Prepared Statement of
the Federal Trade Commission

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Oversight of the Antitrust Enforcement Agencies

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Introduction

Chairman Goodlatte, Ranking Member Watt, 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 Commission and discuss some of our current competition enforcement activities.[1]

As the Members of this Subcommittee well know, competitive markets are the foundation of our economy, and effective antitrust enforcement is essential for those markets to function well. Vigorous competition promotes economic growth by keeping prices down, expanding output and the variety of choices available to consumers, and promoting innovation.

One of the Commission's primary obligations is to promote and protect competition. The FTC has jurisdiction over a wide swath of the economy. Among the sectors that the FTC focuses on are health care, energy, and technology.

We examine both mergers and unilateral and joint conduct by firms. Indeed, broadly speaking one of our most significant responsibilities is to prevent mergers that may substantially lessen competition. Pre-merger filings under the Hart-Scott-Rodino Act are rebounding,[2] and during fiscal 2011, the Commission challenged 17 mergers that we believed would be anticompetitive.[3] In fiscal 2012 to date, the Commission has challenged three more mergers,[4]

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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. Commissioner Rosch dissents from portions of the testimony, as explained in notes 6, 9 and 31.

[2] In FY 2011, twice as many transactions were reported to the antitrust agencies as compared to FY 2009.

[3] Five proposed mergers were abandoned or restructured after FTC staff raised competitive concerns; nine were resolved by entry of Commission consent orders; and in three, the FTC filed complaints in federal court to stop the mergers pending a full administrative trial. Competition Enforcement Database, available at http://www.ftc.gov/bc/caselist/merger/total/2011.pdf.

[4] "FTC Requires Sale of Generic Cancer Pain Drug and Muscle Relaxant as Conditions of Teva's $6.8 Billion Acquisition of Cephalon" News Release dated Oct. 7, 2011, *available at* http://www.ftc.gov/opa/2011/10/tevacephalon.shtm; "FTC Requires Parent of Market Research Firm

including through a recent action in federal court seeking a preliminary injunction against a merger that would combine two of the three hospitals in Rockford, Illinois. Currently, three of the FTC's merger cases are pending in administrative litigation,[5] and one Commission merger ruling is pending appellate review.[6] All of that amounts to a busy year for merger litigation.

This testimony highlights these and other key competition efforts: in the health-care industry, we have focused on ending anticompetitive pay-for-delay pharmaceutical agreements, blocking anticompetitive mergers, and developing policy guidance regarding new health-care collaborations; in technology markets, we have policed exclusionary conduct; and in the energy sector, we have promoted competition. The testimony also briefly describes our efforts to cooperate across borders and minimize inconsistent competition enforcement outcomes, and summarizes important FTC actions to protect consumer privacy and shut down shady operations and deceptive marketing campaigns that aim to take the last dollar out of consumers' pockets during these tough times.

IMS Health to Sell Two Product Lines Before Acquiring Rival SDI Health," News Release dated Oct. 28, 2011, *available at* http://www.ftc.gov/opa/2011/10/ims.shtm; "FTC Challenges OSF Healthcare System Proposed Acquisition of Rockford Health System as Anticompetitive," News Release dated Nov. 18, 2011, *available at* http://www.ftc.gov/opa/2011/11/rockford.shtm.

[5] *In the Matter of ProMedica Health System, Inc.*, Dkt. No. 9346 http://www.ftc.gov/os/adjpro/d9346/index.shtm ; *In the Matter of Phoebe Putney Health Systems, Inc., et al.*, Dkt. No. 9348 http://www.ftc.gov/os/adjpro/d9348/index.shtm; and *In the Matter of OSF Healthcare System*, Dkt. No. 9349 http://www.ftc.gov/os/adjpro/d9349/index.shtm.

