Director David Vladeck recently sent a letter to Google[31] addressing privacy concerns related to Google's plans to digitize millions of books. The letter requested that Google disclose how it will use the personal information it collects when it offers books online and delivers targeted advertising to consumers. In addition, it urges Google to commit to complying with the FTC's self-regulatory principles for online behavioral advertising.[32] This initiative is an example of how the Commission is focusing on this important issue.

Question 10: You testified that so-called "pay-for-delay" settlements are the FTC's "top competition priority" and that they are "on all counts [] a bad outcome." Wouldn't you agree that, at least in some cases, these settlements can lead to a generic drug being available on the market sooner than if the lawsuit had not settled and the brand pharmaceutical company's patent were upheld in court? In cases in which the brand pharmaceutical company would ultimately prevail in the patent litigation, don't the settlements benefit consumers by accelerating entry of generic drug competition into the market before the expiration date of the patent?

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[31] Letter to Jane Horvath, Global Privacy Counsel, Google, Inc., dated September 2, 2009, available at http://www.ftc.gov/os/closings/090903horvathletter.pdf

[32] *FTC Staff Revises Online Behavioral Advertising Principles,* news release dated February 12, 2009 available at http://www.ftc.gov/opa/2009/02/behavad.shtm

Answer 10: We frequently hear claims from the pharmaceutical industry that brand payments to induce generic drug firms to abandon their patent challenges result in earlier generic entry, so I appreciate the opportunity to address the question you raise. First, that claim assumes that the patent holder would ultimately have prevailed in the infringement suit. But it is widely acknowledged that pay-for-delay settlements are most likely to be used to protect the weakest patents (that is, those patents most likely not to be upheld).[33] Second, it assumes that the parties would only settle if the brand paid off the generic. But the evidence shows that parties can and do find ways to settle without exclusion payments.

Moreover, even assuming that a given pay-for-delay settlement enables the settling generic producer to enter the market earlier than it otherwise would have, consumer welfare is not necessarily enhanced. For example, pay-for-delay settlements with so-called "first filer" generic applicants – by far the most common scenario – typically obstruct entry by subsequent generic applicants, including applicants that may have stronger patent claims than the first filer. This result occurs because the Hatch-Waxman Act grants the first generic company to seek FDA approval under "paragraph IV" 180 days of marketing exclusivity, i.e. the first filer is the only generic in the market for 180 days. A first filer usually keeps this exclusivity even when it settles, which means that other generic applicants cannot obtain FDA approval to enter the market until 180 days after the first filer begins selling its product. If the first filer litigates and loses the patent infringement litigation, however, it loses its claim to the 180-day exclusivity period. The first filer's loss thus clears the way for other generics, because the FDA is no longer prevented from giving final approval to other generic applicants seeking to compete.

Question 11: Given the FTC's poor record in litigation challenging patent settlements between brand and generic pharmaceutical companies, and given that the FTC appears to believe that a change in the law is necessary in order to prevail in these lawsuits more frequently, do you think that it is an efficient use of the Commission's limited resources to make these suits the Commission's "top competition priority"?

Answer 11: Challenging pay-for delay settlements is a Commission priority for two reasons: First, the Commission, along with many others, believes that the permissive approach to pay-for-delay settlements taken by some courts is incorrect, and despite setbacks in three circuit courts of appeals, antitrust law in this area is far from settled. Indeed, in one of these circuits, a panel of judges recently invited the plaintiffs to request the full court to reconsider the permissive rule

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[33] Indeed, courts upholding the legality of such settlements have expressly noted this fact. *See, e.g., In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 212 (2d Cir. 2006) (acknowledging that permitting settlements in which branded and generic rivals agree to avoid competition and share the resulting profits would protect patents that are "fatally weak"); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 534 (E.D.N.Y. 2005) ("the patents most likely to be the subject of exclusion payments would be precisely those patents that have the most questionable validity").

adopted in an earlier case.[34] Second, these deals impose enormous costs on consumers – and on the federal government and others who pay the costs of prescription drugs. In its most recent analysis, CBO calculated that stopping these anticompetitive deals will save the federal government approximately $2.68 billion over 10 years. A recent FTC staff report noted that, if not stopped, pay-for-delay deals will, conservatively, cost consumers $3.5 billion a year.[35]

A legislative solution to the problem of pay-for-delay settlements could provide quicker and more comprehensive relief for consumers than antitrust litigation. I therefore look forward to working with the Congress to stop these harmful deals. But in the meantime, the FTC has an obligation to pursue investigations and litigation to protect consumers from conduct that is both anticompetitive and extremely costly to consumers.

Let me also take issue with the notion that we have a "poor record." In fact, in addition to the Second Circuit's extraordinary step of questioning its own standard in the *Tamoxifen* case referenced above, in March 2010, a federal district court judge in Philadelphia denied a defense motion to dismiss the Commission's case against Cephalon

Question 12: The proposed revised Merger Guidelines and the FTC's new emphasis on Section 5 both appear to increase the FTC's discretion to apply its own judgment that behavior is anticompetitive, unconstrained by the objective limits of settled antitrust law. Do you agree that, in general, the FTC's limited enforcement resources are better spent aggressively pursuing violations of settled antitrust law rather than pushing for extensions of the law?

Answer 12: The proposed revised Guidelines that we made public last April are still undergoing revision in response to public comments, so the final product of this important effort to bring the Guidelines up to date is not yet available. Nonetheless, I want to emphasize that the final product will not signal a change in enforcement policy. The agencies' goal in bringing the Guidelines up to date is simply to make the Guidelines better reflect actual agency practice. In this regard, actual agency merger enforcement practice has always focused on, and will continue to focus on, those mergers that are likely to harm consumers. This is the same focus found in the case law. An objective of the revised Guidelines is to make clear that, in our enforcement deliberation, specific, pertinent facts developed during a merger review – not a rigid "check the box" analysis – will govern our assessment. The new Guidelines will not promote unbounded agency discretion, instead we must conclude, based on thorough analysis of all relevant facts, that a merger may substantially lessen competition before we will challenge a transaction.

Similarly, Section 5 actions – which are appealable to a Circuit Court of Appeals and ultimately to the Supreme Court – must be predicated on a finding of anticompetitive harm. The Commission is careful to bring cases based on sound economic and legal reasoning. As noted above, the Commission is planning to issue a report that will provide additional guidance on

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[34] *Arkansas Carpenters Health and Welfare Fund v. Bayer AG,* 604 F.3d 98, 110 (2d Cir. 2010) (per curiam) ("we believe there are compelling reasons to revisit *Tamoxifen*").

[35] Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions, FTC Staff Study (Jan. 2010), *available at* www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

when it will bring a Section 5 case.

Question 13: Are the Antitrust Division and the FTC concerned about the potential ability of companies with market power in the Internet search market to use that market power to steer consumers toward their own products or favored products in other markets, or otherwise to foreclose competition?

Answer 13: The FTC staff is aware of such allegations, but I cannot comment on any specific allegations at this time. However, I can assure you that because of the importance of the Internet and Internet advertising, the Commission has devoted considerable resources to both competition and consumer protection issues raised by Internet-related industries. For example, FTC staff wrote extensively about them – including "net neutrality" – in the wake of our Broadband Competition workshop on this topic in 2007.[36] And the Commission and its staff have continued to follow these issues as Internet markets, and our understanding of them, have evolved. And with regard to search engine neutrality and Internet advertising in particular, the Commission recently investigated two proposed mergers involving Google, *Google/DoubleClick*[37] and *Google/AdMob*.[38] In each instance, after intensive investigation, the Commission closed its investigation after concluding that the facts uncovered did not provide reason to believe that the transaction would be likely to injure competition.

Internet-related markets evolve quickly, so we continue to closely monitor this sector, and we will investigate any circumstances that threaten competitive harm and take enforcement action as appropriate.

Question 14: It seems that both the Antitrust Division and the FTC have played a role in investigating transactions and activities in the Search and Search Advertising markets. The FTC has looked at Google acquisitions of DoubleClick, YouTube, and AdMob, along with the overlapping director issue, while the DOJ has examined the Google/Yahoo and Microsoft/Yahoo deals, as well as the proposed settlement of the Google Books litigation. How have the Antitrust Division and the FTC addressed clearance with respect to these investigations?

Answer 14: The agencies' clearance procedures are based on expertise in the product markets to be investigated. There are some markets, however, in which both agencies have relevant expertise and the clearance procedure seeks to allocate investigative responsibility for specific

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[36] *See, e.g.*, Broadband Connectivity Competition Policy, workshop web page *available at* http://www.ftc.gov/opp/workshops/broadband/index.shtml; FTC, Broadband Connectivity Competition Policy: FTC Staff Report (June 2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

[37] Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[38] Statement of the Federal Trade Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), *available at* http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

investigations. Both agencies have expertise in various Internet services markets, and thus it will not be uncommon for the agencies to investigate the activities of a single firm in different, but possibility adjacent, markets.

Question 15: There are reports that the European Commission may be investigating the state of competition in Internet search, search advertising, and related markets, and that numerous companies have raised concerns about a wide variety of issues. Are the Antitrust Division and the FTC coordinating their investigations of these issues with the European Commission?

Answer 15: The European Commission issued a press release on February 24, 2010, acknowledging that it had received and is examining three complaints against Google.[39] The FTC is aware of these complaints and FTC and EC staff have discussed issues raised by these complaints, as they did under the terms of the 1991 U.S-EC cooperation agreement during their respective investigations of Google's acquisition of DoubleClick in 2007-08. As provided in Article IV of that agreement, the FTC and the EC coordinate their respective investigations where it is appropriate and in their respective interests to do so.

Question 16: Wouldn't you agree that minimum resale price agreements can foster competition in at least some situations? For example, hypothesize a market for blue jeans that is robustly competitive with regard to price, quality, and prestige. In this market, there are both low price brands that compete primarily on price and prestige brands that compete primarily on prestige. If a new market entrant wanted to establish itself as a an option between the two poles of a bargain brand and a prestige brand, it could mandate, through resale price maintenance agreements with its retailers, that its jeans be sold at a price point at or above the median price in the market. If the new entrant's marketing strategy succeeds, then consumers would gain a new option. For some price-conscious consumers, the new entrant could provide a prestige brand that was within their budget. For some prestige-conscious consumers, the new entrant could provide a cheaper prestige brand. For all consumers, there would be more options and more competition in the blue jean market. Wouldn't this hypothetical new market entrant's marketing strategy be pro-competitive?

Answer 16: Economic research suggests that, under certain circumstances, resale price maintenance may enhance interbrand competition, and this hypothetical may be one of those instances. However, this is not the kind of scenario in which the FTC would likely bring a resale price maintenance case. I am not aware of any case in which the FTC challenged a new entrant's use of resale price maintenance to break into a market. Our cases tend to be focused on established manufacturers or retailers using resale price maintenance to facilitate collusive behavior. The Commission continues to believe that there may be circumstances in which RPM may raise prices and reduce choices for consumers.

Question 17: If, at least in some cases, a minimum resale price agreement can be pro-

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[39] (Press release available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/47&format=HTML&aged=0&language=EN&guiLanguage=en).

competitive, then why isn't a rule of reason approach that evaluates the pro- and anti-competitive effects of a particular resale price maintenance agreement preferable to a per se rule that bans pro- and anti-competitive resale price maintenance agreements alike?

Answer 17: My concern is that resale price maintenance can also facilitate collusion at the manufacturing level, the retail level, or both. I agree with Justice Breyer's analysis of the relevant empirical evidence in his *Leegin* dissent, where he cites several studies, including an FTC Bureau of Economics Staff Report, showing that resale price maintenance tends to produce higher prices than would otherwise be the case.[40] Justice Breyer further states that although "economics can, and should, inform antitrust law, [ ] antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views."[41] I agree with that sentiment, and for these reasons believe that *Dr. Miles* should not have been overturned. I agree with you that, post *Leegin*, the current standard of bringing an RPM case cannot be one of *per se* illegality.

Question 18: Assistant Attorney General Varney has advocated a "structured rule of reason" for analyzing minimum resale price agreements. Do you support such an approach? Do you think such an approach is preferable to a per se rule? Why or why not?

Answer 18: As I stated above, I do not think the empirical evidence on resale price maintenance supported a change in the long standing *per se* law. However, the Commission, of course, follows the law as the Supreme Court has interpreted it. My response to the decision in *Leegin* is that we must apply any test carefully. AAG Varney's approach is one way to do so. In so doing, it is imperative that the analysis take great care to make sure that the facts actually and concretely support any contentions that a given exercise of RPM is made necessary by so-called "free rider" problems or is otherwise procompetitive, for example, because it promotes interbrand competition. I believe that the proper enforcement rule is generally to look closely at resale price maintenance arrangements unless the specific facts of a given matter compel a different conclusion.

Question 19: The ABA Section on Antitrust has published a comment criticizing the proposed changes to the merger guidelines. Specifically, the Antitrust Section is concerned that ""the Proposed Guidelines unduly downplay the role of market definition." I agree with this criticism.

> The Clayton Act targets mergers that substantially lessen competition "in any line of commerce or in any activity affecting commerce in any section of the country." I read this language as requiring that the merger affects a specific product or geographic market. The binding Supreme Court case *Brown Shoe v. US* held that anti-competitiveness "can be determined only in terms of the market affected."
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> **19(a):** If the agencies hope for a Clayton Act challenge to a merger to be upheld in court, must they not first define the market in which competition will be affected?

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[40] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2728 (2007).
[41] *Leegin* at 2729.

19(b): Do you agree with the ABA Section on Antitrust that "it would be more consistent...to make clear that market definition remains a necessary element of merger analysis"?

19(c): Can you commit to revising the proposed guidelines to require the definition of markets as a necessary step in merger analysis?

Answer 19: The ABA submission is generally supportive of the agencies' efforts to revise the guidelines. In terms of this specific issue, I do believe that market definition plays an important role in merger analysis. First, it specifies the line of commerce and the section of the country in which a competitive concern may arise. Second, market definition allows the agencies to identify market participants and measure market shares and market concentration, both of which can be useful in illuminating a merger's likely competitive effects. The determination of "likely competitive effects" remains the ultimate touchstone of any merger analysis, and at times the relevant market can be evidenced through careful assessment of those effects. For example, in looking at a consummated merger, anticompetitive effects may be directly observable from post-merger evidence, and the relevant market properly may be defined as the product (or service) and geographic area in which those anticompetitive effects are present. I expect that the revised Horizontal Merger Guidelines will clarify this. The agencies will take this and all other comments into careful consideration for the final guidelines.

Question 20: The 1992 Guidelines stated that the Antitrust Division and the FTC should begin analysis and evaluation of mergers by defining the relevant market. The Agencies would then, in the following order, examine: market concentration, potential competitive effects, possible entry, efficiencies, and, if relevant, the failing firm defense.

> This clearly defined and relatively objective framework functioned like a roadmap for businesses and antitrust practitioners, by which private actors could analyze their own conduct in the same manner in which the conduct would be analyzed by the agencies. The proposed revisions appear to dispense with this objective framework, allowing the agencies to holistically consider other "relevant factors" before defining the market and proceeding with a step-by-step analysis.
>
> I understand that the revised guidelines are intended to present a more accurate picture of the manner in which lawyers and economists in the agencies actually analyze mergers. And I understand that the subjective experience of analyzing a merger did not always necessarily conform to the formal structure of the 1992 guidelines. But I fear that by dispensing with the objective step-by-step analysis and replacing it with a relatively subjective holistic analysis of factors, the new guidelines make it more difficult for private actors to conform their behavior to comply with the agencies' interpretation of antitrust law. Do you agree? Why or why not? Can you commit to revising the proposed guidelines to encompass a more rigorous statement of the objective findings that an agency must make before challenging a merger?

Answer 20: The agencies have never followed a fixed, unbending order of analysis when reviewing mergers. As the FTC and DOJ explained in our 2006 Commentary on the Horizontal Merger Guidelines, "the Agencies do not apply the Guidelines as a linear, step-by-step progression that

invariably starts with market definition and ends with efficiencies or failing assets." Rather, "the Agencies' analysis of proposed mergers . . . is part of an integrated approach." This "integrated process is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." Commentary at 2. There is a broad consensus that the 1992 Guidelines have functioned well in assisting the antitrust bar and the business community to understand how the agencies evaluate mergers. I can assure you that a goal of any revisions to the Guidelines will be to maintain that high level of assistance, and that the rigorous analysis that the agencies historically have brought to bear in analysis of mergers is continuing and will continue following revision of the Guidelines.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 22, 2010

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the responses for the record of Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, to written questions received following the June 9, 2010, hearing held by the Subcommittee on Antitrust, Competition Policy and Consumer Rights entitled, "Oversight of the Enforcement of the Antitrust Laws."

We hope this information is helpful to you. If we can be of further assistance, please do not hesitate to contact this office. The Office of Management and Budget has advised us that there is no objection to the submission of this letter from the perspective of the Administration's program.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Jeff Sessions
Ranking Member

Questions for the Record from the Hearing before
the Subcommittee Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
June 9, 2010

From Senator Orrin G. Hatch

For both Chairman Leibowitz and Assistant Attorney General Varney:

Q. Today we expect hospitals and healthcare providers to work more closely to improve upon efficiency and quality in delivering healthcare and in doing so, lower the cost of care both to patients and to the federal government. However, according to many care providers, a lack of clarity in the administration and enforcement of our antitrust laws has created confusion that has prevented greater clinical integration.

In the 1990s, the FTC and the Justice Department produced the "Statement of Antitrust Enforcement Policy in Health Care" and, at that time, acknowledged that further guidance would be necessary as health care continued to evolve. More than a decade has passed and providers are still waiting on that further guidance so that they can more effectively collaborate to improve the delivery and provide a real reduction in health care costs.

Do you intend to produce user-friendly guidance on clinical integration? If so, is there an expected timetable? If not, can you please explain why not?