[6] The Commission's *Polypore* decision has been briefed and oral argument is scheduled for January, 2012 before the 11th Circuit.(*Polypore v. Federal Trade Commission*, No. 11-10375-EE) *available at* http://www.ftc.gov/os/caselist/0810131/index.shtm. *FTC v. Phoebe Putney Health Systems, Inc.*, No. 11-12906-EE (11th Cir.) is on appeal before the Eleventh Circuit. *See infra nn. 27, 28.* http://www.ftc.gov/os/caselist/1110067/index.shtm. The Eighth Circuit recently denied the Commission's petition for rehearing in *FTC v. Lundbeck Inc.*, No. 10-3458 (8th Cir. 2011). Commissioner Rosch dissents from the testimony as he considers the *Lundbeck* decisions issued by the district court and the Eighth Circuit to be one of the most important (and most erroneous) merger decisions issued this year, and therefore warrants more mention. He would file a petition for certiorari asking for review of the decision by the Supreme Court, which has not reviewed a merger case for many years.

First, however, the Commission would like to provide some background on institutional reforms that have improved the efficiency and effectiveness of the FTC's daily work.

Building a Better FTC to Combat 21st Century Challenges

As the FTC approaches its centennial year, the Commission remains, by design, a bipartisan, consensus-driven organization, attributes that have served consumers well over the years. This design enables the Commission to maintain institutional stability and credibility over time, as it continues to protect competition and consumers.

In the same spirit, the Commission has fostered a productive partnership with our sister antitrust enforcer, the Antitrust Division of the Department of Justice. Our recent joint efforts have resulted in the publication of two significant policy statements – the revised Horizontal Merger Guidelines[7] and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations[8] – that enhance the consistency, clarity, and transparency of U.S. antitrust policy and enforcement.[9] The agencies also jointly revised the Hart-Scott-Rodino Antitrust Improvements Act Rules to reduce unnecessary burdens on merger filers.[10] This is consistent

[7] *See* U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.
[8] http://www.ftc.gov/os/fedreg/2011/10/111020aco.pdf.
[9] Although he voted for the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations, Commissioner Rosch dissents from the assertion that the statement enhances "the consistency, clarity, [or] transparency" of U.S. antitrust policy and enforcement. To the contrary, in his view, accountable care organizations (ACOs) are a kind of joint venture in which the member providers are only clinically, not financially, integrated. Commissioner Rosch believes that under governing case law, a provider must be financially integrated in order safely to jointly contract with other providers. Thus, in his view, the Policy Statement does not provide that kind of protection, i.e., requiring that ACOs be financially integrated as well as clinically integrated, to either Medicare or private insurers.
[10] 16 C.F.R. Part 803. *See* "FTC, DOJ Announce Changes to Streamline the Premerger Notification Form," News Release dated July 7, 2011, *available at* http://www.ftc.gov/opa/2011/07/hsrform.shtm. The premerger notification form was trimmed from 15 pages down to 10 pages, and it no longer requires certain categories of documents and information that have proven not to be useful in an initial antitrust review.

with the FTC's ongoing efforts, as outlined in previous testimony,[11] periodically to review and update rules, regulations, and guidelines so that they do not become obsolete, ineffectual, or unduly burdensome.

To that same end, the Commission also has revised its rules governing administrative litigation to ensure that our process is not unduly time-consuming or burdensome. For example, the revised Rules hold respondents, complaint counsel, the administrative law judge, *and the Commission* to aggressive timelines for discovery, motions practice, trial, and adjudication.[12] The result is a faster-paced administrative process.[13] And just last week, the Commission issued an opinion and final order in an administrative proceeding in record time – slightly over four months from the date of the respondent's notice of appeal.

The Commission is fortunate to have employees who are extraordinarily committed to their jobs and work hard to deliver the best results for consumers. In the 2011 Federal Employee

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[11] *See* Prepared Statement on The FTC's Regulatory Reform Program: Twenty Years of Systematic Retrospective Rule Reviews & New Prospective Initiatives to Increase Public Participation and Reduce Burdens on Business Before the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations, 112th Congress (July 7, 2011) *available at* http://www.ftc.gov/os/testimony/110707regreview.pdf.

[12] "FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice," News Release dated April 27, 2009, *available at* http://www.ftc.gov/opa/2009/04/part3.shtm. In August, the Commission made additional changes relating to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments. *See* "FTC Modifies Part 3 of Agency's Rules of Practice," News Release dated August 12, 2011, *available at* http://www.ftc.gov/opa/2011/08/part3.shtm.

[13] For example, after the Commission voted unanimously on January 6, 2011 to challenge a hospital merger in Toledo, Ohio, FTC lawyers filed an administrative complaint and, with the Ohio Attorney General, a motion for a preliminary injunction in federal court in Ohio. After a two-day trial, the federal judge issued a preliminary injunction on March 29; meanwhile, both FTC complaint counsel and the merging parties prepared for an administrative trial that began on May 31. After 30 days of testimony and motions, including 81 witnesses and over 2700 exhibits, the ALJ heard closing arguments on September 29. In total, within nine months, FTC staff prosecuted both a preliminary injunction action and a trial on the merits, which is a timeframe comparable to a fast-track litigation in Federal district court.

Viewpoint Survey,[14] the FTC ranked second among all federal agencies in leadership and knowledge management, results-oriented performance culture, and talent management.

Promoting Competition in Health Care Markets

Health care costs have risen to nearly 18 percent of GDP and will continue to increase, so it is more important than ever that the Commission be vigilant and take action to preserve and promote competition in health care markets. The cost of health care is a real problem for all Americans, and the Commission seeks to address this national problem by using all the tools Congress gave to us, and by devoting significant resources so that competition will enable market participants to deliver on the promises of cost-containment and continued excellence and innovation.

- **Ending Anticompetitive Pay-for-Delay Pharmaceutical Agreements**

One of the Commission's top competition priorities continues to be ending anticompetitive "pay-for-delay" agreements, settlements of patent litigation in which a branded pharmaceutical manufacturer pays the generic manufacturer to keep its competing product off the market for a certain time. Settlements like these enable branded manufacturers to buy more protection from competition than the assertion of their patent rights alone would provide. The agreements profit both the branded manufacturers, who continue to charge monopoly prices, and the generic manufacturers, who receive substantial compensation for agreeing not to compete. These agreements, however, impose substantial costs on consumers and businesses every year

For the last 15 years, extending through several changes in Commission leadership and composition, the FTC has taken the position that these pay-for-delay deals violate the antitrust laws. Despite our efforts, beginning in 2005 some courts, we believe incorrectly, have upheld pay-for-delay agreements, and they now have become commonplace.

[14] Results are available at http://www.fedview.opm.gov/2011/Ranking/.

These developments are troubling. The Commission continues to challenge agreements in court.[15] But solving this problem through the courts will take considerable time during which American consumers and governments will continue to pay high prices for prescription drugs. Therefore, even as the Commission fights against anticompetitive pay-for-delay settlements in the courts, the Commission continues to support a legislative solution to the problem. Legislation would be the most effective way to winnow out anticompetitive deals, and would result in cost savings to consumers as well as to the federal government.

- **Stopping Anticompetitive Health Care Mergers**

Several FTC merger enforcement actions this year have involved companies in health care markets: hospitals, dialysis centers, pharmaceutical manufacturers, and pharmacies. In particular, the FTC has redoubled its efforts to prevent hospital mergers that may leave insufficient local options for in-patient hospital services. In the late 1990s the Commission lost a string of challenges to hospital mergers, after which then-Chairman Tim Muris announced that FTC economists would undertake a hospital merger retrospective to study consummated hospital mergers to determine whether particular ones resulted in higher prices or affected quality.[16] This effort led to the Commission's administrative challenge to the consummated merger of two Chicago-area hospitals, Evanston Northwestern Healthcare and Highland Park Hospital. There,

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[15] The Commission is actively pursuing two major pay-for-delay cases in federal courts: one against Solvay Pharmaceuticals 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. In addition, FTC staff continues to investigate new pay-for-delay agreements.