A. Antitrust has—and will continue to have—an essential role to play in health care. If health care reform is to harness the power of competitive markets to produce more and more efficient systems, then we must be up to the challenge of ensuring that our health care markets are as competitive as possible. I strongly agree with you that, in this dynamic environment, a successful effort will require more than "business as usual." It will require that we provide clear and accessible guidance to health care consumers, providers, and payers so that there is the predictability needed for health care reform to succeed. We are currently working with our colleagues at the Federal Trade Commission to get a better understanding of the types of integrated delivery models that providers are contemplating, any potential antitrust concerns they might have, and how to best provide them with the guidance they need. Central to this, it is important that health care providers and other stakeholders in the health care industry understand that antitrust is not an impediment to the formation of innovative delivery systems that will improve the quality and reduce the cost of health care for Americans. In this regard, we will consider how we can improve, streamline, and make more transparent our review of integrated provider networks so that providers have user-friendly guidance for forming such networks in accordance with the antitrust laws.

Q. As you may know, I have had a keen interest in our domestic and international intellectual property laws. On May 26th, the FTC, DOJ, and the Patent and Trademark

Office held a workshop to discuss the interface between antitrust, intellectual property, and standards. This week, at the Organization for Economic Co-operation and Development meetings, it is my understanding that the member nations will examine many of these same issues. Further, the World Intellectual Property Organization recently held a workshop on this same subject matter and has plans to continue to explore them going forward.

Given the emphasis the U.S. government has placed on protecting intellectual property rights around the world, and given the challenges we face in China and other countries where foreign governments have been known to try to force outside innovators – including American innovators -- to transfer their intellectual property on non-commercial terms, how are you managing the dialogue on these critical issues at home and abroad? For example, when U.S. antitrust officials make statements that "patent hold ups" and "royalty stacking" are widespread problems without citing empirical evidence, doesn't this invite or provide cover to foreign governments to use their own antitrust laws and remedies to restrict intellectual property rights, potentially disadvantage American inventers and innovators – not to mention American jobs -- and ultimately undermine U.S. efforts to get foreign governments to protect intellectual property rights?

A. Innovation is critically necessary to promote economic growth, create jobs, and maintain U.S. competitiveness in the global economy. Intellectual property rights, competition, and U.S. industry standards are some of the significant engines that drive U.S. and global innovation. Recognizing the importance and value of intellectual property rights, the Department reached out and began a process of engagement with our colleges at the PTO and the FTC with substantive, fact-based discussions about critical issues at the intersection of patent and antitrust law policy. The Department will also be working with relevant U.S. agencies, including USTR, the Department of Commerce's National Institutes of Standards and Technology (NIST), and others in a process led by the National Science and Technology Council (NSTC) to ensure that our communication to international trading partners is well-informed and consistent with international obligations and the positions the U.S. has taken with respect to the development of and participation in international standards in the World Trade Organization (WTO). We will use these forums, as well as our active participation in the OECD and WIPO, to extol the empirically-supported, procompetitive benefits of the U.S. approach to creating and enforcing IP rights, promoting competition, and helping standard-setting organizations determine which patent policies will work best for their members in their specific industry and to discourage the development and use of competition policies and enforcement that unfairly disadvantage U.S. rights holders or create unnecessary obstacles to international trade. Since the issuance of the 1995 DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, we have recognized that standard antitrust analysis should be applied to intellectual property, taking into account any relevant differences in forms of property. Using these Guidelines as a touchstone, we consistently deliver the message that economies work best when intellectual property and antitrust law and policy work in balance to encourage research and development—creating and protecting intellectual property rights, regardless of the national origin or ownership of such rights, and promoting competition around those intellectual property rights.

Q. The Internet has obviously become a core part of the nation's infrastructure, driving growth, innovation, and information flow. I am interested in learning more about any concerns your agencies have with regard to any potential anti-competitive activity online. During the past few years, we've seen multiple investigations into the search and online advertising markets. As you know, the online search market is continually becoming the primary navigation tool for online consumers and an important channel for the distribution of content and information. Obviously, there are very few significant competitors in this market. Many have argued that this will have a negative impact on consumers.

What, in your view, is the state of competition in these markets? Are you concerned with anything that you are seeing in terms of anti-competitive activity or dominant players that could harm competition online? What do you think the focus of policy-makers should be in order to preserve competition and limit barriers to entry of the online markets?

A. The Antitrust Division has been active in opening investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries, and where appropriate, has vigorously pursued enforcement actions to prevent exclusionary or discriminatory behavior from harming consumers. For example, in the last year the Division examined and cleared the proposed Internet search and paid search advertising agreement between Microsoft Corporation and Yahoo! Inc., and expressed views to the court about the proposed settlement of the Google Books litigation. In the latter case, the Division filed with the court statements setting forth our concerns with respect to the parties' proposed settlement agreement and underscored the importance of the concerns expressed in those filings at the court's settlement fairness hearing. We continue to monitor this matter. The antitrust laws provide an important set of tools for addressing conduct that can be used to harm consumers—whether Internet companies that are consumers of Internet gateway and platform services or consumers of applications and services distributed over the Internet.

For Assistant Attorney General Varney:

Q. I am hoping to get some clarification on the Department of Justice's decision to file suit against Dean Foods. As you may know, a June 2009 GAO report on *Agricultural Concentration and Commodity and Food Retail Prices*[1] concluded that "empirical economic literature has not established that concentration has adversely affected commodity or food prices in the beef, pork, dairy or retail sectors." That same GAO report found that concentration in dairy processing had little or no adverse impact on commodity or food prices. Can you cite specific evidence that contradicts the findings of the GAO on this matter?

A. Since the Department's challenge to Dean Foods Company's acquisition of Foremost Farms USA's Consumer Products Division currently is pending, I refer you to our public filings in the litigation. Generally, when the Department investigates a transaction's potential harm to

[1] GAO-09-746R Concentration in Agriculture, June 30, 2009

competition in the agricultural sector, we consider all information available at the time to determine whether enforcement action is appropriate to protect and promote competition.

Q. With regard to the overall dairy market, some have argued that the problems in the dairy market do not stem from concentration, but from the system of milk price regulation, which has been in place since the Great Depression. According to this argument, consumers would benefit if this system was modernized and reformed. To what extent will these types of policy changes be discussed during the Justice Department's workshop later this month, the focus of which is on the dairy industry?

A. The June 25, 2010, workshop focusing on the dairy industry explored issues associated with milk prices and competition. The workshop had three substantive panels: a panel discussion to examine changes in the industry, the perspectives of industry stakeholders and the potential implications for regulation and enforcement; a panel on market concentration; and a panel on farm prices for milk, contracts and related issues. The milk marketing order system was discussed during this workshop. A transcript and video of the workshop are available on the Division's website at *www.justice.gov/atr/public/workshops/ag2010/index.htm.*

From Senator John Cornyn

1. A June 2009 GAO report on *Agricultural Concentration and Commodity and Food Retail Prices*[2] concluded that "empirical economic literature has not established that concentration has adversely affected commodity or food prices in the beef, pork, dairy or retail sectors." Beyond finding no evidence of adverse effects on prices, that same GAO report specifically found that concentration in dairy processing had little or no adverse impact on commodity or food prices. Do you believe that the GAO's conclusions were mistaken, and if so, on what basis?

Answer: The Department typically gathers information on market conditions, customer and competitor concerns and perspectives, and other information while conducting investigations of particular conduct or transactions. We generally seek information across numerous aspects of the industries in question, and consider all information that bears on the likely effect on competition of a transaction. In each case, our objective is to determine whether the information indicates that enforcement action under the antitrust laws is appropriate at that time in order to protect competition and consumers. While we have read the June 2009 GAO report on *Agricultural Concentration and Commodity and Food Retail Prices*, at this time the Department has not attempted to replicate or verify its conclusions. We have heard in the Joint DOJ and USDA workshops that many farmers are concerned with the impact of increased concentration in dairy processing.

2. Wouldn't you agree that the federal system of milk price regulation that dates back to the Great Depression has a significant effect on competition and milk prices? Will price regulation reform be considered as part of your workshop proceedings?

Answer: The June 25, 2010, workshop focusing on the dairy industry explored issues associated with milk prices and competition. The workshop had three substantive panels: a panel discussion to examine changes in the industry, the perspectives of industry stakeholders and the potential implications for regulation and enforcement; a panel on market concentration; and a panel on farm prices for milk, contracts and related issues. The milk marketing order system was discussed during this workshop, and the Division does believe that any analysis of milk pricing trends and levels of competition should include an evaluation of how regulation impacts the market. A transcript and video of the workshop are available on the Division's website at *www.justice.gov/atr/public/workshops/ag2010/index.htm*.

3. Are the Antitrust Division and the FTC concerned about the potential ability of companies with market power in the internet search market to use that market power to

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[2] U.S. General Accounting Office, Rep. No. GAO-09-746R, CONCENTRATION IN AGRICULTURE (2009).

steer consumers toward their own products or favored products in other markets, or otherwise to foreclose competition?

Answer: The antitrust laws protect consumers against conduct or transactions that harm the competitive process and deny consumers the protections of competition. We believe that the antitrust laws provide an important set of tools for addressing conduct that can be used to harm consumers in the Internet search market—whether it be consumers of gateway and platform services who seek faster and more reliable Internet infrastructure development, or consumers of applications and services distributed over the Internet who seek innovative new products and services brought to them by novel business methods. The Antitrust Division has been very active in its investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries. When it is appropriate, the Division vigorously pursues enforcement actions to prevent conduct such as discriminatory practices that may foreclose competitors or favor certain content in a way that harms consumers.

4. It seems that both the Antitrust Division and the FTC have played a role in investigating transactions and activities in the Search and Search Advertising markets. The FTC has looked at Google acquisitions of DoubleClick, YouTube, and AdMob, along with the overlapping director issue, while the DOJ has examined the Google/Yahoo and Microsoft/Yahoo deals, as well as the proposed settlement of the Google Books litigation. How have the Antitrust Division and the FTC addressed clearance with respect to these investigations?

Answer: Over the years the two agencies have developed a process for determining which agency will handle a particular matter, generally on the basis of which agency has the most current experience in the particular markets involved. This process enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests on private parties. On occasion a matter arises in which both agencies believe each has more expertise. In these circumstances, and indeed in all others, the agencies share responsibility for deciding which of them will handle the investigation. We worked with the FTC to clear the matters you mentioned as quickly and efficiently as possible, and will continue to do so for all matters.

5. There are reports that the European Commission may be investigating the state of competition in Internet search, search advertising, and related markets, and that numerous companies have raised concerns about a wide variety of issues. Are the Antitrust Division and the FTC coordinating their investigations of these issues with the European Commission?

Answer: Although I cannot comment on whether or not any specific investigation involving the markets you refer to has been undertaken, as a matter of practice we coordinate with the European Commission on issues of common interest. As I mentioned at the hearing, the Department has, in an unprecedented move, hired a European lawyer as a special counsel to the Assistant Attorney General to help us work on coordination issues for particular investigations, as well as more broadly.

6. Wouldn't you agree that minimum resale price agreements can foster competition in at least some situations? For example, hypothesize a market for blue jeans that is robustly competitive with regard to price, quality, and prestige. In this market, there are both low price brands that compete primarily on price and prestige brands that compete primarily on prestige. If a new market entrant wanted to establish itself as a an option between the two poles of a bargain brand and a prestige brand, it could mandate, through resale price maintenance agreements with its retailers, that its jeans be sold at a price point at or above the median price in the market. If the new entrant's marketing strategy succeeds, then consumers would gain a new option. For some price-conscious consumers, the new entrant could provide a prestige brand that was within their budget. For some prestige-conscious consumers, the new entrant could provide a cheaper prestige brand. For all consumers, there would be more options and more competition in the blue jean market. Wouldn't this hypothetical new market entrant's marketing strategy be pro-competitive?

Answer: I agree with Justice Breyer's statement in dissent in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 914 (2007), that "as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits."

7. If, at least in some cases, a minimum resale price agreement can be pro-competitive, then why isn't a rule of reason approach that evaluates the pro- and anti-competitive effects of a particular resale price maintenance agreement preferable to a per se rule that bans pro- and anti-competitive resale price maintenance agreements alike?

Answer: While some resale price maintenance agreements may bring benefits, figuring out what is the best legal rule for analyzing them—whether rule of reason or a per se ban— may depend on how easy it is for the courts to identify instances in which the benefits are likely to outweigh potential harms. While the law has been moving away from per se rules where analytical tools have developed the power and sophistication to determine competitive effects with more ease and accuracy, the courts have indicated that in instances where doing so proves too costly to administer, a clear and simple price-related antitrust rule may be preferable.

8. You have advocated a "structured rule of reason" for analyzing minimum resale price agreements. Do you still support such an approach? Do you think such an approach is preferable to a per se rule? Why or why not?

Answer: Because the *Leegin* majority found that the use of RPM can either serve legitimate business purposes, on the one hand, or lead to creation or maintenance of market power, on the other hand, the Court invited lower courts to separate the wheat from the chaff and "devise rules ... for offering proof, or even presumptions," "to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." *Leegin*, at 898-99. I think a careful reading of *Leegin* suggests a structured application of the rule of reason tailored to the plaintiff's theory of how RPM is anticompetitive in the case at

hand. A court adopting such an approach could impose a burden on a defendant that would vary with the strength of the showing made by the plaintiff. For instance, a court could require a defendant to establish that it adopted RPM to enhance its success in competing with rivals and that RPM was a reasonable method for accomplishing its procompetitive purposes. The use of a structured rule of reason is consistent with modern development of antitrust analysis under section 1 of the Sherman Act, which has shifted from a binary choice between the per se rule and a full-blown rule of reason analysis to a far more focused inquiry in many instances.

9. The ABA Section on Antitrust has published a comment criticizing the proposed changes to the merger guidelines. Specifically, the Antitrust Section is concerned that "the Proposed Guidelines unduly downplay the role of market definition." I agree with this criticism.

   The Clayton Act targets mergers that substantially lessen competition "in any line of commerce or in any activity affecting commerce in any section of the country." I read this language as requiring that the merger affects a specific product or geographic market. The binding Supreme Court case *Brown Shoe v. US* held that anti-competitiveness "can be determined only in terms of the market affected."

   a. If the agencies hope for a Clayton Act challenge to a merger to be upheld in court, must they not first define the market in which competition will be affected?
   b. Do you agree with the ABA Section on Antitrust that "it would be more consistent...to make clear that market definition remains a necessary element of merger analysis"?
   c. Can you commit to revising the proposed guidelines to require the definition of markets as a necessary step in merger analysis?

Answer: Courts interpret the Clayton Act to require definition of the market in which competition will be affected. Nevertheless, when the agencies investigate proposed transactions, each investigation involves following the facts of the particular matter—a process of determining what information we need and how to analyze that information to determine the likely competitive effects of the merger or acquisition. This process will lead the agencies to the point where we determine whether the evidence supports a finding of a violation of the antitrust laws. The revisions to the Guidelines, to be transparent and consistent with the agencies' practice, should make clear, as did the Commentary on the Horizontal Merger Guidelines issued in 2006, that the agencies' analysis need not start with market definition, even if the courts require presentation of evidence to define the relevant antitrust markets when the agencies bring a challenge. However, the Division is seriously considering the comments we have received on the latest draft of the revisions to the Guidelines, including the observations you make.

10. The 1992 Guidelines stated that the Antitrust Division and the FTC should began analysis and evaluation of mergers by defining the relevant market. The Agencies would then, in the following order, examine: market concentration, potential competitive effects, possible entry, efficiencies, and, if relevant, the failing firm defense.

This clearly defined and relatively objective framework functioned like a roadmap for businesses and antitrust practitioners, by which private actors could analyze their own conduct in the same manner in which the conduct would be analyzed by the agencies. The proposed revisions appear to dispense with this objective framework, allowing the agencies to holistically consider other "relevant factors" before defining the market and proceeding with a step-by-step analysis.

I understand that the revised guidelines are intended to present a more accurate picture of the manner in which lawyers and economists in the agencies actually analyze mergers. And I understand that the subjective experience of analyzing a merger did not always necessarily conform to the formal structure of the 1992 guidelines. But I fear that by dispensing with the objective step-by-step analysis and replacing it with a relatively subjective holistic analysis of factors, the new guidelines make it more difficult for private actors to conform their behavior to comply with the agencies' interpretation of antitrust law. Do you agree? Why or why not? Can you commit to revising the proposed guidelines to encompass a more rigorous statement of the objective findings that an agency must make before challenging a merger?

Answer: The goal of the review of the Merger Guidelines is to take into account legal and economic developments that have occurred since the last significant guidelines revision in 1992 and to determine whether the current guidelines accurately reflect the current practice of merger review at the Department and the FTC. It is important that companies have guidelines to help them plan transactions and avoid violating the antitrust laws, and we believe that the adjustments, by better reflecting agency practice, will give better guidance. As I noted above, the Division is continuing to refine the revisions to the Merger Guidelines to take into account various comments and to make them better reflect agency practice and give more useful guidance to the public.

From Senator Herbert Kohl

1. From time to time, we hear calls that the old rules of antitrust don't apply to the so-called "new economy," especially with respect to high-tech industries. Some argue that antitrust law is outmoded and retards innovation. Supporters of antitrust enforcement, on the other hand, argue that antitrust has proven time and again to be just as crucial to competition today as yesterday. They argue that antitrust principles remain sound, and are flexible enough to take into account conditions in new industries. What's your view? Are the concerns of those in the high tech industry regarding what they view of overzealous antitrust enforcement chilling innovation warrented? Do new high tech industries require a different framework of antitrust enforcement or are the existing antitrust doctrines sufficient?

Answer: I agree that the antitrust laws remain an important tool for ensuring that all Americans reap the benefits of competition. The antitrust laws are written in language sufficiently broad to allow flexible application that is suitable to enhance competition under a wide variety of circumstances. The Antitrust Division is mindful of the concern that more aggressive remedial schemes might chill competition on the merits, along with procompetitive benefits and innovation that may ultimately benefit consumers. As a fundamental principle, the Division works to develop sufficient market intelligence to understand the competitive significance of new business methods and strategies, and to know what emerging dynamics pose threats to established incumbents. Antitrust encourages firms to innovate and compete. We will continue to seek an enforcement regime that stops conduct or transactions that threaten harm to competition while working to craft the right remedies and, if necessary, pursue the best interpretation of the law in the courts, so that firms in high tech industries, as in all industries, have guidance they need to compete and innovate.

2. Google has attracted increased antitrust scrutiny in recent years. It has grown to become a dominant player in internet search and internet search advertising. For a majority of consumers the key point of access to the Internet is to perform a Google search. This gives Google enormous power over the entire Internet economy. Some commentators are concerned whether Google searches are truly neutral, and there have been accusations that Google's search algorithm favors its own e-commerce sites as well as Google's other niche sites and services. Is there a basis for the Antitrust Division and FTC to ensure "search neutrality" under antitrust law, especially considering the massive amount of information and multi-billion dollars of e-commerce that flow through the Internet? Or should we just trust Google's promise to operate a purely neutral search engine? More generally, how will you scrutinize allegations of anti-competitive behavior by Google in the Internet sector in the future?

Answer: The Antitrust Division has been active in opening investigations to thoroughly review conduct and transactions that threaten harm to competition in online industries, and where appropriate, has vigorously pursued enforcement actions to prevent discriminatory behavior from harming consumers. As part of its investigations, the Division considers all information relevant to determining whether the conduct in question raises competitive concerns. In addition, the Department continues to work with the Federal Communications Commission on its broadband policy, and supports its principles to preserve and promote the open and interconnected nature of

the public Internet. The antitrust laws provide an important set of tools for addressing discriminatory conduct that can be used to harm consumers, whether it be consumers of Internet gateway and platform services who seek faster and more reliable Internet infrastructure development, or consumers of applications and services distributed over the Internet who seek innovative new products and services brought to them by novel business methods. You can be assured that we will work aggressively to thoroughly investigate allegations or other indications of anticompetitive conduct or transactions in Internet search and other e-commerce industries, and take enforcement action when appropriate to ensure that competition is not harmed.

3. We've also recently heard concerns expressed about Apple, and its growing share of mobile devices such as the i-Phone and i-Pad. Apple is now placing new requirements on applications developers for these developers that restrict the use of tools which allow developers to write apps to different devices. To some these restrictions resemble the conduct that Microsoft engaged in during the 1990s to exclude competitors from its platform. Do you have any concerns about the competitive implications of Apple's new restrictions on applications developers?

Answer: We are aware of the concerns in the marketplace regarding requirements that Apple, Inc. places on application developers. You can be assured that the Division will thoroughly investigate allegations of conduct that threatens harm to competition and consumers, and if we find that conduct such as that you describe violates the antitrust laws, we will take enforcement action.

4. Last month, the FCC released its annual report on competition in the cell phone industry, and found significant increases in concentration in the wireless market. Last July, I wrote to you after our hearing on the causes of prices increases charged for text messaging among the four major national cell phone carriers, prices that had doubled over a two year period. We concluded that there was no evidence of collusion among the cell phone providers, but that these parallel price increases were evidence of a lack of competition in the cell phone market. Last month's FCC Report appears to support that conclusion.

Are you concerned regarding the level of concentration in the cell phone market? What can the Justice Department do to promote more competition in this industry?

Answer: The Antitrust Division has long recognized the importance of preserving competition in the mobile wireless telecommunications industry, and has brought enforcement actions where appropriate. *See, e.g., United States v. Verizon Communications Inc.*, No. 1:08-CV-01878-EGS (D.D.C. 2008); *United States v. AT&T Inc.*, No. 1:07-01952-ESH (D.D.C. 2007); *United States v. Alltel Corp.*, No. 0:06-03631-RHK-AJB (D. Minn. 2006). The Antitrust Division will continue to monitor this important industry for potentially anticompetitive conduct, and we will take any enforcement action that may be warranted to protect and promote competition.

5. One issue that has long concerned us on the Antitrust Subcommittee is the state of competition in the cable and pay TV industry. Each year for the last decade and a half, consumers have suffered from continual annual cable rate increases at a rate of nearly triple the rate of inflation. These rate increases are occurring when the prices consumers pay for most other telecommunications services – such as local phone service and internet access – has hardly

increased at all. Are these cable TV rate increases a "red flag" showing us that there is a failure of competition in the cable TV industry?

Answer: In recent years, video distribution has received a boost of additional competition from wireline video providers, including the telephone companies. Nonetheless, in some instances a lack of competition can result in increases in cable TV rates. To this end, the Division has provided guidance to states in ensuring that video franchising does not impede competition, so that consumer gains in both video and broadband services are more likely to be realized. When franchising authorities impose restrictions on entry beyond those necessary to protect the public interest, this can weaken competitive pressures on cable TV rates. For example, some local franchising authorities have taken a long time to process applications for franchises, made demands for goods and services (such as landscaping) that are unrelated to the provision of video services, or imposed build-out requirements that have unnecessarily discouraged competitive entry. In a 2007 report, the Federal Communications Commission determined this conduct can create unreasonable barriers to entry into the provision of video services. *See Report and Order and Further Notice of Proposed Rulemaking, In re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, FCC 06-180 (rel. Mar. 5, 2007). Cable television consumers are better served if franchising restrictions do not prevent the market from creating a wider selection of providers. The Antitrust Division will continue to monitor this industry closely, take enforcement actions where necessary to prevent harm to consumers, and seek opportunities to bring our expertise to bear to promote competition.

6. (a) Recently we have been studying the emergence of video over the Internet. Millions of consumers now watch a wide variety of TV programming using broadband Internet connections. Some consumers – known as "cord cutters" – have dropped their pay TV subscriptions entirely and view TV programming over the Internet. The number of cord cutters today is estimated to be 800,000 and growing. Do you agree with me that video over the Internet has the possibility to develop into a strong competitive rival to traditional pay TV services such as cable and satellite? And how can antitrust enforcement ensure that competition flourishes and these new entrants are not stifled are retarded by the dominant pay TV players who might view this competition as a threat?

(b) We have recently heard reports that cable companies were demanding that programmers keep programming off the Internet as a condition of the cable company carrying that programming. Programmers -- who need cable distribution of their programming – have no choice but to comply. Does this concern you? And, more generally, would you be concerned by obstacles placed by pay TV companies to prevent Internet distribution of programming?

Answer: I agree that competition makes consumers better off when they have more providers to choose from for viewing TV and other video programming—whether over cable, fiber optics, satellite, or the Internet. You can be assured that the Antitrust Division will thoroughly investigate allegations of conduct that have the effect of limiting the choices consumers have for distribution of programming, and will take action to protect competition and consumers.

7. During last February's Winter Olympics, NBC showed thousands of hours of Olympics events, much of it live, on its Internet website, NBCOlympics.com. But to view much of that content, a viewer first had to have a subscription to cable or satellite pay TV services. On February 27th, I wrote to NBC CEO Jeff Zucker stating "it is our view that video over the Internet has the potential to become a significant competitive alternative to traditional pay TV subscriptions, and it appears policies such as [NBC's] may have the effect of limiting the prospects of such competition."

Does this type of policy of requiring consumers to purchase pay TV subscriptions in order to view programming on the Internet concern you? If widely adopted, could such policies prevent the Internet from being a true competitive alternative to traditional pay TV services?

Answer: I agree consumers are better off when they have real competitive alternatives to choose from among providers of programming, and the Antitrust Division will thoroughly investigate allegations of conduct that has the effect of limiting the choices consumers have for distribution of programming, and will take action to protect competition and consumers.

8. Under the law today, it is the Department of Transportation, and not the Justice Department that decides whether to grant airlines antitrust immunity for international alliances. Last year, DOT granted two alliance applications, Continental's application to join United in the Star Alliance, and American Airlines's application to join British Airways in the OneWorld Alliance. In the first application, DOT granted antitrust immunity over serious objections from the Justice Department. Critics of airline alliances argue that they make it very difficult for smaller, independent airlines to compete.

(a) Are you satisfied with the Transportation Department's review of international airline alliances? Has the Transportation Department played sufficient heed to competition concerns?

(b) Do you believe that the law should be changed so that it is the Justice Department, and not the Transportation Department, with the authority to grant antitrust immunity to international airline alliances?

Answer: The Department has a good and productive process of sharing information and analysis with the Department of Transportation. We often get the benefit of their expertise in the airline industry, and we appreciate that our views on competition are considered as they review matters involving competition issues in their jurisdiction. As you point out, DOT has the final authority on airline antitrust immunity issues and has been directed by Congress to take account of issues beyond the scope of antitrust. Although we may have some differing perspectives on these matters, we know that both agencies are in agreement in wanting what is best for consumers.

9. (a) We've heard a lot of concerns about competition in the seed market recently. Many farmers and antitrust experts are especially concerned about the actions that Monsanto is taking to allegedly harm competition in the market for genetically modified seeds. What is your view of

this issue? And when do you expect we will see a conclusion to the DOJ investigation of that issue?

Answer: The competitive dynamics of the seed industry were a significant topic at the March 12, 2010, workshop on agriculture and antitrust enforcement, held jointly with the U.S. Department of Agriculture. I have confirmed that the Department has an open investigation into possible anticompetitive practices in the seed market, but beyond that I cannot comment. We will conduct a thorough investigation to determine whether the antitrust laws have been violated.

(b) In the Delta/Pineland merger in 2007, the Justice Department imposed conditions that prohibit Monsanto from refusing to allow seed companies to combine non-Monsanto traits with Monsanto traits in cotton. But we are told that exactly these practices are used by Monsanto today in soy and corn seeds. How can a practice that is improper for cotton seeds be permissible for soy and corn?

Answer: The Final Judgment in the Monsanto/Delta and Pine Land (DPL) merger litigation required Monsanto, among other things, to modify its cottonseed trait licenses with seed companies to permit those licensees to breed and sell, without penalty, cottonseed containing non-Monsanto traits and cottonseed containing both licensed Monsanto traits and non-Monsanto traits. These license modifications specifically addressed competition that otherwise would have been lost from Monsanto's acquisition of DPL. The United States alleged in its Complaint that the merger, among other harms, would have eliminated DPL as a partner independent of Monsanto for developers of cotton traits that would compete against Monsanto's traits. As stated in its Response to Public Comments, the United States made no determination as to whether Monsanto's cottonseed licensing provisions in and of themselves violated the antitrust laws (see footnote 74).

10. Meatpacking plants in the livestock industry have become increasingly concentrated over the years, and today four major meatpacking companies control the majority of the market. In some regions, farmers and ranchers have access to only one or two meatpacking plants leaving farmers and ranchers with little or no choice as to where to take their livestock to be processed. A 2007 study titled "Concentration in Agricultural Markets," by the University of Missouri's Department of Rural Sociology, showed that the market control of the top for processing firms in most agricultural sectors has continued to climb. According to the study, the top four firms' market share for beef processing was 83.5%, for pork was 66%, for broilers was 55.5%, and for turkeys was 55%. What actions can the Justice Department take to bring more competition to the processing sector?

Answer: The Department is making a priority of vigorous antitrust enforcement in agriculture industries, including livestock processing. In addition, as you have noted in letters to me and during the hearing, the Division and the U.S. Department of Agriculture (USDA) will be holding joint public workshops to explore competition issues affecting the agriculture industry, including competition in the livestock industry, and the appropriate role for antitrust and regulatory enforcement in that industry. Specifically, we will conduct a workshop on the livestock industry on August 27, 2010, in Fort Collins, Colorado, to address concentration in livestock markets, buyer power and enforcement of the Packers and Stockyards Act.

11. Some competition advocates believe that consolidation in the retail sector has led to monopsony or oligopsony buying power among food retailers, and that this in turn drives concentration in the meatpacking and food processing sectors. What is your view? Do you believe retailer concentration and buying power may be playing a role in driving the consolidation of agricultural markets? And, if you believe this is a concern, is there anything antitrust enforcement agencies can do to make the retail market more competitive?

Answer: I agree that concentration can increase the risk of monopsony power. Generally, issues involving products at retail are handled by the Federal Trade Commission. Nonetheless, I can assure you that the Department will continue to maintain as one of its priorities aggressive enforcement in the agriculture sector and will take action to prevent conduct or transactions that may harm competition in agriculture markets.

12. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to unfortunate conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

What are your agencies doing to resolve clearance disputes in a more effective way? Are you, as the Antitrust Modernization Commission suggested in 2007, developing a new merger clearance agreement, or do you believe Congress should act in this area, revising the Hart-Scott-Rodino Act to require more effective resolution of clearance disputes?

Answer: Over the years, the two agencies have developed a process for determining which agency will handle a particular matter, generally on the basis of which agency has the most current experience in the particular markets involved. This process enables both agencies to make the most effective use of enforcement resources and avoids duplicative investigatory requests on private parties. On occasion a matter arises in which both agencies believe each has more expertise. In these circumstances, and indeed in all others, the agencies share responsibility for deciding which of them will handle the investigation. The decision-making process is one that has been in place for some time. Since I became Assistant Attorney General, I and the FTC Chairman have pledged to ensure that decisions involving review of mergers and transactions are made expeditiously. We continue to work with the FTC to clear each matter as quickly and efficiently as possible, and I would be happy to work with you and Congress to consider new ideas for improving the process.

13. In April, the Justice Department and FTC jointly published for public comment a comprehensive revision of the Horizontal Merger Guidelines, a document that guides the agencies in reviewing mergers, and guides private parties in determining whether and how to structure mergers so that they are more likely to pass government scrutiny. Among other things, the proposed new Guidelines downplay the focus on market shares, concentration, and market definition. The proposed new Guidelines also increase the HHI thresholds – a measure of market

share -- that might suggest a merger could be problematic, and omit the reference to a two-year standard for "timely" entry into a market.

Do these revisions signal a change in enforcement policy at the agencies? Should merging companies and the lawyers who advise them now feel as if there is an even larger safe harbor in merger enforcement?

Answer: I am committed to enforcing section 7 of the Clayton Act against anticompetitive mergers. The Department will continue to pursue enforcement of section 7 based on sound analytical principles. The goal of the review of the Merger Guidelines is to take into account legal and economic developments that have occurred since the last significant guidelines revision in 1992 and to determine whether the current guidelines accurately reflect the current practice of merger review at the Department and the FTC. The HHI thresholds are meant to give guidance, and do not prevent us from challenging anticompetitive deals below the thresholds. We do not believe that the current HHI numbers have reflected actual practice. It is important that companies have guidelines to help them plan transactions and avoid violating the antitrust laws, and we believe that the adjustments, by better reflecting agency practice, will give better guidance.

14. The proposed revised Horizontal Merger Guidelines released in April states that "these Guidelines reflect the Congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." Should these Guidelines be adopted, how will you interpret them so that they address competitive problems "in their incipiency"?

Answer: Section 7 of the Clayton Act provides that "no person engaged in commerce or in any activity affecting commerce ... shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." As a matter of antitrust legal doctrine, any merger case that does not allege a merger to monopoly is brought pursuant to the "may substantially lessen competition" language of Section 7 and thus falls within the "incipiency doctrine." We will interpret the Horizontal Merger Guidelines consistent with this legal doctrine. The current draft of the Guidelines notes that "certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." The Department's merger enforcement will be consistent with that statement.

15. For over a year now, authors, publishers, and book sellers have been debating the merits of a proposed settlement that would allow Google to digitize millions of books currently under copyright. The Google book project has enormous potential to create a massive digital library of books available over the Internet, and preserve books for years to come. But this project also raises competition concerns, as noted by the Justice Department in its filing in the case, about whether the settlement will give Google rights that its competitors cannot get, therefore harming competition.

Does the Antitrust Division continue to be concerned about the antitrust implications of the proposed Google Books Settlement? Further, what risks do you think the settlement poses for American consumers?

Answer: The Division strongly supports a vibrant marketplace for the electronic distribution of copyrighted works, including in-print, out-of-print, and so-called "orphan" works. On February 4, 2010, the Department filed with the court a second Statement of Interest, setting forth our concerns with respect to the parties' proposed amended settlement agreement. Both that filing and the Department's initial Statement of Interest are available on the Antitrust Division's website, at *www.justice.gov/atr/cases/authorsguild.htm*. On February 18, 2010, the Department underscored the importance of the concerns expressed in those filings at the court's settlement fairness hearing; the court has not yet issued its ruling. The Division will continue to monitor this matter and advance consumer interests through the proper application of antitrust law.

16. Recent events have highlighted the importance of technology companies acting responsibly to ensure the privacy of users. Among other things, breaches of user privacy surrounding the collection of wi-fi data have generated a lot of interest from regulators around the world. One alternative to address this issue is through regulation, but some believe that competition policy and assuring a competitive market is preferable to regulation as a mechanism to address some or all of these concerns. Competition in these markets can incentivize firms to compete more on privacy protections. Does the Justice Department consider whether the lack of adequate privacy protections is a symptom of a lack of competition in search or other online markets? Is this something you can address?

Answer: The antitrust laws protect consumers against conduct or transactions that harm the competitive process and deny consumers the protections of competition. I agree that competition among search engines on privacy policies brings important benefits to consumers, and I believe that the antitrust laws provide an important set of tools for addressing conduct that can be used to harm consumers—whether it be Internet companies that are consumers of Internet gateway and platform services or consumers of applications and services distributed over the Internet. The Antitrust Division has been very active in its investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries. When it is appropriate, the Division vigorously pursues enforcement actions to prevent conduct or transactions from harming consumers. The Federal Trade Commission has authority over unfair or deceptive acts or practices, which may provide an additional set of tools for addressing privacy issues, so I defer to the Commission to discuss how they have addressed these issues.

From Senator Russell D. Feingold

1. Many companies seeking approval of a merger argue that delay in approving the merger will result in jobs being lost. Do you think this is a legitimate concern? In your experience, don't most mergers, especially between competing companies, result in lay-offs in the short to medium term?