[16] Balan, David J. and Patrick S. Romano, "A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare" (Nov. 2010) *available at* http://www.ftc.gov/be/workpapers/wp307.pdf; Thompson, Aileen, "The Effect of Hospital Mergers on Inpatient Prices: A Case Study of the New Hanover-Cape Fear Transaction" (Jan. 2009) *available at* http://www.ftc.gov/be/workpapers/wp295.pdf; Haas-Wilson, Deborah and Christopher Garmon, "Two Hospital Mergers on Chicago's North Shore: A Retrospective Study" (Jan. 2009) available at http://www.ftc.gov/be/workpapers/wp295.pdf; and Steven Tenn, "The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction" (Nov. 2008) *available at* http://www.ftc.gov/be/workpapers/wp293.pdf.

a unanimous Commission found that the merger had resulted in dramatically higher prices for acute inpatient hospital services in the Evanston area.[17] Since that decision, the Commission has successfully stopped an anticompetitive hospital merger in Northern Virginia,[18] and now has three hospital merger cases pending in administrative litigation.[19] This brief history illustrates how the agency develops and uses its expertise to inform and guide its enforcement priorities and efforts.[20]

Recently, Commission enforcement actions in the health care industry have raised important questions about the intersection of state regulation and federal antitrust law. Nearly seventy years ago, the Supreme Court determined that the federal antitrust laws do not apply to the acts of a state as sovereign,[21] and in a line of cases since then, the Court has refined the state action doctrine to permit a state to delegate its sovereign ability to pursue anticompetitive market regulation to non-sovereign actors, such as cities or even private actors. These non-sovereign actors can avail themselves of the state action exemption only if they can show that their actions were both taken pursuant to a clearly articulated and affirmatively expressed state policy and actively supervised by the state itself.[22]

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[17] *Evanston Northwestern Healthcare Corporation and ENH Medical Group,* Inc., Dkt. No. 9315, *available at* http://www.ftc.gov/os/adjpro/d9315/index.shtm.

[18] *FTC v. Inova Health System Foundation and Prince William Health System*, Dkt. 9326, *available at* http://www.ftc.gov/os/adjpro/d9326/index.shtm. The Commission also reviews mergers involving other types of health care facilities to protect competition. For instance, the Commission took action to remedy the anticompetitive effects of a merger of outpatient clinics in Roanoke, Virginia, "FTC Challenges Carilion's Acquisition of Outpatient Medical Clinics," News Release dated July 24, 2009, *available at* http://www.ftc.gov/opa/2009/07/carilion.shtm, and required divestitures in a proposed merger of facilities providing inpatient psychiatric services. "FTC Requires Universal Health Services to Sell 15 Psychiatric Facilities as a Condition of Acquiring Rival Psychiatric Solutions," News Release dated Nov. 15, 2011, *available at* http://www.ftc.gov/opa/2010/11/psychsol.shtm.

[19] See cases cited in footnote 5 above.

[20] For a complete list of FTC enforcement actions relating to health care, see *FTC Antitrust Actions in Health Care Services and Products*, available at http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf.

[21] *Parker v. Brown*, 317 U.S. 341 (1943).

[22] *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).). Certain non-sovereign actors like municipalities need show only that the state has clearly articulated a policy to

The FTC supports the state action doctrine, which protects important interests, but applying it in ways the Supreme Court never intended could cause harm. For example, the Commission recently and unanimously challenged Phoebe Putney's proposed acquisition of its rival hospital in Albany, Georgia,[23] alleging a merger to monopoly, which, if proven, could mean substantially higher health care costs for patients who use those hospitals. The parties' primary defense has been that the acquisition is protected by the state action doctrine regardless of its competitive impact. As we explained to the court of appeals, however, the state action amounted to the parties using a state entity, the Hospital Authority of Albany-Dougherty County, as a straw man to avoid antitrust scrutiny. We do not think the state action doctrine, properly interpreted, covers such conduct. This issue of state action is pending before the Eleventh Circuit.[24]

The Commission also continues to review mergers between pharmaceutical manufacturers, and also is investigating a merger involving pharmacy benefit managers. This year, the Commission required divestitures to remedy competitive concerns in four proposed mergers between drug makers.[25] With the costs of prescription drugs increasing faster than other

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displace competition with regulation to avail themselves of the state action defense. *Town of Hallie v. Eau Claire*, 471 U.S. 34, 38-39 (1985).