Answer: The Antitrust Division is mindful of the potential that delays in companies' ability to move forward with their transactions can have an impact on the parties' businesses and in the marketplace. Therefore, the Division's goal is to get to the right answers as quickly as possible with the least burdens necessary to make responsible enforcement decisions. The Antitrust Division has not systematically analyzed the extent to which mergers, acquisitions, or other transactions have impacted employment in the short, medium, or long term.

2. The Department recently reached a settlement that allowed the Ticketmaster and Live Nation merger to go forward. The settlement contains conditions that prohibit retaliation, forbid anticompetitive bundling, establish ticketing firewalls, and permit portability of customer information. What steps has the Department taken to ensure that the company is living up to these terms? Are there dedicated staff focused on implementing this agreement and improving competition in this industry? Have there been any claims of retaliation or anticompetitive behavior following the settlement?

Answer: The Department has worked diligently to ensure that the newly merged company complies with all conditions of the proposed settlement, including the prohibitions on retaliation and anticompetitive bundling and the requirements to establish a ticketing firewall and to permit portability of customer information. The Department has publicized the terms of the settlement so that music industry participants are aware of their rights and understand that the Department will investigate anticompetitive conduct they report. Public outreach efforts include a speech I gave on March 19, 2010, at the South by Southwest Music and Media Conference and Festival in Austin, Texas, work with non-profit public interest groups developing communication plans about the settlement, and meetings with music industry participants to ascertain whether the merged company is complying with the settlement's terms. The Department also has created a Compliance Committee to evaluate the merged company's compliance with the settlement. The Compliance Committee has monitored closely the merged company's efforts to implement an effective ticketing firewall, and it will audit compliance with the firewall regularly. In addition, the Committee follows up on claims that the merged company has violated the terms of the settlement or otherwise engaged in anticompetitive behavior.

3. (a) Over the past several years, there has been significant controversy over the potential for Internet providers to prioritize their own or an affiliated company's content. This concern about "net neutrality" has led the FCC to propose some open Internet principles and issue a notice of proposed rulemaking. To what degree can the Department using the antitrust laws also constrain this kind of discriminatory behavior? Is the Department looking at this issue?

(b) Are the current antitrust laws sufficient to police this sort of discriminatory behavior by an Internet service provider? If not, what changes would the Department recommend that would enable it to more effectively address these practices?

(c) To what degree does the Department take into account the history of a company's competition violations or other indications it may be willing to leverage its market power in an anti-competitive manner when reviewing a merger proposal? For example, is the Department able to consider allegations that Comcast may have violated net neutrality principles when conducting its merger review?

(d) Has the Department considered imposing conditions as part of a merger settlement that will help ensure net neutrality?

Answer: The antitrust laws protect consumers against conduct or transactions that harm the competitive process and deny consumers the protections of competition. We believe that the antitrust laws provide an important set of tools for addressing discriminatory conduct that can be used to harm consumers—whether it be consumers of Internet gateway and platform services who seek faster and more reliable Internet infrastructure development, or consumers of applications and services distributed over the Internet, who seek innovative new products and services brought to them by novel business methods. The current antitrust laws are sufficient to keep such conduct in check, though it is important in telecommunications and other industries with regulatory regimes that the courts do not narrow the appropriate reach of antitrust enforcement. We do not believe that the current law prevents the Department from prosecuting anticompetitive behavior in any industry, but if this turns out not to be true in any of our matters we will work with Congress to make sure we have the tools we need. The Antitrust Division has been very active in its investigations to thoroughly review conduct and transactions that threaten harm to competition in these industries. When it is appropriate, the Division vigorously pursues enforcement actions to prevent such discriminatory behavior from harming consumers. As part of its investigations, the Division considers all information relevant to determining whether the conduct in question raises competitive concerns. In addition, the Department continues to work with the Federal Communications Commission on its broadband policy, and supports its principles to preserve and promote the open and interconnected nature of the public Internet. Finally, while I cannot comment specifically about any pending investigation, the Department considers a wide variety of factors when assessing a transaction's likely competitive effects—including the involved firm's past competitive behavior—and also has the ability to seek a wide variety of potential remedies in those situations where we conclude a transaction poses likely competitive harm.

4. The Department recently took action to block the acquisition of two milk bottling plants by Dean Foods, but the Department's filing was focused almost exclusively on the impact this merger will have on consumers, rather than the impact on farmers, and the reduction in outlets for their milk. Has the Department examined the potential harm to farmers and other small businesses if this merger were to go through?

Answer: Since the Department's challenge to Dean Foods Company's acquisition of Foremost Farms USA's Consumer Products Division currently is pending, I refer you to our public filings

in the litigation. Generally, when the Department investigates a transaction's potential harm to competition in the agricultural sector, we contact numerous farmers and small businesses to assess thoroughly the impact that the transaction will have, and take account of their concerns.

5. The USDA has established a Dairy Industry Advisory Committee (DIAC) to examine both the long and short term challenges facing the industry. I believe many of these challenges have some relationship with competition. What steps has the Department taken to reach out to the DIAC to involve any interested members with the upcoming workshop on dairy competition and to present a summary of the workshop findings and information on dairy competition in general?

Answer: A central goal of the agriculture workshops we are conducting with the U.S. Department of Agriculture is to listen to and learn from parties with real-world experience in the agriculture sector. We have been active in reaching out to all stakeholders in this sector. The Department has worked through the office of the Secretary at USDA and through the dairy program in USDA's Agricultural Marketing Service to make sure we are fully informed what is being presented to the DIAC, and that, in turn, they are apprised of what is going on in the workshops. We have also invited a number of witnesses who have presented ideas to the DIAC or who sit on the DIAC to serve on panels at the workshops.

From Senator Charles E. Grassley

1. I'm pleased that the U.S. Justice Department and the U.S. Department of Agriculture are conducting workshops across the country to look at competition issues in the agriculture sector. As you know, I'm concerned about increased consolidation in agriculture and possible anti-competitive and abusive practices in the industry.

    a. What have you learned from these workshops?
    b. What do you expect to come out of these sessions?
    c. Do you believe that these workshops have improved coordination between the Justice and Agriculture Departments on agriculture competition matters?
    d. Do you believe that the antitrust laws need to be modified to protect against abusive and anti-competitive practices and unfair consolidation in the agriculture sector?
    e. Will the Justice Department be more pro-active in policing anti-competitive behavior in agriculture? What kind of assurances can you give me that the Antitrust Division is taking competition concerns in the agriculture sector seriously?

Answer: Competition issues affecting agriculture have been a priority for me since I was confirmed last spring. As I told this Committee at its field hearing last September in St. Albans, Vermont, the Antitrust Division is carefully evaluating the relevant market conditions, informed by input from those in the agricultural community who live with these developments every day. We have heard concerns from Congress, farmers, and consumers about changes in the agricultural marketplace, including increasing concentration and vertical integration. In the joint workshops we intend to examine the dynamics of competition in agriculture markets, review the state of the law and current economic learning, and provide an opportunity for farmers, ranchers, consumer groups, processors, the agribusinesses, and other interested parties to provide examples of potentially anticompetitive conduct. The goals of the workshops are to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues, as well as to listen to and learn from parties with real-world experience in the agriculture sector. Through the dialogue established in these workshops, the Department and USDA hope to be able to learn how we can work together to ensure that antitrust enforcement and regulatory actions are as effective as possible. We will approach the matters that come before the Division and the upcoming workshops without any preconceptions and cannot promise any particular answers or results. I can assure you, however, that we are committed to a careful and comprehensive examination of the marketplace.

2. United Airlines and Continental Airlines recently announced that the two companies would be merging. I want to make sure that air service to Iowa is not adversely impacted. Many times consumers in smaller communities and rural areas are the hardest hit by these mergers.

a. Can you assure me that the Antitrust Division will take a hard look at this proposed merger to ensure that it does not lead to higher prices and reduced choices for Iowans?

Answer: You can be assured that the Antitrust Division will conduct a thorough investigation of the proposed transaction, including its effects on Iowans, and take any action necessary to ensure that the transaction does not harm consumers or competition in the airline industry.

3. At the Subcommittee hearing last week, Senator Hatch spoke about competition issues relating to college football and asked whether they are significant enough to warrant the attention of our antitrust enforcement agencies. I share these concerns and believe that if there are antitrust violations, the Justice Department should ensure that the antitrust laws are enforced and consumers are not harmed, regardless of whether the matter involves sports and entertainment issues.

   a. Will the Antitrust Division continue to look into any antitrust violations that may exist with regard to the Bowl Championship Series?
   b. What information can you provide about any current inquiries relating to this matter?

Answer: The Department of Justice is reviewing materials submitted to us, including materials from Senator Hatch, to determine whether to open an investigation into the legality of the current system under the antitrust laws. Importantly, and in addition, the Administration also is exploring other options that might be available to address concerns with the college football post-season. These include encouraging the NCAA to take control of the college football post-season at the FBS level (as it does at other football levels and with regard to other sports), asking a governmental or non-governmental entity or a commission to study the benefits, costs and feasibility of a playoff system, asking the Federal Trade Commission to examine the legality of the current system under consumer protection laws, exploring whether other agencies may be able to play a role, and legislative efforts aimed at encouraging adoption of a playoff system.

SUBMISSIONS FOR THE RECORD

Testimony of David Balto
Senior Fellow
Center for American Progress Action Fund

Subcommittee on Antitrust, Competition Policy
and Consumer Protection,
Senate Judiciary Committee

"Oversight of the Enforcement of the Antitrust Laws"

June 9, 2010

Chairman Kohl, Ranking Member Hatch and other members of the Committee, I am David Balto, a Senior Fellow at the Center for American Progress where my work focuses on antitrust enforcement, intellectual property and health care. I am the former policy director of the Federal Trade Commission and have practiced antitrust law for over a quarter of a century. I am pleased to submit this testimony for today's important hearing on oversight of our antitrust enforcement agencies.

We have reached a critical juncture in antitrust enforcement. Increasingly, the markets consumers depend upon the most – health care, consumer goods, telecommunications and airlines, just to name a few – are becoming more concentrated. The bulwarks of the competitive marketplace, choice and aggressive rivalry, have been diminished and many of these markets are plagued by deceptive conduct. Moreover, our typical reliance on an entirely "free market" unshackled from any form of regulation have been shattered by recent economic events. Increasingly, we recognize the need for more intensive and thoughtful regulation, as it is evident that the mantra, that deregulation or "regulation lite" is the best result is a recipe for consumer harm, not consumer welfare.

Fortunately, President Obama selected exceptional leaders for both the antitrust division of the Department of Justice and the Federal Trade Commission. Both Assistant Attorney General Christine Varney and FTC Chairman Jon Leibowitz bring a keen perception about the important role of antitrust enforcement as a bulwark to a competitive marketplace. Both are strong leaders who know how to make the most of the limited resources of their agencies and both are supported by talented career lawyers and economists who are dedicated to the mission of protecting consumers.

My testimony today provides observations on four important areas.

- The role of regulation and the need for antitrust enforcers to support and strengthen regulation. This has been demonstrated by an innovative collaboration between DOJ and USDA addressing chronic competitive problems in agriculture markets.

- The need for a realignment of enforcement priorities in health care to support health care reform. In particular, the need for far greater enforcement against health insurers and greater acceptance of collaboration by health care providers.

- The need for the enforcement agencies to use their full range of powers especially when investigating and challenging conduct by dominant firms.

- The need for Congress to enact new legislation to eliminate manipulation of the exclusivity period in pharmaceutical patent settlements, declare resale price maintenance per se illegal, and eliminate the antitrust exemption for health insurance.

THE ROLE OF REGULATION AND ANTITRUST

For years, antitrust enforcers strongly believed that the only good regulation was a dead regulation. In fact, the antitrust enforcement agencies played a critical role in efforts to deregulate numerous markets. As we have recognized in the past two years, some of those efforts to deregulate may have been overgenerous in their faith in the working of the market. As FTC Commissioner Tom Rosch observed "if not dead [the Chicago School] is on life support.... [M]arkets are not perfect; imperfect markets do not always correct themselves; and business people do not always behave rationally." To give just one example, the failure of effective financial service regulation has led to the chronic fraud and deception that the House and Senate have addressed in their financial service reform bills. The bills allow regulators the access and authority needed to monitor financial products and protect consumers from being preyed upon by financial entities.

It is important for the antitrust enforcement agencies to learn to work more effectively with both federal and state regulators to help find solutions to competitive and consumer protection problems. Perhaps the most important observation by any antitrust enforcer in the past several years has been the comments of AAG Varney that, in many cases, **a competition problem may not necessarily have an antitrust enforcement solution.** Antitrust enforcement may have limited tools to adequately challenge ongoing anticompetitive conduct. Moreover, in many cases, a regulatory solution may be a more effective way of dealing with competitive problems in the market than a narrow antitrust enforcement action. Thus, antitrust enforcers must work to strengthen regulation so that it fully protects consumers.

Nowhere is the observation about the importance of antitrust enforcers and regulators working together more important than in agricultural markets. As I documented in my testimony before this Committee last year, there are chronic competitive problems in agricultural markets – particularly dairy, beef, and chicken – where increasingly consumers pay more while farmers receive less. These problems have grown only worse in the past year, especially in dairy, where countless farmers increasingly face the prospects of closing their farms that have been in their families in decades.

Make no mistake about it, the demise of competitive agricultural markets costs consumers dearly in higher food prices and less choice. Food processing markets are increasingly dominated by a small handful of firms with the power threaten the viability of producers in many markets.

Fortunately, the Obama Administration has recognized the need for a comprehensive approach to this problem. As many members of this Committee know, in the past year the USDA and Antitrust Division of the Department of Justice have begun a series of hearings to learn about problems in agricultural markets. The agencies have scheduled five hearings throughout the United States and the results to date are promising. Both Attorney General Holder and Secretary Vilsack attended the first two hearings and heard from dozens of farmers about the egregious and harmful practices in various agricultural markets. Over 500 farmers attended each of these hearings.

The importance of the innovative nature of the hearings and the coordinated approach of the USDA and DOJ cannot be understated. Typically, enforcement officials wait for problems to come across their desks in Washington and do not act proactively to seek out concerns. And too often agencies respond to problems with, "That's not my job, it is someone else's jurisdiction." The problems in agriculture markets are so severe we cannot afford bureaucratic finger pointing. The coordination between DOJ and USDA will hopefully lead to comprehensive approach in both strengthening USDA regulations and bring enforcement actions to correct the chronic problems in the market. The DOJ can play a critical role in providing assistance to USDA in strengthening its regulatory powers. This model of cooperation hopefully will serve as a model in the future collaborative approaches by antitrust enforcement agencies and regulators to strengthen regulation and antitrust enforcement.

There are at least two other areas in which enforcement of the antitrust enforcement agencies can work with regulators to improve competition in regulated markets.

- **Reform of the antikickback provisions in healthcare.** There are chronic competitive problems in medical device markets because dominant medical device manufacturers pay kickbacks to group purchasing organizations to give them exclusive or near exclusive arrangements. These kickbacks reinforce the dominant positions of these firms and exclude more innovative, lower-cost alternatives produced by smaller competitors. Although the industry has promised to "self-regulate" those efforts have had minimal effect on the exclusionary conduct of dominant firms which have found ways to work around the so-called regulations. Fortunately, both Senators Kohl and Grassley have taken a leadership role in investigating these types of problematic kickbacks. The Federal Trade Commission should investigate these practices and challenge them where appropriate. The FTC should also work with the appropriate regulators to try to eliminate the safe harbor for these kickback payments.

- **Addressing fundamental problems in the market for pharmacy benefit managers (PBMs)**. The conduct of pharmacy benefit managers raises substantial competition and consumer protection concerns. The three largest PBMs have paid over $370 million in penalties and fines for consumer protection violations in the past five years. Consumer groups, unions, community pharmacists and health care plans have called for greater transparency in PBM operations. As part of the healthcare reform legislation, Congress enacted basic transparency requirements for PBMs that provide services to health care plans in the public exchanges. Unfortunately, in the past the Federal Trade Commission has aggressively lobbied against PBM regulations. It is time for the FTC to reconsider those views and work together with both state and federal regulators on improving both state and federal PBM regulation.

HEALTH CARE ENFORCEMENT PRIORITIES MUST BE REALIGNED

If one fact is clear from over a year of healthcare debate, it is that health insurance markets are broken. Members of Congress heard testimony from dozens of individuals who described how they were harmed by egregious, deceptive and anticompetitive conduct by

dominant by health insurance companies. Congress also heard from scores of employers who testified that they were unable to provide basic health insurance for the employees because of escalating premiums and other forms of anticompetitive conduct. Congress appropriately enacted significant reforms that hopefully will begin to restore greater protections for consumers. The Department of Health and Human Services has established a new agency, the Office of Consumer Information and Insurance Oversight, to implement these reforms, help create health insurance exchanges, and regulate health insurers. It should be a central priority for both the Federal Trade Commission and the Antitrust Division to work with the new federal regulators to make these reforms as effective as possible.

Unfortunately, the antitrust agencies are not as well-positioned as they should be to fully assist the new federal regulators in beginning to reign in health insurers. First, in the prior administration there were no enforcement actions against anticompetitive or deceptive practices by health insurers. In addition, the administration permitted a tremendous number of health insurance mergers to occur with relatively little challenge. As I have described in prior testimony, this is largely because of misplaced enforcement priorities in which almost all of the enforcement actions were brought against doctors. In addition, there are jurisdictional obstacles. Because of the McCarran-Ferguson Act, the FTC believes that it does not have jurisdiction to challenge health insurance consumer protection violations.