[23] "FTC and Georgia Attorney General Challenge Phoebe Putney Health System's Proposed Acquisition of Palmyra Park Hospital as Anticompetitive" News Release dated April 20, 2011, *available at* http://www.ftc.gov/opa/2011/04/phoebeputney.shtm.

[24] *FTC v. Phoebe Putney Health Systems, Inc.*, No. 11-12906-EE (11th Cir.), http://www.ftc.gov/os/caselist/1110067/index.shtm. There are also state action issues in the *North Carolina Board of Dental Examiners* case, *In the Matter of* N.C. Bd. of Dental Examiners, 151 F.T.C. 607 (2011), *available at* http://ftc.gov/os/adjpro/d9343/110208commopinion.pdf.

[25] *Hikma Pharmaceuticals and Baxter International*, Dkt. No. C-4320 (consent order) *available at* http://www.ftc.gov/os/caselist/1110051/index.shtm; *Grifols and Talecris Biotherapeutics Holdings Corp.*, Dkt. No. C-4322 (consent order) *available at* http://www.ftc.gov/os/caselist/1010153/index.shtm; *Perrigo Company and Paddock Laboratories, Inc.*, Dkt. No. C-4329 (consent order) *available at* http://www.ftc.gov/os/caselist/1110083/index.shtm; *Teva Pharmaceuticals, Inc. and Cephalon*, Dkt. No. C-4335 (consent order) *available at* http://www.ftc.gov/os/caselist/1110166/index.shtm.

health care costs,[26] the Commission is committed to preventing pharmaceutical and related mergers that may allow companies to exercise market power by raising prices.

- **Encouraging Beneficial Collaboration to Reduce Costs and Improve Care**

The new U.S. health care law, the Patient Protection and Affordable Care Act,[27] seeks to improve quality and reduce health care costs by, among other things, encouraging physicians, hospitals, and other health care providers to become accountable for a patient population through integrated health care delivery systems, such as Accountable Care Organizations (ACOs). ACOs will serve Medicare fee-for-service beneficiaries through the Medicare Shared Savings Program. But as these integrated groups begin to act in the commercial market, they could potentially gain market power and reduce competition. The FTC has worked with the Department of Justice and other agencies – most notably the Centers for Medicare and Medicaid Services – to provide guidance to ACOs. This guidance will ensure that the antitrust laws are not perceived as a barrier to bona fide collaboration to improve healthcare and reduce costs while at the same time ensuring that any benefits from the increased collaboration will not be lost to anticompetitive conduct.[28]

In October, the FTC and DOJ issued a joint Statement of Antitrust Enforcement Policy[29] to make clear that the antitrust analysis of ACO applicants to the Medicare Shared Savings Program seeks to protect both Medicare beneficiaries and commercially insured patients from

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[26] Centers for Medicare and Medicaid Services, HHS, National Health Expenditure Fact Sheet, *available at* http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf.

[27] The Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119-1025 (March 23, 2010), to be codified at scattered sections of 42 U.S.C., amended by Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (March 30, 2010).

[28] *Another Dose of Competition: Accountable Care Organizations and Antitrust* workshop, May 9, 2011, *materials available at* http://www.ftc.gov/opp/workshops/aco2/index.shtml.

[29] *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program,* Federal Trade Commission and Department of Justice (Oct. 20, 2011) *available at* http://www.ftc.gov/os/fedreg/2011/10/111020aco.pdf.

anticompetitive harm, while allowing ACOs the opportunity to integrate to achieve significant efficiencies. The Policy Statement (1) describes when the Agencies will apply rule of reason treatment to ACOs; (2) sets out an antitrust safety zone; (3) identifies potential ACO conduct that might raise competitive concerns and that ACOs should therefore avoid; and (4) provides additional antitrust guidance for ACOs that are outside the safety zone.[30] Further, newly formed ACOs concerned that they may run afoul of the antitrust laws may take advantage of a voluntary expedited antitrust review process, which can provide specific guidance to ensure that the ACO's proposed conduct does not violate the antitrust laws.