The problem of misdirected priorities is unfortunate. The agencies pride themselves on setting priorities which bring the greatest benefit to consumers. In the past administration over 30 cases were brought against doctors for alleged price fixing. Did the consumer benefit from these enforcement actions? Only one of them resulted in a private antitrust suit seeking damages – and the insurance company plaintiff lost. A large percentage were in rural markets which suffer from chronic shortages of providers. Almost all the cases are settled since provider groups can rarely afford a battle of a protracted antitrust suit. The settlements rarely allege consumers had to pay more; rather to the extent they allege harm, it is that the physicians sought higher reimbursement from insurers. The fact that a powerful insurer may not be able to secure lower reimbursement from physicians does not mean consumers suffer; rather, any lower reimbursement may have simply ended up in higher profits for insurers or reductions in reimbursement may have led to worse health care.

Are these physician negotiation groups a significant competitive problem? Congress exhaustively examined problems in health care markets for over a year. There was no mention of these alleged physician negotiation groups. Nor does the academic literature on rising health care costs identify these entities as a significant cause of rising health care expenditures.[1] The results of the Congressional health care examination are clear – the problem is in a lack of competition and deceptive conduct in health insurance markets and that is where the agencies' resources must be focused.

[1] This is not to suggest that these physician negotiation groups can never be a problem. But to the extent they pose a competitive concern, the insurance companies certainly have the resources and the incentive to protect themselves through private antitrust litigation. There is no reason the antitrust enforcers should be using such a large portion of their limited resources to attack these practices where far greater harm occurs in health insurance markets.

Recently, the DOJ has started to set a better balance in enforcement priorities and pay some much-needed attention to broken health insurance markets. At a recent meeting of the American Bar Association, AAG Varney described the results of a study they conducted on barriers to entry in health insurance markets in which the DOJ found that these barriers are indeed significant, and as a result, the antitrust enforcers must take action to protect existing competition and choice in health insurance markets. The DOJ took such an action when it threatened to challenge the merger of two Michigan health insurers, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan this past March. The merger would have created an insurance behemoth with about 90% of the market in Lansing. Because of the DOJ's threat, the companies called off their merger, maintaining some level of competition in that market.

Besides misdirected enforcement priorities, the enforcement agencies have taken an extremely limited approach to permitting collaboration by health care providers. The most recent statement of guidance on permissible collaboration is the agencies' joint Statements of Antitrust Enforcement Policy in Health Care, last revised in 1996. These statements have not been revised in over fourteen years. Obviously the healthcare market has changed dramatically during this period. Moreover, under these Guidelines, the agencies have taken an extremely limited approach to permissible collaborations by health care providers.

- During the Bush Administration, they approved only four provider collaboration groups, compared to over 25 in the Clinton Administration.

- The costs of securing a business review letter to permit collaboration have grown exponentially. The cost of securing a business review letter now exceeds well over $100,000, clearly out of reach for any group except a very large group of providers, and can take over a year to obtain.

- Because of the elaborate standards necessary to satisfy the enforcement agencies, these groups must increasingly involve large numbers of physicians. Most of the approved entities involve well over 100 physicians. Ironically, the standards applied by the agencies are effectively forcing physicians to form groups that are so large that they basically acquire market power; precisely the problem the antitrust laws want to avoid.

- Even when these groups can overcome the severe and costly gauntlet required to get necessary approval, insurance companies often refuse to deal with these groups.

There is a simple fact that is becoming increasingly clear. Insurance companies are not interested in the efforts of health care providers to improve health care quality but simply want to secure the services of health care providers at the lowest possible cost.

Senators Kohl, Leahy, Feinstein, Whitehouse and Specter recognized the need to revise these Guidelines in a letter to AAG Varney and Chairman Leibowitz this past November. They wrote, "The *Statements* are now 15 years old and while their success in providing clear and concise guidance is a testimonial to both antitrust agencies and an excellent model of agency collaboration, an updated version including a broad and clear statement of enforcement policy is

needed. Similar to the early 1990s when the agencies issued the Statements, we are in another time of 'fundamental and far-reaching change' in the health care field. Clear and user-friendly guidance would reduce barriers to coordination and innovation ultimately leading to cost efficiencies in the health care delivery system."[2]

The challenge of allowing providers to collaborate under the existing health care Guidelines is significant. We should be clear about the cost of the antitrust enforcers' overly narrow approach to permitting health care collaboration. Doctors are prevented from providing a full range of services to improve health care quality and lead to better health care results. Ultimately, consumers suffer when physician reimbursement is reduced and consumers are relegated to assembly line health care.

This issue is particularly critical because an essential part of health care reform is the formation of accountable care organizations, systems which provide incentives for the various providers delivering a patient's care to cut costs by coordinating care, focusing on prevention or otherwise improving quality of care. ACOs can conceivably raise some of the same concerns of permissible integration under the health care guidelines. Conceivably, the agencies may impose very strict requirements, or may see physician cartels lurking behind these arrangements. Indeed, at a recent ABA conference, representatives of both the FTC and DOJ cautioned that ACO-like collaboration would only be permissible for CMS-sanctioned programs, leaving open the significant risk that the same ACO-like collaboration would be deemed illegal if applied to commercial insurance contracting. This approach would make it difficult for ACOs to be formed. Ironically, with respect to those ACOs that are formed, the agencies' approach might permit for-profit commercial insurers to free ride on the benefits derived through clinical integration. It should be a top priority of the enforcement agencies to promptly provide guidance to permit the significant formation of ACOs.

USING THE AGENCY'S FULL RANGE OF POWERS AGAINST DOMINANT FIRM CONDUCT

As I suggested earlier, antitrust enforcement is facing unique challenges because of the significant changes in the economy. One of the most critical problems is the fact that there are an increasing number of dominant firms in significant markets. Sometimes the fact that a firm has a dominant share is simply the sign of appropriate success, but when a dominant firm uses various types of exclusionary conduct consumers suffer from the lack of competition.

Last year when I submitted testimony for the confirmation hearing for Assistant Attorney General Varney, I recommended that the antitrust division rescind the report of dominant firm conduct issued during the Bush Administration. Soon after taking office, AAG Varney did precisely that, bringing alignment between the FTC and the DOJ on the issue of dominant firm conduct.

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[2] Senators Kohl, Leahy, Feinstein, Whitehouse and Specter. Letter to Assistant Attorney General Varney and Chairman Leibowitz. November 3, 2009.

In a program at the Center for American Progress where AAG Varney spoke last spring, we highlighted the increasingly limited scope of Section 2 of the Sherman Act, and the question of whether it is adequate to police dominant firm conduct. As many commentators have noted, recent Supreme Court decisions have severely restricted the scope of Section 2.

In the most important monopolization case brought in the past year, the FTC case against Intel, the FTC has challenged alleged anticompetitive conduct not only under Section 2, but also Section 5 of the FTC Act which declares illegal "unfair methods of competition" and "unfair acts or practices." Some people have criticized this use of Section 5, but those criticisms are misplaced.

The FTC case against Intel is a traditional Section 2 case which highlights exclusionary conduct by a firm which has had a market share between 80 and 98% for over a decade. The practices at issue in the FTC litigation have been condemned by the Japan Fair Trade Commission in March 2005, by the Korean Fair Trade Commission in June 2008 and by the European Commission in May 2009. In the U.S., Advanced Micro Devices, Inc., Intel's sole significant rival, sued Intel for a broad range of exclusionary practices in 2005 and settled those charges for over $1 billion.

Intel has had its day in court in proceedings before the EC, KFTC and JFTC — and lost. Each of those tribunals found that Intel engaged in two distinct anticompetitive practices: Intel promised discounts or rebates to computer manufacturers so long as they purchased microprocessors exclusively from Intel, and Intel paid computer manufacturers to cancel or delay the launches of product lines that included AMD-based central processing units (CPUs).

There are two important reasons why the FTC action is necessary. First, although the AMD settlement resolved AMD's concerns, it did not fully protect the interests of consumers. Second, the FTC complaint includes another set of concerns not challenged in the earlier enforcement actions. The FTC complaint challenges exclusionary conduct in the emerging and critically important graphic processing unit ("GPU") market. The complaint alleges that Intel has sought to thwart competition from GPU manufacturers, because "these products have lessened the need for CPUs, and therefore pose a threat to Intel's monopoly power." In order to diminish the potential competitive threat from GPU manufacturers, according to the complaint Intel engaged in deception, degraded connections between GPUs and CPUs, and unlawfully bundled Intel's GPUs with its CPUs, resulting in "below-cost pricing of relevant products." This set of concerns is sufficient alone for enforcement.

The FTC's use of Section 5 is wholly appropriate. Moreover, the Intel case is a model of the type of enforcement action antitrust authorities should pursue because it focuses on protecting dynamic competition. It is critical that enforcement agencies use all of their powers to challenge conduct that deters competition especially engaged in by dominant firms.

One particular area where the FTC's Section 5 powers can be critical is health care. As I documented in testimony before the FTC, Section 5 can be used to attack competitively harmful

conduct by healthcare intermediaries such as group purchasing arrangements.[3] Well-conceived enforcement actions involving GPOs would eliminate artificial barriers to competition, help reduce healthcare costs, and lead to safer and more innovative products.

The problem of dominant firm conduct can be prevented in the first instance through aggressive merger enforcement. Unfortunately, the DOJ did not seize the first opportunity to strengthen merger enforcement when it failed to challenge the Ticketmaster LiveNation merger, which combined the largest ticketing firm with the largest concert promoter. Rather than challenging the merger, the DOJ entered into a complex consent decree which attempts to create a new rival through a divestiture to AEG Group.

The DOJ attempts to address possible anticompetitive conduct by the merged firm through provisions of the proposed consent order that seek to prevent various forms of retribution, bundling, and anticompetitive information sharing. Many people? have filed Tunney Act comments questioning whether the consent order provisions are sufficient to protect rivals in the market including independent concert promoters. There is evidence that the DOJ staff is reaching out to market participants in an effort to make the order as effective as possible.

The DOJ must continue to be tremendously vigilant because the merged firm has tremendous power and a history of attempting to stifle new forms of competition. One particular area of concern for competition enforcers is the secondary market, which provides consumers with a vast number of opportunities to attend events that they may not otherwise be able to attend. Last year when the CEO of Ticketmaster appeared before your Committee he stated, "I don't believe there should be a secondary [tickets] market at all." Ticketmaster would like to eliminate the secondary market for tickets through vertical integration and closed loop paperless ticket distribution schemes. The DOJ should be skeptical of any effort by Ticketmaster to stifle other forms of ticketing competition.

THE NEED FOR ANTITRUST LEGISLATION

In no period in recent history has legislation to reform the antitrust laws been as critical to restoring effective antitrust enforcement. There are three pieces of legislation which have passed this Committee and are supported by major consumer groups. It should be a major priority for the Senate and for the Congress as a whole to have this legislation enacted.

- **Pharmaceutical patent settlements**. This Committee has demonstrated its leadership in addressing the pharmaceutical patent settlement problem by passing S. 369, which would amend the antitrust laws to clarify the standards for litigating challenges of these settlements. As the FTC has noted, these settlements will cost consumers over $3.5 billion a year over the next decade. However, as many of the leading consumer groups have made clear, S. 369 is a necessary but not sufficient approach to addressing the patent settlement problem. In essence, the pay-for-delay problem occurs because of manipulation of the Hatch-Waxman exclusivity provision, and the most effective means

[3] David Balto. "Reviving Competition in Healthcare Markets: The Use of Section 5 of the FTC Act." Testimony before the FTC Workshop: Section 5 of the FTC Act as a Competition Law. October 17, 2008.

of attacking that problem is amending that provision. Fortunately, Senators Kohl and Nelson have sponsored S. 1315, which would reform the exclusivity provision so that a later patent challenger which successfully challenges the patent could share the exclusivity period. A coalition of consumer groups, including Families USA, Consumers Union, U.S. PIRG and Consumer Federation of America, wrote to Congressional leadership earlier this year that "Expanding the exclusivity period is vitally important, since it removes the barrier to entry that has protected collusive settlements between brands and first-filing generics."[4]

- **Resale price maintenance.** The Supreme Court's 2006 decision in *Leegin Creative Leather Products v. PSKS* abandoned the rule that resale price maintenance – the practice of a manufacturer dictating resale prices to its distributors – was per se illegal. The results have been increased obstacles for discounters – especially Internet-based discounters – to aggressively compete and significantly higher prices for consumers. Fortunately, Senator Kohl and numerous other members sponsored S. 148, which would reinstate the rule of per se illegality. Major consumer groups, including the National Consumers League, the American Antitrust Institute, Consumers Union, U.S. PIRG and the Consumer Federation of America, support this legislation and have called upon Majority Leader Reid to make its passage a major priority.[5]

- **Repeal of the McCarran-Ferguson antitrust exemption for health insurers.** The antitrust exemption for health insurers under the McCarran-Ferguson Act has simply outweighed its usefulness. As AAG Varney testified before this Committee last fall, there is very little in procompetitive practices that justify the McCarran-Ferguson antitrust exemption. Appropriately, Senator Leahy has proposed and this Committee has approved S. 1681, legislation to repeal this exemption. Major consumer groups, including U.S. PIRG, the Consumer Federation of America and the American Antitrust Institute support repeal; they wrote in a letter to Majority Leader Reid earlier this year that "No time is more critical than now to ensure that the forces of competition break out in health care markets, as we implement broad reforms of the health care system. For the full range of provisions of health care reform to be effective, the unnecessary exemption to the antitrust laws must be implemented."[6]

CONCLUSION

The antitrust enforcement agencies face unprecedented challenges in their enforcement missions because of the significant recent changes in this economy. Fortunately, President Obama has selected tremendous leaders for these agencies and with the continued attention of your Committee the agencies will be more than capable of facing these challenges.

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[4] Families USA, U.S. PIRG, Consumer Federation of America, Consumers Union, Community Catalyst, the National Legislative Association on Prescription Drug Prices, and the American Antitrust Institute. Letter to Speaker Pelosi and Leader Reid re Expanding Access to Affordable Generics. January 11, 2010.

[5] National Consumers League, the American Antitrust Institute, Consumers Union, U.S. PIRG and the Consumer Federation of America. Letter to Representative Johnson. May 18, 2009.

[6] The American Antitrust Institute, U.S. PIRG and the Consumer Federation of America. Letter to Leader Reid. April 20, 2010.

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Oversight Of The Enforcement Of The Antitrust Laws"
June 9, 2010

Today, the Judiciary Subcommittee on Antitrust performs one of its most critical duties: oversight of the Federal agencies that enforce our Nation's antitrust laws. The antitrust laws protect hardworking Americans by ensuring that our markets are characterized by vibrant competition. This competition results in lower prices and more choices for consumers. I thank Senator Kohl for chairing this important hearing.

Last year, when the Obama administration took office, it promised a more vigilant enforcement of the antitrust laws. Thus far, the administration's actions have matched its words. In the fall, I chaired a Committee hearing in Vermont at which Assistant Attorney General Varney promised to take a close look at competition issues in the dairy industry. Subsequently, the Department of Justice (DOJ) began hosting workshops around the country to analyze competition issues in the agriculture sector, and the Department challenged the acquisition of two dairy bottling plants by the country's largest dairy distributor. This vigilance has extended to other industries as well, including financial products, ticketing, and air cargo, just to name a few. Similarly, the Federal Trade Commission (FTC) has pursued an aggressive enforcement agenda that has resulted in enforcement actions in the healthcare, manufacturing and retail clothing industries.

Today our antitrust enforcers face complex markets and economic issues never encountered in the pre-digital age. Their hard work ensures that our antitrust laws adapt, and continue to be suited for enforcement actions in the new millennium. The latest example of this is the newly proposed joint DOJ-FTC guidelines for horizontal merger review. While I am still reviewing the specific changes that the new guidelines entail, I applaud the continued effort to enable companies to understand the review that will be undertaken to analyze their proposed merger. As I work with our antitrust authorities and business community to find the ways to promote consistent antitrust enforcement standards around the world, an important first step is transparency. Demonstrating that we take transparency seriously at home provides an example that the rest of the world can follow. These merger guidelines send that signal, and I applaud this effort.

The DOJ and FTC perform a critical service to American consumers by serving as competition watchdogs. We need not look far to understand the value these agencies provide. The health insurance industry, which enjoys a statutory exemption from the federal antitrust laws, is a great example of the problems that would result from a lack of adequate antitrust oversight. The industry is characterized by high levels of market concentration throughout the country. Millions of Americans suffer the consequences through un-affordably high health care costs, which may not reflect the price that would be set through true competition. For the past three Congresses, I have worked to repeal this six-decade-old exemption from the Federal antitrust laws. There is no justification for it, and I have urged the Senate to take up quickly and pass the legislation that cleared the House with an overwhelming bipartisan majority. I appreciate the administration's support for this legislation. In the meantime, we must continue to ensure that the DOJ and FTC

have the resources to protect consumers from anticompetitive practices in those industries over which they do have jurisdiction.

Finally, I would like to thank Chairman Leibowitz for his prompt response to my recent inquiry as to whether the antitrust laws pose any barrier to companies meeting to discuss how best to deal with the oil crisis. This oil spill is an ecological disaster, with far-reaching consequences. The Chairman's immediate attention to this matter again demonstrates the FTC's priority of dealing with critical real world problems that impact the lives of hard working Americans.

I commend Assistant Attorney General Christine Varney and Chairman Jon Leibowitz for the tremendous job they are doing to lead their respective agencies. I look forward to hearing from them today.

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How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy

Prepared Statement of the Federal Trade Commission

Before the
United States Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Washington, D.C.
June 9, 2010

Introduction

Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Jon Leibowitz, Chairman of the Federal Trade Commission, and I am pleased to testify on behalf of the FTC to discuss our competition enforcement activities and the many important antitrust issues under your jurisdiction.[1] Today, this testimony will highlight several key areas of our competition agenda: ending pay-for-delay pharmaceutical agreements that cost consumers at least $3.5 billion per year; blocking or modifying anticompetitive mergers; revising the Horizontal Merger Guidelines; developing policy guidance regarding the ongoing changes in news media markets; effectively using our enforcement authority under Section 5 of the Federal Trade Commission Act; and acting to promote competition in the energy sector.

As the Members of this Subcommittee know very well, free and open markets are the foundation of our economy, and competition is essential for those markets to function. Years of experience have proven that competitive markets work better than anything else to bring consumers lower prices, greater innovation, and choice among products and services. For that reason, one of the Commission's primary obligations is to remove the obstacles that impede competition and to allow its benefits to flow to consumers.

To meet that obligation, the Commission has an aggressive and active antitrust enforcement agenda. Our jurisdiction is broad, and we enforce the laws in a wide range of markets. In order to maximize the impact of our efforts we attempt to focus on areas that most

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[1] The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner.

directly affect consumers and businesses, such as health care, energy, emerging technologies, real estate, and retail.

The Commission's competition agenda falls into three broad categories: merger review; investigations of anticompetitive unilateral and coordinated conduct; and competition policy analysis. With regard to mergers, Commission staff reviews proposed and consummated deals to ensure that they do not "substantially lessen competition." As necessary, the Commission files complaints to enjoin anticompetitive mergers, or, if we have reason to believe that only some aspects of the merger are likely to have adverse competitive effects, we negotiate remedies that address our concerns.

Of course, businesses engage in a range of other activities, some of which have implications for competition, and the Commission is always on the lookout for potentially anticompetitive conduct. This conduct may be unilateral – for example, when a monopolist requires exclusivity from its customers in a way that harms the ability of other suppliers to compete fairly for those customers. Or the conduct might be coordinated – for example, when a brand pharmaceutical company pays a generic pharmaceutical company to keep its product off the market.

Congress also has empowered the Commission to provide substantive policy analysis and guidance, and we focus significant resources on fulfilling our policy mission. The Commission analyzes a wide variety of competition issues via research, workshops, and hearings, and these efforts result in a steady stream of detailed and thoughtful reports, studies, advocacy filings, and *amicus* briefs.

The Commission is gratified that we can now fulfill our broad range of responsibilities with a full Commission, including our two newest Commissioners, Julie Brill and Edith

Ramirez. As a Commission, we are working together in a bipartisan manner to bring enforcement actions – whether in large or small markets – that will benefit consumers and protect competition. Of course, it should go without saying that we are careful to avoid interfering with the kind of aggressive, rough and tumble competition that has long been the hallmark of our dynamic economy. At the same time, however, we will act against mergers and conduct that go over the line and threaten competition – even if those cases are difficult ones, and even when they involve some of our country's most successful companies.

I. Ending Pay-for-Delay Pharmaceutical Agreements

One of the Commission's top competition priorities is stopping "pay-for-delay" agreements between brand-name pharmaceutical companies and generic competitors that delay the entry of lower-priced generic drugs into the market. These are settlements of patent litigation in which the brand-name drug firm pays its potential generic competitor to abandon a patent challenge and delay entering the market. Such settlements, known as pay-for-delay, exclusion payments, or reverse payments, effectively buy more protection from competition than the assertion of the patent alone provides. And they do so at the expense of consumers, whose access to lower-priced, generic drugs is delayed, sometimes for many years.

Agreements to eliminate potential competition and share the resulting profits are at the core of what the antitrust laws proscribe, and for that reason the Commission believes strongly that these pay-for-delay settlements are prohibited under the antitrust laws. We are making some progress in our efforts to block these deals, but a number of obstacles remain and the legal environment remains unsettled. In 2005, several courts took, what is in our view, an unduly lenient approach to such agreements in drug patent settlements. As a result, it became

increasingly difficult to halt pay-for-delay settlements through litigation, and such settlements have now become a common industry strategy.

These developments are extremely troubling. Delays in generic competition harm all those who pay for prescription drugs: individual consumers, the federal government (which purchases roughly one-third of all prescriptions), state governments struggling with the cost of providing access to health care, and American businesses striving to compete in a global economy. This year, a comprehensive FTC staff report studied this problem, and found:

- The number of these agreements is increasing, from zero in fiscal year 2004 to 19 in fiscal year 2009;
- These deals currently protect at least $20 billion in sales of branded drugs from generic competition.
- On average, the deals delay the availability of cost-saving generics by 17 months; and
- If not stopped, pay-for-delay deals will, conservatively, cost consumers $3.5 billion a year.[2]

In simple terms, these findings document how these sweetheart deals increase prescription drug costs for American consumers. Because of the inherently anticompetitive nature of these deals and the enormous consumer harm caused by pay-for-delay, the Commission continues to challenge them despite some earlier set-backs in the courts. For example, we are still actively pursuing two major pay-for-delay cases: one against Solvay Pharmaceuticals (owned by Abbott Laboratories) and generic manufacturers (Watson Pharmaceuticals, Par Pharmaceutical, and

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[2] "Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions," FTC Staff Study (Jan. 2010), www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf. In addition, the Commission staff releases detailed annual summaries on the type of settlements brand and generic companies are entering. *See* www.ftc.gov/os/2010/01/100113mpdim2003rpt.pdf.

Paddock Laboratories) regarding AndroGel, a testosterone replacement drug often used by victims of testicular cancer, and the other against Cephalon regarding the drug Provigil, a sleep disorder medication with nearly $1 billion in annual U.S. sales.[3] In addition, Commission staff are continuing to initiate new investigations into other pay-for-delay agreements.

We have reason to believe that the tide may be turning. Just last month, an appellate panel in the Second Circuit, which previously had adopted a permissive approach on pay-for-delay settlements, took the extraordinary step of questioning its own standard and explicitly encouraged consumer plaintiffs to request the full court's consideration of the pay-for-delay issue.[4] Both the Federal Trade Commission and the Department of Justice filed briefs with the Second Circuit advocating that the full court revisit this issue.[5] And, in March 2010, a federal

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[3] *In re AndroGel Antitrust Litig.* (No. II), 1:09-MD-2084-TWT (N.D. Ga. Feb. 22, 2010) (granting defendants' motion to dismiss); *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141 (E.D. Pa. Mar. 29, 2010) (denying motion to dismiss), www.ftc.gov/os/caselist/0610182/index.shtm.

[4] *See Ark. Carpenters Health & Welfare Fund v. Bayer AG*, Nos. 05-2851-cv(L), 05-2852-cv(CON) (2d Cir. Apr. 29, 2010) (affirming summary judgment for defendants but inviting plaintiffs to petition for rehearing en banc).

[5] Consumer organizations; state attorneys general; and law, economics, and business professors also submitted strong amici briefs advocating for a full court review. *See* Brief of American Antitrust Institute as Amicus Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of AARP et al. as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of Consumers Union et al. as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of 34 State Attorneys General as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of 86 Law, Economics, Public Policy, and Business Professors as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010).

district court judge in Philadelphia denied a defense motion to dismiss the Commission's case against Cephalon.

Even as we fight against pay-for-delay settlements in the courts, we are working to help find a legislative solution to the problem. We are gratified that the Senate Judiciary Committee, the House, and the Administration support our efforts to stop pay-for-delay deals, and particularly grateful for the work of this Committee to approve legislation restricting the ability of pharmaceutical companies to engage in these anticompetitive agreements. The Commission continues to support congressional action to prohibit pay-for-delay settlements, and we look forward to working with Congress to address this issue. In the meantime, the agency will continue to aggressively pursue our investigations and enforcement actions.

II. Stopping Anticompetitive Mergers

The Commission's merger review program is critical to maintaining competitive markets. Merger filings have rebounded over the last year, and the Commission continues to review transactions for potential anticompetitive effects, and to challenge mergers in appropriate circumstances. During fiscal year 2009, the Commission challenged 19 mergers. In nine of those cases the parties agreed to a consent order, in three they abandoned the deal, and in a record seven cases we authorized staff to file a complaint in federal district court or in an administrative proceeding.[6] Additionally, through the first half of fiscal year 2010, the Commission has brought 11 merger enforcement actions. These challenges covered a wide range of markets, including pharmaceuticals, fertilizer, the funeral services industry, and the chemical industry.

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[6] *See* FTC Competition Enforcement Database, Merger Enforcement Actions, www.ftc.gov/bc/caselist/merger/index.shtml.

Just as important, when after a thorough investigation we determine that a deal is not anticompetitive, we do not hesitate to close the investigation and allow the parties to move forward with their transaction. This happens as a matter of course on a wide range of mergers, but one prominent recent example is the Google/Admob deal, where the Commission also issued a statement explaining why it closed the investigation. We will continue to employ our resources effectively by focusing our efforts on deals that have a significant potential to lessen competition and harm consumers.

III. Proposed Revisions to the Horizontal Merger Guidelines

In April, the Commission, in conjunction with the Antitrust Division of the Department of Justice, released for public comment a proposed update of the Horizontal Merger Guidelines.[7] The Guidelines outline for courts and practitioners how the federal antitrust agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. The last major revision to the Guidelines was in 1992, and they have been widely used and quoted in the intervening years. Advances in economic understanding and additional experience, however, have gradually modified the way that the agencies evaluate and investigate mergers. As a result, the 1992 Guidelines no longer offer an entirely accurate representation of agency practices. To ensure that the Guidelines remain a useful tool, the Commission and the Antitrust Division have worked together to revise the Guidelines to more accurately reflect the way the FTC and DOJ currently conduct merger reviews. These proposed Guidelines will assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the agencies' enforcement decisions.

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[7] Horizontal Merger Guidelines For Public Comment (Apr. 20, 2010), www.ftc.gov/opa/2010/04/hmg.shtm.

This update of the Guidelines is notable for the transparency of the process. The proposed revisions were issued after consideration of public comments and input received during a series of five joint FTC/DOJ workshops held over the past six months, which were open to the public and attended by attorneys, academics, economists, consumer groups, and businesses.[8]

The result is a revised version of the Guidelines that more closely reflects the current practice of the antitrust agencies. One of the key differences is that the proposed Guidelines clarify that merger analysis does not use a single methodology, but is instead a fact-specific process, using a variety of tools to analyze the evidence. The Guidelines also explain that market definition is not an end in and of itself, or even a necessary starting point of merger analysis, but instead a tool to be used when it is useful to illuminate the potential competitive effects of the proposed merger. Another highlight is the increase in the Hirschmann-Herfindahl Index ("HHI") concentration levels likely to warrant either further scrutiny or challenge from the agencies; again, this update more accurately reflects current agency practice, and provides a more useful guide for businesses considering potential deals.

We have been gratified by the reaction from the legal and business community. The Guidelines have been warmly received by a wide range of practitioners, consumer groups, businesses and academics, and we look forward to their further comments. Of course, we welcome any comments and questions from the Members of the Committee.

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[8] Horizontal Merger Guidelines Review Project Website, www.ftc.gov/bc/workshops/hmg/index.shtml.

IV. News Media Workshops

The Commission continues to pursue an active policy and research agenda, and as a part of these efforts the FTC regularly holds hearings and workshops to examine important economic and competition issues affecting businesses and consumers. A recent example is a series of workshops entitled "How Will Journalism Survive the Internet Age?" The expansion of electronic commerce and media is challenging conventional journalism business models. This sea change may have implications both for competition among media outlets and our democratic society. The Commission's workshops have been designed to focus attention on this emerging concern, assess the range of economic and policy issues raised by the changes in the market, and explore how competition can be used to enhance consumer welfare.

The FTC held the first workshop in December 2009, and the opening session featured contributions from a diverse group of well-informed participants, from Rupert Murdoch to Arianna Huffington. Owners of news organizations, journalists, bloggers, technologists, economists, and other academics discussed the changing dynamics of the news business and considered what new journalism business models might evolve in the future. The workshops continued in March 2010, when experts in a variety of fields discussed the pros and cons of a number of proposals to increase the efficiency and profitability of journalism, including: more accessible and more manageable government data; possible changes to copyright law, various new business models, and collaborations among news organizations. The series of hearings will conclude later this month, when the Commission will hold a final public workshop to compare the policy options that have emerged during our study. The Commission will thoroughly evaluate the results of the workshops and assess the various issues raised and discussed, and plans to issue a report on this project in the fall.

V. Section 5 of the Federal Trade Commission Act

As the Members of this Committee are well aware, the Federal Trade Commission has enforcement authority beyond that of the Sherman and Clayton Acts. When Congress created the FTC in 1914, it empowered the agency to prevent "unfair methods of competition" through Section 5 of the Federal Trade Commission Act.[9] Congress was dissatisfied with the state of antitrust enforcement at that time, and its goal was to create an agency with broader jurisdiction than the Department of Justice. At the same time, Congress sought to balance that broader jurisdiction with a limitation on the actions that may be taken under the new law. Thus, under Section 5, while its remedies are somewhat limited, the Commission may reach conduct that undermines competition even if it does not violate the Sherman Act. This broad authority is clear in the legislative history of the FTC Act, which shows that Section 5 was not enacted merely to mirror the Sherman Act. Rather, as Senator Cummins, one of the bill's main proponents, squarely stated on the Senate floor: "[t]hat is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law."[10] This view of Section 5 has been confirmed by the U.S. Supreme Court,[11] but lower courts in the 1970s and 1980s struck down FTC efforts to use this authority.

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[9] 15 U.S.C. § 45.

[10] 51 Cong. Rec. 12,454 (1914).

[11] *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 240 (1972). Also, the Supreme Court observed in *Indiana Federation of Dentists* that the "standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

After those cases, until recently, the Commission had generally limited use of its Section 5 authority to conduct that would also violate the Sherman Act.

Since the 1970s, the Supreme Court has increasingly narrowed the scope of the Sherman Act, in part due to concerns that private class-action antitrust litigation and the impact of treble damage awards will tend to deter legitimate, competitive activity.[12] But whatever the reason, the result is that the antitrust agencies, as antitrust plaintiffs themselves, find themselves limited in their ability to challenge anticompetitive conduct that harms consumers – even though the Commission is not entitled to treble damages, and Section 5 does not provide for a private right of action. Thus, the use of Section 5 by the Commission should limit the remedial and follow-on litigation concerns that may be raised by the use of the Sherman Act.

Accordingly, the Commission is actively considering how it can best use Section 5 to enhance enforcement in a responsible and transparent manner. We have held a workshop[13] to assess the best uses of Section 5, and are planning to issue a report with our conclusions. We recently filed a case against Intel that included a free-standing unfair method of competition claim,[14] and we have other investigations in progress that may include similar claims. Of course, in using our Section 5 authority the Commission will focus on bringing cases where there is

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[12] *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1992); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto v. Spray-Rite Serv. Co.*, 465 U.S. 752 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[13] "Section 5 of the FTC Act as a Competition Statute," Workshop Website, www.ftc.gov/bc/workshops/section5/index.shtml.

[14] *In the Matter of Intel Corporation*, (Administrative Complaint Dec. 16, 2009), www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

clear harm to the competitive process and to consumers. We are confident that Section 5 will prove to be an effective mechanism to block anticompetitive behavior, and will allow the Commission to aggressively protect consumers without sparking concerns in the courts..

VI. Energy

The petroleum industry plays a crucial role in our economy, and few issues are more important to consumers and businesses than the prices they pay for gasoline and energy to heat and light their homes and businesses. Because of this, the Commission carefully monitors energy markets and devotes significant resources to maintain and protect competition across a wide range of industry activities. This work is undertaken by a large number of economists and attorneys who specialize in the energy sector.

Merger review is an essential part of this effort, and in 2009 the Commission reviewed proposed acquisitions involving refined petroleum products, pipelines and terminals, liquefied petroleum gas (propane), lubricant oils, natural gas, and natural gas liquids storage and transportation.

In addition, the Commission continues the "Gas Price Monitoring Project" that began in 2002. The monitoring project is a daily, in-depth review of retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. The project provides information that helps the Commission to investigate potentially anticompetitive conduct in fuel markets and serves as an early-warning system to alert our experts to unusual pricing activity.[15]

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[15] *See* Gasoline and Diesel Price Monitoring, www.ftc.gov/ftc/oilgas/gas_price.htm.

Last November, the Commission added another tool to its arsenal. Pursuant to authority granted by Congress under the Energy Independence and Security Act of 2007, the Commission issued the Petroleum Market Manipulation Rule, which prohibits fraud or deceit in wholesale petroleum markets.[16] The agency conducted an extensive rulemaking proceeding to decide whether and how to craft such a rule, holding a public workshop with participants representing industry, government agencies, academics, and consumers; holding numerous meetings with consumer groups, trade associations, and businesses; and considering over 150 written comments from consumers and businesses. The Commission worked diligently on this issue for 16 months and promulgated a rule that meets the goal of Congress. Importantly, the rule prohibits statements that intentionally omit material information and that are likely to distort petroleum markets. Commission staff has prepared a compliance guide for businesses, which explains the rule in depth and provides examples of the type of actions that would violate it.[17] Examples of potential violations include: false public announcements of planned pricing or output decisions, false statistical or data reporting, and wash sales intended to disguise the actual liquidity of a market or the price of a particular product. The Market Manipulation Rule has only been in effect for a short time, and the agency plans to aggressively enforce the rule as needed.

In addition to these actions, Commission economists and attorneys issue reports on energy matters, including market statistics and trends for use by Congress and other

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[16] *See* FTC Press Release, New FTC Rule Prohibits Petroleum Market Manipulation (Aug. 6, 2009), www.ftc.gov/opa/2009/08/mmr.shtm; 74 Fed. Reg. 40686 (Aug. 12, 2009).

[17] Guide to Complying with Petroleum Market Manipulation Regulations, www.ftc.gov/os/2009/11/091113mmrguide.pdf.

policymakers. For example, the Commission has submitted multiple comments to the Federal Energy Regulatory Commission (FERC) on a broad range of competition-related issues.[18]

The Commission will continue to utilize its expertise in all of these ways to promote competition in the energy sector and pursue potential illegal conduct that harms consumers.