Antitrust Oversight in Technology Industries

Some question how antitrust law can keep up with a rapidly evolving marketplace. But the antitrust laws have stood the test of time because they are rooted in fundamental principles: that competition among independent firms yields lower prices, better service, more choices, and the promise of better products tomorrow; and that business conduct that unreasonably impedes competition limits economic growth.[31]

It has been widely reported that the Commission has ongoing investigations into potentially anticompetitive conduct by dominant firms in certain high-profile, high-tech

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[30] As indicated in footnote 9 above, however, the Policy Statement's safety zone does not comport with Commissioner Rosch's view of the governing case law, which requires that competing providers be financially as well as clinically integrated in order to contract jointly.

[31] *See also* "How Enduring Competition Principles Enforced by the Federal Trade Commission Apply To Today's Dynamic Marketplace," testimony of the Federal Trade Commission presented before the House Committee on the Judiciary Subcommittee on Courts and Competition Policy, Sept. 16, 2010, *available at* http://www.ftc.gov/os/testimony/100916digitalagetestimony.pdf. The Commission has used its authority under Section 5 of the Federal Trade Commission Act to police unfair methods of competition in rapidly changing markets. Remedies available under the FTC Act are particularly well suited to deal with antitrust violations in new or dynamic markets especially because a finding of a Section 5 violation by the Commission should greatly limit treble damage liability in private litigation against the same defendant. Because the Commission lacks the authority to fine or penalize violators, Commission remedies limit the potential for unduly harsh or punitive responses to what may be somewhat novel situations in new markets. Thus, the Commission can apply antitrust principles in new situations and dynamic markets with reduced risk of unduly chilling a leading firm's incentives to compete aggressively.

industries. Without getting into the specifics of any investigation, it is certainly true that our efforts to police exclusionary or collusive conduct often involve high-tech products.

For example, in the 2009 FTC enforcement action against Intel Corporation, the Commission alleged, among other things, that Intel used "exclusive dealing" agreements that effectively punished companies wanting to utilize or distribute competing products.[32] This blocked rivals from successfully reaching consumers with their products, and thereby unlawfully maintained the company's monopoly.

Another important high-tech matter resulted in no case being filed – the Commission's May 2010 decision to close its investigation of the Google/AdMob merger.[33] There, near the conclusion of a thorough investigation, the Commission evaluated "late breaking news" that Apple was poised to challenge Google in the future in the mobile advertising space. Taking account of Apple's anticipated entry into the market, the Commission determined that future competition in mobile advertising was not likely to be harmed by the merger. This reflects a balanced approach of focusing on the facts as they develop in real time, which helps the Commission assess what competition is likely to look like in the future, even in fast-paced technology industries.

The Commission also has made a number of other contributions to the analysis of high-tech issues through our policy efforts addressing innovation, standard-setting, and patents. Over the past decade and a half, the Commission has brought several cases involving anticompetitive

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[32] "FTC Settles Charges of Anticompetitive Conduct Against Intel," News Release dated August 4, 2010, *available at* http://www.ftc.gov/opa/2010/08/intel.shtm. The case against Transitions, Inc. featured similar allegations. "FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses," News Release dated March 2, 2010, *available at* http://www.ftc.gov/opa/2010/03/optical.shtm.

[33] See "FTC Closes its Investigation of Google AdMob Deal," News Release dated May 21, 2010, *available at* http://www.ftc.gov/opa/2010/05/ggladmob.shtm

conduct by technology companies for undermining the standard-setting process.[34] In addition, the Commission previously issued two well-regarded reports on competition and patent law, in 2003 and 2007.[35] This year we issued another significant patent study, focusing on notice and remedies.[36] We held a workshop to learn more about licensing in the standard-setting context and how standard-setting organizations and their members have dealt with the risk of patent hold-up (whereby a firm is able to demand higher royalties after a standard is implemented than it could have obtained beforehand).[37] The Commission will continue to foster an on-going dialogue with stakeholders in this important area.