VII. Consumer Protection

On the consumer protection front, the Commission continues to use aggressive law enforcement, innovative consumer and business education, and partnerships with other federal and state law enforcement agencies to further the reach of our initiatives. In particular, the FTC has increased its emphasis on protecting consumers in financial distress. Since January 2009, the FTC has brought 40 law enforcement actions against defendants engaged in deceptive practices targeting financially-distressed consumers, and the agency is also engaged in rulemaking and consumer education efforts related to financial services. By working closely with state attorneys general, we have expanded the reach of these efforts through the filing of more than 200 enforcement actions by our state partners.

Privacy also remains a significant priority. In addition to the agency's 29 enforcement actions against businesses that failed to protect consumers' personal information, the FTC is actively engaged in an effort to examine privacy issues more broadly. FTC staff convened three

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[18] *See* Comment of the Federal Trade Commission on *Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act,* FERC Docket No. RM09-16-000 (Mar. 29, 2010); Comment of the Federal Trade Commission on Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, FERC Docket No. PL09-3-000 (Apr. 28, 2009); Reply Comment of the Federal Trade Commission on *Transmission Planning Processes Under Order No. 890*, FERC Docket No. AD09-8-000 (Dec. 3, 2009).

public roundtables to explore concerns about consumer privacy and ensure that the Commission's approach to privacy keeps pace with the latest technologies and emerging business models.[19] The Commission plans to release recommendations for public comment later this year.

The FTC vigorously enforces the rule prohibiting marketing calls to phone numbers on the National Do Not Call Registry, which soon will have more than 200 million unique phone numbers, and takes enforcement action against deceptive telemarketing. For example, during the past year, the Commission filed nine new actions that attack the use of harassing "robocalls" – the automated delivery of prerecorded messages – to deliver deceptive telemarketing pitches that promised extended auto warranties and credit card interest rate reduction services.[20]

VIII. Conclusion

The Commission is active in a number of other areas that may be of interest to the Subcommittee, including Internet privacy, clinical integration of medical practices, and consideration of the use of Resale Price Maintenance policies in light of the recent Supreme Court decision in *Leegin*. I'd be pleased to discuss any of these topics, and any others of interest to the Subcommittee.

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[19] *See generally* FTC Exploring Privacy Website, www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml.

[20] *See, e.g.*, FTC Press Release FTC Sues to Stop Robocalls With Deceptive Credit Card Interest-Rate Reduction Claims (Dec. 8, 2009), www.ftc.gov/opa/2009/12/robocall.shtm.

Thank you for this opportunity to share highlights of the Commission's recent work to promote and protect competition in the marketplace. The Commission looks forward to continuing to work with the Subcommittee to ensure that our antitrust laws and policies are sound and that they benefit consumers without unduly burdening businesses.

NCPA
NATIONAL COMMUNITY PHARMACISTS ASSOCIATION
WWW.NCPANET.ORG

Statement of the National Community Pharmacists Association (NCPA)

The United States Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights

The Federal Trade Commission (FTC) and United States Department of Justice (DOJ) Antitrust Oversight Hearing

June 9, 2010

Summary of NCPA Statement
NCPA recommends that the FTC/DOJ:
(1) Revise the 1996 Antitrust Enforcement Policy in Healthcare Guidelines to include pharmacist collaboration;
(2) Encourage and support federal and state efforts to regulate pharmacy benefit managers; and
(3) Implement a comprehensive enforcement action against CVS Caremark to address the concerns of independent pharmacies and their patients

Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee:

NCPA welcomes and appreciates this opportunity to provide input and suggestions regarding the antitrust oversight and guidance of the FTC and the DOJ particularly as it relates to pharmacy care providers and the health care arena in general. NCPA represents the pharmacist owners, managers and employees of more than 23,000 independent community pharmacies across the United States. The nation's independent pharmacies, independent pharmacy franchises and independent chains dispense nearly half of the nation's retail prescription medicines. NCPA strongly believes in the missions of the antitrust enforcement agencies and that this Subcommittee's oversight of those agencies is important to assure effective antitrust enforcement for all consumers.

NCPA encourages the FTC/DOJ to update their 1996 Antitrust Enforcement Policy in Health Care Guidelines to reflect the current health care marketplace

The FTC and DOJ jointly issued the *Statements of Antitrust Enforcement Policy in Health Care* in 1996 to provide guidance to health care providers and related entities about the agencies' enforcement policies in this area. This document also provides examples of types of collaboration among these providers or entities that the agencies would not challenge as violative of the antitrust laws—or those within antitrust "safety zones." Needless to say, there have been tremendous changes in the delivery of health care services in the United States since 1996, and these guidelines are now out-of-date.

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When the 1996 guidelines were issued, then-FTC Commissioner Christine Varney wrote, "[t]he health care marketplace is undergoing rapid change, and it is primarily through an open dialogue with all involved in the health care industry that the Agencies can continue to provide appropriate and relevant antitrust guidance." We believe that revision of these Guidelines is long overdue and that the time is ripe in light of the passage and pending implementation of health care reform legislation.

The permissible scenarios cited in the 1996 health care guidelines are primarily focused on collaborative efforts among physicians or hospitals and do not mention pharmacists, pharmacies or other types of healthcare providers. We urge the FTC with the DOJ to revise the guidelines and start by initiating a dialogue with a variety of healthcare practitioners, including pharmacists, to gain an understanding of the types of collaboration that are being explored or contemplated by providers and the ways in which these efforts can positively impact the quality of patient care and lower overall healthcare costs. The need for an updated version of these guidelines has been noted by Congressional leaders on a number of occasions in the recent past. An initial letter to this effect was sent to the FTC/DOJ in June 2007 by Senators Kohl, Specter, Grassley, Durbin and Whitehouse. Most recently in a letter dated November, 3, 2009, Senators Leahy, Kohl, Specter, Grassley, Whitehouse and Feinstein also urged the FTC and the DOJ to revise these same guidelines based on the fact that "clear and user-friendly guidance would reduce barriers to coordination and innovation ultimately leading to cost efficiencies in the health care system" particularly given the fact that significant health care reform appeared imminent.

The Asheville Project is a successful example of pharmacist collaboration to provide medication therapy management (MTM) for chronic disease states

One example of successful collaboration among pharmacists that has had significant demonstrable patient outcomes is the Asheville Project—an undertaking that utilized a network of community pharmacies to combat chronic disease states. Community pharmacists are often more accessible than other health care providers and provide a wide variety of services beyond the simple dispensing of drugs. In addition, community pharmacies are often located in rural or inner city areas, typically underserved by other types of health care providers. Community pharmacies can serve an important role in reducing costs, while improving healthcare results, especially if there is greater clarity about pharmacy collaboration under the antitrust laws.

The "Asheville Project" began in 1996 as an effort by the city of Asheville, NC, a self-insured employer, to provide education and personal oversight for employees with chronic health problems such as diabetes, asthma, hypertension and high cholesterol. According to the Centers for Disease Control and Prevention, chronic diseases make up 75% of the annual health care bill. Diabetes alone affects 18.2 million people and costs $132 billion a year, including lost productivity and disability. In the Asheville Project, patients were paired with pharmacists from one of twelve network community pharmacies who served as coaches to these at-risk patients, monitored medication adherence and encouraged and facilitated lifestyle changes. These pharmacists were paid on a fee-for-service basis patterned after a federal claims model for these clinical services-- now broadly referred to as medication therapy management or MTM. The results in terms of patient outcomes as well as the savings to the employer were astounding. In 1996, the city spent an average of $6,127 a year on each of its 48 diabetic

employees. By the end of 1997, expenditures for these employees had been cut in half, to $3,554 per patient. The average sick time among the diabetic employees dropped from 12.6 days per employee each year to 6 days and has remained at 6 or below since 1999. Since the Asheville Project was launched, thousands of people in the Asheville area have taken control of their diabetes, cholesterol, hypertension and asthma as the model has been expanded to include other diseases over the years. Six employers and more than 1,200 people currently participate in the project in the Asheville area. Using the Asheville Project as a model, similar programs sprang up in West Virginia, North Dakota, Kentucky, Georgia, Ohio and Wisconsin and demonstrated similar success rates in terms of positive health care outcomes and cost savings.

The Joint FTC/DOJ health care guidelines should be updated to allow the collaboration of pharmacists to provide clinical services and the ability to effectively negotiate with health insurance companies and PBMs for adequate reimbursement rates that would allow them to provide these services.

NCPA would welcome the revision of the antitrust health care guidelines to include various types of pharmacist collaboration—like medication therapy management-- demonstrated by the Asheville Project. Pharmacists are increasingly gaining recognition for the integral role that they play in encouraging preventative care and promoting wellness given their subject matter expertise and access to the communities in which they serve. Allowing pharmacists to collaborate and negotiate with insurers and PBMs for adequate reimbursement for such services would ensure that more consumers would have access to this type of innovative care and reduce overall health care costs.

The newly passed federal health care reform legislation clearly recognizes the importance of preventative care and the management of chronic disease states as an important tool in reducing prescription drug spending as well as overall health care costs. Specifically, the legislation requires qualified health plans to provide coverage for all preventative services rated "A" or "B" by the U.S. Preventative Services Task Force effective September 2010. Some of these highly- rated preventative services include tobacco cessation intervention and diabetes and high blood pressure screening and management. In addition, the legislation authorizes $100 million in grant funding to states for preventative health programs including tobacco cessation, weight control and diabetes management effective January 2011 as well as a 1% increase in federal matching funds for states whose Medicaid programs provide coverage for all preventative services recommended by the U.S. Preventative Services Task Force.

The implementation of these preventative health care services by the states will most likely require increased collaboration among health care providers and pharmacists are uniquely qualified to provide these services. Support for the expansion of medication therapy management programs is growing in both the public and private sectors as well. In recognition of the past successes and future potential of medication therapy management in the areas of cost savings and patient outcomes for patients with chronic disease states, CMS requires all Medicare Part D plans to offer MTM to assist beneficiaries with multiple chronic diseases who take multiple Part D eligible drugs. NCPA urges the FTC/DOJ to

recognize the expanded role that pharmacists can play in increasing efficiencies in the health care system, and to revise the guidelines to permit these activities.

NCPA Urges the FTC/DOJ to Examine Potentially Anticompetitive Actions by Pharmacy Benefit Managers and to encourage both federal and state legislation to regulate these entities

In the past year the Congressional debate over healthcare began to identify how health care intermediaries such as health insurance companies and Pharmacy Benefit Managers (PBMs) take advantage of the lack of competition in health care markets and the complexity of healthcare financing to harm consumers. Although these entities are supposed to control and reduce healthcare costs, often they engage in apparently fraudulent and deceptive conduct that result in employers and consumers paying more.

For several years, NCPA and its members have worked to educate Congress, state legislators and healthcare plans about the questionable and anticompetitive conduct of PBMs that negatively affect patients. Through a period of consolidation in the last decade, the PBM industry is now dominated by three large companies -- Medco, CVS Caremark and ExpressScripts – which now collectively administer 80% of insured prescriptions and 90% of insured mail order prescriptions. In addition, each company reports annual revenues exceeding $15 billion dollars. Unfortunately this market has consolidated due to a lack of antitrust enforcement. PBMs are middlemen that were originally designed to lower transaction costs between pharmacies and health insurance plans but have been allowed to operate unchecked—with no consistent regulatory structure or oversight. Because of the complexity of the market and the significant concentration the profits for the three largest PBMs have skyrocketed in the last four years, from about $900 million to over $3 billion annually.

When a PBM contracts with retail pharmacies, the PBM is able to determine how much the pharmacy will be reimbursed, which drugs will be covered, the days supply that the pharmacy can dispense, and the patient co-pay, as well as other factors. A conflict of interest exists, in that most PBMs own a mail order pharmacy that competes with the retail pharmacies that are part of the PBM network. Between 2004 and 2008, a coalition of over 20 state attorneys general brought cases against each of the three major PBMs over allegations of fraud; misrepresentation to plan sponsors, patients and providers; unjust enrichment through secret kickback schemes; and failure to meet ethical and safety standards. These cases have resulted in over $370 million in damages returned back to states, plans and patients so far.

There is clearly a need for greater regulation of PBMs. Congress recognized this in healthcare reform by requiring that PBMs that participate in either the health care exchanges or Medicare Part D provide plans with a basic level of transparency. Unfortunately in the past, the FTC on several occasions discouraged state legislation designed to elicit common-sense disclosures from the PBMs. This opposition to transparency seems puzzling. After all, information enables a buyer to determine what is being sold. Assistant Attorney General for Antitrust Christine Varney highlighted the importance of transparency when she said "I am a firm believer in what Justice Brandeis said in another context:

'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' Markets work better and attempted harms to competition are more likely to be thwarted when there is increased transparency to consumers and government about what is going on in an industry."

NCPA respectfully requests that the agencies support both federal and state efforts to rein in the questionable documented practices of these entities.

NCPA Appreciates the Current FTC Investigation Into Alleged Anticompetitive Conduct of CVS-Caremark and Encourages the Agency to Continue Its Efforts

NCPA respectfully requests that the FTC vigorously continue its investigation into the alleged anti-competitive conduct of the CVS Caremark Corporation. The merger of CVS and Caremark was cleared by the FTC in November 2007 and combined CVS- the largest pharmacy chain- with Caremark, the second largest PBM. The root of the problem is the company's dual role as both prescription drug plan administrator for approximately 82 million Americans and as the owner of 7,000 drug stores. That inherent conflict of interest apparently allows the company to leverage independent community pharmacies into unfavorable reimbursement contracts in order to claim that they offer a broad pharmacy network for patients. However, then, CVS Caremark effectively steers patients to fill prescriptions at its own mail order or retail pharmacies — effectively becoming both payors of and competitors with community pharmacies.

Since the merger, NCPA has been inundated with hundreds of complaints about the company's conduct. Patients, who are the direct targets of these tactics, resent now being steered against their will to CVS Caremark's mail order and retail pharmacies. Savings promised by CVS Caremark have seemingly vanished into thin air. Sensitive patient information is apparently being accessed by the company not for valid health reasons of payment, treatment and operations, but simply to pursue an even greater market share.

After raising these concerns, NCPA officials and over 80 community pharmacy owners were granted an opportunity to present evidence of CVS Caremark's anticompetitive and anti-privacy practices at the FTC headquarters on May 13, 2009. Additional, bipartisan support was provided, after hearing about the complaints from their constituents (whether they were patients or pharmacists) by U.S. Senators Sherrod Brown (D-Ohio), Byron Dorgan (D-N.D.), Russ Feingold (D-Wis.), Amy Klobuchar (D-Minn.), Frank Lautenberg (D-N.J.), Mark Pryor (D-Ark.) and Roger Wicker (R-Miss.), and U.S. Representatives Michael Acuri (D-N.Y.), Robert Aderholt (R-Ala.), Marion Berry (D-Ark.), Jo Bonner (R-Ala.), John Boozman (R-Ark.), Judy Chu (D-Calif.), Lloyd Doggett (D-Texas), Jim Gerlach (R-Pa.), Walter Jones (R-N.C.), Larry Kissell (D-N.C.), Robert Latta (R-Ohio), Michael Rogers (R-Ala.), Linda Sanchez (D-Calif.), Jan Schakowsky (D-Ill.) and Anthony Weiner (D-N.Y.) in a series of letters that among other things called for, "the FTC to reopen the CVS Caremark merger investigation and determine if the acquisition poses a threat of reducing competition or whether CVS is engaging in any unfair or deceptive business practices."

In August 2009, the FTC heeded those concerns by launching an investigation into CVS Caremark, which later disclosed this development to its shareholders. More recently over 24 states have joined

the investigation. The complaints from consumers and pharmacies all document actions by CVS Caremark to drive community pharmacies from the market and reduce choices and services to consumers. In some cases, confidential information is used to drive patients from rival independent pharmacies to a CVS pharmacy. In other cases, CVS Caremark limits consumers' access to either CVS stores or CVS mail order. We have heard numerous complaints of how aggressive auditing is used to recoup funds from community pharmacies on minor technicalities. Some of these actions have a particular pernicious effect on community pharmacies and patients in rural markets, where health care options are more limited. Patients told they can only use CVS Caremark often face a long trip to the closest CVS or a significant wait for their medicine through the mail—losing their access to a local pharmacist familiar with their health needs and history.

When the CVS Caremark transaction was announced the company made two commitments: to be "agnostic" about the choice of pharmacy (in other words not to discriminate), and to have a firewall to keep CVS and Caremark separate. Neither of those commitments have been adhered to as CVS has increasingly used Caremark as a tool to drive rival pharmacies from the market. Ultimately consumers lose.

NCPA greatly appreciates the active investigation of CVS Caremark by the FTC and the states thus far. We urge the FTC and the states to take a comprehensive enforcement action to fully resolve the concerns identified by community pharmacies and their patients.

Conclusion

NCPA appreciates the opportunity to share our suggestions and concerns with the Subcommittee. In conclusion, NCPA recommends that the FTC/DOJ: (1) revise the 1996 Antitrust Enforcement Policy in Health Care Guidelines to include pharmacist collaboration; (2) encourage and support federal and state efforts to regulate pharmacy benefit managers; and (3) take comprehensive enforcement action against CVS Caremark to address the concerns of independent pharmacies and their patients.

Department of Justice

STATEMENT

OF

CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS"

PRESENTED ON

JUNE 9, 2010

STATEMENT
OF
CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION
BEFORE THE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY
AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ENTITLED
"OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS"
PRESENTED ON
JUNE 9, 2010

Good afternoon Chairman Kohl and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Department of Justice to discuss with you the work of the Division over the last year.

Competition is a cornerstone of our nation's economic foundation. The Department of Justice's Antitrust Division takes a measured approach to enforcement using sound competition principles, evaluating each matter carefully, thoroughly, and in light of its particular facts. Our enforcement helps keep markets competitive, thereby protecting consumers and spurring innovation. We appreciate this Subcommittee's active interest in—and strong support of—our law enforcement mission. We are particularly thankful that the Committee Chairman and Leader Reid, with the support of the Obama Administration, are leading the effort to eliminate antitrust immunity for the health-insurance industry.