Monitoring Energy Markets

Few issues are more important to consumers and businesses than the prices they pay for gasoline to run their vehicles and energy to heat and light their homes and businesses. Accordingly, the Commission carefully monitors energy markets and devotes significant resources to fostering competition in them.

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[34] Dell Computer Corp., 121 F.T.C. 616 (1996), *available at* http://www.ftc.gov/os/decisions/docs/vol121/FTC_VOLUME_DECISION_121_(JANUARY_-_JUNE_1996)PAGES_561-655.pdf#page=56; Union Oil Co. of Cal., 140 F.T.C. 123 (2005), *available at* http://www.ftc.gov/os/adjpro/d9305/index.shtm; Rambus Inc., 2007 F.T.C. LEXIS 13 (2007), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf; Negotiated Data Solutions, LLC, 2008 F.T.C. LEXIS 120 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf; Dissenting Statement of Commissioner Kovacic, Negotiated Data Solutions, LLC 2008 F.T.C. LEXIS 9 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf; Dissenting Statement of Chairman Majoras, Negotiated Data Solutions, LLC 2008 F.T.C. LEXIS 10 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

[35] FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition: A Report Issued By the U.S. Department of Justice and the Federal Trade Commission (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf; FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[36] FTC, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

[37] FTC Workshop: "Tools to Prevent Patent "Hold-Up," (June 21, 2011); materials available at http://www.ftc.gov/opp/workshops/standards/index.shtml.

The FTC is conducting a publicly disclosed investigation of petroleum industry practices and pricing.[38] In response to allegations of increases in crude oil and refined petroleum product prices and profit margins accompanied by a reduction in refinery utilization rates, the Commission is investigating whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged in practices, including manipulation, that have lessened or may lessen competition in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency. Such acts or practices could violate Section 5 of the FTC Act,[39] the Commission's Prohibition of Energy Market Manipulation Rule,[40] or Section 811 or Section 812 of the Energy Independence and Security Act of 2007.[41]

The FTC and the Commodity Futures Trading Commission have concurrent law enforcement authority to challenge fraud-based manipulation of petroleum markets. In addition, the CFTC has exclusive jurisdiction to regulate exchanges, clearing organizations, and intermediaries in the U.S. futures industry. In April of this year, the Commission and the CFTC signed a Memorandum of Understanding[42] to facilitate our sharing of non-public information relating to matters of common interest, such as evidence of possible manipulation of oil and gasoline markets, thereby enhancing the effectiveness of both our law enforcement efforts.

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[38] Information To Be Publicly Disclosed Concerning the Commission Petroleum Industry Practices and Pricing Investigation, Statement by the Federal Trade Commission, File No. 111 0183 (June 20, 2011) *available at* http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf.
[39] 15 U.S.C. § 45.
[40] 16 C.F.R. 317.
[41] 42 U.S.C. §§ 17301, 17302.
[42] Memorandum of Understanding between the Commodity Futures Trading Commission and the Federal Trade Commission, effective April 6, 2011, *available at* http://www.ftc.gov/os/2011/04/110412ftccftc-mou.pdf.

Additionally, the Commission continues to monitor daily retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. This daily monitoring serves as an early-warning system to alert our experts to unusual pricing activity, and helps the Commission to find appropriate targets for further investigation of potentially anticompetitive conduct.[43] We also use the data generated by the monitoring project in conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.[44]

Mergers also can significantly affect competition in energy markets, so the Commission's review of proposed mergers is essential to preserving competition in those markets. This year, the Commission challenged Irving Oil Terminals Inc.'s acquisition of certain assets from ExxonMobil. To preserve competition in gasoline and distillates terminaling services markets in the South Portland and Bangor/Penobscot Bay areas of Maine, the Commission entered a Consent Order requiring Irving Oil to relinquish its rights to acquire the Maine terminal and pipeline assets.[45] The settlement resolves the FTC's charges that the acquisition as proposed was anticompetitive, and likely would have resulted in higher gasoline and diesel prices for Maine consumers.

International work

Our international work supports our domestic initiatives. With well over 100 jurisdictions currently enforcing competition laws, it is crucial for us to work with antitrust agencies worldwide to ensure that the international competition law system functions coherently

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

[44] A recent report by the staff of the Commission's Bureau of Economics concludes that while a broad range of factors influence the price of gasoline, worldwide crude oil prices continue to be the main driver of what Americans pay at the pump. See "FTC Issues New Report on Gasoline Prices and the Petroleum Industry," News Release dated Sept.1, 2011, *available at* http://www.ftc.gov/opa/2011/09/gasprices.shtm.

[45] Irving Oil Ltd., Dkt. C-4328 (consent order) *available at* http://www.ftc.gov/os/caselist/1010021/index.shtm.

and effectively. We have developed strong bilateral relations with our foreign counterparts and work with colleagues and, often, the business community, in multilateral fora to promote cooperation and convergence toward sound competition policy.

Bilaterally, we continue to strengthen our cooperation and coordination with our counterpart foreign agencies, such as those in the EU and its member states, Canada, and Japan, with whom we cooperate on cases of mutual interest and discuss policies of common concern. For example, at our recent annual bilateral consultations with the EC's DG COMP,[46] we issued revised Best Practices on Cooperation in Merger Investigations.[47] In addition, we have developed our ties with newer agencies from key jurisdictions, such as China and India, through our technical assistance program and through participation in our International Fellows program. Notably, earlier this summer, we entered into a Memorandum of Understanding with the three Chinese antitrust agencies aimed at promoting greater communication and cooperation among the antitrust agencies in our two countries,[48] and hope to enter into a similar MOU with our counterparts in India shortly.

The FTC remains a recognized leader in key multilateral competition fora, such as the International Competition Network (ICN), the competition committee of the OECD, the experts committee of the United Nations Conference on Trade and Development and APEC, where we encourage convergence toward sound competition policies and enforcement. Through these

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[46] The European Commission, together with the national competition authorities, directly enforces EU competition rules. Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for investigation and enforcement of these rules. http://ec.europa.eu/dgs/competition/index_en.htm.

[47] "United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews," News Release dated October 14, 2011, *available at* http://www.ftc.gov/opa/2011/10/eumerger.shtm.

[48] "Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding With Chinese Antitrust Agencies," News Release dated July 27, 2011, *available at* http://www.ftc.gov/opa/2011/07/chinamou.shtm.

initiatives and others, the Commission works with foreign partners to ensure sound analysis, consistent outcomes, and convergence towards best practices to benefit American consumers and ensure that American businesses receive fair and equal treatment from antitrust regimes around the world.

Consumer Protection Highlights

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 agencies to further the reach of our initiatives. The FTC has continued its focus on protecting financially distressed consumers. The exponential growth of the Internet, combined with the current economic downturn, has fueled a resurgence of what we call "last dollar frauds." These are targeted at the most vulnerable consumers and include foreclosure rescue scams, sham debt relief services, and bogus job opportunities. Since 2009, the FTC alone has brought 90 cases against these predators. Leveraging our resources, we have partnered with State Attorneys General and other federal and state agencies that have filed more than 400 enforcement actions.

Consumer privacy also remains a significant priority. Ever-evolving technologies, such as mobile devices, open up the riches of the Internet but also pose new threats. The FTC has responded by bringing almost 100 spam and spyware cases, more than 30 data security cases, and nearly 80 cases for violations of Do Not Call in the past decade. Last December, we issued a preliminary staff report requesting comment on proposals to inform policymakers as they develop solutions, policies, and potential laws governing privacy, and to guide industry as it develops more robust and effective best practices and self-regulatory guidelines.[49]

[49] *A Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers* (Dec. 1, 2010), *available at* http://www.ftc.gov/os/2010/12/101201privacyreport.pdf.

Conclusion

Thank you for this opportunity to share highlights of the Commission's recent work to promote competition and protect consumers. 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.