The Antitrust Division is galvanizing the tremendous skills of our lawyers and economists to coordinate strong enforcement with thorough market and policy analysis, as part of a broad effort to encourage competition. In addition to our enforcement efforts, the Division plays a vital role within the government promoting competition. We are mindful that initiatives in other parts of the government can often have significant competition implications, and we

share our expertise throughout the government. We also listen to other parts of the government, academics, and marketplace leaders to learn from them and anticipate potential antitrust problems to better serve American consumers.

Merger enforcement continues to be a core priority for the Antitrust Division. We are committed to going to court to block those mergers that will substantially reduce competition. The commitment to litigate enhances our ability to negotiate settlements that simultaneously enable any procompetitive aspects of a deal to go forward yet also prevent harm to consumers. At the same time, we are also committed to quickly closing our investigations of mergers that do not threaten consumer harm so as not to unnecessarily impede business operations. Just as consumers rely on us to protect them against harmful business combinations, businesses should also be able to rely on us to quickly and efficiently clear their lawful transactions.

One enforcement action that remains in active litigation involves the nation's largest dairy processor. In January, the Division filed suit to undo the merger of Dean Foods and Foremost Dairy, alleging that the merger reduced competition for milk sold to schools, grocers, and retailers in Illinois, Michigan, and Wisconsin. The Department's suit seeks not only to undo the 2009 deal but also an order requiring Dean to notify the Department before any future acquisition involving a milk processing operation. More generally, this enforcement action is indicative of this Department of Justice's commitment to our nation's farming industries.

Investigation dynamics can be difficult in transactions, like the one between Dean and Foremost, where the pre-merger notification process under the HSR Act does not apply and the parties are free to close their transaction before review of the transaction is complete. Nevertheless, the Division continues to investigate and, where appropriate, take action against transactions that do not require pre-merger notification. Another example of our law

enforcement was the abandonment by Blue Cross-Blue Shield of Michigan of its proposed purchase of Physicians Health Plan of Mid-Michigan. Had that acquisition gone forward, it would have given Blue Cross control of nearly 90 percent of the commercial health insurance market in the Lansing; Michigan, area, resulting in higher prices, fewer choices, and a reduction in the quality of commercial health insurance plans purchased by Lansing area residents and their employers. The acquisition also would have given Blue Cross the ability to control physician reimbursement rates in a manner that could harm the quality of health care delivered to consumers. We informed the parties that we would file an antitrust suit to block the transaction, and the parties then abandoned the deal.

It is in the shadow of our willingness to litigate that we have also been able to obtain several settlements that simultaneously resolve our competitive concerns while permitting the parties to proceed with those parts of their transaction that do not threaten consumer welfare. For instance, in January, the Antitrust Division announced that it would require Ticketmaster, the world's largest ticketing company, to license its ticketing software, divest ticketing assets, and subject itself to anti-retaliation provisions in order to proceed with its proposed merger with Live Nation Inc. The remedy, which remains under Tunney Act review, will give concert venues more choice for their ticketing needs and will promote incentives for competitors to innovate and discount.

The proposed relief in the Ticketmaster matter is both structural and behavioral. The settlement requires Ticketmaster to divest more ticketing than it will gain through its acquisition of Live Nation. Simultaneously, the licensing solves a second competitive issue by giving AEG, an integrated competitor, the ability and incentive to compete with the combination of Ticketmaster and Live Nation for concert promotion, venue management, and ticketing. Under

the settlement, Ticketmaster will be required to license its ticketing software to AEG, which had been Ticketmaster's single largest customer. AEG will now have the opportunity and incentive to compete in primary ticketing, both in its own venues and third-party venues, thereby opening the door for AEG to become a vertically integrated competitor with competitive incentives similar to those of the merged company. In addition, Ticketmaster was required to divest Paciolan, an established ticketing business that sells tens of millions of tickets annually. Finally, the settlement provides tough, ten-year, anti-retaliation provisions that prohibit anticompetitive bundling and should keep the merged company in check. Those anti-retaliation provisions illustrate a slight shift of Division policy in realm of merger remedies. Although we generally prefer structural solutions, we are also committed to thinking creatively about market conditions and employing behavioral solutions, particularly when they are needed, in tandem with structural solutions, to protect against consumer harm.

Another transaction where we were able to obtain a proposed consent decree resolving our competitive concerns involved Bemis's $1.2 billion acquisition of the Alcan Packaging Food Americas business from Rio Tinto. As originally proposed, the transaction would have combined Bemis and Alcan, two of the leading U.S. manufacturers of (1) flexible-packaging rollstock for chunk, sliced, and shredded natural cheese and (2) flexible-packaging shrink bags for fresh meat. Without divestitures, the acquisition would have led to higher prices, lower quality, less favorable supply-chain options, reduced technical support, and less innovation. The proposed settlement requires the companies to divest Alcan contracts and intellectual property, plants located in Oklahoma and Wisconsin, and other assets necessary to the manufacture of flexible packaging for natural cheese and fresh meat.

Similarly, we moved quickly to remedy the combination of the nation's two largest providers of voting machines. Again, this transaction fell below the HSR-reporting thresholds, so our investigation began only after the parties had combined their assets and dismantled some of their pre-combination operating divisions. The proposed settlement provides quick, effective relief resolving our competitive concerns and enabling local and state jurisdictions to obtain competitive bids for their immediate voting equipment needs.

Specifically, under the settlement, the acquirer, Election Systems & Software, was required to divest the means to produce Premier Voting Equipment Systems, including the necessary intellectual property, tooling, fixed assets, inventory of finished devices, and replacement parts. The settlement also prohibits ES&S from bidding on new voting equipment system contracts using the Premier equipment. Last month, Dominion Voting Systems purchased the Premier assets from ES&S. The divestiture allows Dominion to contract immediately with third party manufacturers, consistent with Premier's past practice, for the production of Premier devices and parts.

As mentioned earlier, the Antitrust Division is also committed to expeditiously closing those matters that do not threaten consumers. Unnecessary delay is simply unacceptable. For instance, the Justice Department did not challenge either the combination of Oracle and Sun or the collaboration between Microsoft and Yahoo!. In other words, we seek to ensure that our commitment to vigorous enforcement of the antitrust laws does not impede legitimate business transactions that do not run afoul of the antitrust laws.

On civil non-merger issues, we have two matters that remain under court review through the provisions of the Tunney Act. In the first, we allege that the then-largest seller of electricity capacity in the New York City market engaged in an anticompetitive swap transaction that likely

resulted in a price increase for retail electricity suppliers and, in turn, an increase in electricity prices for consumers. In the second, we allege that a group of Idaho orthopedic surgeons organized a boycott of Idaho's workers' compensation system, essentially refusing to treat injured workers. Our proposed decree would enjoin the conduct.

In our criminal program, we continue to uncover and prosecute a number of cartels that inflicted significant competitive harm. These efforts were significantly enhanced by the provisions of the Antitrust Criminal Penalty Enhancement and Reform Act, which supplements our leniency program, and we thank you for leading the effort to extend that program through a ten-year reauthorization.

Recently, we have prosecuted criminal cases against firms and individuals in several industries, including air transportation services, liquid crystal display panels, financial services, Internet services for disadvantaged schools and libraries, packaged ice, environmental services, and post-Hurricane Katrina remedial work. Those prosecutions resulted in significant fines. In our most recent fiscal year 2009, the Division obtained more than $1 billion in fines, which is the second highest amount of total fines ever obtained by the Division in a fiscal year. The bulk of those fines were the result of the Division's investigations of the air transportation and LCD industries. Recent fines in the air transportation area includes (1) a $119 million fine against Luxembourg-based Cargolux Airlines International, (2) a $109 million fine against LAN Cargo, a Chilean company, and a Brazilian company that it substantially owns, (3) a $50 million fine against Korea-based Asiana Airlines, (4) a $45 million fine against Japan-based Nippon Cargo Airlines, and (5) a $15.7 million fine against EL AL, an Israeli company. Recent fines in the LCD area include (1) a $400 million fine—the second largest fine in Antitrust Division history—against Korean LCD manufacturer LG Display and its California subsidiary, (2) a $220 million

fine against Taiwan manufacturer Chi Mei Optoelectronics, (3) a $120 million fine against Japanese manufacturer Sharp, (4) a $65 million fine against Taiwan manufacturer Chunghwa Picture Tubes, (5) a $31 million fine against Japanese manufacturer Hitachi Displays, and (6) a $26 million fine against Japanese manufacturer Epson Imaging Devices.

In addition to corporate fines, holding culpable individuals accountable by seeking jail sentences also remains an effective way to deter and punish cartel activity. Individuals prosecuted by the Division are being sent to jail with increasing frequency and for longer periods of time. In our most recent fiscal year, courts imposed more than 25,000 jail days against defendants in Antitrust Division matters. Defendants prosecuted by the Division are, on average, serving increasingly longer sentences, and they are also going to jail with increasing frequency. For instance, in the 1990s, 37 percent of defendants prosecuted by the Division were sentenced to jail on average. Last year, 80 percent were.

In addition to the threat of fines and jail time, rigorous internal compliance programs, where employers rigorously instruct their employees about the requirements of the antitrust laws and set up internal controls to protect against cartel activity, are another important deterrence mechanism that can prevent harmful cartel activity from occurring in the first place. As we move forward, we look forward to encouraging firms to undertake effective compliance programs and thinking creatively about ways to stimulate them. Early detection of criminal antitrust activity allows companies, where necessitated, to take advantage of the Division's criminal leniency program.

On the competition-advocacy front, the Antitrust Division has stepped up its efforts with various programs and initiatives directed at strengthening markets and preserving economic freedom and fairness. Promoting competition principles through broad advocacy efforts and

regulatory outreach is one of our highest priorities. As a result of our enforcement efforts, the Antitrust Division has gained enormous insight into the competitive dynamics of many industries. We are committed to sharing that expertise throughout the government to enhance pro-consumer outcomes. To that end, the Division works actively with a broad range of federal and state agencies to promote competition principles across a number of vitally important industries in our economy, including agriculture, telecommunications, energy, financial services, and healthcare.

Prominent among these efforts is our work in the agriculture industry. Earlier this year, the Department of Justice and the Department of Agriculture launched a series of workshops around the United States to discuss competition and regulatory issues in the agriculture industry. Both Attorney General Holder and Secretary of Agriculture Vilsack are personally participating in these unprecedented series of joint public workshops, which are the first-ever sponsored jointly by the Justice Department and the USDA to discuss competition and regulatory issues in the agriculture industry.

The first workshop was held in March of this year in Ankeny, Iowa, and featured panel discussions on a variety of topics important to America's farmers and ranchers, including competitive dynamics in the seed industry, trends in contracting, transparency, and buyer power, and concluded with public testimony. More than 700 citizens were in attendance. Just last month, we had our second hearing in Normal, Alabama, where we addressed the concerns of poultry farmers, trends in poultry production, and related regulatory and enforcement issues. More than 500 farmers and other participants attended. An additional three hearings will be held later this year in Wisconsin, Colorado, and back here in Washington, D.C. I also attended this Committee's field hearing in Vermont with Senators Leahy and Sanders on dairy issues and

joined Senator Schumer in New York to meet and hear from his state's dairy farmers a few months ago. Among other lessons, these hearings have impressed upon us the vital importance of effective co-operatives and family farms for well-functioning agriculture markets.

To maximize the effect of our learning from these hearings, the Justice Department has formed a joint task force with the USDA to help us determine how the government can best utilize what is learned from those hearings to help promote competition in our nation's agricultural markets. Even though antitrust is not the solution to all problems, we are committed to championing throughout the government pro-consumer principles that will promote competition in agriculture markets.

Another inter-agency task force that we are fully engaged on is the Financial Fraud Enforcement Task Force, which the President established to strengthen efforts to combat financial crime. Led by Attorney General Holder, the task force works with state and local partners to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, address discrimination in the lending and financial markets, and recover proceeds for victims. We are fully engaged in this effort.

In transportation, the Division has been working closely with the Department of Transportation, especially on issues related to antitrust immunity requests for airline alliances. We conducted thorough investigations and filed comments with the DOT addressing the competitive implications of immunity requests affecting the Star and oneworld alliance agreements. We also collaborated closely with our European counterparts in those matters. In addition, we provided to the DOT comments regarding the proposed transaction whereby Delta and USAir would swap their slots at LaGuardia and National airports. The DOT cited our

submission extensively in its order requiring slot divestitures before the transaction could proceed.

We have been active in telecommunications as well. Earlier this year, the Division submitted comments promoting competition principles with the Federal Communications Commission regarding its national broadband plan inquiry. We are also collaborating closely with the FCC on our concurrent review of the proposed transaction involving Comcast and NBC in order to harmonize to the maximum extent possible government review of that deal.

In the energy sector, the Division, along with the Federal Trade Commission, recently held an internal workshop on competition in the energy markets, which involved collaboration with representatives from the Federal Energy Regulatory Commission, the Department of Energy, and several state regulatory agencies. That workshop was part of a broader effort to coordinate with state enforcers on various matters, including both particular industries and antitrust doctrine more broadly. We are also working closely with the FERC on proposed transactions in the energy industry in an effort to more closely align our efforts.

In intellectual property, the Division is committing significant attention to the Intellectual Property Task Force established by Attorney General Holder. The Task Force focuses on strengthening efforts to combat intellectual property crimes through close coordination with state and local law enforcement partners, as well as international counterparts. It also serves as an engine of policy development to address the evolving technological and legal landscape of this area of law enforcement. Moreover, we have been working closely with the Patent and Trademark Office on issues relating to the intersection between patent law and competition principles. As part of that effort, the Department, the Federal Trade Commission, and the PTO held a public workshop last month on the intersection of patent policy and competition policy

and its implications for promoting innovation. The collaboration marked the first time that the three groups had sponsored a public workshop on this vitally important aspect of today's economy.

In addition to collaborating on the workshop, the Division has collaborated efficiently and effectively with the Federal Trade Commission on a number of other fronts. For example, our joint, ongoing review of the Horizontal Merger Guidelines and examination of whether they need to be updated in light of changes in agency practice in the eighteen years since the Guidelines were last significantly revised has been a constructive and positive collaboration. We are also beginning to coordinate efforts to support effective implementation of the new health-care-reform legislation. During my confirmation hearing, I stressed the need for harmonizing relations between the Division and the Federal Trade Commission, and we are working actively on that.

Healthcare is a particular priority for the Department. We have been actively working on the complicated competitive issues surrounding clinical integration among doctors, and the resulting competitive dynamic with health insurers, in conjunction with the Federal Trade Commission. We are also working collaboratively with the Department of Health and Human Services on the new Patient Protection and Affordable Care Act, seeking to proactively identify competitive issues relating, for instance, to administrative services organizations and the new marketplace dynamics that will be shaped by the reform.

Another important piece of the Division's commitment to advocate on behalf of competition and consumers is our amicus program where, often in conjunction with other parts of the Department and other parts of the government, we participate in the filing of amicus briefs in cases dealing important antitrust issues. For instance, the Division worked with the

Department to articulate to the United States Court of Appeals for the Second Circuit our competitive concerns about so-called "pay-for-delay" settlements in the pharmaceutical arena, whereby firms agree to delay the entry of generic-drug competition through settlement of a patent dispute. Amicus briefs provide a valuable opportunity for the Department to offer courts the benefits of the Division's specialized competition knowledge and expertise. These briefs also increase public transparency and inform the business community and antitrust counselors about the Division's approach to key antitrust and competition issues.

A very recent milestone for our amicus program occurred a few weeks ago when the Supreme Court issued its American Needle decision, which accorded with the recommendation of the Solicitor General. The Court's unanimous decision was an important win for consumers. It clearly stated that competitors, including joint ventures involving sports leagues and teams, are subject to the antitrust laws and rejected an effort to create a broad immunity under the antitrust laws for agreements among competitors. The decision ensures that playing fields remain open and competitive, providing consumers with more choices.

Not only are we championing consumers and competition domestically, but we are also actively engaging with the global antitrust community, which has grown as the scope of international business operations have grown. The Division works with international competition groups, like the Organisation for Economic Co-operation and Development and the International Competition Network, as well as international competition agencies, to promote competition and consumer interests across the globe. Our efforts to spearhead this important priority have been particularly enhanced by the strong relationship we have with our counterparts in the European Union. By way of example, we recently had a particularly constructive working

relationship with the European Commission analyzing the transaction between Cisco and Tandberg, and we aim to build upon that relationship going forward.

A particular priority has been promoting dialogue on the importance of transparency, due process, and fairness among international competition agencies. These efforts include participating in international workshops on a broad range of policy issues and contributing to guidance documents promulgated by organizations like the OECD and the ICN. The Division also consults bilaterally with a range of international jurisdictions on issues like adopting new antitrust laws, drafting guidelines, intellectual property licensing, and cooperation on international investigations and enforcement actions. Among many accomplishments, the Division and the FTC entered into a groundbreaking Memorandum of Understanding with the Russian Federal Anti-Monopoly Service in November 2009. We are also engaging actively with the relatively new Chinese and Indian competition authorities, and are establishing relationships there that will serve as springboards for future dialogue and discussion. For example, over the past year, the Division has had exchanges with Chinese agencies on their proposed regulations and guidelines, arranged a training program for eighty Chinese judges, and participated as instructors in workshops on merger enforcement, cartels, and other topics. The Division also participates in the Administration's initiatives in China, including the U.S.-China Strategic and Economic Dialogue and the Investment Forum. These and related efforts seek to promote the adoption of sound competition principles and antitrust enforcement around the world.

My first year as AAG has been remarkable. Working within the Justice Department on Attorney General Holder's team and closely with the dedicated men and women of the Antitrust Division, we are doing all we can to ensure that the competitive playing field is open and fair,

giving consumers more and better choices. I look forward to year two and am committed to further fulfillment of what we started.

Mr. Chairman, that concludes my remarks. I am grateful to have had the opportunity to speak with you, and am happy to answer any questions.